# Notes and Comments

North Carolina Law Review

# NOTES AND COMMENTS

## Criminal Conspiracy in North Carolina.

### INTRODUCTION

In recent years probably no offense has received as much newspaper comment and public attention as that of criminal conspiracy.[1] The famous Appalachian convictions have recently been reversed by the United States Court of Appeals for the Second Circuit.[2] Prosecutors have been charged with using the conspiracy indictment as a substitute for the gathering of evidence.[3] Judge Clark, in a concurring opinion in the Appalachian reversals, was moved to suggest that the case should never have been prosecuted. "For in America we still respect the dignity of the individual, and even an unsavory character is not to be imprisoned except on definite proof of specific crime."[4]

Unlike the labor union prosecutions of the early nineteen hundreds, the controversial issue in conspiracy trials today is the quantum and quality of proof required for a conspiracy conviction and not the type of conduct which is punishable as a conspiracy.[5] Although newspaper and law review controversy over what the law requires (or ought to require) as an objective of the agreement before that agreement is a criminal conspiracy has receded, the subject is far from settled.[6] This article will attempt to show the substantive and procedural development of the law of criminal conspiracy in North Carolina.[7]

### ORGIN AND DEVELOPMENT OF THE CRIME

The early development of conspiracy as a criminal offense is recorded not in judicial opinions but in the Parliament Rolls of England.[8]

[1] See, *e.g.*, the series in the Raleigh News and Observer, Nov. 23, 1960, p. 4, dealing with the conviction of a group of textile union members and officers for conspiracy to dynamite certain facilities appurtenant to the mill in the course of a prolonged strike. So great was the public interest, these articles were published on the first anniversary of the convictions. The North Carolina Supreme Court affirmed the convictions in State v. Walker, 251 N.C. 465, 112 S.E.2d 61, *cert. denied*, 364 U.S. 832 (1960).

[2] 285 F.2d 408 (2d Cir. 1960). The opinion is reported in full at page 32 of the New York Times, Nov. 29, 1960 (city ed.).

[3] Note, 35 NOTRE DAME LAW. 446 (1960).

[4] 285 F.2d 408, 420 (2d Cir. 1960).

[5] See SAYRE, *Criminal Conspiracy*, 35 HARV. L. REV. 393 (1922), where the author argues that normal labor union activity should not be punished as a conspiracy.

[6] See generally Note, 68 HARV. L. REV. 1056 (1955).

[7] For an excellent discussion of the law of conspiracy in the United States generally, see *Developments-Criminal Conspiracy*, 72 HARV. L. REV. 920 (1959).

[8] WINFIELD, THE HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE 109 (1921).

According to Professor Sayre, a very persuasive writer in the field, the crime did not originate as a general offense at common law but arose from a series of statutes dating from the time of Edward I.[9] These statutes were designed to punish those who "through Malice intending to grieve other, do procure false Appeals to be made of Homicides and other Felonies by Appellors."[10] Professor Sayre concludes that during the early period only conspiracies to abuse process were criminal, and then only when an indictment was actually procured. While there can be no doubt that the common early meaning of the term "conspiracy" was confined to an abuse of legal process by a combination of persons, there is evidence that as early as 1230 courts were asked to rule upon combinations to effect other socially undesirable ends.[11] Thus, a suit was brought by one William Wymer, complaining that several men had combined to ruin his mill by refusing to trade with him and threatening injury to those who did. Though the accused escaped on a technicality, William obtained a writ to the sheriff of Stafford, protecting those who wished to trade with him.[12] In 1304, however, the famous Third Ordinance of Conspirators[13] undertook to define the term: "Conspirators be they that do confeder or bind themselves by Oath, Covenant, or other Alliance, that every of them shall aid and support the Enterprise of each other falsely and maliciously to indite, [naming other abuses of process] . . . ." If this statute were considered an exclusive definition of conspirators, the crime would bear little resemblance to the modern conception of conspiracy.

In North Carolina, as in all American states, it was held at an early date that conspiracy applied to agreements other than those for the abuse of process.[14] "[T]he statute [Third Ordinance of Conspirators] . . . was only declaratory of the common law to the extent of the crimes enumerated in the act, leaving the common law as applicable to all other forms of conspiracy known to the law."[15] The question then arises as to what "other forms of conspiracy" were known to the common law.

Prior to the seventeenth century, there is no record of a conviction for criminal conspiracy other than for the abuse of process.[16] During

[9] SAYRE, *Criminal Conspiracy*, 35 HARV. L. REV. 393, 395 (1922). The earliest statute was 13 Edw. 1, c. 12.
[10] SAYRE, *supra* note 9.
[11] WINFIELD, *op. cit. supra* note 8, at 109.
[12] Bracton's Note Book Case 479 (1230). The case is indexed under "Conspiracy."
[13] 1304, 33 Edw. 1, c. 3.
[14] State v. Howard, 129 N.C. 584, 40 S.E. 71 (1901); State v. Younger, 12 N.C. 357 (1827) (conspiracy to get one drunk and cheat him at cards).
[15] State v. Howard, *supra* note 14, at 658, 40 S.E. at 75.
[16] SAYRE, *supra* note 9.

the seventeenth century, however, the original view of conspiracy as an agreement for the abuse of legal process was rapidly disappearing. In line with a broadening general concept of crime which was taking form in the period,[17] lawyers began to argue that agreements to effectuate almost any undesirable object should be punishable as a criminal conspiracy.[18]

The first case actually departing from the abuse of process theory was *Rex v. Starling*,[19] decided in 1665. There the defendants were indicted for a conspiracy to impoverish certain farmers by depressing the price of produce. The defendants argued that since impoverishment of another with the intent to enrich oneself was not criminal the agreement to attain that end was not a crime. Noting that to impoverish the farmers would render them incapable of paying the King his revenue, the court said that the bare conspiracy, without any act in furtherance of it, constituted a criminal offense. The case is susceptible to the interpretation that an agreement to do any undesirable act was indictable, whether or not the contemplated act was itself a crime. Lord Holt,[20] however, observed that the gist of the offense in *Starling* was injury to the public (deprivation of the King's revenue) and not merely an agreement to do an undesirable act. Whatever the effect of *Starling*, it is significant that in all other seventeenth century conspiracy convictions the object of the agreement was the commission of a criminal act.

Nevertheless, in 1716 Hawkins stated that "all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal at common law."[21] It should be noted, however, that the statement was inserted in Hawkins' discussion of conspiracy in its original meaning—relating to abuse of process. If the phrase "wrongfully to prejudice" is read in reference only to abuse of process, it is not objectionable. But the cases after 1716 indicate that Hawkins' statement was read to apply to any agreement to do a "wrongful" act. In the light of this development Professor Sayre concludes that the modern crime of conspiracy is of illegitimate birth.[22]

Just five years after the Hawkins' statement it was held that tailors who entered into a combination for the purpose of raising their wages committed an indictable offense at common law.[23] Then in *Rex v. Ed-*

[17] See, *e.g.*, Bagg's Case, 11 Co. Rep. 93b, 77 Eng. Rep. 1271 (1616), where the court of King's Bench resolved that "no wrong or injury, either public or private, can be done, but that it shall be (here) reformed or punished by due course of law."

[18] WINFIELD, *op. cit. supra* note 8, at 112.

[19] 1 Sid. 174, 82 Eng. Rep. 1039 (1665).

[20] Reg. v. Daniell, 6 Mod. 99, 87 Eng. Rep. 856 (1674).

[21] 1 HAWKINS, PLEAS OF THE CROWN 348 (1716).

[22] SAYRE, *supra* note 9, at 402 n.28. Mr. Winfield, *op. cit. supra* note 8, was of the opinion that the statement was of "questionable accuracy."

[23] Rex. v. Journeymen Tailors, 8 Mod. 10, 88 Eng. Rep. 9 (1721). Profes-

*wards*[24] the defendants were indicted for conspiracy to marry off a pauper woman to a native of another county and thus relieve themselves of the duty to support her. The decision was for the defendants, but the court rendered a famous dictum which has since reverberated through the North Carolina reports:[25] "A bare conspiracy to do a lawful act to an unlawful end is a crime, though no act be done in consequence thereof." The court apparently contemplated, as did Hawkins, that the object need only be "wrongful" and not "criminal."

