UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 38 | Number 2 Article 4

2-1-1960

Notes and Comments

North Carolina Law Review

NOTES AND COMMENTS

Automobiles—Agency—Family Purpose Doctrine—Wife's Liability for Husband's Negligence

In *Small v. Mallory*[1] the plaintiff's automobile was damaged in a collision with an automobile driven by defendant's husband. The jury found the husband negligent. On the issue of defendant's liability the husband, as witness for the plaintiff, testified substantially as follows: His wife had purchased the car three years before the accident; it had not been purchased for cash, but had been financed and re-financed; both he and his wife had been working when the car was purchased; she had paid the taxes on the car, made several initial installment payments, and, together with him, had paid repair bills up until the time she had stopped working. However, his wife had not worked for "about three years," and while she was not working he had made all installment payments and had paid the usual expenses incurred in operating an automobile. Both he and his wife had used the car for their pleasure and convenience. The question on appeal was whether, under these facts, the trial court committed error in submitting the case to the jury on the wife's liability for her husband's negligence under the family purpose doctrine[2]. The court affirmed a judgment for the plaintiff. One justice dissented on the ground that the husband, and not the wife, had provided and maintained the automobile for his own and the family's use. "A realistic evaluation of the evidence indicates that through financing and re-financing he was making payments, similar to rentals, to retain the possession and use of the car."[3]

The family purpose doctrine has been used to assure recovery by an outsider when a financially irresponsible member of a family causes injury by his negligent operation of the family car.[4] The doctrine is an

[1] 250 N.C. 570, 108 S.E.2d 852 (1959).

[2] Since N.C. GEN. STAT. § 20-71.1 (1953), which establishes a prima facie case of agency on proof of ownership, was not used by the plaintiff, the case went to the jury on the family purpose doctrine alone. Letter from Mr. John L. Rendleman, attorney for plaintiff, September 30, 1959.

[3] 250 N.C. at 575, 108 S.E.2d at 855.

[4] The importance of the doctrine in North Carolina has been greatly reduced by the Financial Responsibility Act, N.C. GEN. STAT. § 20-227 (1953), which requires all automobile owners to carry liability insurance and writes into liability policies a provision whereby anyone using the car with the insured's consent, either express or implied, is himself insured. However, one can imagine at least two situations in which the plaintiff would still want to join the member of the family who might be liable under the family purpose doctrine, notwithstanding the Financial Responsibility Act. The first is where the extent of the plaintiff's damages appears to be more than the minimum amount of liability insurance required by the act and the tort-feasor is himself "judgment proof." Unless the plaintiff invokes the doctrine, he may get a substantial judgment only to discover that a large part of it is uncollectible because of the driver's insolvency. The second is where the family auto-

extension of the principle of *respondeat superior*,[5] the theory of the doctrine being that some member of the family has made it his business to provide transportation in the form of an automobile for himself and for other members of the family. Thus when the car is being used to transport a member of the family it is being used in the business of the providing member. Under this reasoning the ordinary rules of agency are applied. Therefore, if a plaintiff is successful in casting a financially responsible family member in the role of master, the collectibility of his judgment is assured. The doctrine is of comparatively late vintage,[6] and, although it could be applied with equal logic to any item furnished for family use, it has been confined to automobiles.[7]

In North Carolina the family purpose doctrine was first recognized in 1918.[8] Since that time, fairly well-established rules have attended its application. A plaintiff in order to invoke the doctrine must allege and prove that the car was customarily used by the family as a general-purpose vehicle,[9] and that at the time of injury it was being used[10] by an authorized family member within the scope of his authority.[11]

Assuming these factors to be present, which member of the family is to be held liable under the doctrine? Although the court has frequently stated the rule in terms of a liability of the head of the household,[12] it has not been necessary to show that the defendant was in fact the head of the household to obtain a judgment against him.[13] The fact that one is the head of the household is a factor to be considered in

---

mobile involved was owned by an uninsured citizen of a state having no financial responsibility act. In this situation under the prevailing conflicts of law rule the doctrine as applied in North Carolina could be used by the plaintiff to hold the "providing" member of the tort-feasor's family liable for his damages if it appeared that the tort-feasor himself was financially irresponsible. Cronenberg v. United States, 123 F. Supp. 693 (E.D.N.C. 1954); Goode v. Barton, 238 N.C. 492, 78 S.E.2d 398 (1953).

[5] Lyon v. Lyon, 205 N.C. 326, 171 S.E. 356 (1933).

[6] One of the first cases applying the doctrine was Daily v. Maxwell, 152 Mo. App. 415, 133 S.W. 351 (1911).

[7] See, *e.g.*, Felcyn v. Gamble, 185 Minn. 357, 241 N.W. 37 (1932), where the majority of the Minnesota court refused to apply the doctrine to motorboats.

[8] Clark v. Sweaney, 176 N.C. 529, 97 S.E. 474 (1918).

[9] Grier v. Woodside, 200 N.C. 759, 158 S.E. 491 (1931), held that the burden is on the plaintiff to show that the car was used for family purposes. This proof gets his case to the jury. The burden then shifts to defendant to show that at the time of injury the driver was not using it for such purposes.

[10] Goss v. Williams, 196 N.C. 213, 145 S.E. 169 (1928), held the husband liable where a third party was driving at the wife's request. Thus it is not necessary to the invocation of the doctrine that a family member be driving the car. It need only be driven in the interest of the family.

[11] In Vaughn v. Booker, 217 N.C. 479, 8 S.E.2d 603 (1940), it was held proper to instruct the jury to find for defendant father if it believed he had forbidden his son to drive in Raleigh, the site of the accident.

[12] See, *e.g.*, Watts v. Lefler, 190 N.C. 722, 130 S.E. 630 (1925).

[13] In Goode v. Barton, 238 N.C. 492, 78 S.E.2d 398 (1953), the wife was held liable under the family purpose doctrine for the negligent operation of an automobile without any mention of who was the head of the household.

fixing liability, but not a conclusive one. It seems that the true test for determining which member of the family is to be held liable under the doctrine is one of control. The basic question to be determined then is who controls the car, not who is the head of the household.[14]

The factors of ownership and maintenance have been used as a further guide in determining which member of the family controls the car.[15] In *Matthews v. Cheatham*[16] the court had before it the following situation: A minor child had won the family car in a newspaper contest; it was registered in her name; the father had paid all costs of maintaining the car. The mother was adjudged negligent while driving the car alone. The court, in holding the father liable under the family purpose doctrine, said that the one who owns, maintains or controls an automobile for family use is the one responsible for its negligent operation. Thus the father was held liable, in spite of the fact that his daughter held legal title to the car, on the ground that he maintained and controlled it. Then in *Goode v. Barton*[17] it was expressly held immaterial whose funds were used to purchase the car, since liability under the doctrine "is not confined to owner or driver . . . [but] depends upon control and use."[18] The "use" referred to here can only mean that use for which the car was bought, *i.e.*, use by the family as a general purpose car. Since ownership, both legal and equitable, has been held not to be determinative of control, it would seem that maintenance is the more important guide in determining control and, hence, in predicting the family member on whom liability will fall. In taking this view of the doctrine, North Carolina is in line with the weight of authority.[19]

In the principal case the husband testified that the wife had purchased the car by financing it and that he had never signed a mortgage. Thus the wife was the purchaser. Since both husband and wife had made payments on the car, they were both apparently equitable owners. On the other hand, the wife had not worked for more than two years prior to the accident, and all the evidence was to the effect that the husband alone had maintained the car during that time. The majority

[14] Although the principal case is the first instance in which the court has been asked to hold another member of the family under the doctrine for the negligence of the head of the household, the majority of courts facing the issue have held such member liable. *E.g.*, Wyant v. Phillips, 116 W. Va. 207, 179 S.E. 303 (1935); Turner v. Gackle, 168 Minn. 514, 209 N.W. 626 (1926); Smith v. Overstreet, 258 Ky. 781, 81 S.W.2d 571 (1935). *But see* Cewe v. Schuminski, 182 Minn. 126, 233 N.W. 805 (1930).

[15] See, *e.g.*, Elliot v. Killian, 242 N.C. 471, 87 S.E.2d 903 (1955).

[16] 210 N.C. 592, 188 S.E. 87 (1936).

[17] 238 N.C. 492, 78 S.E.2d 398 (1953).

[18] *Id.* at 499, 78 S.E.2d at 404.

[19] See, *e.g.*, Smith v. Doyle, 98 F.2d 341 (D.C. Cir. 1938); Mortensen v. Knight, 81 Ariz. 325, 305 P.2d 463 (1956); Cewe v. Schuminski, 182 Minn. 126, 233 N.W. 805 (1930). *But see* Wyant v. Phillips, 116 W. Va. 207, 179 S.E. 303 (1935), where the wife was held liable because she owned the car, even though her husband, who was driving at the time of the accident, maintained and controlled it.

opinion cited the *Matthews* case, which, as we have seen, declared that the test for fixing liability under the family purpose doctrine was control. Since the evidence clearly showed that the wife had not maintained the car for more than two years prior to the accident and that the husband was head of the household, it seems apparent that two of the important factors in proving control in the wife were lacking. The only evidence that plaintiff presented to establish control of the car in the wife was the not very convincing testimony of the defendant's husband: "Yes, my wife drives. She uses the car and I use the car too . . . . I could use the car anytime that I wanted to."[20] In allowing the case to go to the jury on this extremely weak showing of control, it would appear that the court went beyond established boundaries of the family purpose doctrine as applied in North Carolina. Apparently, under the theory of the principal case, a showing of little more than legal title in the defendant will take a case to the jury under the doctrine.

As has been noted, the family member who maintains the car may be held liable, and the principal case holds an equitable owner liable under the doctrine. In a proper case, could the equitable owner and the maintainer be joined on the theory that each exercised some control over the automobile? In *Cronenberg v. United States*,[21] a federal case applying North Carolina law, the government filed a cross-claim against the parents of the minor co-defendant who was driving his mother's car, as joint tort-feasors under the doctrine. G.S. § 20-71.1, presuming agency on proof of ownership, was used against the wife to establish a prima facie case. The judge, sitting as a jury, found the question of both parents' liability under the doctrine to be an issue of fact which he resolved in their favor on the ground that the car was not used for family purposes. Since the statute only creates a rule of evidence, this holding assumes that, in legal theory, both parents could have been held responsible under the family purpose doctrine. Thus in North Carolina it may be that it is possible to recover from both where one family-member owns the car and another maintains it.[22] Under the approach of the principal case, only a slight showing of control in each party is necessary to take the case to the jury against him.

As has been indicated, the family purpose doctrine is an extension of *respondeat superior*. It came into being as an instrument of social policy to afford greater protection for the rapidly growing number of

[20] 250 N.C. at 572, 108 S.E.2d at 853.
[21] 123 F. Supp. 693 (E.D.N.C. 1954).
[22] On this point the authorities are in direct conflict. The leading case of Birch v. Abercrombie, 74 Wash. 486, 133 Pac. 1020 (1913), held both husband and wife on the theory of joint ownership, and Thalman v. Schultze, 111 W. Va. 64, 160 S.E. 303 (1931), held both because the wife owned and the husband maintained the car. *Contra*, Smith v. Overstreet, 258 Ky. 781, 81 S.W.2d 571 (1935).

motorists in the United States. The principal case seems to indicate that the court, in furtherance of the basic policy of the doctrine, does not wish to impair its utility by imposing technical standards for its use. Thus, from *Small v. Mallory* it may be inferred that if there is any evidence of control in the defendant, it will be sufficient to withstand his motion of nonsuit on the issue of liability under the family purpose doctrine.

JACK W. FLOYD

Constitutional Law—Due Process—Denial of Confrontation to Witnesses in Loyalty-Security Hearings

The issue of the right to confront and cross-examine witnesses in loyalty-security hearings was presented to the United States Supreme Court in the recent case of *Greene v. McElroy*.[1] Greene was an aeronautical engineer employed as general manager and vice-president of a private corporation which was doing classified research for the Navy under contract. Such contracts incorporated by reference[2] a condition that the contractor was to exclude from the job all persons not cleared for access to classified information.

Although Greene had been previously cleared,[3] the corporation was notified by the Secretary of the Navy in April 1953 that his clearance was revoked and that he was to be denied access to any classified information. This led to Greene's discharge. He appealed to the Eastern Industrial Personnel Security Board (EIPSB), and a hearing was held at which he was subjected to intense cross-examination by the board without the opportunity to confront and cross-examine his accusers.[4] EIPSB affirmed the order of revocation and this action was affirmed by

[1] 360 U.S. 474 (1959).

[2] All government contracts for classified work incorporated by reference the Department of Defense Industrial Security Manual for Safeguarding Classified Information, 32 C.F.R. § 66 (1954).

[3] Greene was given a Confidential clearance by the Army in August 1949, a Top Secret clearance by the Assistant Chief of Staff G-2, Military District of Washington in November 1949, and a Top Secret clearance by the Air Materiel Command in February 1950. 360 U.S. at 476 n.1. In 1951 Greene's clearance was withdrawn but was restored by the Industrial Employment Review Board (IERB) in 1952. In 1953 the Secretary of Defense abolished the Personnel Security Board (PSB) and the IERB and directed the Secretaries of the three armed services to establish Regional Industrial Personnel Security Boards. 360 U.S. at 480.

[4] The revocation of Greene's security clearance was based primarily on incidents occurring between 1942 and 1947. It was during this period that Greene was living with his former wife who was alleged to have been an ardent Communist. The fact that he stayed with her until 1947 seems to be the main reason that the government suspected that he was a security risk. 360 U.S. at 490. Greene testified that the main reason for the divorce was that his ex-wife held views with which he did not concur and was friendly with persons with whom he had little in common. 360 U.S. at 479. From a review of the record it appears that Greene's clearance was revoked because of his association with his wife.

the Industrial Personnel Security Review Board (IPSRB) in 1956. Greene then started his action in the federal courts.[5] On appeal[6] the Supreme Court avoided the constitutional question concerning the right of confrontation, and reversed on other grounds the decisions of the lower courts, which had affirmed the IPSRB ruling.[7]

In proceedings other than security hearings, where disclosure of sources of information does not endanger national security, the problems of confrontation and cross-examination are less acute. Thus, in the field of criminal law the sixth amendment explicitly secures the right of confrontation in the federal courts in any case where disclosure of the informant's identity, or the contents of his communication are relevant to the defense.[8] Though the right is less definite in state criminal

[5] Before an employee can get a decision in the federal courts he must first show that the court has jurisdiction. In the type of case under discussion this involves two important things. First, he must show that he has a right which has been violated. In this situation the due process clause of the fifth amendment is usually invoked to show that a property right has been taken without due process of law. In the case of government employees there is a question as to whether the right to employment is a property right. Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd mem. by an equally divided Court,* 341 U.S. 918 (1951). In the case of the private employee there is the question of whether a security clearance is a mere privilege to be taken away without procedural due process or a property right like the license to practice a profession. *Ex parte* Robinson, 86 U.S. (19 Wall.) 505 (1873); Suckow v. Alderson, 182 Cal. 247, 187 Pac. 965 (1920); People *ex rel.* State Bd. of Health v. McCoy, 125 Ill. 289, 17 N.E. 786 (1888). Secondly, he must show that the issue is justiciable, *i.e.,* that it is a matter which the courts should and are able to decide, and not a question which can best be determined by the political departments of the government. The problem of justiciability has been much discussed by the courts in security type cases. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951); Adams v. Humphry, 232 F.2d 40 (D.C. Cir. 1955); Bailey v. Richardson, *supra*; Harmon v. Brucker, 137 F. Supp. 475 (D.D.C. 1956), *aff'd,* 243 F.2d 613 (D.C. Cir. 1957), *rev'd,* 355 U.S. 579 (1958).

[6] The district court in Greene v. Wilson, 150 F. Supp. 958 (D.D.C. 1957), denied Greene's motion for summary judgment and granted the government's same motion on the ground that Greene had shown no invasion of his rights. This was affirmed in Greene v. McElroy, 254 F.2d 944 (D.C. Cir. 1958), with the holding that it was not a justiciable controversy because it was an executive decision as to whether a person was fitted to be assigned to a particular kind of confidential work. This decision is criticized in Note, 46 CALIF. L. REV. 828 (1958).