In spite of repeated attacks upon the theory by legal writers, the substance of Hawkins' statement is found in the North Carolina case of *State v. Younger*.[26] In the syllabus of that case it is said that "a combination by two or more to do any unlawful act, or *one prejudicial* to another, is indictable at common law as a conspiracy." This statement is quoted with approval in the majority opinion of *State v. Howard*.[27] It was urged in the dissent in the *Howard* case that what the court actually said in *Younger* was "that every conspiracy to injure individuals, or to do acts which are unlawful, *or prejudicial to the community*, is a conspiracy, and indictable."[28] The dissent pointed out that there is an essential difference between acts prejudicial to an individual and acts prejudicial to the community and that in the *Younger* case the conspiracy was to cheat by gambling. Since gambling was a crime, the decision could have been upon the ground that the agreement was to do a criminal act. The court in *Younger*, however, did not choose to limit its decision to so narrow a base. In addition, it would seem that the *Howard* decision, concerning conspiracy to defraud, was not based upon the criminality of the acts contemplated since fraud was not a crime.

At this point in the development of North Carolina law, it would appear that the court was ready to hold that a combination to effect any wrong to another would be criminal.[29] If conspiracy is of so broad

sor Sayre points out that in 1720 the statute, 7 Geo. 1, c. 13, p. 403, had expressly made the combination of tailors to raise their wages criminal. He concludes that the case is therefore not authority for saying that the act need not be criminal. But the court held that the indictment need not allege the statute "because it is not the denial to work except for more wages that is allowed by Statute, but it is for a *Conspiracy* to raise their wages, for which these defendants are indicted." It seems that this holding must be taken as meaning that a conspiracy to raise wages, even in the absence of the statute, was criminal.

[24] 8 Mod. 320, 88 Eng. Rep. 229 (1724).

[25] *E.g.*, State v. Davenport, 227 N.C. 475, 42 S.E.2d 686 (1947); State v. Whiteside, 204 N.C. 710, 169 S.E. 711 (1933).

[26] 12 N.C. 357 (1827).

[27] 129 N.C. 584, 40 S.E. 71 (1901).

[28] *Id.* at 666, 40 S.E. at 77 (Emphasis by the dissenter.).

[29] The phrase "an unlawful act, or a lawful act in an unlawful manner," as used in the North Carolina decisions, would seem to encompass all agreements which were morally wrong, according to the standards of the community. Justice Douglas in his dissent in *Howard* made it abundantly clear that he thought *Howard* had gone this far. State v. Howard, 129 N.C. 584, 667, 40 S.E. 71, 74 (1901).

a scope, the public prosecutor does indeed hold the key to the public conscience.

Three years after the *Howard* case the court seemed to dispell the notion that an agreement to do *any* "wrongful" act constituted a conspiracy. In *State v. Van Pelt*[30] labor union members were indicted for a conspiracy to impoverish a certain lumber dealer by publishing in a newspaper a statement to the effect that he was unfair to organized labor. The court reversed the conviction, saying that the word "unlawful" is of "such varied and uncertain import that it is unfortunate that it was ever used to define a criminal act."[31] The *Howard* case was distinguished on the ground that the bill of particulars in that case had set out an indictable offense, namely obtaining money by false pretenses. The court had some difficulty in distinguishing the language of the *Younger* case. The court observed that it was not necessary to find that the acts charged (getting the victim drunk and cheating him at cards) were indictable at common law, apparently because they were made criminal by a North Carolina statute. The court concluded, "it is not our purpose to bring the *decision* of Younger's case into question, but we can not accept the definition given of a criminal conspiracy."[32]

The *Van Pelt* opinion undoubtedly went far toward pinning down the ever elusive meaning of the word "unlawful" in the definition of a criminal conspiracy. Thus when the court says that "a conspiracy is an agreement by two or more persons to do an unlawful thing or to do a lawful thing in an unlawful way or by unlawful means,"[33] according to *Van Pelt,* the word "unlawful" embraces all criminal acts, whether felonies or misdemeanors.[34] But the acts conspired for need

Consequently, an agreement to effect a simple breach of contract, see Vertue v. Lord Clive, 4 Burr. 2472, 98 Eng. Rep. 296 (1769), or to go upon the land of another for sport would be punishable as a criminal conspiracy. *But see* the statement of Lord Ellenborough in Rex v. Turner, 13 East. 228, 231, 104 Eng. Rep. 357, 358 (1911): "I should be sorry to have it doubted whether persons agreeing to go and sport upon another's ground, in other words, to commit a civil trespass, should be thereby in peril of an indictment for an offense which would subject them to infamous punishment."

[30] 136 N.C. 633, 49 S.E. 177 (1904).

[31] *Id.* at 646, 49 S.E. at 182.

[32] *Ibid.*

[33] See State v. Walker, 251 N.C. 465, 468, 112 S.E.2d 61, 64, *cert. denied,* 364 U.S. 832 (1960), and cases there cited.

[34] Also, a conspiracy to cheat, though an individual may not have been guilty as a common law cheat, was indictable at common law. This exception was made necessary by the many loopholes in the technical crime of cheats. See SAYRE, *supra* note 9, at 423. But the crime of obtaining property by false pretense is no longer of such a technical nature. Thus an indictment charging a conspiracy to "cheat and defraud" charges a combination for a criminal act in North Carolina. See, *e.g.,* State v. Davenport, 227 N.C. 475, 42 S.E.2d 686 (1947).

not be indictable at common law; they may constitute a crime only by express authority of statute.[35]

This restricted meaning of the word "unlawful" conveyed by the *Van Pelt* decision was short lived. In *State v. Dalton*[36] the indictment charged that the defendants, employees of one company, conspired to "break up any sales made or sought to be made" by a rival company. The defendants would follow employees of the rival company, deride its product, and call its sales agents liars and thieves. Although the anti-trust law[37] was then in effect, the indictment was deemed to charge the common law crime of conspiracy. The trial court quashed the indictment and the State appealed. The court held, citing the *Howard* case, that conspiracy at common law was properly charged. *Van Pelt* was distinguished simply on the ground that there the conduct of the union members was not "unlawful." The court said, as to the instant situation, that "a combination to use such means, reeking with fraud and falsehood . . . has not been made lawful by any statute nor recognized as permissible by the decision of any court." The apparent meaning of this language and the decision is that agreements to perpetrate wrongs which if perpetrated by an individual would result in civil liability only are indictable in North Carolina. The defendants were clearly guilty of slander, but the same acts done in the absence of an agreement would not be indictable.

As noted earlier, combinations to injure a person in his trade or business have been especially frowned upon by the courts.[38] Perhaps the *Dalton* case is explainable on that basis. But the court made it clear that the *means* used to injure the competitor was the factor re-

[35] The distinction between ends and means stressed by the definition appears meaningless, at least from the substantive point of view. There may be substantial differences flowing from this distinction, however, in the manner in which the offense must be charged in the indictment. See the text at note 148. If the means by which any result is to be accomplished are "unlawful," then the conspirators necessarily agree to do an "unlawful" act, and the gist of the offense is the agreement. State v. Walker, 251 N.C. 465, 112 S.E.2d 61, *cert. denied*, 364 U.S. 832 (1960). This should be contrasted with the civil action for damages based on conspiracy where the gravamen of the action is the resultant injury and not the agreement itself. Holt v. Holt, 232 N.C. 497, 61 S.E.2d 448 (1950).

[36] 168 N.C. 204, 83 S.E. 693 (1914).

[37] N.C. GEN. STAT. § 75-1 (1960).

[38] WINFIELD, *op. cit. supra* note 8, at 111. As early as 1320 the English Parliament is found to have taken action against confederations to interfere with trade. But these acts, and such statutes as N.C. GEN. STAT. § 75-1 (1953) (anti-trust law), are designed to prohibit combinations which are prejudicial to the whole economy. Thus the conspiracy conviction is used to protect a pressing public interest. To stretch this concept to every combination that will prejudice an individual seems a dangerous and unwarranted extension of the crime. Therefore, where North Carolina's anti-trust laws bring every combination or act in restraint of commerce which "violates the principles of the common law" within the sanction of the courts, the provision should be deemed to refer only to those combinations having a substantial adverse effect on the public. See N.C. GEN. STAT. § 75-2 (1953); Mar-Hof Co. v. Rosenbacker, 176 N.C. 330, 97 S.E. 169 (1918).

quiring criminal punishment. Thus any combination wrongfully to prejudice an individual could be deemed a conspiracy, and it seems that the court returned to the *Younger* definition. The cases subsequent to *Dalton,* however, have not afforded the court an opportunity to use the broad *Younger* definition, for the object of all conspiracies presented to the court since that decision has been the commission of a criminal act.[39]

In spite of a marked lack of decisions, there seems no reason to doubt that a combination to abuse process, the original meaning of conspiracy, remains indictable in North Carolina.[40] It seems likely that an agreement to interfere with the administration of justice is also indictable, even though such interference by one individual may not be a crime.[41]

It is debatable whether a combination to defraud an individual, when the scheme would not amount to a crime if executed by one person, is a criminal conspiracy.[42] It cannot be denied that at common law[43] and in other American jurisdictions[44] the agreement to defraud is indictable whether or not the fraud would be criminal. But it is at least arguable that, if the fraud when consummated would not fall within the broad converage of the North Carolina fraud statutes,[45]

[39] The reason for this lack of cases is not apparent. It is probably due to a hesitancy of solicitors in seeking indictments where no crime is contemplated. Examples of convictions since *Van Pelt* follow. *Fraud on insurance companies:* N.C. GEN. STAT. § 14-214 (1953); State v. Hedrick, 236 N.C. 727, 73 S.E.2d 904 (1953); State v. Batts, 210 N.C. 659, 188 S.E. 99 (1936). *Operation of lotteries:* N.C. GEN. STAT. § 14-290 (1953); State v. Gibson, 233 N.C. 691, 65 S.E.2d 508 (1951). *Violation of election law:* State v. Abernethy, 220 N.C. 226, 17 S.E.2d 29 (1941). *Embezzlement:* State v. Shipman, 202 N.C. 518, 163 S.E. 657 (1932). *Obtaining property by false pretenses:* State v. Phillips, 240 N.C. 516, 82 S.E.2d 762 (1954). *Violation of liquor laws:* State v. Lippard, 223 N.C. 167, 25 S.E.2d 594 (1943). *Malicious injury to property:* State v. Hicks, 233 N.C. 511, 64 S.E.2d 871 (1951). *Banks loans in excess of statutory limitation:* State v. Davidson, 205 N.C. 735, 172 S.E. 489 (1934). *Assault:* State v. Aldridge, 206 N.C. 850, 175 S.E. 191 (1934). *Bribery:* State v. Smith, 237 N.C. 1, 74 S.E.2d 291 (1953). *Bombing:* State v. Caldwell, 249 N.C. 56, 105 S.E.2d 189 (1958).

[40] State v. Jackson, 82 N.C. 565 (1880) (conspiracy to impute infanticide).

[41] See State v. Enloe, 20 N.C. 508 (1839), where defendants were indicted for conspiracy to destroy a warrant. Conviction was reversed, but upon the ground that the warrant was not sufficiently described in the indictment.

[42] In State v. Christianbury, 44 N.C. 46 (1852), the charge was that defendants had agreed to convey property, one to the other, in order to defeat the prosecutor's judgment. They were indicted for conspiracy to deceive. Conviction was reversed because of the statute of limitations, but the court seemed convinced that a crime was charged. But in State v. Trammell, 24 N.C. 379 (1842), a conviction of conspiracy to defraud the prosecutor of land was reversed because it was shown that in fact the defendants had only fraudulently entered their names in the land book before the prosecutor had the opportunity to enter his. Thus the indictment was insufficient because the prosecutor had no land.

[43] See *Developments—Conspiracy,* 72 HARV. L. REV. 920, 944 (1959).

[44] See, *e.g.,* State v. Gannon, 75 Conn. 206, 52 Atl. 727 (1902); State v. Burns, 215 Minn. 182, 9 N.W.2d 518 (1943) (pursuant to a statute).

[45] N.C. GEN. STAT. §§ 14-100 to -117 (1953).

the agreement should not be indictable. A holding to this effect would go far to clarify the law in this area.

In the final analysis, it would seem virtually impossible to arrive at any sound conclusion as to the type of agreement which is necessary for a common law conspiracy conviction. Although North Carolina solicitors and courts have contained the crime within reasonable bounds in the past, the absence of any well defined standard leaves a serious lack of predictability for the future.

In addition to the common law crime of conspiracy, there are several statutes in North Carolina punishing agreements to accomplish certain crimes.[46] At common law a defendant can be convicted of both the conspiracy and its criminal object, and separately punished for the two offenses.[47] Although no North Carolina case has been found on the point, under these statutes a defendant might also be punished separately for the conspiracy and the completed object thereof.[48] The effect of the statutes is only to prescribe the punishment; they do not merge the conspiracy and the substantive offense.[49]

The crime of conspiracy has been stretched by judges "to the limit of its logic."[50] This is due to the general feeling that a combination of persons to do an act or to achieve any object may in itself be an evil, or a social danger, quite apart from the act or object.[51] This aspect of the crime probably acounts for its vague nature, for the degree of social danger must vary directly with the security of the times. Thus a combination of persons to oppose a court decision in peaceful times may present no special danger to society, so long as no act is done. The same combination may be adjudged criminal if the community is incensed.[52] The cases must therefore be read in the context of the period of time in which they were rendered.[53] Some state statutes declare that there is no criminal conspiracy unless it comes within a statutory definition.[54] Such a statute would seem to be a desirable step toward predictability.

[46] N.C. GEN. STAT. §§ 14-42 (abduction), -356 (blacklisting employees), -50 (injury by explosives), -89 (train robbery), -9 (rebellion) (1953).

[47] See State v. Bennett, 237 N.C. 749, 76 S.E.2d 42 (1953).

[48] See Callanan v. United States, 364 U.S. 587 (1961). In its early stages, when it was confined to agreements for abuse of process, the crime was incomplete unless an indictment was procured. But in the famous Poulterers' Case, 9 Co. 55b, 77 Eng. Rep. 813 (Star Chamber 1611), it was held that the agreement was punishable, even though its object remained unexecuted.

[49] The problems of cumulative punishment generally are discussed in text at note 59.

[50] Krulewitch v. United States, 336 U.S. 440, 445 (1949) (concurring opinion).

[51] See Dennis v. United States, 341 U.S. 494 (1951).

[52] See, *e.g.*, State v. Cole, 249 N.C. 733, 107 S.E.2d 732 (1959) (inciting to riot).

[53] *Compare* State v. Van Pelt, 136 N.C. 633, 49 S.E. 177 (1904), *with* State v. Dalton, 168 N.C. 204, 83 S.E. 693 (1914).

[54] See, *e.g.*, CAL. PEN. CODE § 183; N.Y. PENAL LAW § 582.

Another theory treats conspiracy in accord with the same general principles whereby an attempt is held criminal.[55] When a person has taken steps which put the crime sufficiently close to commission, at the point where conduct advances beyond "mere" preparation to the stage of attempt, he is criminally punishable though the intended crime is uncommitted. The rationale of punishing this unexecuted intent is said to be that the acts bear criminal intent upon their face and when the point of attempt is reached there is less likelihood that the defendant will forego its completion; the state is therefore justified in stepping in at that point. Similarly, when one person agrees with another to commit a criminal act, the likelihood of actual commission is increased. He receives strength of purpose from the combination. There also seems to be greater danger to society by virtue of the increased efficiency obtainable from numbers. Further, like the overt act in the law of attempt, the agreement bears within itself the evidence of criminal intent. However, the vital distinction between attempt and conspiracy should not be overlooked. No overt act is necessary to a common law conspiracy, unless the agreement itself is deemed an "act," while an overt "step" toward commission of the crime is the very crux of an attempt. Indeed, a defendant may be convicted in the same trial of both a conspiracy to commit a certain crime and its attempt.[56]

## Elements of the Crime

### *Agreement*

The criminal act in conspiracy is the agreement; nothing further need be accomplished.[57] But there are two dimensions to every agreement, namely, the parties to the agreement and the object thereof. The indictment must allege both.[58] The nature of the object dimension having been previously discussed, there remains the exploration of the requisites of the party dimension and the plurality of objects in determining the number of existing conspiracies.

Since the gist of the crime is the agreement, each time a new act is incorporated, or a change in members is effected, it is theoretically possible to find a new conspiracy. It *could* be said that each member commits another crime by agreement with a new member to accomplish the same act, or by agreement with the old members to accomplish a new act. It seems clear, however, that such is not the crime of con-

[55] See *Developments—Conspiracy*, 72 Harv. L. Rev. 920, 924 (1959).