[7] The basis of the decision was that there had been no explicit authority from the President or Congress for the Department of Defense to fashion and apply an industrial security program which denied the procedural safeguards of confrontation and cross-examination. In the absence of explicit authorization the Court was not willing to find authority for such restraint on the traditional forms of a fair proceeding. The Court also said it was not necessary at this time to decide whether such procedures, where explicitly authorized, would be constitutional. 360 U.S. at 580.

[8] Roviaro v. United States, 353 U.S. 53 (1957); United States v. Reynolds, 345 U.S. 1 (1953). In Jencks v. United States, 353 U.S. 657 (1957), the Court held that even the reports in the files of the F.B.I. must be turned over to the accused for his use in preparing a defense when such reports contain relevant statements of government witnesses touching the subject matter of their testimony at the trial of the accused. Shortly after this decision Congress passed the Anti-Jencks Act, 71 Stat. 595 (1957), 18 U.S.C. § 3500 (1958), which was enacted to place limits on the accused and prevent him from making fishing expeditions into the F.B.I. files hoping to find helpful information.

proceedings,[9] the Court has held that a denial of the right of confrontation in a state proceedings is a denial of due process under the fourteenth amendment.[10] In the area of civil court proceedings the problem of confrontation has presented little difficulty as it has been dealt with adequately by the "hearsay rule" and an established right of cross-examination.[11] Finally, in the field of administrative hearings where there is no question of the national security being endangered, the parties have the full right of confrontation and cross-examination both in federal and state proceedings.[12]

The "cold war" situation has provided some execptions to the elements of procedural due process which heretofore have been applied as a matter of course. The rationale of any resulting deprivation of personal rights lies in the balancing of national security against individual rights.[13] The due process provisions of the Constitution are not definitive terms by which it can be said that one certain act is a denial of due process while another is not. Rather they are applied in the light of the entire situation.[14] With the cold war in the background it is not inconceivable that the Court will hold that the denial of confrontation is not a denial of due process where the national security is involved.[15] Much more than this has been done under the war powers,[16] and the exigency of the cold war might likewise be deemed such as to warrant denial of some procedural rights in the interest of national security.

Thus far the rule that the Supreme Court will avoid all constitutional

[9] Snyder v. Massachusetts, 291 U.S. 97 (1934).

[10] *In re* Oliver, 333 U.S. 257 (1948). *But cf.* Stein v. New York, 346 U.S. 156 (1953), where petitioner alleged denial of due process when a confession of a co-defendant was used against the petitioner who did not have the opportunity to confront because the co-defendant did not take the witness stand. The Court held that the right of the co-defendant not to testify was greater than the petitioner's right to confrontation. However, since this case the Court has reiterated its former position. *In re* Murchison, 349 U.S. 133 (1955). Compare Williams v. New York, 337 U.S. 241 (1949), where the Court held that it was not a denial of due process for the trial court to use confidential information in passing sentence because the right of confrontation goes only to the establishment of guilt.

[11] 5 WIGMORE, EVIDENCE § 1367 (3d ed. 1940).

[12] Reilly v. Pinkus, 338 U.S. 269 (1949); Carter v. Kubler, 320 U.S. 243 (1943); Morgan v. United States, 304 U.S. 1 (1938); Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292 (1937); Southern Ry. v. Virginia, 290 U.S. 190 (1933). See also Larche v. Hannah, 176 F. Supp. 791 (W.D. La. 1959), where the court followed the principal case in that since the Civil Rights Commission had not been explicitly authorized to adopt rules that denied confrontation, investigating state vote registrars without allowing the registrars to face their accusers was illegal.

[13] Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd mem. by an equally divided Court,* 341 U.S. 918 (1951).

[14] Carlson v. Landon, 342 U.S. 524 (1952); Rochin v. California, 342 U.S. 165 (1952); Wolf v. Colorado, 338 U.S. 25 (1949); Betts v. Brady, 316 U.S. 455 (1942). Compare Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856).

[15] See Ullmann v. United States, 350 U.S. 422 (1956).

[16] U.S. CONST. art. I, § 8; see Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

questions if there is another ground in which a decision may rest[17] has prevented the Court's determination of the question of whether a person has a constitutional right of confrontation and cross-examination in administrative hearings where it is contended that the national security would be endangered by divulging the source of the information on which the government bases its charge or decision. The decisions in this area have usually turned on the construction of a departmental regulation or, as in the principal case, its authorization.

The issue of confrontation and cross-examination was before the Court in *Bailey v. Richardson,*[18] where a government employee was fired for security reasons without being given the opportunity to face or cross-examine her accusers at the security hearing. And, as typical in this type of case, the identify of the informant was withheld not only from the employee, but also from the members of the hearing board who had to judge its probative value. The Court of Appeals held that the sixth amendment did not apply because its application is limited to criminal actions where the accused may be punished,[19] and that the fifth amendment did not apply because government employment is a privilege, not a property right, nor "life" nor "liberty." The court also said, "Never in our history has a government administrative employee been entitled to a hearing of the quasi-judicial type upon his dismissal from government service."[20] The Supreme Court affirmed this decision by an equally divided Court without a written opinion.[21] This is the only case that holds that an employee at a security hearing does not have the right to confront his accusers. In all the recent cases which involved security-dismissals, including the principal case, the Court has found other grounds on which to reverse the lower courts' decision upholding dismissal.[22]

There are several different views concerning the right of confrontation in security hearings that have been advanced extrajudicially.[23] One view is that there should be no right of confrontation because to allow it would unnecessarily endanger the national security.[24] It is argued

[17] Peters v. Hobby, 349 U.S. 331 (1955); Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549 (1947).

[18] 341 U.S. 918 (1951), *affirming mem.* 182 F.2d 46 (D.C. Cir. 1950).

[19] 182 F.2d at 55. The dissent took the view that a dismissal for disloyalty is punishment and requires all the safeguards of a judicial trial. *Id.* at 69.

[20] *Id.* at 57.

[21] Bailey v. Richardson, 341 U.S. 918 (1951).

[22] Vitarelli v. Seaton, 359 U.S. 535 (1959); Cole v. Young, 351 U.S. 536 (1956); Peters v. Hobby, 349 U.S. 331 (1955).

[23] Krasnowiecki, *Confrontation by Witnesses in Government Employee Security Proceeding,* 33 NOTRE DAME LAW. 180 (1958), gives a good summary of the reasons most commonly advanced against disclosure.

[24] The most noted exponent of this doctrine of complete non-disclosure is the Director of F.B.I., J. Edgar Hoover. For a discussion of the Director's views and reasons, see McKay, *The Right of Confrontation,* 1959 WASH. U.L.Q. 122 (1959).

in support of this view (1) that professional informants must be protected if the effectiveness of their work is to be unimpaired; (2) that the casual informant would not volunteer his adverse testimony if required to do it openly; and (3) that in any event, the use of confidental informants is not unfair to the person who by his own conduct has created a doubt as to his loyalty to this country and who, therefore, should not expect the nation, or its responsible officials, to gamble national security on his continued status.[25] The difficulty with these arguments is that they assume that there are no other ways to insure a continued inflow of information which bears on national security but by the use of undisclosed informers, and that the employee is guilty as charged and therefore entitled to no procedural rights. Also it is difficult to say that one by his own conduct has created a doubt as to his loyalty when in fact it is the conduct or word of the faceless informer which has created the doubt. If there is no right of confrontation the word of the undisclosed informant is allowed to create a presumption of disloyalty and the employee must rebut the presumption by guessing what the basis of the charge is and then defend himself before a hearing board which most often does not know the source or reliability of the evidence against the employee.

Another view is that the employee should have the right to confront the casual informant, but not the professional informant.[26] The difficulty with this view is obvious; there is no practical way to determine who is "casual" and who is "professional." Where would you place the man who works without charge but who constantly gives information? Furthermore, who is to make the decision? If left with the investigatory agency in charge, any doubt would probably be resolved in favor of security and against the individual as has been the marked tendency throughout the total operation of the security programs. It would seem that whether the derogatory information comes from a casual or professional informant should not be important when the question of the constitutional right of confrontation is being considered. The basic issue remains the same, and this suggested compromise does not change that issue. The issue for consideration is *how* such information is used against the employee at the hearing.

A third view is an alternative to confrontation. Its premise is that the hearing officer or board should conduct an *in camera* proceeding and examine informants privately for the purpose of satisfying them-

[25] This is the reason advanced by a special committee of the American Bar Association for its position on the question. U.S. COMMISSION ON GOVERNMENT SECURITY, REPORT 661 (1957).

[26] This is the view approved by the Commission on Government Security. *Id.* at 668, 670. Proposed legislation adopting this view has been introduced in Congress, S. 2314, 86th Cong., 1st Sess. (1959), to replace the present industrial security program invalidated by the principal case.

selves as to the reliability of such informants and the truthfulness of the information they furnish.[27] This view provides for an unbiased party to have access to the true basis of the disloyalty charge.[28] However, this view does not meet the issue. It would seem that a third party confronting the informant would not satisfy the *reason* for the constitutional right of confrontation, if there is such a right. The accused has a great advantage over any third party in examining the accuser to determine the truth, for he will know if and when the informant is lying and by cross-examination can show this to be a fact.

The fourth view is one which would do away with any practice that denies the right of confrontation.[29] In support of this view it is argued that if an informant is not willing to testify openly and subject his reliability to the test of cross-examination, his statement should not be used to damage another person. It is further argued that the informant can be used by the investigatory agency to develop leads to independent evidence[30] that can be disclosed at a subsequent hearing. By this view the accused would have adequate personal safeguards, and at the same time the government could conceal the identity of the informant and thereby maintain his effectiveness. In essence this would parallel the rule now followed in criminal prosecutions. The difficulty with these arguments is that in the situation where the only evidence available is that possessed by the informant the government must either compromise the effectiveness of future sources of information to the possible detriment of national security or let the alleged security risk remain at his job.

By way of summary it should be pointed out that the first view assumes that there is no constitutional right of confrontation. The second and third views appear to be nothing more than compromises in avoidance of the issue. It is only the fourth view that assumes that there is such a right.

There are many indications that when the constitutional issue of confrontation is decided by the Court the decision will be that the denial

[27] This policy is used by the Atomic Energy Commission to some extent as expressed in the revised regulations issued in May of 1956. U.S. COMMISSION ON GOVERNMENT SECURITY, REPORT 663 (1957); 10 C.F.R. § 4.27(m) (1959).

[28] The merits of an *in camera* proceeding are discussed in Note, 45 CALIF. L. REV. 524 (1957).

[29] This view is supported by the American Jewish Congress. U.S. COMMISSION ON GOVERNMENT SECURITY, REPORT 662 (1957).

[30] To appreciate the practicality of this argument it is important to know the sufficiency of evidence necessary to sustain a security dismissal. It need not be a preponderance of the evidence as in civil litigation, nor must it be beyond a reasonable doubt as in criminal cases. It is something less than either of these. "Clearance shall be denied or revoked if it is determined, on the basis of all the available information, that access to classified information by the person concerned is *not clearly consistent* with the interest of the national security." 32 C.F.R. § 67.3-1 (Supp. 1959). (Emphasis added.) The same standard is applied to government employees. Exec. Order No. 10450, 18 Fed. Reg. 2489 (1953). For an interpretation of this standard see Cole v. Young, 351 U.S. 536 (1955).

of such an important procedural right is a violation of the due process clause of the fifth amendment. While the majority in *Jay v. Boyd*, a deportation case, held the issue to be non-justiciable, four dissenting justices reached the issue and supported such a right in strong language.[31] Also, in the principal case the Court went much further in its language expounding on such rights than was necessary in making the decision arrived at.

> Certain principals have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots . . . . This Court has been zealous to protect these rights from erosion. It has been spoken out not only in criminal cases . . . but also in all types of cases where administrative and regulatory action were under scrutiny.[32]

The Court also quoted Wigmore[33] to the effect that there is no safeguard for the testing of human statements comparable to that fur-

[31] 351 U.S. 345 (1956). (Warren, C. J., dissenting at 362) "Such a hearing [as Jay had] is not an administrative hearing in the American sense of the term. It is no hearing . . . . To me, this is not due process. . . . I am unwilling to write such a departure from American standards into the judicial or administrative process or to impute to Congress an intention to do so in the absence of much clearer language than it has used here." (Black, J., dissenting at 365, 366) "No nation can remain true to the ideal of liberty under law and at the same time permit people to have their homes destroyed and their lives blasted by slurs of unseen and unsworn informers. There is no possible way to contest the truthfulness of anonymous accusations. The supposed accuser can neither be identified nor interrogated. He may be the most worthless and irresponsible character in the community. What he said may be wholly malicious, untrue, unreliable, or inaccurately reported. In a court of law the triers of fact could not even listen to such gossip, much less decide the most trifling issue on it . . . . Article III of our Constitution and the Bill of Rights intended that people shall not have valuable rights and privileges taken away from them by government unless the deprivation occurs after some kind of court proceeding where witnesses can be confronted and questioned and where the public can know that the rights of individuals are being protected." (Frankfurter, J., dissenting at 373) "In this country, if someone dislikes you, or accused you, he must come up in front. He cannot hide behind the shadow. He cannot assassinate you or your character from behind, without suffering the penalties an outraged citizenry will impose." (Douglas, J., dissenting at 375, 376) "Fairness, implicit in our notions of due process, requires that any hearing be full and open with an opportunity to know the charge, and the accusers, to reply to the charge, and to meet the accusers . . . . A hearing is not a hearing in the American sense if faceless informers or confidential information may be used to deprive a man of his liberty."

[32] 360 U.S. at 496.

[33] *Id.* at 497, citing 5 WIGMORE, EVIDENCE § 1364 (3d ed. 1940).

nished by cross-examination and that no statement should be used as testimony until it has undergone that test. This seems to indicate that the Court is of the opinion that the right of confrontation and cross-examination is a basic right guaranteed under the Constitution and when the question is met it will so hold. The dissent in the principal case was of this opinion when it said: "While the Court disclaims deciding this constitutional question, no one reading the opinion will doubt that the explicit language of its broad sweep speaks in prophecy."[34]

There is much more involved than the accused employee's right to work.[35] It is submitted that there is a right not to have unchallenged and unverified suspicion and contempt with their concomitant social and economic disadvantage cast upon an individual and his family. This writer suggests that the due process clause does require the accused be given an opportunity to face his accusers and to cross-examine them, and that a decision by the Court to this effect would be fully warranted.

OLIVER W. ALPHIN

Constitutional Law—Right To Travel and Area Restrictions—Foreign Relations Power

Worthy v. Herter[1] involved a newspaperman who was denied a renewal[2] of his passport when he would not agree to comply with the area restrictions[3] stamped on it. The issue presented was whether the Secretary of State had the power to prevent the travel of a law-abiding United States citizen to certain areas of the world in a time when the nation is not at war. The federal district court dismissed the action which sought a declaratory judgment and injunctive relief against the Secretary of State. The Court of Appeals for the District of Columbia affirmed

[34] *Id.* at 524.

[35] The writer has made no distinction in his discussion between the rights of private and government employees. It is submitted that there is no valid distinction to be made. Both require security clearances; the effect of dismissal is the same; the constitutional guarantees appear to be the same. *Compare* Meyer v. Nebraska, 262 U.S. 390 (1923), and Trauax v. Raich, 239 U.S. 33 (1915), *with* Slochower v. Bd. of Educ., 350 U.S. 551 (1956), and Wieman v. Updegraff, 344 U.S. 183 (1952). The danger to national security is the same, Parker v. Lester, 112 F. Supp. 433 (N.D. Cal. 1953), and each is in fact engaged in government work, often at the same place.

[1] 270 F.2d 905 (D.C. Cir. 1959), *cert. denied,* 361 U.S. 918 (1959).

[2] It appears that Worthy had traveled to Hungary and Communist China on his previous passport. This would explain why the State Department took occasion to ask Worthy about his intended use of a renewed passport.

[3] At the present time the following inscription is stamped in U.S. passports: "This passport is not valid for travel to the following areas under control of authorities with which the United States does not have diplomatic relations: Albania, Bulgaria, and those portions of China, Korea and Viet Nam under Communist control." *Hearings Before Senate Foreign Relations Committee on Department of State Passport Policies,* 85th Cong., 1st Sess. 65 (1957) [hereinafter cited as *1957 Hearings*].

and concluded that the Secretary did have such power both statutorily and inherently within the executive control of foreign relations.[4] The Supreme Court denied petition for certiorari.[5]

The individual's freedom of movement, the right to leave one's own country and go to any other, is the interest for which the court's protection was sought in the *Worthy* case. The idea that an individual is free to move from place to place in the world, barring war or criminal indictment, has very old roots in Anglo-American jurisprudence. Magna Charta first guaranteed the right in 1215: "It shall be lawful in future for anyone . . . to leave our kingdom and to return, safe and secure by land and water, except for a short period in time of war . . . ."[6] The only limitation imposed upon this freedom by the King was the ancient writ of *ne exeat regno*[7] ("let him not leave the realm"). Apparently this writ still survives in England today, but its use in the name of the Crown seems definitely restricted to times of war.[8]

The right to travel finds expression in the Universal Declaration of Human Rights, adopted in the General Assembly of the United Nations, December 10, 1948. Article 13 provides: "1. Everyone has the right to freedom of movement and residence within the borders of each state. 2. Everyone has the right to leave any country, including his own, and to return to his country."[9]

Contemporary writers agree that freedom to travel is a natural right and that its unfettered exercise is in the best interest of a free and self-enlightening society.[10] The fact that no specific mention is made of the right in the United States Constitution has usually been interpreted by writers in this field to mean that it was regarded as unchallenged, basic, and essential.[11] Freedom to travel has been intimately associated with other American freedoms. Protection of a property in-

[4] The scope of this note in intended to extend primarily to a discussion of the foreign relations power of the United States Government and how it bears on freedom to travel. The passport problem itself is only incidental to this discussion. For a more complete treatment of the passport cases and authorities per se see Note, 37 N.C.L. REV. 172 (1958).

[5] 361 U.S. 918 (1959).

[6] Clause 42 of the Magna Charta of 1215. BARRINGTON, THE MAGNA CHARTA AND OTHER GREAT CHARTERS OF ENGLAND 240 (1900). Although this clause was left out of Magna Charta after 1215, it has been argued that the broad grant of liberty contained in it represented the common law, which, according to one authority, recognized the right of everyone to leave the kingdom at his pleasure. BEAMES, NE EXEAT REGNO, A BRIEF VIEW OF THE WRIT (1st Am. ed. 1821).

[7] BEAMES, *op. cit. supra,* note 6.

[8] VII HALSBURY, LAWS OF ENGLAND 293-94 (3d ed. 1954).

[9] 3 DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS 960-61 (Chafee ed. 1952).

[10] See CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION (1956); McDougal and Leighton, *The Rights of Man in the World Community,* 14 LAW & CONTEMP. SOCIETY 490 (1949); Note, *Passports and Freedom of Travel,* 41 GEO. L.J. 63 (1952).

[11] Jaffe, *The Right to Travel: The Passport Problem,* 35 FOREIGN AFFAIRS 17-20 (1950).

terest, for example, may be involved where travel abroad is essential to a person's livelihood. A religious calling may require a person to travel overseas. The "right to know," to be informed about other lands and peoples, depends on the basic freedom of international mobility.

In recent history the right to travel has been recognized by two important cases, *Shactman v. Dulles*[12] and *Kent v. Dulles*.[13] In *Shactman* the appellant had been denied a passport in the "best interests of the country" because he was the head of an organization on the Attorney General's list of subversive groups. The Court of Appeals for the District of Columbia held the denial was an arbitrary restraint on the individual's liberty and ordered that the passport be issued.

> The right to travel, to go from place to place . . . is a natural right subject to the rights of others and to reasonable regulation under law. A restraint imposed by the Government of the United States upon this liberty, therefore, must conform with the provisions of the Fifth Amendment that 'no person shall be . . . deprived of . . . liberty . . . without due process of law.'[14]

In *Kent v. Dulles*[15] the Supreme Court recognized this right and stated that it is a part of the "liberty" guaranteed by the fifth amendment, and therefore it may not be infringed without due process of law.[16] In *Kent* the Court held that the Secretary has no statutory authority to deny passports on the basis of political beliefs or associations.[17]

The problem in the principal case is a new one to the courts but not to American citizens. In the 1930's the first positive area restrictions were imposed on United States citizens through passport control. Travel to Ethiopia was prohibited in 1935, and to Spain during the Civil War of 1936-39,[18] and to China in 1937.[19] Apparently these travel restrictions were never challenged, one possible explanation being that travel without a passport was still possible to some extent. Furthermore the

[12] 225 F.2d 938 (D.C. Cir. 1955).
[13] 357 U.S. 116 (1958).
[14] 225 F.2d at 941.
[15] 357 U.S. 116 (1958). Here the passport denial rested on Communist affiliation and refusal to sign the non-Communist affidavit. The Court met squarely the issue of the Secretary of State's discretion over issuance of passports under existing statutes. Since the right to travel is an element of liberty protected by the fifth amendment, the Court points out, Congress alone has the power to establish substantive grounds for denial of passports, which are now regarded as essential to travel abroad. The Court found that Congress had intended that a person might be refused a passport only if his citizenship was in question or if he was accused of a crime.
[16] 357 U.S. at 125.
[17] *Id.* at 128, 130.
[18] 2 HYDE, INTERNATIONAL LAW § 406A (2d rev. ed. 1945).
[19] 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW 532 (1942). It is interesting to note that in all three of these periods a war was in progress within the country to which travel was prohibited. At the time of the passport denial in the principal case no war was in progress on the Chinese mainland.

area restrictions, with the exception of those relating to Spain, were of short duration.

The "cold war" following World War II and the emergence of Red China have presented the United States government with difficult problems in the conduct of foreign relations. While trying to establish an equilibrium and to normalize its relations with the older part of the Communist world, *i.e.,* Soviet Russia, the government has officially ignored the newer Communist countries. Out of this situation has arisen the latest governmental policy of forbidding travel in countries whose governments are not recognized by the United States.[20] In May 1952 the Department of State began stamping passports invalid for the U.S.S.R., China, and the Soviet satellite states except on special application to the Department.[21] Then in October 1955 Russia and most of her satellites[22] were opened to travel; but all passports were stamped with the statement that they were not valid for travel to Albania, Bulgaria, and those portions of China, Korea, and Viet Nam under Communist control.[23]

Recently a Congressman interested in traveling in the Far East to obtain information regarding United States relations and policies in that area was denied a passport for Red China.[24] In the State Department letter denying the Congressman's request several basic tenets underlying the China travel ban were revealed—namely, the existence of "a state of unresolved conflict" stemming from the Korean action, lack of diplomatic relations, inability "to provide the customary protection," and the maltreatment of Americans on the mainland. More significant, however, is the statement that the Congressman's presence in China might be taken for a change in policy.[25]

The rationale of area retrictions has most often been stated in terms of the local dangers to the traveler and the lack of diplomatic channels through which to extricate him from detention.[26] These criteria have not been applied uniformly. In 1957, for example, the ban was lifted for

[20] In the case of Soviet Russia after 1923 and before United States recognition, there was no travel ban. *1957 Hearings, op. cit. supra* note 3, at 65.

[21] *1957 Hearings, op. cit. supra* note 3, at 65.

[22] Czechoslovakia, Hungary, Poland, and Rumania.

[23] See note 3 *supra.*

[24] The district court in dismissing Porter v. Herter, — F. Supp. — (D.D.C. 1959), cited *Worthy* and refused to find a difference between an ordinary citizen and a Congressman travelling in an unofficial capacity. A petition for writ of certiorari has been denied. 361 U.S. 918 (1959).

[25] Letter from William B. Macomber, Jr., Assistant Secretary, to the Hon. Charles O. Porter, House of Representatives, July 2, 1959. (Exhibit B in the complaint of Porter v. Herter, — F. Supp. — (D.D.C. 1959).)

[26] SPECIAL COMMITTEE TO STUDY PASSPORT PROCEDURES OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, FREEDOM TO TRAVEL 53 (1959) [hereinafter cited as FREEDOM TO TRAVEL].

short visits to Albania[27] and Bulgaria[28] by persons with compelling professional reasons. In the case of Red China, three classes of persons have been granted passports valid for travel to that country. The first group consisted of the mothers and one brother of three Americans held prisoners there.[29] Also a lawyer representing defendants charged with sedition was permitted to go to China in order to gather data for their defense.[30] The largest group receiving the Secretary's approval consisted of twenty-four newsmen, specially selected on the basis of their papers' foreign news coverage,[31] who were authorized to stay in Red China for six months. These exceptions indicate that the State Department's prime object is the success of its foreign policy and not the safety of individual Americans.

This rationale finds expression in the *Worthy* opinion, where the court approves another reason for imposing area restrictions, namely the prevention of possible "clashes" caused by Americans in "trouble spots" of the world.[32] The decision rests on statutory authority and on the President's executive power in the foreign relations field. "It is settled that in respect to foreign affairs the President has the power of action and the courts will not attempt to review the merits of what he does. The President is the nation's organ in and for foreign affairs."[33] "We think the designation of certain areas of the world as forbidden to American travelers falls within the power to conduct foreign affairs."[34] This language of the court suggests two inter-related concepts of American constitutional law, the foreign relations power and the political question doctrine.

The "foreign relations power" refers to the ability of the United States government to carry on official intercourse with other nations.[35] The Constitution makes no specific grant of a "foreign relations power." Rather it allocates to the President the treaty-making function, the power to appoint and receive diplomatic agents, and the command of the army and navy.[36] The Constitution grants to Congress the power (1) to establish and collect customs and duties, (2) to regulate foreign commerce, (3) to establish naturalization laws, (4) to declare war, and (5) to define and punish piracies and felonies committed on the high

[27] Washington Post and Times Herald, Nov. 15, 1957, § A, p. 12, col. 4.
[28] N.Y. Times, Sept. 6, 1957, p. 1, col. 3 (city ed.).
[29] N.Y. Times, Dec. 7, 1957, p. 1, col. 1 (city ed.).
[30] The lawyer was Mr. A. L. Wirin. N.Y. Times, Nov. 21, 1957, p. 17, col. 1 (city ed.).
[31] N.Y. Times, Aug. 23, 1957, p. 1, col. 8 (city ed.).
[32] 270 F.2d at 910.
[33] *Id.* at 911.
[34] *Id.* at 910.
[35] United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).
[36] U.S. CONST. art. II, § 2.

seas and offenses against the law of nations.[37] These powers collectively make up the constitutional authority for the regulation of the country's conduct in respect to other nations.

In 1829 to the Supreme Court in *Foster v. Neilson*[38] first announced the "political question" doctrine which precludes judicial interference with governmental action concerning foreign policy. The case dealt with Spanish lands in the southeastern part of the country. Chief Justice Marshall, speaking for the Court, declared:

> If those departments which are entrusted with the foreign intercourse of the nation . . . have unequivocally asserted its rights over a country . . . which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of nations is . . . more a political than a legal question, and in its discussion, the courts . . . must respect the pronounced will of the legislature.[39]

Labelling presidential or congressional action concerning foreign relations as a "political question," however, does not prevent the court's looking behind the label, as was done in *Worthy*.[40] The court may examine what was done in the name of foreign relations or foreign policy, particularly where the claim is made that constitutional rights have been infringed.[41]

When some action of the federal government is under consideration, the problem before the court is determining what is properly within the field of foreign relations. It is not an easy determination to make, because the limits of this power are nowhere defined. The Constitution in broad terms mentions a few specific powers in the field; significantly, these constituitonal grants are made both to the President and to Congress. One writer has suggested that the co-existence of these affirmative constitutional grants has assured a struggle between the President and Congress for the privilege of directing the country's foreign policy.[42] Undoubtedly the President has won the lion's share of the privilege,[43]

[37] U.S. CONST. art. I, § 8.
[38] 27 U.S. (2 Pet.) 253 (1829).
[39] *Id.* at 309.
[40] 270 F.2d at 909.
[41] Although there are no decided cases having to do with an executive invasion of personal rights as a by-product of the foreign relations power, the point is made by one writer that the President's acts should be no less subject to judicial review than are acts of Congress. Carrington, *Political Questions: The Judicial Check on the Executive,* 42 VA. L. REV. 175, 184 (1956).
[42] CORWIN, THE PRESIDENT: OFFICE AND POWERS 171 (4th ed. 1957).
[43] The Senate was intended to exercise a special role in the conduct of our foreign relations, acting like a council in which the "President in Council" could work out policies and have diplomatic appointments approved. Subsequent events did not develop this role, and the words "with the advice and consent of the Senate" have come to mean little more than the power of ratification or veto of presidential treaty proposals. If, however, the Senate has lost power, certainly

and it is the presidential exercise of the foreign relations power which is most often the object of complaint before the courts. The subjects dealt with in the cases can be classified as follows: (1) recognition of foreign governments,[44] (2) assessment of treaty obligations,[45] (3) resolution of disputed sovereigns,[46] (4) acquisition of new lands,[47] (5) participation in *ad hoc* international bodies,[48] (6) the making of international executive agreements,[49] and (7) the licensing of domestic carriers for foreign air routes.[50] Not all of these situations involve purely executive functions; for example, congressional involvement was necessary in the new lands and international organization cases. Furthermore an act of Congress underlay the situation in the foreign air routes case. It would seem that the plenary power of the President in the field of foreign relations, so far as the cases are concerned, is fairly limited to recognition, executive agreements with other governments, and treaty interpretation. None of these traditional subjects was at issue in the principal case, yet the court has found that the Secretary of State's action in imposing area controls is protected by the presidential "power to conduct foreign affairs."

In the principal case statutory authority, quite apart from the President's inherent power, was held to be equally decisive of the question of the power of the Secretary of State. Two statutes were found by the court to be controlling. First, section 211(a) of the basic passport act of 1926 gives the Secretary of State authority to "grant and issue pass-

---

the President and to a lesser extent Congress as a whole have gained power. The task of the President is to formulate and propose the nation's plans for dealing officially with other nations. The Congress is in a position to support or modify these plans through control of appropriations and through passage of statutes governing United States participation in international organizations. See CORWIN, *op. cit. supra* note 42, at 170-226. The recently proposed Bricker Amendment was an attempt to invest Congress with a larger role in the actual conduct of the country's international relations. Specifically the proposed amendment was aimed at the treaty making power and would require action by both houses of Congress, just as in the case of any other legislation, before a treaty would become binding as law. The effect of such a provision would undoubtedly be to reverse the trend of concentrating the direction of the nation's foreign affairs in the hands of the President. Congress, however, wisely refused to pass the proposal. See Whitton and Fowler, *Bricker Amendment—Fallacies and Dangers,* 48 AM. J. INT. L. 23 (1953); Henkin, *The Law of the Land and Foreign Relations,* 107 U. PA. L. REV. 403 (1959).

[44] United States v. Pink, 315 U.S. 203 (1942).

[45] *In re* Cooper, 143 U.S. 472 (1892); Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415 (1839); Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829).

[46] Terlinden v. Ames, 184 U.S. 270 (1902); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).

[47] Wilson v. Shaw, 204 U.S. 24 (1907).

[48] Koki v. MacArthur, 338 U.S. 197 (1949) (establishment of war crimes tribunal); Z. & F. Assets Realization Corp. v. Hull, 114 F.2d 464 (D.C. Cir.), *aff'd,* 311 U.S. 740 (1941) (Mixed Claims Commission, United States and Germany).

[49] United States v. Belmont, 301 U.S. 382 (1950).