[56] State v. Caldwell, 249 N.C. 56, 105 S.E.2d 189 (1958) (bombing). There could probably be no conviction for conspiracy to attempt a crime because the thing agreed to would be the crime itself. There seems to be no reason, however, why one could not attempt to conspire—make an offer to conspire which is rejected or of which the intended receiver is not cognizant.

[57] State v. Caldwell, 249 N.C. 56, 105 S.E.2d 189 (1958); State v. Ritter, 197 N.C. 113, 147 S.E. 733 (1929).

[58] The sufficiency of the allegations in these respects is discussed in text at note 151.

spiracy. For example, *A* and *B* agree to rob *C* and *D*. Are they guilty of two conspiracies or only one? "The gist of the offense is the conspiracy and it is single, though its object is to commit a number of crimes."[59] Even though the indictment sets out the conspiracy in two separate counts, it is nevertheless single.[60] This result is manifestly correct, for to find multiple crimes would in many cases result in unreasonable punishment for a comparatively innocent act.[61] If, however, the agreement to rob *D* is made after the robbery of *C*, it seems consistent with the rationale of the crime to punish for the two distinct agreements.[62]

If *E* should enter into the conspiracy after its formation, there remains but one conspiracy, and each of the three are responsible, at least evidentially, for the actions of the others.[63] But suppose *A*, *B*, and *E* agree to rob *C* and *D*. Then *B* and *E*, in the absence of *A*, decide to rob only *D* and carry out the plan as modified. *A's* responsibility is in no way affected by the modification of the agreement. He may be liable not only for the conspiracy but also for the accomplished robbery.[64]

The agreement must contemplate that each of the parties will further the unlawful purpose; thus there can be no conspiracy to do an act which is already accomplished.[65] It is not necessary, however, that the parties expressly state the agreement. A mutual, implied understanding is sufficient, though no word is said.[66] Neither is it necessary that each party to the conspiracy be personally acquainted with the other members; if there is one member, or several, who act as unifying agents, there is a single conspiracy.[67]

In *State v. Smith*[68] it was held that a single conspiracy may exist even though all but one of the defendants were ignorant of the existence of more than one other conspirator. There the charge was conspiracy to bribe, against Smith and four different police officers. It was held that all defendants were parties to the same conspiracy, although each

[59] Dowdy v. United States, 46 F.2d 417, 420 (4th Cir. 1931).
[60] State v. Gibson, 233 N.C. 691, 65 S.E.2d 508 (1951). See also State v. Smith, 237 N.C. 1, 74 S.E.2d 291 (1953).
[61] See, *e.g.*, State v. Davenport, 227 N.C. 475, 42 S.E.2d 686 (1947), where the agreement was to swindle literally thousands of investors.
[62] The crime of conspiracy punishes the combination because of its danger to society, quite apart from the prevention of the specific crime. Thus, in this light, the combination is no more dangerous when it contemplates numerous crimes than when its object is single. But after the crime is consummated, there is a legitimate interest in preventing a re-forming of the group. See Callanan v. United States, 364 U.S. 587, 593 (1961).
[63] State v. Turner, 119 N.C. 841, 25 S.E. 810 (1896).
[64] State v. Summerlin, 232 N.C. 333, 60 S.E.2d 322 (1950). For discussion of the liability of co-conspirators for substantive offenses, see text at note 212.
[65] State v. Phillips, 240 N.C. 516, 82 S.E.2d 762 (1954).
[66] State v. Connor, 179 N.C. 752, 103 S.E. 79 (1920).
[67] State v. Davenport, 227 N.C. 475, 42 S.E.2d 686 (1947).
[68] 237 N.C. 1, 74 S.E.2d 291 (1953).

officer was unaware of Smith's agreement with their fellow officers. In support of this proposition, the court cited cases holding that an agreement may be implied from acts of the parties. It is arguable that these cases should not be applicable. It seems proper to find a single conspiracy when all defendants are aware that a number of persons are included but are not personally acquainted with them. In such a case the defendant may be deemed to assume the risk of his personally unknown accomplices' action. But when a defendant agrees with one known to him, it seems unreasonable to hold that he can conspire with another, the existence of whom he was unaware. In this type of case, it seems more reasonable to find multiple conspiracies.[69]

The decision in *Smith* avoids rendering certain the North Carolina position on the proposition that two parties cannot be convicted of a conspiracy to commit a crime when the crime is of such a nature as to necessarily require the participation of two persons. This is the general rule elsewhere,[70] but no North Carolina case has been found in which it was so held. Had the court in the *Smith* case found four separate agreements, it would not have been possible under the general rule to convict any of the defendants of conspiracy. But if the agreement is between more persons than are actually necessary to commit the offense, it is generally held that all parties to the agreement may be guilty of conspiracy.[71]

A party may be convicted of conspiracy to commit a crime which individually he could not commit. Thus in *State v. Davis*[72] the defendants were charged with conspiracy to violate statutory provisions against misapplication by bank officers of banking funds. One defendant was not an officer and thus could not commit the offense. He was nevertheless found guilty of conspiracy. The court said it is not necessary that all of the conspirators be capable of executing the conspiracy if one or more of them is able to do so.

It is obvious that in order to have an agreement, there must be a concurrence of at least two parties. If the indictment alleges a conspiracy by only two defendants and one is acquitted, the other must go free.[73] Although it is not necessary that both conspirators be tried at the same time, a subsequent acquittal of the only other alleged party will require a release of a previously convicted conspirator.[74] This

[69] In the *Smith* case there was some evidence that at least one officer knew of the crimes of the others. But the court did not proceed upon that basis.

[70] 1 WHARTON, CRIMINAL LAW AND PROCEDURE 191 (Anderson ed. 1957).

[71] State v. Clemenson, 123 Iowa 524, 99 N.W. 139 (1904). *Cf.* State v. Wilson, 121 N.C. 650, 28 S.E. 416 (1897), where a conspiracy between *A* and *B* to persuade two girls to submit to sham marriages for the purpose of seducing them was held indictable.

[72] 203 N.C. 13, 164 S.E. 737 (1932).

[73] State v. Raper, 204 N.C. 503, 168 S.E. 831 (1933); State v. Tom, 13 N.C. 569 (1828).

[74] *Ibid.*

problem is solved by an indictment charging a conspiracy between the defendant and parties unknown or parties not prosecuted.[75] On the other hand, the defendant may nevertheless be convicted, though his co-conspirator has died before prosecution.[76]

In *State v. Gardner*[77] it was held that the jury could find only one defendant guilty, on the theory that the indictment mentioned another, not on trial nor indicted, who could have been part of the conspiracy. When the indictment charges that persons other than those on trial were included in the conspiracy, it is obviously error for the judge to charge that two must be convicted or none at all. But whether the error is prejudicial to the convicted defendant is a question upon which there is some confusion in the North Carolina decisions. In *State v. Diggs*[78] the court answered the question in the affirmative. The theory of the court was apparently that the jury might convict one about whose guilt there was a reasonable doubt in order to avoid an acquittal of the guilty party. But in three subsequent cases, an instruction to like effect was held not to be prejudicial to defendants.[79] It seems that the reasoning of the *Diggs* case is sound.

Because of the requirement of an agreement between two independent minds, some jurisdictions have held that a wife could not be guilty of a conspiracy with her husband, unless there was also a third party involved.[80] An early North Carolina case said in a dictum: "A husband and wife cannot be indicted for (conspiracy) . . . because, in law, they are but one person."[81] A number of jurisdictions, however, have held that the unity of husband and wife has been destroyed by the Married Women's Acts; thus the husband and wife alone may be guilty of conspiracy.[82] North Carolina has not decided the question.[83]

[75] State v. Caldwell, 249 N.C. 56, 105 S.E.2d 189 (1958); State v. Abernethy, 220 N.C. 226, 17 S.E.2d 25 (1941).

[76] State v. Aldridge, 206 N.C. 850, 175 S.E. 191 (1934).

[77] 84 N.C. 732 (1881).

[78] 181 N.C. 550, 106 S.E. 834 (1921).

[79] State v. Lippard, 223 N.C. 167, 25 S.E.2d 594 (1943); State v. Anderson, 208 N.C. 771, 182 S.E. 643 (1935). In State v. Caldwell, 249 N.C. 56, 105 S.E.2d 189 (1958), it was said that the charge was "more favorable than defendants were entitled to." *Id.* at 59, 105 S.E.2d at 192. The theory of these cases is apparently that the jury would be more disposed to convict one defendant than it would be to convict two.

[80] See Annot., *Effect of Coverture Upon the Criminal Responsibility of a Woman*, 71 A.L.R. 1116 (1930).