[50] Chicago & So. Airlines v. Waterman Corp., 333 U.S. 103 (1948).

ports . . . under such rules as the President shall designate and prescribe . . . ."[51] Secondly, section 1185(b) of the Immigration and Nationality Act of 1952[52] provides the President with power to declare a national emergency and makes it unlawful during the declared emergency for American citizens to depart or enter the country without a valid passport. Under authority of section 211(a) the President in 1938 issued an executive order[53] enabling the Secretary of State in his discretion to restrict the use of passports on a geographic basis.[54] A national emergency now exists by virtue of the President's 1953 proclamation,[55] thus activating section 1185(b). The court held that the effect of these statutes and orders is to grant the Secretary of State a discretionary power to prohibit travel of Americans to certain areas of the world by making the passport invalid for use in those areas.

The statutes relied on would appear to be insufficient to sustain so broad a discretion in the Secretary of State in the issuance of passports. Both section 211(a) and the executive order issued pursuant to it and section 1185(b) were strictly construed in *Kent v. Dulles*[56] as not giving the Secretary "unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose." In *Kent* passport denial by the Secretary was based on the applicant's political associations and beliefs, and this was held to be a substantive ground not available to the Secretary under existing statutes. An area restriction would certainly be a substantive ground for denial equally unavailable without statutory authority.

The language of the *Worthy* opinion indicates that the existence of a national emergency extended the scope of section 211(a) to include area restrictions under the power of the President to prescribe rules and regulations governing passport issuance.[57] The Supreme Court in *Kent,* however, was not constrained to expand the Secretary's 211(a) authority, implemented by executive order, on account of an emergency falling short of war.[58] It is submitted that the government's power was overreached in *Worthy* because: (1) section 211(a) and section 1185(b) do not provide the substantive rules on which passport denial can be based, and clearly to restrain citizens from going to certain areas of the

[51] 44 Stat. 87 (1926), 22 U.S.C. § 211(a) (1952).
[52] 66 Stat. 190 (1952), 8 U.S.C. § 1185(b) (1952).
[53] Exec. Order No. 7856 (1938), 3 Fed. Reg. 681 (1938).
[54] "§ 51.75. *Refusal to issue passport.* The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries." *Ibid.*
[55] Proclamation No. 3004, 67 Stat. c.31 (1953).
[56] 357 U.S. 116 (1958).
[57] 270 F.2d at 912.
[58] 357 U.S. at 128.

world is to impose a substantive regulation; (2) the issue of whether the foreign relations power includes the power in the President to impose area restrictions on individual travel has never been passed upon by the courts. Furthermore the exercise of the foreign relations power by the President where it touches personal liberties is subject to the due process clause of the fifth amendment.[59] Under the *Kent* decision due process requires an act of Congress to circumscribe the right to travel.

When the President needs additional powers to carry out the legitimate policies of the government, the customary approach is through the use of special purpose legislation.[60] Where the powers asked for will infringe basic individual rights, the Congress of course should be certain the powers are essential and reasonable and that the grant of power is limited in scope and duration. The current need arises from the difficulties of carrying out the government's over-all "cold war" policies. These policies include non-recognition of China, limiting socio-economic intercourse with the Soviet world, and the military objective of containing Communist influences throughout the world.[61] The President has said that if these policies are to be successful, then the Secretary of State must have authority to impose area restrictions on United States citizens abroad.[62] He asked Congress to provide the needed legislation. Such legislation has been recommended by a special committee of the New York Bar studying passport procedures.[63] Whether area restric-

[59] United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); Shactman v. Dulles, 225 F.2d 938 (D.C. Cir. 1955).

[60] CORWIN, *op. cit. supra* note 42, at 191-92.

[61] Statement by Under Secretary of State Murphy before the Senate Foreign Relations Committee, April 2, 1957, *1957 Hearings, op. cit. supra* note 3, at 69; President's Special Message to Congress, July 7, 1958, 104 CONG. REC. 1832-33 (1958); see generally Rostow, *American Foreign Policy and International Law*, 17 LA. L. REV. 552 (1957).

[62] President's Special Message to Congress of July 7, 1958, 104 CONG. REC. 1832-33 (1958). "[T]he secretary should have clear statutory authority to prevent Americans from using passports for travel to areas where there is no means of protecting them, or where their presence would conflict with our foreign policy objectives or be inimical to the security of the United States."

[63] "[W]ithin the area of foreign affairs, the United States has the powers of a sovereign State and these powers, no matter how divided between them, are vested in total in the Congress and the President, subject of course to the provisions of the Constitution. Leaving aside the question of whether or not Congress in 22 U.S.C. § 211a . . . has provided a legislative foundation for executive action, it is clear that the Congress and the President, acting in concert, may restrict the travel of Americans to certain areas of the world . . . . The present national emergency becomes the reason and the occasion for the imposition of restrictions on the travel of Americans into specified areas, as an instrument in the conduct of the cold war. The Committee adopts this view in full consciousness that it may result in restricting the travel of all Americans to certain countries in the national interest of the United States . . . . Because of its nature, the restriction on travel to certain countries or areas should be employed only in situations of gravity and seriousness.

"[T]he Committee has concluded, on balance, that the authority to prohibit travel by all United States citizens in areas designated by the Secretary of State

tion as a policy is advisable or not,[64] it is clear that statutory limits should be imposed in pursuing these "cold war" policies as they impinge on the right to travel.

Several bills were introduced in the Eighty-fifth Congress, but no statute was passed. The Eighty-sixth Congress now has before it some of the same proposals as well as new ones. There is considerable difference among them as to the limits of the discretion to be given the President or the Secretary.[65]

> A two point statute is recommended which would read as follows: Area restrictions may be imposed on United States citizens traveling abroad by the President through a directive to the Secretary of State:
>
> (1) When a state of war exists between this country and the one to be restricted;
>
> (2) In countries where United States forces are actually engaged in hostilities.[66]

There is in such a statute no unbridled discretion "to protect the nation's best interests" nor power to insure the "orderly conduct of foreign relations," at the expense of the individual's right to travel, nor

---

is a necessary instrument to advance the national interest, and it recommends legislation to clear up any doubts as to the possession by the Secretary of State of such authority . . . ." FREEDOM TO TRAVEL, *op. cit. supra* note 46, at 52-53, 55.

[64] The point is made by the authors of the bar committee report that such restrictions often impose greater penalty on this country than the one against which it is directed. *Id.* at 54.

[65] While the 85th Congress failed to enact any legislation in this field, there is prospect of a statute forthcoming from the 86th Congress. As of this writing the House has passed H.R. 9069, 86th Cong., 1st Sess. (1959), which would give the President wide discretion in restricting areas of the world to entry by United States citizens. Essentially the bill provides three criteria for area control: first, where the United States is at war; second, where actual hostilities are in progress; and third, where the President finds the national interest at stake either because of inability to provide protection or because the travel would "seriously impair the foreign relations of the United States." The Senate Foreign Relations Committee has under study at least three different bills, one of which is the Humphrey Bill (S. 806, 86th Cong., 1st Sss. (1959)) which would restrict the American traveler overseas only when war has been declared or in areas where United States troops are fighting without a declaration of war. Another bill (S. 2287, 86th Cong., 1st Sess. (1959)) introduced by Senator Fulbright adopts the geographical limitations of H.R. 9069, *supra,* but adds a provision to prevent travel abroad of any U.S. citizen who in the opinion of the Secretary would incite international conflicts involving the United States. Senator Wiley's bill (S. 2315, 86th Cong., 1st Sess. (1959)) also follows the House bill in the area limitations and provides a unique provision by which the President may make exceptions to any general geographical restraints for such persons as newsmen, legislators, doctors and missionaries. Another interesting feature in every bill here discussed except S. 806 is a penalty section which makes it a misdemeanor punishable by $1,000 fine or one year's imprisonment to violate travel bans.

[66] Such a statute is essentially like that introduced by Senator Humphrey. S. 806, 86th Cong., 1st Sess. (1959).

any other device by which individual Americans become the unwilling instruments of foreign policy.[67]

KENNETH L. PENEGAR

Corporations—Constitutional Law—Retroactive Application of Curative Statute Affecting Corporate Existence

The case of *Lester Bros. v. Pope Realty & Ins. Co.*[1] affirmed the doctrine of *Park Terrace, Inc. v. Phoenix Indem. Co.*[2] that a corporation became dormant when the number of stockholders was reduced to less than the statutory requirement of three. The court in the *Lester* case held that the North Carolina legislature's curative act,[3] passed in an attempt to obviate the *Park Terrace* doctrine, was of no aid to the defendant Pope because the statute could not operate retroactively to defeat vested rights. In *Park Terrace* the result of dormancy was that the sole stockholder became the real party in interest in a breach of contract suit brought in the name of the corporation.[4] In *Lester* one of two stockholders was made a defendant and was held individually liable for an extension of credit which had ostensibly been made to the corporation only.

The plaintiff in *Lester* had sought to hold defendant Pope individually liable for certain sales of package houses made to defendant corporation Pope Realty and Insurance Company. The corporation had been formed with three stockholders. Between January 12 and June 20, 1955, the plaintiff delivered three bills of merchandise to the Company which during this time had only two stockholders. These bills were unpaid, and this indebtedness comprised part of the claim for which suit was brought.[5] At trial the Superior Court denied plaintiff's motion for judgment against Pope individually.

On appeal the Supreme Court cited *Park Terrace* and stated that when a corporation had less than three stockholders the stockholders

[67] There is nothing in the proposed statute which would preclude travel to areas where the individual's safety might be in doubt. It should be government's function to forewarn the traveler of the dangers and not to prevent him from assuming the risk.

[1] 250 N.C. 565, 109 S.E.2d 263 (1959).

[2] 243 N.C. 595, 91 S.E.2d 584 (1956). For an extensive discussion of this case see Note, 34 N.C.L. REV. 531 (1956).

[3] N.C. GEN. STAT. § 55-3.1 (Supp. 1959).

[4] The decision caused much adverse comment. Latty, *A Conceptualistic Tangle and the One- or Two-Man Corporation*, 34 N.C.L. REV. 471 (1956); Latty, *The Close Corporation and the New North Carolina Business Corporation Act*, 34 N.C.L. REV. 432, 441-44 (1956); Comment, 14 WASH. & LEE L. REV. 72 (1957).

[5] The plaintiff alleged fraud on the part of Pope and sought to hold him liable on all other deliveries made to the corporation, as well as these three. The Supreme Court upheld a finding that there was no reliance on his false statements and therefore no liability on the basis of fraud.

could no longer function as a corporate entity but only as individuals. Thus Pope was individually liable for the three bills of merchandise, and the court ruled that plaintiff's motion for judgment should have been granted.

In 1957, after the *Park Terrace* decision, G.S. § 55-3.1 was enacted by the North Carolina legislature for the purpose of nullifying the ruling that a corporation became dormant when the number of shareholders dropped below three. In the principal case the court quoted subsection (d) of this statute which reads:

> If any corporation or purported corporation might have been considered dormant or inactive solely in consequence of the acquisition heretofore of all its shares by one or two persons, such corporation or purported corporation is hereby declared to have had uninterrupted capacity to act as a corporation.[6]

The court then stated:

> The defendant Pope contends the foregoing statute[7] relieves him from individual liability . . . . [W]hen plaintiff dealt with Pope the law of this State as declared in the *Park Terrace* case made him individually liable . . . . The plaintiff had a vested right in that liability. The liability attached in 1955. The Legislature, in 1957, could not take it away without violating the obligation of the contract. U.S. Constitution, Article I, Section 10; N.C. Constitution, Article I, Section 17.[8]

Thus the plaintiff-creditor acquired a vested right against the stockholder Pope individually, even though there was no showing that at the time the merchandise was delivered the plaintiff was aware that there were less than three stockholders or that the plaintiff had any intention of extending credit to anyone other than the corporation itself.

Although the court stated that this vested right could not be abridged by retroactive legislation, this does not mean that G.S. § 55-3.1 was held to be wholly void. The court may have intended to hold that only subsection (d) was unconstitutional, severing this part from the rest of the statute.[9] Or the court may have intended to construe the statute as constitutional in all cases except where vested rights would be affected, so that only as applied in the latter case would the act be invalid.[10] The language of the decision is susceptible to either interpretation.[11]

[6] N.C. GEN. STAT. § 55-3.1(d) (Supp. 1959).

[7] It is difficult to tell if the court here referred to all of § 55-3.1 or only subsection (d). The dissent seems to support the view that the majority referred only to subsection (d).

[8] 250 N.C. at 568, 109 S.E.2d at 266.

[9] A court may sever part of a statute even when the legislature does not expressly so provide. El Paso & N.E. Ry. v. Gutierrez, 215 U.S. 87 (1909).

[10] An act may be invalid when applied in certain cases, but this will not cause the downfall of the entire statute. Missouri Rate Cases, 230 U.S. 474 (1913).

[11] The court also quoted with approval from a case which construed a statute

There are other instances in which the North Carolina court has interpreted retroactive legislation. A North Carolina statute[12] made proof of registration in a party's name prima facie evidence of ownership of a vehicle and prima facie evidence that the vehicle was being operated in the course and scope of the owner's employment. The court held[13] that this statute would apply to causes of action which arose before its effective date of operation because the statute merely changed a rule of evidence; the court stated that there is no vested right in a rule of evidence. Another case[14] held constitutional a 1929 statutory amendment[15] as applied retroactively to a trust created in 1927. The court held that this amendment, allowing revocation of a trust for unborn beneficiaries, disturbed no vested rights. A subsequent trust case[16] held valid a retroactive law[17] which changed the method of removing and substituting trustees; the court said no substantive rights were involved and there was no impairment of the obligation of contract. The court has also upheld[18] the constitutionality of a statute[19] which validated a previous township election and an issue of bonds. Other cases have not dealt so favorably with retroactive legislative acts. In a dictum the court has stated[20] that a creditor could not be deprived of rights which had vested under a former statute[21] imposing double liability on holders of bank stock, and thus an amendment[22] terminating double liability would not be allowed to affect such a creditor. Conversely, another dictum declared[23] that a shareholder could not be assessed under a 1925 statute[24] for stock purchased in 1919, since to have held the stockholder liable would have destroyed the obligation of a contract, impaired vested rights and denied due process. Where the legislature passed an act[25] to validate void deeds of gift by extending the time for registration, the court

as being only operative prospectively. Statutes will be so construed where possible. However, the language of § 55-3.1 would make it virtually impossible for the court to hold that the act was not intended to be retroactive.

[12] N.C. GEN. STAT. § 20-71.1 (1953).

[13] Spencer v. McDowell Motor Co., 236 N.C. 239, 72 S.E.2d 598 (1952). The statute excepted pending litigation from its effect.

[14] Stanback v. Citizens' Nat'l Bank, 197 N.C. 292, 148 S.E. 313 (1929).

[15] N.C. GEN. STAT. § 39-6 (1950).

[16] Bateman v. Sterrett, 201 N.C. 59, 159 S.E. 14 (1931).

[17] N.C. Pub. Laws 1931, ch. 78 (now G.S. §§ 45-10, -12, -17 (1950)).

[18] Burney v. Commissioners of Bladen County, 184 N.C. 274, 114 S.E. 298 (1922).

[19] N.C. Priv. Laws Ex. Sess. 1921, ch. 32.

[20] Hood *ex rel.* United Bank & Trust Co. v. Richardson Realty, Inc., 211 N.C. 582, 590, 191 S.E. 410, 415 (1937) (dictum).

[21] N.C. Pub. Laws 1921, ch. 4, § 21; N.C. Pub. Laws 1925, ch. 121, § 1.

[22] N.C. Pub. Laws 1935, ch. 99.

[23] Bank of Pinehurst v. Derby, 218 N.C. 653, 657-58, 12 S.E.2d 260, 263 (1940) (dictum). The court avoided the constitutional question by construing the statute as operative only prospectively.

[24] N.C. Pub. Laws 1925, ch. 117.

[25] N.C. Pub. Laws Ex. Sess. 1924, ch. 20.

said, in refusing relief under the statute, that "the validating statute, if constitutional, cannot be invoked to impair the vested right."[26] The court has also stated[27] that a statute[28] would not be construed as giving authority to retroactive provisions of a corporate charter amendment where such a construction would interfere with vested rights in preferred stock dividends.