[81] State v. Christianbury, 44 N.C. 46, 48 (1852).

[82] *E.g.*, State v. Martin, 4 Ill. 2d 105, 122 N.E.2d 245 (1954). But as shown in an annotation to the *Martin* case, Annot., 46 A.L.R.2d 1275 (1954), the American opinion is by no means unanimous.

[83] *But see* State v. Phillips, 240 N.C. 516, 82 S.E.2d 762 (1954), where the husband and wife were convicted in the lower court. This judgment was reversed on appeal because of the insufficiency of evidence. The court expressly declined to rule on whether or not the husband and wife alone could commit a conspiracy.

A number of legal writers have concluded that the requirement of an agreement has been so diluted in American jurisdictions that it is no longer an effective prerequisite.[84] In this connection however, it should be noticed that the necessity of agreement may arise in two essentially different contexts. The first is when an indictment charges the crime of conspiracy. Here the necessity of an agreement is absolute for the very essence of the charge is an agreement. The only difficulty encountered is in the quantum of proof necessary to establish it.[85] Secondly, an indictment may charge multiple defendants with the same substantive offense (not conspiracy). In this context the state may seek to sustain the admission of evidence, as for example under the co-conspirator exception to the hearsay rule, or to hold one defendant vicariously liable for the actions of another,[86] upon the theory that there was an agreement (conspiracy) to accomplish some unlawful end.

In this second situation, there is some understandable meshing of the law of parties with the law of conspiracy. Thus in *State v. Knotts*[87] four defendants were indicted for an assault with pistols. The evidence showed that one Stamey "had nothing to do with the shooting. Just standing there." The court stated that it was conclusively shown that he was there for the purpose of aiding and abetting his comrades. But there was also evidence of a conspiracy to rob. In supporting his conviction as a principal by finding a conspiracy the court observed that: "If he concurs, no proof of agreement to concur is necessary. As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is complete."[88] It may be inferred from this statement that even if the assault defendants had not known of the existence of Stamey, he could have been guilty of conspiracy, *i.e.*, by "concurring" in the assault. But to have a "union of wills" it is necessary to have at least a tacit "agreement" between the parties. Thus the quotation is self contradictory unless it is read only to mean that no express *verbal* agreement is required. That is not to say that no agreement at all need be proved.

Suppose, for example, that *A* is engaged in stealing from *C*. *B* happens along and, seeing *A* drop an item, picks it up and hands it to him, having no love for *C*. It seems clear that *B* is guilty as an aider and abettor. Are *A* and *B* also guilty of a conspiracy to steal from *C*? If so, then it is difficult to conceive a crime by multiple

[84] See ARENS, *Conspiracy Revisited*, 3 BUFFALO L. REV. 242 (1954); Note, *Agreement as an Element in Conspiracy*, 23 VA. L. REV. 898 (1937).

[85] See State v. Phillips, 240 N.C. 516, 82 S.E.2d 762 (1954); State v. Wellborn, 229 N.C. 617, 50 S.E.2d 720 (1948). And see text at note 161.

[86] See text at note 212.

[87] 168 N.C. 173, 83 S.E. 972 (1914).

[88] *Id.* at 188, 83 S.E. at 979.

parties wherein the additional punishment for conspiracy could not be imposed. On the other hand, in *State v. Kendall*[89] the court summarily dismissed an objection that there was no evidence of an agreement (conspiracy) with the statement that "one was present aiding and abetting the other." Thus it appears that in practice *A* and *B* in the hypothetical could be found guilty of a conspiracy. This follows from the conclusive weight given to the *fact* of aiding and abetting. Since no agreement need be shown for aiding and abetting,[90] then, it may be said that the same is true for conspiracy.

Although this analysis is perhaps logically defensible, it does not give a true picture of conspiracy. These statements by the court must be put into their proper setting. In these cases, since the indictment is for a "substantive" crime, the defendant may, at least arguably, be guilty as charged if he is either an aider and abettor *or* a conspirator. The remarks as to conspiracy are thus in support of the finding that defendant is a co-principal and not the basis for it.[91] This concept of the crime has fortunately not been carried over to cases wherein the indictment separately charges the crime of conspiracy, so that in that situation at least an agreement *before* the perpetration of the crime is still a requirement for conspiracy.[92]

As noted, when only two are charged with conspiracy and one is acquitted, the other must be released.[93] From this it necessarily follows that if one is only pretending to agree, there has been no conspiracy regardless of the criminal intent of the other. But if there are three parties to the agreement, there may be a conspiracy between the remaining two, even though one of the three is innocent.[94] It has been seen that in North Carolina it is unnecessary for a defendant to know that there is a third party to the agreement in order for him to be guilty as a co-conspirator with such third party.[95] Suppose *B*, an offi-

[89] 143 N.C. 659, 663, 57 S.E. 340, 342 (1907).

[90] Pereira v. United States, 347 U.S. 1, 11 (1954). See also Nye & Nissen v. United States, 336 U.S. 613 (1949). "An aider and abettor is one who advises, counsels, procures, or encourages another to commit a crime." State v. Ham, 238 N.C. 94, 97, 76 S.E.2d 346, 348 (1953). But he must be constructively present at the time and place of the commission of the offense. See State v. Hart, 186 N.C. 582, 120 S.E. 345 (1923).

[91] See, *e.g.*, State v. Connor, 179 N.C. 752, 103 S.E. 79 (1920), where it is said that if the defendants were at the scene of the murder by *preconcert* and were aiding, they were guilty as principals.

[92] See, *e.g.*, State v. Phillips, 240 N.C. 516, 82 S.E.2d 762 (1954). Thus, in the situation supposed, *A* had already committed larceny. *B's* role was only that of an approving bystander until he volunteered assistance after the crime was consummated.

[93] State v. Tom, 13 N.C. 569 (1828).

[94] State v. Walker, 251 N.C. 465, 112 S.E.2d 61 (1960); State v. Caldwell, 249 N.C. 56, 105 S.E.2d 189 (1958).

[95] See State v. Smith, 237 N.C. 1, 74 S.E.2d 291 (1953); *accord*, Coates v. United States, 59 F.2d 173 (9th Cir. 1932). *But see* United States v. Falcone, 311 U.S. 205 (1940).

cer, pretends to agree with *A* to commit a crime and independently with *C* to commit the same offense. Neither *A* nor *C* know of *B's* pretended agreement with the other. Are *A* and *C* co-conspirators? It seems clear that they *should* not be. But if *A* and *C* separately agree with *B* that he is to enlist the aid of some other person, then even though *B* was pretending, the conviction of *A* and *C* may be justified upon an agency theory. When *A* agrees with *B*, he agrees also with *C* who is represented by *B*.

*Intent*

It has been said that "criminal conspiracy involves a *specific intent* to commit a particular act, the perpetration of which the state desires to forestall."[96] The intent, with reference to the "act" of agreement is indeed "specific." The parties must knowingly and consciously agree. But if the quoted statement is taken to refer to the intent to bring about a specific *crime*, apart from the agreement, its accuracy may be legitimately questioned.[97] The problem here discussed is closely related to the question of whether or not the object of the conspiracy must be criminal. If that question is answered in the affirmative, then the quoted statement seems unimpeachable, *i.e.*, the intent must be to perpetrate the commission of a specific crime.

But, as discussed earlier, there is considerable uncertainty as to the requisite nature of the act contemplated. It should be noted that conspiracy may differ from other crimes in that there need be no intent to do a *criminal* act; as related to other crimes and the intent required, the "specific intent" requirement in conspiracy is misleading. Similarly, it seems fruitless to speculate whether or not the parties must know that the contemplated act is "unlawful."[98]

It is clear that the defendant need not intend the very act in fact accomplished by the group, at least for the purpose of holding him vicariously liable for some substantive offense.[99] But he must intend to bring about the act which is the object of the conspiracy charged. Thus in *State v. Trammell*[100] the defendants were charged with conspiring to defraud certain citizens of their lands. The evidence showed that the citizens did not in fact own the land, because they had not registered in the land books pursuant to the homestead acts, but that the defendants had agreed to fraudulently enter their own names before the land office opened and deprived others of the opportunity to claim

[96] HARNO, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624, 635 (1941). (Emphasis added.)

[97] See ARENS, *supra* note 84, at 250.

[98] There is authority elsewhere that the parties must have such knowledge. See, *e.g.*, Landen v. United States, 299 Fed. 75 (6th Cir. 1924).

[99] State v. Finley, 118 N.C. 1162, 24 S.E. 495 (1896).

[100] 24 N.C. 379 (1842).

their chosen lands. The court held: "[T]he charge of conspiracy should clearly set forth the purpose and object of the combination, as in these are to be found almost the only marks of certainty by which the parties accused may known [*sic*] what is the accusation which they are to defend."[101]

In *State v. Batts*[102] the indictment charged a conspiracy to wreck an automobile with the intent to defraud an insurance company. The court held evidence of other damage inflicted by defendant upon his automobile admissible over objection. The court said: "One of the elements of the offense with which the defendant was charged was the intent. In such cases it is well established that evidence of other like offenses is competent."[103] Thus a group may wreck an automobile, and each thereby intend to defraud. But the conspiracy was complete *before* the automobile was wrecked. It consisted of an agreement between the parties to wreck the automobile. In this light, the "element" of intent does not refer to the intent to agree but to the intent to wreck an automobile in order to defraud. In proving the *agreement,* however, the fact that *one* of the defendants had previously wrecked his car has no logical competence.

Once an agreement is shown, it is then incumbent upon the State to show that the object of the agreement was unlawful. Wrecking a car is, in this context, only unlawful if it is done with the intent to defraud. The proof should then take the following form: (1) *A* and *B* agreed to wreck *A's* car. (2) The ageement was for the purpose of defrauding the insurance company. If all of the evidence in the case is relevant only to the purpose of the agreement, then the "crime charged" has not been proved.[104]

*Significance of the Overt Act*

Although at common law, and in North Carolina, the crime of conspiracy is complete as soon as the agreement is made, some jurisdictions[105] require the commission of an overt act in furtherance[106] of the agreement. In these jurisdictions, however, the overt act may be that of a single conspirator,[107] and his act is sufficient to convict all parties to the agreement. The purpose of the overt act requirement

[101] *Id.* at 386.
[102] 210 N.C. 659, 188 S.E. 99 (1936).
[103] *Id.* at 660, 188 S.E. at 100.
[104] See State v. McCullough, 244 N.C. 11, 92 S.E.2d 389 (1956).
[105] See, *e.g.,* People v. Buffum, 40 Cal. 2d 709, 256 P.2d 317 (1953); State v. Townley, 149 Minn. 5, 182 N.W. 773 (1921), *cert denied,* 257 U.S. 643 (1922); People v. Flack, 125 N.Y. 324, 26 N.E. 267 (1891). See also ARK. STAT. ANN. § 41-1201 (1947) ("conspire to commit . . . and make some advance thereto"); and the federal general conspiracy law, 18 U.S.C. § 371 (1958).
[106] Williams v. United States, 271 F.2d 703 (4th Cir. 1959).
[107] Braverman v. United States, 317 U.S. 49 (1942).

is to permit the parties to withdraw from the combination before the unlawful act is committed.[108]

It might be assumed that, since there is no overt act requirement in North Carolina, the commission of an overt act is irrelevant to a charge of conspiracy. This is not always the case. When an agreement is formed outside of the state, the North Carolina courts have no jurisdiction unless there has been an overt act within the state.[109] But when one of the conspirators performs an overt act within the state "in legal contemplation, a criminal conspiracy is continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design."[110] On the other hand when an agreement entered into in North Carolina does not contemplate any overt act within the state, conviction will be sustained,[111] and the venue is in the county in which the agreement was made.[112] The overt act of one conspirator is also admissible in evidence against the other in North Carolina.[113]

## DEFENSES

### *Statute of Limitations*

There is no statute of limitations for felonies in North Carolina. The application of the statute, therefore, depends in the first instance upon the classification of the conspiracy. At the common law, all conspiracies were misdemeanors, even though their object was the commission of a felony.[114] In North Carolina, however, conspiracies to commit misdemeanors are misdemeanors, and conspiracies to commit felonies are felonies.[115]

The North Carolina statute of limitations[116] provides that indictment "shall be presented or found by the grand jury within two years after the commission of the . . . [misdemeanor], and not afterwards." The statute applies to "all misdemeanors except malicious misdemeanors." It has been stated that this statute does not apply to conspiracies.[117] This is probably asserted upon the assumption that conspiracies are either "felonies" or they are "malicious." Since a conspiracy may be a misdemeanor, the question arises as to whether all conspiracies which are misdemeanors are "malicious misdemeanors," and thus outside the pale of the statute.

[108] United States v. Belisle, 107 F. Supp. 283 (D.C. Wash. 1951).
[109] Dowdy v. United States, 46 F.2d 417 (4th Cir. 1931).
[110] State v. Hicks, 233 N.C. 511, 517, 64 S.E.2d 871, 876 (1951).
[111] *Ibid.* (dictum). See Note, 1 OSGOODE HALL L.S.J. 76 (1958).
[112] State v. Davis, 203 N.C. 13, 164 S.E. 737 (1932).
[113] See text at note 179.
[114] State v. Jackson, 82 N.C. 565 (1880).
[115] This conclusion is reached through an integration of N.C. GEN. STAT. § 14-1 (1953) and N.C. GEN. STAT. § 14-3 (1953).
[116] N.C. GEN. STAT. § 15-1 (1953).
[117] *Developments-Conspiracy*, 72 HARV. L. REV. 920, 960 and n.287 (1959).

The court has ruled[118] that only those misdemeanors having malice as an element of the offense are malicious misdemeanors within the meaning of our statute of limitations. There is no requirement in the law that the parties to a conspiracy must "maliciously" agree; furthermore, in many cases the offense which is the object of the conspiracy will not have malice as an essential element. Consequently, if the misdemeanor conspiracy still must contain the element of malice in order to be outside the statute,[119] many misdemeanor conspiracies would seem to come within the statute.

Assuming that conspiracies to accomplish non-malicious misdemeanors must be prosecuted within two years, the question arises as to when the statute will begin to run. Since the crime is complete upon agreement, it may be thought that the two year period commences with the agreement. But conspiracy is a continuing offense. It is renewed with each overt act, and the danger to society remains as long as the agreement continues. Thus it has been held that the point of termination of the agreement, whether by abandonment or achievement of the object, starts the running of the statute.[120]

*Former Jeopardy*

It has been noted that the conspiracy indictment affords great opportunity for abuse in that separate indictments may be brought and cumulative punishment inflicted for each conspiracy. The limits of the crime are vague enough to permit a finding of separate conspiracies each time a new object is incorporated[121] or a new party added. For purposes of cumulative punishment, whether upon separate trials or separate counts in the indictment, the defendant is interested in showing that there was only one conspiracy with multiple parties and objects. The latter observation applies equally to the defense of former jeopardy.

The test for the application of the double jeopardy doctrine is stated by Justice Ervin, in *State v. Hicks*,[122] to be, "Whether the facts alleged in the second [indictment], if given in evidence, would

[118] State v. Frisbee, 142 N.C. 671, 55 S.E. 722 (1906). See also State v. Claywell, 98 N.C. 731, 3 S.E. 920 (1887).

[119] In State v. Frisbie, *supra* note 118, at 675, 55 S.E. at 724, the court said that the legislature "evidently intended to describe offenses of which malice is a necessary ingredient to constitute the criminal act, as in the case of malicious mischief." This interpretation followed, according to the court, from the use of the phrase "other malicious misdemeanors" immediately after the phrase "malicious mischief" in the statute. In 1943 the statute was rewritten, weakening this argument by inserting the provision for petit larceny between the two uses of "malicious."

[120] United States v. Kissel, 218 U.S. 601 (1910). *But cf.* Lowell v. People, 131 Ill. App. 137, 140, *rev'd on other grounds*, 229 Ill. 227, 82 N.E. 226 (1907). See generally Note, 56 COLUM. L. REV. 1216 (1956).

[121] *But cf.* State v. Gibson, 233 N.C. 691, 65 S.E.2d 508 (1951).

[122] 233 N.C. 511, 516, 64 S.E. 2d 871, 875 (1951).

have sustained a conviction under the first indictment ... or whether the same evidence would support a conviction in each case." In the first *Hicks* trial the indictment charged that defendant conspired to injure the property of *X*. The proof was that he conspired to injure the property of *Y*. The conviction was reversed for variance.[123] The second action for conspiracy to injure the property of *Y* was not barred, because evidence of a conspiracy to injure *Y's* property would not have supported a conviction for conspiracy to injure *X's* property.[124]

It is apparent from the "same evidence" test that a former trial for the substantive offense conspired to will not bar a subsequent prosecution for conspiracy to commit the offense.[125] The essential element in the later trial for conspiracy is the agreement. That element is not raised at the former trial. Should an acquittal on a charge of conspiracy to commit an offense bar a subsequent prosecution for the substantive offense? It seems clear that it should not. Proof of an overt act on the former trial is wholly unnecessary, and since the conspiracy does not merge[126] with the completed offense, it would seem that evidence proving the substantive offense would not support a conviction of conspiracy.