The construction of curative legislation affecting corporations has been dealt with by other jurisdictions. An Iowa case[29] held constitutional a curative act[30] which validated a corporation previously defective due to improper publication. The court here stated that the statute interfered with no contractual libality. The Tennessee court[31] sustained a statute[32] which validated corporate charters previously defective due to faulty acknowledgment. In this case the court held that there were no vested rights in a defective charter. The United States Supreme Court, however, held[33] that the California legislature could not take away the individual liability of a director of a corporation, the liability having vested under a former constitutional provision.[34] The repeal of this constitutional provision did not help the defendant because the obligation was contractual, and the right to enforce it had already vested in the plaintiff. An Oregon case[35] construed as operating prospectively a constitutional amendment[36] which imposed double liability on holders of bank stock; this construction kept the amendment from being unconstitutional.

The North Carolina curative statute, G.S. § 55-3.1, took effect on July 1, 1957. It is clear under the statutory construction in the principal case that this act could sustain all corporations formed on or after the effective date of the statute. Under this decision, however, the statute will be able to sustain corporations in existence before this date only in so far as no vested rights are involved in the corporate transactions. This has left many problems for the one- and two-man corporations regarding transactions during the time before July 1, 1957. Would the grantee in a deed executed by the dormant corporation be liable on a dower claim if the sole shareholder, or either of the two shareholders,

[26] Booth v. Hairston, 193 N.C. 278, 283, 136 S.E. 879, 881 (1927).
[27] Patterson v. Durham Hosiery Mills, 214 N.C. 806, 200 S.E. 906 (1939).
[28] N.C. Pub. Laws 1901, ch. 2, §§ 29, 30, 37, as amended; N.C. Pub. Laws 1925, ch. 118, §§ 1, 2(a), as amended; N.C. Pub. Laws 1901, ch. 2, § 19, as amended; N.C. Pub. Laws 1925, ch. 118, §§ 2, 2a, as amended.
[29] Adler v. Baker-Dodge Theatre Co., 190 Iowa 970, 181 N.W. 254 (1921).
[30] Iowa Acts and Joint Resolutions 1915, ch. 127.
[31] Shields v. Clifton Hill Land Co., 94 Tenn. 123, 28 S.W. 668 (1894).
[32] Tenn. Acts 1890, ch. 17.
[33] Coombes v. Getz, 285 U.S. 434 (1932).
[34] CAL. CONST. art. XII, § 3 (1879).
[35] Schramm v. Done, 135 Ore. 16, 293 Pac. 931 (1930).
[36] ORE. CONST. art. XI, § 3 (1912).

died before this date?[37] Would there be personal income tax problems raised for the one or two shareholders?[38] In all corporate litigation where the cause of action arose before July 1, 1957, would the one or two stockholders be the real party or parties in interest?[39] Did the corporate status come and go before July 1, 1957, depending on whether at any given time there were at least three shareholders or less than that number?[40] Unfortunately the answers to these and other questions will have to be determined on a case by case basis.

JOHN G. SHAW

Criminal Law—Inciting To Riot

In *State v. Cole*[1] the Ku Klux Klan burned two crosses in the county and publicized a meeting to be held later in the week, the purpose of which was to intimidate the Indian population of the county. Before the day of the meeting the sheriff was apprised of tension growing among the Indians of the county. He went to defendant Cole, who claimed to be the Grand Wizard of the Klan, and told him that it would be dangerous to hold the meeting, but the meeting was not cancelled. As members of the Klan began appearing with firearms at the appointed place for the meeting, Indians of the county appeared with firearms and shooting began. Several hundred shots were fired before law enforcement officers could restore order. There was no further attempt to convene the meeting. The defendants Cole and Martin (and others to the State unknown) were indicted for inciting to riot, in that they willfully and unlawfully, while armed with firearms, assembled with the intent to preach racial dissension and coerce and intimidate the populace, and with the common intent to carry out such purpose in a violent manner to the terror of the people and to assist each other against all who should oppose them. The defendants were convicted, and the Supreme Court upheld defendant Cole's conviction of inciting to riot (defendant Martin's conviction was reversed on other grounds). In so doing the court recognized that inciting to riot and riot are separate and distinct offenses and said:

> [I]nciting to riot is a common law offense, the gist of which is its tendency to provoke a breach of the peace, though the parties

[37] This question was raised in Note, 36 N.C.L. REV. 48, 50 (1957).

[38] This question was raised by Latty, *A Conceptualistic Tangle and the One- or Two-Man Corporation*, 34 N.C.L. REV. 471, 479 (1956).

[39] This question was raised by Latty, *A Conceptualistic Tangle and the One- or Two-Man Corporation*, 34 N.C.L. REV. 471, 479 (1956).

[40] This question was raised in 250 N.C. at 570, 109 S.E.2d at 267 (dissent). Judge Bobbitt also dissented in the *Park Terrace* case on its original hearing. If his point of view had been adopted, several problems in North Carolina corporation law might have been avoided.

[1] 249 N.C. 733, 107 S.E.2d 732 (1959).

> first assembled for an innocent purpose. . . . "Inciting to riot . . . means such a course of conduct, by the use of words, signs or language, or any other means by which one can be urged to action, as would naturally lead or urge other men to engage in or enter upon conduct which, if completed, would make a riot."[2]

The court also stated that the defendants could not have been convicted of inciting to riot unless the incitement resulted in a riot.[3]

A survey of the cases pertaining to the crime of inciting to riot, exclusive of the principal case, discloses that there are seemingly only two jurisdictions that have dealt directly with the crime of inciting to riot, Pennsylvania and the District of Columbia. Apparently the earliest case of record in the United States recognizing inciting to riot to be an indictable offense was decided in 1824.[4]

The American cases make it clear that riot and inciting to riot are separate and distinct offenses.[5] In cases where no riot has occurred, but where the defendant's acts or words were such as to imply that they were committed or said with the intent to provoke a riot or with willful disregard of their probable consequences, convictions of inciting to riot have been upheld.[6] In an early case one court, in discussing the problem, said that an averment that a riot resulted is not necessary to a conviction of inciting to riot.[7] In most of the cases the defendant has been indicted for inciting to riot *and* riot.[8] Where a riot was found to have

[2] *Id.* at 741, 107 S.E.2d at 738, quoting Commonwealth v. Sciullo, 169 Pa. Super. 318, 321, 82 A.2d 695, 697 (1951).

[3] Riot is defined as a tumultuous disturbance of the peace by three or more persons assembling together of their own authority with an intent mutually to assist one another against all who shall oppose them, and afterwards putting the design into execution in a terrific and violent manner, whether the object in question be lawful or otherwise. State v. Hoffman, 199 N.C. 328, 154 S.E. 314 (1930); State v. Stalcup, 23 N.C. 30 (1840).

[4] Commonwealth v. Haines, 4 Clark (Pa.) 17 (1824).

[5] State v. Cole, 249 N.C. 733, 107 S.E.2d 732 (1959); Commonwealth v. Apriceno, 131 Pa. Super. 158, 198 Atl. 515 (1938); Commonwealth v. Safis, 122 Pa. Super. 333, 186 Atl. 177 (1936); Commonwealth v. Merrick, 65 Pa. Super. 482 (1917).

[6] Commonwealth v. Sciullo, 169 Pa. Super. 318, 82 A.2d 695 (1951); Commonwealth v. Frankfeld, 114 Pa. Super. 262, 173 Atl. 834 (1934); Commonwealth v. Egan, 113 Pa. Super. 375, 173 Atl. 764 (1934).

In England inciting to riot seems to be a properly indictable offense when no riot—or even assembly—occurred. No reported cases were found but there is a "precedent" (apparently based on an unreported case) on inciting to riot, where the first count of the indictment alleged that as a result of the incitement there was an assembly, and the second count alleged the inciting and omitted the assembling in consequence of it. 1 RUSSELL, CRIMES 381 (9th ed. 1877); see CROWN CIRCUIT ASSISTANT 167 (1788); CROWN CIRCUIT COMPANION 420 (1st Amer. ed. 1816); 2 CHITTY, CRIMINAL LAW § 506 (1841); 3 BISHOP, NEW CRIMINAL PROCEDURE § 999(4) (1913).

[7] United States v. Fenwick, 25 Fed. Cas. 1062 (No. 15086) (D.C. Cir. 1836).

[8] Commonwealth v. Apriceno, 131 Pa. Super. 158, 198 Atl. 515 (1938); Commonwealth v. Safis, 122 Pa. Super. 333, 186 Atl. 177 (1936); Commonwealth v. Egan, 113 Pa. Super. 375, 173 Atl. 764 (1934); Commonwealth v. Merrick, 65 Pa. Super. 482 (1917); United States v. Fenwick, 25 Fed. Cas. 1062 (No. 15086) (D.C. Cir. 1836).

occurred, the court in one case upheld a conviction without stating whether this was done on one or both counts,[9] while two cases indicated that the conviction could be upheld on either or both counts.[10] However, it has also been said that the lesser crime of inciting to riot may become merged in the more serious crime of riot,[11] and apparently one conviction has been affirmed on that basis.[12]

Although basically in accord with the American cases, the English cases have gone to the extent of holding that one who incites, encourages, promotes, or abets a riot may be held as a principal rioter,[13] even though he takes no active part in the riot or is not present when it occurs.[14] The only American case found that has considered this latter point merely recognized that the common law permitted this to be done.[15]

While there is accord between the American and English cases on the proposition that even though no riot ensues the defendant's conduct may nevertheless be the basis for a conviction of inciting to riot,[16] this may not be the law in North Carolina, as indicated by dictum to the contrary in the *Cole* case. It is submitted that if North Carolina continues to require that the riot be proved, the indictment should contain charges for inciting to riot *and* riot, and the conviction should be for riot, or possibly, as warranted by some of the Pennsylvania cases,[17] for inciting to riot *and* riot.

THOMAS L. NORRIS, JR.

[9] United States v. Fenwick, *supra* note 8.

[10] Commonwealth v. Apriceno, 131 Pa. Super. 158, 198 Atl. 515 (1938); Commonwealth v. Safis, 122 Pa. Super. 333, 186 Atl. 177 (1936).

[11] Commonwealth v. Apriceno, *supra* note 10; Commonwealth v. Merrick, 65 Pa. Super. 482 (1917). The application of "merger" may be questioned if the strict common law definition of merger is adhered to: "The common law rule was that, if the offenses were of different degrees, there was a merger, but not if they were of the same degree. Misdemeanors merged in felonies . . . and conspiracy to commit a felony in the felony, if committed. But there was no merger of a felony in a felony. . . . Nor was there any merger of a misdemeanor in a misdemeanor, as of an attempt or conspiracy to commit a misdemeanor in the misdemeanor when committed." CLARK & MARSHALL, CRIMES, 103 (6th ed. 1958). See also Graff v. People, 208 Ill. 312, 70 N.E. 299 (1904).

[12] Commonwealth v. Merrick, *supra* note 11.

[13] Regina v. Sharpe, 3 Cox C.C. 288, 12 L.T.O.S. 537 (1848); Clifford v. Brandon, 2 Camp. 358, 170 Eng. Rep. 1183 (Com. Pl. 1809); Rex v. Royce, 4 Burr. 2073, 98 Eng. Rep. 81 (K.B. 1767); Anonymous, 12 Mod. Rep. 509, 88 Eng. Rep. 1482 (K.B. 1702). Compare: "In misdemeanors there are no degrees, but all who participate in them are principals and may be charged as such and convicted upon proof of having taken any part therein." Commonwealth v. Jaffas, 284 Mass. 417, 419, 188 N.E. 263, 264 (1933).

[14] "It is not the hand that strikes the blow, or throws the stone that is alone guilty under the circumstances; but that he who inflames people's minds and induces them, by violent means, to accomplish an illegal object, is himself a rioter, though he takes no part in the riot." Regina v. Sharpe, 3 Cox C.C. 288 (1848).

[15] Commonwealth v. Merrick, 65 Pa. Super. 482 (1917).

[16] This is also in accord with the English law relating to inciting to other crimes. Rex v. Higgins, 2 East 5, 102 Eng. Rep. 269 (K.B. 1801); see generally, 14 ENGLISH & EMPIRE DIGEST, Part I, § 6(7) (1956).

[17] Commonwealth v. Apriceno, 131 Pa. Super. 158, 198 Atl. 515 (1938); Commonwealth v. Safis, 122 Pa. Super. 333, 186 Atl. 177 (1936).

Criminal Law—Search Warrants—Requirements of Search Warrants for Liquor Possessed for the Purpose of Sale

Although the recent case of *State v. Banks*[1] had a modern fact situation,[2] it brought to the attention of the North Carolina Supreme Court the old and troublesome problem of the requirements of search warrants obtained for liquor possessed for the purpose of sale.[3]

Search warrants may be issued in North Carolina only as authorized by statute.[4] The statute authorizing search warrants for liquor possessed for the purpose of sale and for liquor-making materials is G.S. § 18-13. The pertinent provisions are:

> Upon the filing of a complaint under oath by a reputable citizen, or information furnished under oath by an officer charged with the execution of the law, before . . . [any] officer authorized by the law to issue warrants, that he has reason to believe that any person has in his possession, at a place or places specified, liquor for the purpose of sale, or equipment or materials designed . . . for use in the manufacture of . . . liquor, a warrant shall be issued commanding the officer . . . to search the place or places described in such complaint or information . . . .

There is no other statute specifically dealing with the requirements of search warrants for liquor, but G.S. § 15-27 places certain restrictions on the issuance of *all* search warrants. It provides that:

> Any officer who shall sign and issue . . . a search warrant without first requiring the complainant or other person to sign an affidavit under oath and examining said person . . . in regard thereto shall be guilty of a misdemeanor; and no facts discovered by reason of the issuance of such illegal search warrant shall be competent as evidence in the trial of any action: Provided, no facts discovered or evidence obtained without a legal search warrant in the course of any search, made under conditions requiring . . . a search warrant, shall be competent as evidence in the trial of any action.

Before the 1957 General Assembly enacted G.S. § 15-27.1, the North Carolina decisions were in conflict as to whether or not a liquor warrant issued under G.S. § 18-13 had to meet the requirements of G.S. § 15-27. G.S. § 15-27.1 was designed to resolve this conflict by providing that:

[1] 250 N.C. 728, 110 S.E.2d 322 (1959).

[2] The search warrant was obtained with information transmitted by highway patrol radio.

[3] The scope of this note will be limited to the procedure to be followed in issuing a search warrant, and will not discuss the requirement of a description of the place to be searched and of the items to be searched for. These latter requirements are found in N.C. GEN. STAT. § 15-26 (1953). As to the detail needed to comply with the statute, see MACHEN, SEARCH AND SEIZURE 21-28 (1950).

[4] State v. Mann, 27 N.C. 45 (1844); State v. McDonald, 14 N.C. 468 (1832).

"The provision of this article[5] shall apply to search warrants issued for any purpose including those issued pursuant to the provisions of G.S. 18-13 . . . ."

The fact that North Carolina needed such legislation becomes apparent when one examines the case law dealing with the procedure for issuing search warrants for liquor prior to the enactment of this statute. It appears that the court initially presumed that search warrants for liquor had to comply with the dual requirements of G.S. § 18-13 and G.S. § 15-27.[6] However, in 1952 in *State v. McLamb*[7] the court held that only the provisions of G.S. § 18-13 were applicable to search warrants for liquor. In that case the court held not relevant the defendant's contention that the search warrant was defective for the reason that the magistrate who issued it had not complied with the requisites of G.S. § 15-27 in that he had failed to require the procuring officer to furnish facts showing probable cause for the issuance of the warrant. Thus apparently under that decision, if the search warrant for liquor was sought by "an officer charged with the execution of the law," the normal G.S. § 15-27 requirement of furnishing facts upon which the officer based his belief to the examining magistrate was relaxed. *State v. Brady*,[8] a later case, reiterated this rule. Thus there arose a distinction between the basic requirements for the issuance of search warrants for liquor and the issuance of search warrants for other types of contraband.

The constitutionality of G.S. § 18-13 has never been challenged. However, since under the *McLamb* and *Brady* decisions its provisions do not require that an officer seeking a search warrant for liquor furnish facts showing probable cause for its issuance, this statute would appear to be vulnerable to such an attack. The North Carolina Constitution requires that all warrants "be supported by evidence,"[9] and the fourteenth amendment to the United States Constitution guarantees that a state shall issue no warrant without probable cause supported by oath or affirmation.[10] G.S. § 18-13 as interpreted by *McLamb* and *Brady* would not seem to meet the foregoing requirements.

[5] Article 4, chapter 15, entitled Search Warrants, of which G.S. § 15-27 is a component part.

[6] Several pre-1952 decisions deal with the issuance of search warrants for liquor possessed for the purpose of sale, and discuss compliance with G.S. § 15-27. *E.g.*, State v. Gross, 230 N.C. 734, 55 S.E.2d 517 (1949); State v. Elder, 217 N.C. 111, 6 S.E.2d 840 (1940); State v. Cradle, 213 N.C. 217, 195 S.E. 392 (1938).

[7] 235 N.C. 251, 69 S.E.2d 537 (1952).

[8] 238 N.C. 404, 78 S.E.2d 126 (1953).

[9] N.C. CONST. art. I, § 15.

[10] "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." Wolf v. Colorado, 338 U.S. 25, 27 (1949).

Although the court emphatically stated in the *McLamb* and *Brady* decisions that G.S. § 18-13 was controlling as to the procedural requisites in cases of liquor warrants, in reality the court maintained this position for only a short time. Soon after the *McLamb* decision the court rendered several decisions that indicated that both G.S. § 18-13 and G.S. § 15-27 applied with equal force to the issuance of liquor warrants. In *State v. Rainey*[11] the court, ruling on the validity of a liquor warrant, stated, "The [issuing] procedure followed fulfills the requirements of the controlling statutes. G.S. 18-13 and G.S. 15-27 as amended."[12] In *State v. Harrison*[13] the court relied on G.S. § 15-27 to exclude evidence obtained under an invalid search warrant for liquor issued under G.S. § 18-13. In *State v. McMilliam*[14] the court again relied on the provisions of G.S. § 15-27 to exclude evidence obtained where officers made a search for liquor without a warrant under circumstances that required a valid search warrant.

In 1956 the court in *State v. White*[15] held that a search warrant for liquor was defective because the issuing officer had not required the constable to sign an affidavit under oath to support the issuance of the warrant as required by G.S. § 15-27. Thus this case was in direct conflict with the court's previous holding in the *McLamb* and *Brady* decisions.[16]

The 1957 General Assembly took cognizance of the conflict among the cases in this area and enacted the aforementioned G.S. § 15-27.1. The obvious intent of the General Assembly was to insure that before any magistrate issued a search warrant for liquor he would examine the complainant, take a sworn affidavit, and make a judicial determination of probable cause upon evidence furnished by the complainant. The General Assembly thereby overruled the *McLamb* and *Brady* decisions on this precise point.

In the principal case, *State v. Banks*,[17] a highway patrolman saw the defendant make eight or nine trips into an Alcoholic Beverage Control store and on each trip return to an automobile with a large paper bag. The patrolman stopped the defendant, asked for permission to search the automobile, and, when this request was refused, radioed headquarters and informed a second patrolman. Acting on this information, the second patrolman went before an issuing officer and obtained a search warrant. The automobile, stopped a second time by the patrolman, was

[11] 236 N.C. 738, 74 S.E.2d 39 (1953).
[12] *Id.* at 740, 74 S.E.2d at 40.
[13] 239 N.C. 659, 80 S.E.2d 481 (1954).
[14] 243 N.C. 771, 92 S.E.2d 202 (1956).
[15] 244 N.C. 73, 92 S.E.2d 404 (1956).
[16] For an analysis of the conflict between the *McLamb* and *White* decisions see NOTE, 35 N.C.L. REV. 424 (1957).
[17] 250 N.C. 728, 110 S.E.2d 322 (1959).

searched pursuant to the warrant, and a large quantity of tax-paid liquor was found.

The defendant was convicted for the illegal possession of the liquor that had been seized in his automobile, and on appeal the validity of the search warrant was challenged. In a per curiam opinion the North Carolina Supreme Court said that "the information furnished by Patrolman McDonald over the radio to Patrolman Moran, who signed the affidavit based on such information, pursuant to which the search warrant was issued, was sufficient *information* within the meaning of G.S. 18-13 to authorize Patrolman Moran to make the affidavit and to authorize the Clerk of the General County Court . . . to issue such warrant. *State v. McLamb* . . . ."[18]

The court's acquiescence in the use of the information transmitted over the patrol radio is in essence the approval of the use of hearsay evidence in obtaining a search warrant. This rule of evidence is established in North Carolina as in many jurisdictions,[19] and within the bounds of proper discretion[20] it would seem to be a sound and practical one. In light of North Carolina's adoption of the use of hearsay evidence to show probable cause, the magistrate was justified in issuing the search warrant in the *Banks* case.

Even if under the circumstances of the case the requirements of G.S. § 15-27 were not met,[21] the defendant failed to overcome the pre-

[18] *Id.* at 730, 110 S.E.2d at 323.

[19] Some courts have held affidavits sufficient where the affiant's belief is based on information received from "reliable persons," "responsible persons," "reputable persons," "citizens," and "credible people." Annot., 14 A.L.R.2d 605 (1950).

The federal rule is contra. "A search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury . . . and would lead a man of prudence and caution to believe that the offense has been committed." Grau v. United States, 287 U.S. 124, 128 (1932).

The North Carolina decisions seem to approve the hearsay rule, and there is no indication of an adoption of the federal rule. State v. Cradle, 213 N.C. 217, 195 S.E. 392 (1938). "There is nothing in the statute [G.S. § 15-27] that requires the complainant or other person who makes the affidavit to state therein who his informant is, or which requires the informant to make the affidavit, as seems to be the contention of the appellant." *Id.* at 218, 195 S.E. at 392; *accord*, State v. Elder, 217 N.C. 111, 6 S.E.2d 840 (1940). These cases hold only that the informer's name need not be given in the affidavit. Whether the magistrate would be justified in issuing the warrant without learning the source on the examination is an open question.

[20] A magistrate cannot be allowed to find a probability of guilt without examining the complaining witness in regards to his affidavit. G.S. § 15-27. This examination is to test the reliability of the evidence, and if the magistrate fails to make such an examination recourse may be had against him. G.S. § 15-27.

Reliable evidence has been held to include hearsay information originating with reputable informers. State v. Cradle, 213 N.C. 217, 195 S.E. 392 (1938); Annot., 14 A.L.R.2d 605 (1950). It would not appear that anonymous phone calls or tips should be accepted as reliable hearsay. MACHEN, SEARCH AND SEIZURE 11 (1950).

[21] From the statement of facts given in the *Banks* case it appears that Patrolman Moran told the issuing officer just what Patrolman McDonald had seen and that Patrolman Moran did sign the affidavit, so the requirements of G.S. § 15-27 would seem to have been complied with.

sumption of statutory compliance that arises when the warrant and supporting affidavit are set out in the record.[22] The decision is therefore proper. However, the court in citing the *McLamb* decision and speaking of meeting the requirements of only G.S. § 18-13 could leave the erroneous impression that there is still a distinction between the requirements for obtaining a search warrant for illegally possessed liquor and a search warrant for other statutory contraband. As we have noted, since the enactment of G.S. § 15-27.1, there is no longer any such distinction in the requirements for issuance of search warrants. It is unfortunate that the court did not seize upon this opportunity to take judicial notice of G.S. § 15-27.1, and it is hoped that on the court's next opportunity it will recognize this legislative move toward greater uniformity and thereby clear the muddy waters in this area.

JOHN H. KERR, III

Criminal Procedure—Capital Offenses—Prosecution's Mention of Death Penalty Before Jury as Error

Prior to 1949 a conviction of murder in the first degree in North Carolina carried an automatic death penalty under the former version of G.S. § 14-17.[1] That year the General Assembly added a proviso to the statute which stated that "if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life . . . and the court shall so instruct the jury."[2]

State v. McMillan[3] was apparently the first case interpreting this proviso. The trial judge had instructed the jury that they might recommend life imprisonment if they felt justified in doing so under the facts and circumstances of the case. A new trial was granted because the

[22] State v. Rhodes, 233 N.C. 453, 64 S.E.2d 287 (1951); State v. Elder, 217 N.C. 111, 6 S.E.2d 840 (1940); *cf.* State v. McMilliam, 243 N.C. 771, 92 S.E.2d 202 (1956), where the State failed to produce a search warrant or render testimony supporting its existence. The court ruled that the evidence obtained by the search would not be introduced. "It might have been a general warrant, which is 'dangerous to liberty'." *Id.* at 773, 92 S.E.2d at 204.

[1] "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree . . . ." N.C. Sess. Laws 1893, chs. 85, 281.

[2] N.C. GEN. STAT. § 14-17 (1953). For the origin of the proviso see *Report of the Committee for Improvement of Justice,* Popular Government, Jan. 1949, p. 13, col. 3; *Criminal Law, Survey of Statutory Changes,* 27 N.C.L. REV. 449 (1950). Provisos of like effect were also added to N.C. GEN. STAT. § 14-21 (1953) (rape), N.C. GEN. STAT. § 14-52 (1953) (burglary) and N.C. GEN. STAT. § 14-58 (1953) (arson).

[3] 233 N.C. 630, 65 S.E.2d 212 (1951).

charge implied restrictions upon the jury's discretion unauthorized by the statute. The court held that the proviso gave the jury an "unbridled discretionary right"[4] to recommend life imprisonment upon finding the defendant guilty of first degree murder; that the right had no conditions, qualifications or limitations imposed upon it; and that any charge, instruction or suggestion by the court as to causes for which the right should or should not be exercised was reversible error. Subsequent cases were in accord.[5]

In *State v. Dockery*[6] counsel for the private prosecution argued to the jury: "There is no such thing as life imprisonment in North Carolina today."[7] Counsel explained that he had reference to the state's liberal parole laws. This was held to be "an appeal calculated and intended to induce members of the jury not to exercise the unbridled discretionary right, given to them by law."[8] The court also stated that such argument was improper in that it went outside the record. The case left open the question what would be permissible argument addressed to the jury's discretion. The court seemed to imply that the prosectuor in a capital case could not argue that the evidence did not warrant a recommendation of life imprisonment.[9]

State v. Oakes[10] and *State v. Pugh*[11] seem to strengthen any implication of the *Dockery* case that a solicitor may not argue for the death penalty. In both cases convictions were reversed because the trial judge repeated to the jury the contention of the solicitor that they should return a verdict of guilty of murder in the first degree without a recommendation that the punishment be imprisonment for life. In *Oakes* the judge quoted only the ultimate contention of the State. However, in *Pugh* the judge went further and repeated the reasons the State had given for withholding the recommendation. The charges of both trial judges were held to be erroneous because they infringed on the unbridled discretion of the jury as guaranteed by the proviso of G.S. § 14-17.

One justice concurred in *Pugh*,[12] pointing out that it was his impression that a majority of the court felt that a solicitor had no right

[4] *Id.* at 633, 65 S.E.2d at 213.

[5] State v. Denny, 249 N.C. 114, 105 S.E.2d 446 (1958); State v. Cook, 245 N.C. 610, 96 S.E.2d 842 (1957); State v. Adams, 243 N.C. 290, 90 S.E.2d 383 (1955); State v. Carter, 243 N.C. 106, 89 S.E.2d 789 (1955); State v. Connor, 241 N.C. 468, 85 S.E.2d 584 (1954); State v. Simmons, 236 N.C. 340, 72 S.E.2d 743 (1952); State v. Simmons, 234 N.C. 290, 66 S.E.2d 897 (1951); State v. Marsh, 234 N.C. 101, 66 S.E.2d 684 (1951).

[6] 238 N.C. 222, 77 S.E.2d 664 (1953).

[7] *Id.* at 226, 77 S.E.2d at 667.

[8] *Id.* at 227, 77 S.E.2d at 668.

[9] *Ibid.* See also *Survey of the Decisions of the North Carolina Supreme Court—Criminal Procedure*, 32 N.C.L. REV. 438 (1954).

[10] 249 N.C. 282, 106 S.E.2d 206 (1958).

[11] 250 N.C. 278, 108 S.E.2d 649 (1959).

[12] *Id.* at 280, 108 S.E.2d at 651.

to urge a jury to refuse to exercise their power to recommend life imprisonment in a capital case. This was the first opinion that said directly what *Dockery, Oakes* and the majority opinion of *Pugh* seemed to say indirectly, *i.e.,* that the question of punishment could not be argued by the State to the jury.

Two justices joined in a dissent in the *Pugh* case[13] stating that the jury should be allowed to hear proper argument based on the evidence and a charge of the court fairly reviewing the contentions upon the evidence and *then* should be allowed to exercise their discretion. They pointed out that if, as the majority held, it was error for the judge to review contentions of the State in regard to punishment, it would follow that it would also be error for such contentions to be made by the solicitor. They admitted that the jury had discretion, but contended that the manner of its exercise should be governed by the evidence,[14] not mere whim or fancy. The dissent further stated that *State v. McMillan* was erroneous and that the error should not be perpetuated, thus seeming to assume that the majority holding was a necessary result of the holding in *McMillan.*

State v. Manning[15] is the most recent development in the interpretation of G.S. §14-17. On *voir dire* examination the solicitor said: "As far as the state is concerned the sole and only purpose of this trial is to send the defendant . . . to his death in the gas chamber . . . ."[16] The prospective juror to whom the statement was made was discharged upon defendant's motion. However, three other prospective jurors who had heard the statement were seated on the jury after the judge instructed them to "disabuse their minds"[17] of the remark. Defendant's motion to discharge the whole panel was overruled by the trial court. Thereafter the solicitor informed five prospective jurors that the state was asking for the death penalty. Defendant's objections to these statements were overruled. Upon the jury's returning a verdict of guilty of murder in the first degree without a recommendation of life imprisonment, defendant appealed.

[13] 250 N.C. at 286, 108 S.E.2d at 655.

[14] In State v. Shackleford, 232 N.C. 299, 302, 59 S.E.2d 826, 827 (1950) the court said that the proviso in N.C. GEN. STAT. § 14-21 (1953) (rape) gave the jury "the right on the evidence in the case to render a verdict of rape with recommendation of life imprisonment." When placed in context, this statement seems to lend little support to the view of the *Pugh* dissent. The court used the quoted language in affirming the exclusion of evidence that defendant contended had become relevant, because of the proviso, as bearing on punishment. Apparently there have been no rape, arson, or burglary cases that turned on the point of jury discretion.

[15] 251 N.C. 1, 110 S.E.2d 474 (1959).

[16] *Id.* at 2, 110 S.E.2d at 475.

[17] *Ibid.*

The controlling opinion in *Manning*[18] held that the trial court had committed three reversible errors. *First,* the trial judge erred in failing to sustain the defendant's motion to dismiss the panel of jurors. The statement by the solicitor that the only reason for the trial was to send defendant to the gas chamber was held to violate the proviso in G.S. § 14-17 and to be so prejudicial to the defendant that merely telling the panel to dismiss the remark from their minds could not remove the prejudice. *Second,* the trial judge erred when he failed to sustain an objection to the solicitor's statements to the five prospective jurors that the State was asking for the death penalty. It was held, without explanation, that to allow the statements would be "a manifest violation of the proviso in G.S. § 14-17."[19] The only authority cited was *State v. Carter*[20] which had held that a defendant indicted for drunken driving was entitled to an impartial judge and jury and a fair trial in an "atmosphere of judicial calm."[21] *Third,* the controlling opinion held that it was error to refuse a manslaughter charge on the evidence in the case.

The concurring opinion in *Manning*[22] stated that the remark that the only purpose of the trial was to send defendant to the gas chamber was error because it implied erroneously that defendant had tendered a plea of guilty (which, if accepted, would call for life imprisonment under G.S. § 15-162.1) and that it had been refused by the court. While the opinion made no mention of whether the statement violated the proviso in G.S. § 14-17, it agreed with the controlling opinion that the statement was such that an instruction by the judge could not cure its prejudicial effect. The concurring justices also agreed with the controlling opinion that failure to give the requested manslaughter charge was reversible error.