But suppose a defendant was tried for conspiracy to burglarize and for burglary of *A's* house and was acquitted. *A* was killed in the course of the alleged burglary. May the defendant later be convicted of the murder of *A* upon the theory that by furnishing transportation to and from *A's* house he had participated in the murder? In *State v. Bell*[127] it was held that double jeopardy could successfully be pleaded as a bar to the subsequent prosecution. The court noted that the evidence in this second trial showed a conspiracy to "rob" *A* but not a conspiracy to murder. Thus, since the defendant would be guilty of all crimes committed in furtherance of the conspiracy to rob, "the facts required to convict him on the second indictment would necessarily have convicted him on the first."[128] That is, proof of the agreement to burglarize would render the defendant guilty of both the burglary and the murder.

The second indictment in the *Bell* case charged a conspiracy to murder; yet the proof showed a conspiracy to burglarize. Thus for

[123] 233 N.C. 31, 62 S.E.2d 497 (1950).

[124] For an early holding to the same effect see The King v. Vandercomb, 2 Leach Cr. Cas. 708, 720, 168 Eng. Rep. 455, 461 (1796).

[125] State v. Lippard, 223 N.C. 167, 25 S.E.2d 594 (1943).

[126] See, *e.g.*, State v. Caldwell, 249 N.C. 56, 105 S.E.2d 189 (1958); State v. Gibson, 233 N.C. 691, 65 S.E.2d 508 (1951); State v. Dale, 218 N.C. 625, 12 S.E.2d 556 (1940); State v. Shipman, 202 N.C. 518, 163 S.E. 657 (1932).

[127] 205 N.C. 225, 171 S.E. 50 (1933).

[128] *Id.* at 227, 171 S.E. at 51.

practical purposes, the case is the same as if the defendant initially had been tried for conspiracy to burglarize and then for murder. In this light, his guilt in both trials depended upon evidence of an *agreement* to burglarize, because it was shown that he did not actually participate in the entry. His liability for murder would have been wholly vicarious. The main issue, the agreement, had therefore been litigated in the former trial. The result seems entirely sound.

### INCONSISTENCY

The conspiracy indictment usually charges that at least two named defendants have agreed, but the indictment need only charge that "defendant conspired with others."[129] As was noted previously, there must exist at least one other party who could have agreed and who has not been acquitted of the crime.[130] It is immaterial that the only other party implicated is dead at the time of trial.[131] But having implicated only two parties, may the state take a *nolle prosequi* as to one and yet acquire a conviction of the other? There is authority both ways. Some courts view the nol pros as the equivalent of an acquittal.[132] Others hold that it has no effect upon the conviction of the co-conspirator.[133] Recent writers disagree as to which is the majority opinion.[134]

North Carolina, so far as the writer has discovered, has never had a case presented in which the State took a *nolle prosequi* as to all but one of the implicated parties. In *State v. Davenport*[135] all of the parties except the defendant who were both charged and *living* were nol prossed. But the court sustained the conviction of the one remaining upon the theory that the evidence implicated another party who was charged but who had died before the trial. The court expressly refused to determine the effect of the *nolle prosequi*.[136] Since a nol pros merely represents an election on the part of the State not to pursue the case further, and in view of the vagueness permitted in describing the co-conspirator, it seems that North Carolina would follow those jurisdictions holding the nol pros has no effect upon the conviction of the co-conspirator.

Another question of consistency is presented by the statement that

[129] State v. Lewis, 142 N.C. 626, 55 S.E. 600 (1906).
[130] State v. Raper, 204 N.C. 503, 168 S.E. 831 (1933); State v. Tom, 13 N.C. 569 (1828).
[131] State v. Turner, 119 N.C. 841, 25 S.E. 810 (1896).
[132] State v. Jackson, 7 S.C. 283 (1876); Miller v. United States, 277 Fed. 721, 726 (4th Cir. 1921) (dictum).
[133] *E.g.*, United States v. Fox, 130 F.2d 56 (3d Cir.), *cert. denied*, 317 U.S. 666 (1942).
[134] *Compare Developments-Conspiracy*, 72 HARV. L. REV. 920, 973 (1958), *with* 1 WHARTON, CRIMINAL LAW AND PROCEDURE 201 (Anderson ed. 1957).
[135] 227 N.C. 475, 42 S.E.2d 686 (1947).
[136] In State v. Turner, 119 N.C. 841, 25 S.E. 810 (1896), two defendants were nol prossed, but it does not appear how many were charged.

a conspirator is liable for all substantive crimes committed by his co-conspirators in furtherance of the common design. "The least degree of consent or collusion between the parties to an illegal transaction makes the act of one of them the act of the other."[137] Upon this theory, it was held that two defendants charged with murder are not entitled to an instruction to the effect that if it was impossible to determine which one did the killing, both should be found not guilty.[138] It should follow that one conspirator could not be found guilty of both conspiracy and the objective crime, while the other is found guilty of conspiracy only. If, indeed, the acts of one in pursuance of the conspiracy are automatically the acts of the other, a finding that only one is guilty of the offense conspired to while both are guilty of conspiracy is logically impossible. Yet in *State v. Shipman*[139] the jury returned such a verdict and the court affirmed without discussion of the apparent inconsistency.

### Consolidated Prosecutions

Since conspiracy is necessarily a multi-party crime, it generally affords the prosecutor the advantages of the joint trial.[140] For example, in the joint trial the number of peremptory challenges of jurors granted a defendant may be cut;[141] the large number of defendants, and the complexity and mass of the evidence, may confuse the jury to the detriment of an individual.[142] The jury may have difficulty in differentiating among defendants and may tend to infer the guilt of one merely because he is tried with the others.[143] The effectiveness of defense counsel may be impaired by the presence of many lawyers and defendants, and if fewer counsel are retained, the possibility of detriment by association is heightened.[144]

Since these disadvantages arise from the joint trial, and not from the nature of the conspiracy, a logical solution is to seek a severance. However, in North Carolina the denial of severance is reviewable only upon abuse of discretion.[145] With the court dockets continually overcrowded, severance is seldom used.

[137] State v. Anderson, 92 N.C. 733, 747 (1885).
[138] State v. Finley, 118 N.C. 1162, 24 S.E. 495 (1896).
[139] 202 N.C. 518, 163 S.E. 657 (1932).
[140] See Note, 68 Harv. L. Rev. 1046 (1955).
[141] N.C. Gen. Stat. § 15-163 (1953) permits each defendant to have his undiminished number. *Cf.* Ga. Code § 59.805 (1933) (twenty challenges for each defendant); N.Y. Code Crim. Proc. §§ 360, 373 (five challenges exercisable only jointly).
[142] See, *e.g.*, State v. Walker, 251 N.C. 465, 112 S.E.2d 61, *cert. denied*, 364 U.S. 832 (1960) (eight defendants); State v. Diggs, 181 N.C. 550, 106 S.E. 834 (1921) (fourteen defendants).
[143] See O'Brian, *Loyalty Tests and Guilt by Association*, 61 Harv. L. Rev. 592, 602 (1948).
[144] See O'Dougherty, *Prosecution and Defense Under Conspiracy Indictments*, 9 Brooklyn L. Rev. 263 (1940).
[145] State v. Lewis, 185 N.C. 640, 116 S.E. 259 (1923).