The remainder of the concurring opinion was devoted, in effect, to dissenting from the view of the controlling justices that it was error for the solicitor to be allowed to tell prospective jurors that the State was seeking the death penalty. The concurring justices indicated in positive language that in their opinion it would be permissible for a solicitor to make such statements. They also pointed out that they thought "it permissible for the court to state *the ultimate contentions* of the State and of the defendant, namely, the simple statement that the State contends the jury should not, and the defendant contends the jury should, recommend life imprisonment, but that it is not permissible for

[18] In *Manning* there was no opinion in which a majority of the justices joined. Three justices joined in the leading opinion, two concurred on grounds other than the one here under discussion, one dissented, and one did not sit. Therefore, the writer has used the term "controlling opinion" in lieu of "majority opinion."

[19] 251 N.C. at 5, 110 S.E.2d at 477.

[20] 233 N.C. 581, 65 S.E.2d 9 (1951).

[21] *Id.* at 583, 65 S.E.2d at 10.

[22] 251 N.C. at 6, 110 S.E.2d at 477.

the court to discuss or review the various reasons or arguments submitted by the State's counsel or by the defendant's counsel in support of their respective ultimate contentions."[23] The concurring opinion thereby expressly disapproved the result reached in *Oakes,* although it did not go so far as to disapprove that reached in *Pugh.* Furthermore, the opinion stated that while the jury's discretion is absolute or unbridled in the sense that there is no rule of law by which the jury is to be guided in making its decision, "it does not follow that the State's counsel and the defense counsel may not submit their respective contentions for jury consideration."[24]

The *Manning* dissent[25] did not consider the initial statement made by the solicitor nor did it mention the judge's refusal to give a manslaughter charge. As to the statements of the solicitor upon *voir dire,* that the State was asking for the death penalty it expressed substantially the same view as the concurring opinion, stressing that the proviso of G.S. § 14-17 does not warrant the holding that a solicitor could not so argue.[26] The dissent also indicated that the proviso would not prohibit argument for the death penalty. The dissenting justice warns that the "erroneous interpretation of the meaning of the proviso in G.S. 14-17"[27] in the principal case and in *Oakes* and *Pugh* has the effect of abolishing capital punishment to a large extent, if not completely, in North Carolina.

Conceding that the correct interpretation of the proviso in G.S. § 14-17 is that it gives the jury "unbridled discretion" in recommending the life sentence, it does not seem to follow that urging the death penalty places a "bridle" on the jury's discretion. If permitted, a solicitor could make a very convincing argument in favor of the death penalty, but the jury would not be bound thereby to bring in a verdict of guilty with no recommendation. If the court were to tell the jury that it must consider certain factors as conclusive in deciding whether to make the recommendation or not, it would seem that then and only then would their discretion be restricted in a legal sense. Even in the latter instance the jury would not be bound to bring in a verdict without recommendation, because the death penalty can never be mandatory in North Caro-

[23] *Id.* at 7, 110 S.E.2d at 478.
[24] *Ibid.*
[25] *Id.* at 8, 110 S.E.2d at 478.
[26] The reader will recall that the dissent in *Pugh* stated that an erroneous decision in *McMillan* was responsible for the result reached by the majority in *Pugh.* Text accompanying note 14 *supra.* In *Manning,* however, the dissenter (who joined in the *Pugh* dissent) seems to have reasoned that *McMillan* does not require the result reached by the controlling opinion. *Quaere* whether the inconsistency reflects an acquiescence in *McMillan* on its facts by the dissenter since his dissent in *Pugh.*
[27] 251 N.C. at 10, 110 S.E.2d at 480.

lina except when the jury in its discretion fails to recommend life imprisonment.

An argument can be made to the effect that since capital punishment is still sanctioned in this state, it would seem to follow that the State is entitled to a jury that would have no objection to capital punishment under certain circumstances. If this be true, then it would seem to follow that a solicitor should be allowed to examine prospective jurors in order to determine whether or not they have any conscientious objections to inflicting capital punishment, in order to insure that the State obtains such a jury. To the extent that *Manning* implies that the State is not entitled to so question prospective jurors, it is submitted that the case is inconsistent with North Carolina's provision for capital punishment. Carrying this argument to its logical conclusion one reasons that if the solicitor is permitted to so question prospective jurors, he is at the same time clearly implying that the State desires the jurors to bring back a verdict requiring that the defendant be punished by death. If it would be permissible for the solicitor to imply that the State desires that the accused be so punished, it would seem anomalous to disallow a direct statement to that effect.

Until 1949 the right of the prosecution to make inquiry on *voir dire* as to a prospective juror's views on capital punishment was well established by North Carolina case law.[28] No case since the proviso was added to G.S. § 14-17 has held or intimated that the challenge because of objection to capital punishment is no longer available to the State, unless it be *Manning*. As late as 1954 the court gave tacit approval to the use of the challenge.[29] The overwhelming weight of authority in this country holds that it is proper to ask a prospective juror if he would have any conscientious scruples against capital punishment.[30]

The argument of the concurring and dissenting opinions of the *Manning* case seems to be bolstered by the failure of the controlling opinion to explain how words spoken by counsel can restrict jury discretion. Although authority from other jurisdictions with statutes similar to G.S. § 14-17 has not been cited by the court, the weight of

[28] See State v. Vick, 132 N.C. 995, 43 S.E. 626 (1903); State v. Bowman, 80 N.C. 432 (1879).

[29] State v. Canipe, 240 N.C. 60, 81 S.E.2d 173 (1954).

[30] See Johnson v. State, 203 Ala. 30, 81 So. 820 (1919); Bell v. State, 102 Ark. 530, 180 S.W. 186 (1915); People v. Kynette, 15 Cal. 2d 731, 104 P.2d 794 (1940); Swain v. State, 162 Ga. 777, 135 S.E. 186 (1926); People v. Winchester, 352 Ill. 237, 185 N.E. 580 (1933); Stephenson v. State, 110 Ind. 358, 11 N.E. 360 (1886); Corens v. State, 185 Md. 561, 45 A.2d 340 (1945); Spain v. State, 59 Miss. 19 (1881); State v. Comery, 78 N.H. 6, 95 Atl. 670 (1915); Commonwealth v. Pasco, 332 Pa. 439, 2 A.2d 736 (1938); State v. Condit, 101 Utah 558, 125 P.2d 801 (1942); State v. Aragon, 41 Wyo. 308, 285 Pac. 803 (1930).

authority[31] allows the State to seek and argue for the death penalty, sometimes even in a seemingly unfair manner.[32]

From the standpoint of pure justice, the result produced by the controlling opinion in *Manning* may be justified under the present method of handling capital cases. Under G.S. § 14-17 guilt and punishment are determined in the same verdict. There is the possibility that if the State seeks to enforce the law in its most extreme form, argument that would not prejudice the defendant on the question of punishment could be given too much weight in the determination of the initial question of guilt.

Another possibility of prejudice to defendant on the issue of guilt arises because the State's argument against the jury's recommending life imprisonment would seem to force defendant to argue in the alternative that he is not guilty, but that if he is found guilty the jury should recommend life imprisonment. This objection is subject to the attack that in many cases a party may be required to offer alternative arguments. It might be pointed out, however, that in those cases the party's life is not at stake. The North Carolina Supreme Court has held that the gravity of death cases requires that they receive special treatment on review.[33] It would seem that if capital defendants are entitled to special considerations on appeal they also ought to be relieved of the task of arguing these alternatives in the lower court.

In the opinion of the writer the statute cannot properly be interpreted to deny argument by the State for the death penalty. Conceding that such argument is permissible, the problem then is that the argument concerning punishment may be prejudicial on the issue of guilt. A system of double hearings was adopted in California[34] where a statute similar to G.S. § 14-17 had been in effect. Under the system adopted,

[31] See Burgunder v. State, 55 Ariz. 411, 103 P.2d 256 (1940); House v. State, 192 Ark. 476, 92 S.W.2d 868 (1936); People v. Goodwin, 9 Cal. 2d 711, 72 P.2d 551 (1937); Biggers v. State, 171 Ga. 596, 156 S.E. 201 (1930); Howell v. State, 102 Ohio St. 411, 131 N.E. 706 (1912); Acros v. State, 120 Tex. Crim. 315, 29 S.W.2d 395 (1930).

[32] In Powell v. Commonwealth, 276 Ky. 234, 123 S.W.2d 279 (1938), and State v. Shawen, 40 W. Va. 1, 20 S.E. 873 (1894), solicitors were allowed to argue the possibility of parole as a reason for inflicting the death penalty. In *State v. Buttry*, 199 Wash. 228, 90 P.2d 1026 (1938), the argument that if defendant were not put to death he might escape and "get even" with State's witnesses was allowed.

[33] In *State v. Dockery*, 238 N.C. 222, 228, 77 S.E.2d 664, 668 (1953), Denny, J., speaking for the court, said: "Except in death cases, however, a new trial will not be granted because of improper argument of counsel, unless an exception thereto has been timely entered and duly preserved."

[34] CAL. PEN. CODE § 190.1 provides that "Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict."

the second hearing was held after a verdict of guilty had been returned, to hear evidence bearing on what punishment the defendant should receive. Before this system was adopted, the California court had held that mitigating evidence was inadmissible as not pertaining to the issue of guilt;[35] however, the court, in other cases,[36] had approved instructions that the jury must find some mitigating circumstance in order to recommend that the sentence be only life imprisonment. Obviously the double hearing system eliminated the injustice to capital defendants resulting from the combined effect of these decisions.

Though North Carolina has not experienced the same problem that California faced, the adoption of a similar statute would eliminate the possibility of argument for the death penalty prejudicing the defendant on the issue of guilt. Under such a system defendant would no longer have to present the inconsistent arguments that he is not guilty, but that if he is found guilty a life sentence should be recommended. Under this system counsel for both sides should be held rigidly to evidence and argument thereon pertaining to the issue of guilt in the first phase of trial. If defendant is found guilty of a capital offense, then there should be a second hearing before the same jury on the question of punishment. Evidence and argument could then be presented as to the character and previous record of defendant, and facts and circumstances in aggravation or mitigation of the crime could be shown.[37] The double hearing concept seems to assume that the jury should be charged to consider the evidence and to exercise their discretion thereon in determining whether to inflict the death penalty or recommend life imprisonment. Jury discretion would still be present, but hearing evidence solely in regard to the penalty, coupled with a charge from the judge to consider the evidence, would tend to give the jury something more than mere whim as a criterion for exercise of that discretion.[38]

[35] People v. Witt, 170 Cal. 104, 148 Pac. 928 (1915).

[36] *E.g.*, People v. Kolez, 23 Cal. 2d 670, 145 P.2d 580 (1944).

[37] Although there is no jury in a court martial, military procedure provides that "after the court has announced findings of guilty, the prosecution and defense may present appropriate matter to aid the court in determining the kind and amount of punishment to be imposed." MANUAL FOR COURTS-MARTIAL, UNITED STATES, 119 (1951). Note that the military system of double hearings is not limited to capital cases.

[38] Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099 (1953).

Note that the California statute, discussed *supra* note 35, assumes that existing law would allow defendant to waive a jury in a capital case. Clearly no such waiver could be made under existing North Carolina law. The California statute further assumes an existing murder statute which specifies that the trier of fact may recommend the alternative penalties of death or life imprisonment. In North Carolina the jury, by the terms of G.S. § 14-17, is only permitted to recommend life imprisonment. The absence of a recommendation by the jury requires the judge to enter a death sentence. The proviso in G.S. § 14-17 requires the recommendation to be made at the same time the verdict of guilty is rendered.

A system of double hearings would seem to accomplish the purposes outlined

Regardless of the suggested legislation, it is submitted that the three-justice controlling opinion in the *Manning* case should not be accepted as definitive of the law in regard to the solicitor's telling prospective jurors that the State will seek the death penalty. The other three justices said that as long as North Carolina law permits capital punishment the State is entitled to seek the death penalty. The seventh member of the court expressed a similar view in his dissent in *State v. Pugh*,[39] where he stated his opposition to a holding "that counsel must not contaminate the jury with any argument as to the bearing the evidence should have on the recommendation."[40] Thus it would appear that in a case squarely presenting the question four members of the court would uphold the right of the State to ask the jury not to recommend life imprisonment and to argue on this point to some extent. Such a holding would be more in keeping with the present law that a defendant found guilty of a capital crime must die unless the jury recommends otherwise. On the other hand, the fact that in *Manning* five justices held it error for the solicitor to say that the only reason for having the trial was to put defendant to death demonstrates that, regardless of their views as to whether G.S. § 14-17 would permit the State to argue for death, a majority of the court would reverse where such argument becomes prejudicial *per se*.[41]

ROBERT L. LINDSEY

Trial Practice—Damages—Pain and Suffering—Per Diem Argument to the Jury

In *Ratner v. Arrington*[1] a Florida Court of Appeals held that the trial judge in a personal injury action had not abused his discretion in allowing the use of the per diem argument as a measurement of pain and suffering damages. The plaintiff's counsel had been permitted, over objection, to use a placard in his closing argument on which were listed various elements of plaintiff's damages, including an amount for pain and suffering calculated at fifteen dollars per day for the length of his life

in the text whether defendant is allowed to waive the jury or not. However, since G.S. § 14-17 seems to contemplate but one hearing, it would appear that the adoption of the suggested system would require that G.S. § 14-17 be repealed and that it be replaced with a statute allowing the jury to recommend alternative punishments. The new murder statute could provide for double hearings, or a separate section could be enacted to accomplish the purpose.

[39] 250 N.C. at 286, 108 S.E.2d at 655.

[40] 250 N.C. at 289, 108 S.E.2d at 657.

[41] "Prejudicial *per se*" is used in the text to distinguish between the types of prejudice that the court has traditionally recognized as grounds for a new trial, and the "possibility of prejudice" suggested by the writer as inherent in the present single-hearing system of trial in capital cases.

[1] 111 So. 2d 82 (Fla. Dist. Ct. App. 1959).

expectancy. In a similar action, *Certified T. V. & Appliance Co. v. Harrington*,[2] the Virginia Supreme Court reversed the trial court and held that counsel's use of a per diem or other mathematical formula to measure pain and suffering was error, for it allowed him to invade the province of the jury and get before it that which did not appear in the evidence.

In the Virginia case the plaintiff's counsel had been allowed by the lower court to place the per diem figures for pain and suffering on a blackboard. In reversing, the Supreme Court stated that it was not improper for counsel to use figures placed upon a blackboard, provided that the figures were supported by the evidence. The great majority of jurisdictions allow the use of the blackboard to some degree in a jury argument.[3] The propriety of using this method to list damage elements depends upon whether in a particular jurisdiction counsel would be allowed to put such elements before the jury in oral argument.[4] Thus where the court does not allow graphic illustrations of per diem figures, its objection goes to the use of the mathematical formula applied to pain and suffering, and not to the blackboard or other means of illustration used.

The propriety of the per diem argument for pain and suffering damages was first litigated in 1950[5] and has been directly ruled upon in nine states. Five states have sanctioned the use of the per diem argument,[6] and four have condemned it.[7] In *Wuth v. United States*,[8] an

[2] 201 Va. 109, 109 S.E.2d 126 (1959).

[3] Apparently, in all jurisdictions the granting or denying of permission to use a blackboard and the extent to which it may be used rests in the sound discretion of the trial court. Haycock v. Christie, 249 F.2d 501 (D.C. Cir. 1957). Upon timely objection, however, the jury should be instructed that neither the blackboard nor argument of counsel is evidence. Miller v. Loy, 101 Ohio App. 405, 140 N.E.2d 38 (1959); see 88 C.J.S. *Trial* § 177 (1955).

[4] McLaney v. Turner, 267 Ala. 558, 104 So. 2d 315 (1958). Counsel should not allow the damage figures to remain before the jury at any time other than during argument. Kindler v. Edwards, 126 Ind. App. 261, 130 N.E.2d 491 (1955). The court in Clark v. Hudson, 265 Ala. 630, 93 So. 2d 138 (1956), refused to make a distinction between the use of a blackboard listing the damages prayed for and the use of a prepared chart for the same purpose. The use of a prepared chart would preclude the opposing counsel's erasing the figures and replacing them with some of his own. See generally Annot., 44 A.L.R.2d 1205 (1955) (use of a chart not in evidence relating to damages); 1 BELLI, MODERN TRIALS §§ 130, 133(2), 135 (1954).

[5] J. D. Wright & Son v. Chandler, 231 S.W.2d 786 (Tex. Civ. App. 1950).

[6] (1) Alabama: McLaney v. Turner, 267 Ala. 558, 104 So. 2d 315 (1958). (2) Florida: Ratner v. Arrington, 111 So. 2d 82 (Fla. Dist. Ct. App. 1959). (3) Minnesota: Boutang v. Twin City Motor Bus Co., 248 Minn. 240, 80 N.W.2d 30 (1957); Flarhrerty v. Minneapolis & St. L. Ry., 251 Minn. 345, 87 N.W.2d 633 (1958). In two cases prior to the *Boutang* case, Alstrom v. Minneapolis, St. P. & S. Ste. M. Ry., 244 Minn. 1, 68 N.W.2d 873 (1955), and Hallada v. Great No. Ry., 244 Minn. 81, 69 N.W.2d 673 (1955), the court held that the per diem arguments could not be allowed. In *Boutang*, however, the court discussing these two cases said: "In neither case did we hold that the mathematical formula may not be used for purely illustrative purposes. In *Hallada* we merely held that the segmentation process of breaking the damage picture into fragments and then

action under the Federal Tort Claims Act, the District Court for the Eastern District of Virginia sitting without a jury refused to apply the per diem method of evaluation to pain and suffering damages. In an admiralty action[9] the Sixth Circuit Court of Appeals, however, expressly endorsed the use of the per diem formula.[10] In view of the limited number of jurisdictions which have considered the issue there would seem to be no discernible weight of authority at this time, and even the Florida court in the *Ratner* decision which allowed per diem expressed a desire not to foreclose the question.[11]

The various reasons advanced in support of the per diem argument are as follows: (1) The very absence of a fixed standard for the monetary measurement of pain and suffering is reason for allowing wide

applying to each fragment a mathematical formula whereby damages are calculated at a fixed rate per day for the entire period of the injured person's life expectancy, though illuminating, may be misleading and therefore may not be used as a yardstick for determining the reasonableness of the award for damages. This rule does not bar the use of the mathematical formula for purely illustrative purposes." *Quaere* as to the distinction between illustrative and non-illustrative use of the per diem argument. (4) Mississippi: 4-County Electric Power Ass'n v. Clardy, 221 Miss. 403, 73 So. 2d 144 (1954); Arnold v. Ellis, 231 Miss. 757, 97 So. 2d 744 (1957). (5) Texas: J. D. Wright & Son v. Chandler, *supra* note 5 (no objection had been made to argument at trial).

[7] Delaware: Henne v. Balick, — Del. —, 146 A.2d 394 (1959). (2) New Jersey: Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958). The court not only held that a mathematical formula argument was improper but overruled prior decisions in saying that any statements by counsel requesting a specific award or even disclosing the total amount prayed for was improper. In Henne v. Balick, *supra,* the court did not go this far and stated only that the per diem argument was improper. (3) Pennsylvania: The court has steadfastly refused to allow counsel to disclose the amount claimed or expected when damages are unliquidated. Thus this state must be included with those prohibiting the per diem argument. See Stassum v. Chapin, 234 Pa. 125, 188 Atl. 111 (1936); Bostwick v. Pittsburgh Rys., 255 Pa. 387, 100 Atl. 123 (1917); Goodhart v. Pennsylvania Ry., 177 Pa. 1, 35 Atl. 191 (1896). (4) Virginia: Certified T. V. & Appliance Co. v. Harrington, 201 Va. 109, 109 S.E.2d 126 (1959).

At the time of Botta v. Brunner, *supra,* in 1958, the weight of authority was clearly in favor of allowing the per diem argument. Since that time two state courts, in Henne v. Balick, *supra,* and Certified T. V. & Appliance Co. v. Harrington, *supra,* and one federal court in Wuth v. United States, 161 F. Supp. 661 (E.D. Va. 1958), have adopted the *Botta* reasoning in refusing to sanction per diem. In the two decisions allowing per diem arguments subsequent to the *Botta* decision, McLaney v. Turner, *supra* note 6, and Ratner v. Arrington, *supra,* note 6, the former was decided less than five months after *Botta* and did not mention that case in following the then existing majority reasoning.

[8] 161 F. Supp. 661 (E.D. Va. 1958).

[9] Imperial Oil, Ltd. v. Drlik, 234 F.2d 4 (6th Cir. 1956), *cert. denied,* 352 U.S. 941 (1956), *affirming* 141 F. Supp. 388 (N.D. Ohio 1955).

[10] Admiralty courts are not bound by all the rules of evidence required in common law actions and may receive evidence which might be inadmissible in other courts. 3 BENEDICT, ADMIRALTY § 381 (6th ed. 1940). It is questionable, therefore, whether Imperial Oil, Ltd. v. Drlik, *supra* note 9, would be authority for the use of the per diem argument in common law actions.

[11] "The ultimate course of judicial opinion on the point [per diem] is not yet discernible. Recent holdings, for and against the allowance of such arguments, are not grounded on reasons of sufficient force to compel the decision either way. Therefore, in approving the practice now we do not purport to foreclose the question." Ratner v. Arrington, 111 So. 2d 82, 89 (Fla. Dist. Ct. App. 1959).

latitude in arguing these damages,[12] and counsel should be allowed to draw all proper inferences from the evidence.[13] (2) The trier of facts should be guided by some reasonable and practical considerations, as an award for pain and suffering should not depend upon a mere guess.[14] (3) The per diem arguments are not evidence, but are merely illustrative,[15] and the jury is free to weigh the argument and pass on its credibility.[16]

Courts not allowing this argument generally have relied on the following reasons: (1) Pain and suffering have no known dimensions, and the only standard is "reasonable compensation." Thus there is no direct correlation between money and physical or mental suffering.[17] (2) Reasonable compensation for pain and suffering cannot be determined by multiplying the life expectancy by a fixed rate per day since the varieties and degrees of pain are infinite and differ among individuals, and in the same individual these will vary from day to day.[18] (3) The allowance of the argument would permit counsel to introduce factors not admissible in evidence, since no witness would be permitted to testify as to the reasonable award for pain and suffering.[19] (4) The argument is prejudicial to defendant's counsel because he must either risk its effect upon the jury or argue a lesser per diem sum. By arguing a lesser sum he fortifies his adversary's implication that the law recognizes pain and suffering as capable of being measured by a mathematical yardstick.[20]

The particular effect which the per diem argument may have upon the jury's award for pain and suffering is difficult to ascertain. Courts have stated that it leads to monstrous verdicts[21] and that it puts before the jury figures out of proportion to those which they would otherwise have in mind.[22] One of the leading exponents of the argument explains:

[12] Ratner v. Arrington, *supra* note 11.
[13] McLaney v. Turner, 267 Ala. 558, 104 So. 2d 315 (1958).
[14] Imperial Oil, Ltd. v. Drlik, 234 F.2d 4 (6th Cir. 1956), *cert. denied*, 352 U.S. 941 (1956).
[15] Boutang v. Twin City Motor Bus Co., 248 Minn. 240, 80 N.W.2d 30 (1957).
[16] J. D. Wright & Son v. Chandler, 231 S.W.2d 786 (Tex. Civ. App. 1950).
[17] Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958).
[18] Henne v. Balick, — Del. —, 146 A.2d 394 (1959).
[19] Certified T. V. & Appliance Co. v. Harrington, 201 Va. 109, 109 S.E.2d 126 (1959).
[20] Botta v. Brunner, 26 N.J. 82, 138 A.2d (1958). For an interesting argument that there is a yardstick to measure pain and suffering see *Dollars-and-Sense Appraisal in F.E.L.A. Cases*, Panel Discussion at the Eighteenth Annual Law Institute of the University of Tennessee College of Law and the Knoxville Bar Ass'n, November 8, 1957 in 25 TENN. L. REV. 220, 227-30 (1958). The panelist observes that the yardstick exists in practical experiences. When one pays fifty dollars to an anesthetist to be free from pain for one hour during an operation, or one similarly gives the dentist three dollars for fifteen minutes of relief, that these are cases where a human being has to put pain in one side of the scale and money in the other and weigh them.
[21] Alstrom v. Minneapolis, St. P. & S. Ste. M. Ry., 244 Minn. 1, 68 N.W.2d 873 (1955).
[22] Henne v. Balick, — Del. —, 146 A.2d 394 (1958).

> When it [pain and suffering] is thus broken down into seconds and minutes, then a jury begins to realize the real meaning of this permanent pain and suffering of which the doctors have spoken, and that $60,000 at $5 a day, is not an excessive award. . . . Jurors must start thinking in days, minutes, and seconds and in $5, $3, and $2, so that they can multiply to the absolute figure. . . . [H]e has started thinking, and when he follows this system of multiplication he comes to a substantial figure . . . .[23]

A Florida case[24] illustrates the apparent effectiveness of per diem. A nine year old child obtained a jury verdict of 248,439 dollars which exactly coincided with counsel's demands as set out on a chart before the jury. Of the total recovery, 102,200 dollars was awarded for future pain, suffering, and inconveniences which had been calculated on the chart at five dollars per day for the duration of plaintiff's life expectancy.[25]

The North Carolina court recognizes pain and suffering as an element of damages for personal injuries,[26] but the propriety of the per diem argument has never been ruled upon. This court has refrained from laying down exacting rules as to the latitude counsel is allowed in his argument, especially in the area of damages for personal injury.[27] In *Jenkins v. North Carolina Ore Dressing Co.*[28] the court stated that the propriety of counsel's argument must ordinarily be left up to the discretion of the trial judge, and the court will not review his decretion unless it is apparent that the impropriety was gross and well calculated to prejudice the jury. The court has stated that counsel may not travel outside the record and inject facts not included in the evidence.[29] Counsel is, however, allowed to argue every phase of the law supported by the evidence and to deduce from the evidence all reasonable inferences.[30]

[23] 1 BELLI, MODERN TRIALS § 133, at 871-72 (1954).

[24] Braddock v. Seaboard Air Line Ry., 80 So. 2d 662 (Fla. 1955).

[25] An effective per diem argument is illustrated as follows: The attorney after telling the jury that they must determine what his client's pain and suffering are worth in dollars and cents says, "Let's take Pat, my client, down to the waterfront. He sees Mike, an old friend, . . . and says, 'Mike, I've got a job for you. . . . You're not going to have to work any more for the rest of your life, and the best part of this job is . . . you'll never lose it. . . . You don't have to do any work . . . . All you have to do is trade me your good back for my bad one, and I'll give you five dollars a day for the rest of your life. Do you know what five dollars a day for the rest of your life is? Why that's $60,000! Of course, I realize that you are not going to be able to do any walking, or any swimming, or driving an automobile, or be able to sit in a moving picture show; you're going to have excruciating *pain* and *suffering* with this job, thirty-one million seconds a year, and once you take it on, you'll never be able to relieve yourself of this, but you get $60,000!'" Address by Melvin M. Belli, Mississippi State Bar Ass'n Annual Meeting, June 2, 1951, in 22 MISS. L.J. 284, 319 (1951).

[26] Hargis v. Knoxville Power Co., 175 N.C. 31, 94 S.E. 702 (1917).

[27] See generally 2 MCINTOSH, NORTH CAROLINA PRACTICE & PROCEDURE § 1492 (2d ed. 1956).

[28] 65 N.C. 563 (1871).

[29] Irvin v. Southern Ry., 164 N.C. 6, 37 S.E. 955 (1913).

[30] Lamborn v. Hollingsworth, 195 N.C. 350, 142 S.E. 19 (1928).

There is no North Carolina case concerning the methods by which the jury may assess pain and suffering damages. The jury must be charged that the measure of recovery shall be a reasonable satisfaction for the actual suffering of both body and mind which is the immediate and necessary consequence of the injury.[31]

There are several factors which would seem to point toward an approval of the per diem argument by the North Carolina Supreme Court, when and if the issue is presented before it. First, it is required in North Carolina that all prospective damages be reduced to their present value,[32] and to do this accurately the jury must ascertain the present worth of a number of future installments.[33] Thus under the present value rule it would appear that the jury must in some manner allot a definite sum of money for specific periods of the plaintiff's life. Second, the North Carolina practice of reading the pleadings to the jury informs them, through the *ad damnum* clause, of the amount demanded by the plaintiff as damages. Apparently, although there is no case on this point, counsel in their final argument may relate to the jury their estimate of the total worth of plaintiff's damages for pain and suffering. The per diem argument would relate counsel's inference from the evidence as to a portion of the total worth—the per diem worth. Third, when the propriety of a trial practice is questioned on appeal, the reviewing court may take judicial notice of the customary usage of this practice in the lower courts.[34] In *Ratner v. Arrington*[35] the court took judicial notice of the customary use in Florida trial courts of

[31] Mintz v. Atlantic Coast Line R.R., 233 N.C. 607, 65 S.E.2d 120 (1951).

[32] Taylor v. J. A. Jones Constr. Co., 193 N.C. 775, 138 S.E. 129 (1927). In applying this rule with respect to pain and suffering North Carolina is against the weight of authority. See Annot., 60 A.L.R.2d 1347, 1352 (1958); Annot., 154 A.L.R. 796, 801 (1945); 23 N.C.L. REV. 46, 48 (1944).

A reason frequently quoted for refusing to permit a reduction of an award for pain and suffering to its present value appears in Chicago & N.W. Ry. v. Candler, 238 Fed. 880, 885 (8th Cir. 1922), where the court said: "At best the allowance [for pain and suffering] is an estimated sum determined by the intelligence and conscience of the jury, and we are convinced that a jury would be much more likely to return a just verdict, considering the estimated life as one single period, than if it should attempt to reach a verdict by dividing the life into yearly periods, setting down yearly estimates, and then reducing the estimates to their present value." This same reasoning is advanced by some courts in refusing to allow the per diem argument.

[33] MCCORMICK, DAMAGES § 86 (1935). The author notes two methods of determining present value: (1) by the use of annuity tables and (2) by adding to the sum to be paid in the future interest on the same sum during the interval, dividing the result into the original sum, the quotient being the present value. The incapacity of a jury to determine present value without the use of annuity tables is apparent, unless an accountant be in their midst.

North Carolina refuses to allow the use of the annuity tables in determining present value. Poe v. Railroad, 141 N.C. 525, 54 S.E. 406 (1906). Thus it is doubtful that the jury gives any effect to the judge's present value charge.

[34] See Hanson v. Yandle, 235 N.C. 532, 70 S.E.2d 565 (1952); 31 C.J.S. *Evidence* § 49 (1942).

[35] 111 So. 2d 82 (Fla. Dist. Ct. App. 1959).

damage charts and per diem arguments for pain and suffering damages.[36] Counsel in several North Carolina trial courts today are using the per diem argument in their summation,[37] and the Supreme Court could properly take judicial notice of this practice.

It is submitted that the better rule would be to allow counsel to argue that pain and suffering damages should be calculated on a per diem basis. Forbidding the argument places a severe restriction on the right and duty of an attorney to argue every phase of his case. It denies the plaintiff the right of advocacy where the techniques of persuasion are of crucial importance to him. Should abuse of the privilege occur, either in application or in presentation, the appellate judiciary has adequate processes to prevent injustice to either party.

WILLIAM H. MCNAIR

[36] *Accord,* 4-County Elec. Power Ass'n v. Clardy, 221 Miss. 403, 73 So. 2d 144 (1954); *cf.* Haley v. Hockey, 103 N.Y.S.2d 717 (Sup. Ct. 1950).

[37] Personal observation of trials by the writer and inquiries to practicing attorneys concerning personal injury actions in North Carolina indicate that damage charts and the per diem argument are often utilized without objection from the defendant's counsel or the court.