THE INDICTMENT

Because of the vague nature of conspiracy, and the clandestine manner in which it is committed, the requirements of stating the crime in the indictment are less stringent than in other prosecutions. In the ordinary indictment, when two or more offenses are charged in the same count, the indictment is faulty because of duplicity.[146] But "in conspiracy cases the court will never be keen to hold an indictment bad for duplicity."[147] Consequently, the conspiracy and the crime which is its object may be laid in the same count.[148] In such a case the defendant, before verdict, may require the State to elect. But after the verdict is returned and the jury is discharged, it is too late to complain.[149] Similarly, an indictment which charged conspiracy to run a horse lottery in one count, and conspiracy to operate a butter and egg lottery in another, has been held to charge the same crime. Since the two counts were only different ways of stating the crime, the indictment was neither duplicitous nor multifarious.[150]

As in any other crime, however, the indictment must set out facts showing all the elements of the offense; and the injured parties must be identified, although not necessarily by name. It has been held that an indictment charging a conspiracy to rape certain females "to the jurors unknown" did not adequately lay the charge.[151] Proof of a conspiracy to dynamite *A's* property will not support a charge of conspiracy to dynamite the property of *B*.[152] Similarly, a charge of conspiracy to destroy a warrant must set out the substance of the warrant, or it must state that the warrant was issued and by whom.[153]

In *State v. Dale*[154] it was said that when the indictment charges a conspiracy to commit a crime, "it is unnecessary to describe the crime, which is the subject of the conspiracy, with legal and technical accuracy." In support of this statement the court cited a Maryland case and a federal case. North Carolina authority, however, is not lacking,[155] but the early cases gave a distinctly different impression. In *State v. Trammell*[156] the court observed that a conspiracy is complete even though no act is done in furtherance of the agreement.

[146] *Ibid.*
[147] State v. Dale, 218 N.C. 625, 639, 12 S.E.2d 556, 564 (1940). *But cf.* dicta in State v. Lewis, 185 N.C. 640, 116 S.E. 259 (1923).
[148] *Ibid.*
[149] State v. Dale, 218 N.C. 625, 12 S.E.2d 556 (1940).
[150] State v. Gibson, 233 N.C. 691, 65 S.E.2d 508 (1951).
[151] State v. Trice, 88 N.C. 628 (1883).
[152] State v. Hicks, 233 N.C. 31, 62 S.E.2d 497 (1950).
[153] State v. Enloe, 20 N.C. 508 (1839).
[154] 218 N.C. 625, 641, 12 S.E.2d 556, 565 (1940).
[155] See State v. Abernethy, 220 N.C. 226, 17 S.E.2d 25 (1941); State v. Lewis, 185 N.C. 640, 116 S.E. 259 (1923); State v. Howard, 129 N.C. 584, 40 S.E. 71 (1901); State v. Brady, 107 N.C. 822, 12 S.E. 325 (1890).
[156] 24 N.C. 379 (1842).

> This consideration renders it but the more important that the charge of conspiracy should clearly set forth the purpose and object of the combination, as in these are to be found almost the only marks of certainty by which the parties accused may known [*sic*] what is the accusation which they are to denfend.[157]

The difference in attitude apparent from these quotations is probably traceable to the development of the crime itself. When the conspiracy indictment was in wide use against agreements to do acts not in themselves criminal, there was a greater necessity for detailed statement of the acts complained of. A defendant could not adequately prepare his defense, since the act contemplated need not have been criminal. This accounts for the statement that "if the criminality of the offense consists in the agreement to accomplish a purpose not in itself criminal or unlawful, by criminal or unlawful means, the means must be set out."[158] This merely means that the "unlawful" act, whether end or means, which is contemplated must be charged.

When the act contemplated is criminal, however, a charge simply that defendant agreed to commit it would seem to be sufficient notice, without requiring a statement of the method to be used in its perpetration. The method may be extremely complex,[159] and "the modern tendency is against technical objections which do not affect the merits of the case."[160] It has been noted that no reported conviction for conspiracy, where the act contemplated was not in itself criminal, has been obtained since 1914.

## EVIDENCE

### *Circumstantial*

The central element which the state must prove in a conspiracy trial is the agreement, and agreement is necessarily a state of mind.

> When resorted to by adroit and crafty persons, the presence of a common design often becomes exceedingly difficult to detect.... [T]he results accomplished, the divergence of those results from the course which would ordinarily be expected, the situation of the parties and their antecedent relations to each other, together with the surrounding circumstances, and the inference legitimately deducible therefrom, furnish, in the absence of direct proof, and often in the teeth of positive testimony to the

[157] *Id.* at 386.
[158] Pettibone v. United States, 148 U.S. 197, 203 (1893); see State v. Van Pelt, 136 N.C. 633, 49 S.E. 177 (1904). *But see* State v. Brady, 107 N.C. 822, 12 S.E. 325 (1890).
[159] *Cf.* State v. Davenport, 227 N.C. 475, 42 S.E.2d 686 (1947).
[160] State v. Davis, 203 N.C. 13, 27, 164 S.E. 737, 744 (1932).

> contrary, ample ground for concluding that a conspiracy exists.[161]

Under this broad statement of the rule, it is exceedingly difficult, if not impossible, to determine that any given set of circumstances is insufficient to permit the jury to infer guilt.

But "when the state relies upon circumstantial evidence for a conviction, the circumstances and evidence must be such as to produce in the minds of the jurors a moral certainty of defendant's guilt, and exclude any other reasonable hypothesis."[162] This formulation furnishes no more of a guide than the first. Both statements rather illustrate two fundamentally conflicting policies in the trial of a defendant for conspiracy. That is, in each case the difficulty of proving the agreement must be balanced against the danger of a conviction upon evidence sufficient only to "beget suspicion in imaginative minds."[163]

In this balancing process, it seems that the quantum of proof required to sustain a verdict of guilty varies inversely with the severity of the crime allegedly contemplated. Thus in *State v. Powell*[164] a man and a woman were indicted for conspiracy to induce an eighteen year old girl to commit fornication with the male defendant. Conviction was sustained merely upon testimony that the defendants would engage in secret conversations, after which the male defendant would importune the girl. Also in *State v. Whiteside*,[165] a conviction of conspiracy to rob a theatre was sustained upon little more than testimony that the defendant knew the robber and had asked the State's witness if the theatre would be a good place to rob.[166] On the other hand, in *State v. Smith*[167] officers had learned that a lottery was in operation and that the tickets were distributed by leaving them in a brown bag in front of a church. Officers planted a bag at the appropriate spot, and at one o'clock a.m. defendant stopped his car just in front of the Church, got out, and leaned over the bag. He was apprehended before he touched the bag. Conviction for conspiracy to sell lottery tickets was reversed for insufficient evidence.[168] The court pointed out that defendant's

[161] State v. Whiteside, 204 N.C. 710, 712, 169 S.E. 711, 712 (1933).
[162] State v. Parker, 234 N.C. 236, 242, 66 S.E.2d 907, 912 (1951).
[163] State v. Phillips, 240 N.C. 516, 82 S.E.2d 762 (1954).
[164] 121 N.C. 635, 28 S.E. 525 (1897).
[165] 204 N.C. 710, 169 S.E. 711 (1933).
[166] The court observed that "if the defendant has been erroneously convicted, as he contends, he must attribute it to his evil associations." *Id.* at 713, 169 S.E. at 712. See also State v. Beal, 199 N.C. 278, 154 S.E. 604 (1930) (conspiracy to murder). *But cf.* State v. Wellborn, 229 N.C. 617, 50 S.E.2d 720 (1948) (conspiracy to murder, conviction reversed).
[167] 236 N.C. 748, 73 S.E.2d 901 (1953).
[168] See also the following cases in which the conspiracy conviction was reversed for insufficiency of circumstantial evidence: State v. McCullough, 244 N.C. 11, 92 S.E.2d 389 (1956) (illegal transportation of beer); State v. Phillips, 240 N.C. 516, 82 S.E.2d 762 (1954) (false pretenses); State v. Benson, 234 N.C. 263,

mission might have been innocent, although the jury had found that it was not.

Once it is shown that a defendant had knowledge of a conspiracy, the slightest evidence of participation on his part is sufficient to sustain his conviction.[169] In *State v. Davidson*,[170] it was held that "where the evidence . . . shows . . . that a loan was made by . . . [bank officers] in violation of the statute, it may reasonably be inferred by the jury that such . . . [officers] entered into an agreement to make the loan before the same was made."[171]

The *Davidson* case indicates that mere participation in some crimes may be a sufficient circumstance to infer an agreement. But any such conclusion as to all crimes is negatived by a subsequent case.[172] There must be some circumstance shown from which the jury can legitimately infer a prior agreement.[173] To compensate for the difficulties of proof faced by the prosecutor in conspiracy trials, "considerable latitude is allowed in the reception of evidence offered to establish the gravamen of the charge or offense."[174]

*Testimony of a Co-Conspirator*

When a number of persons are implicated in the conspiracy, the task of proving the crime is considerably lightened if one conspirator is persuaded to be a witness for the State. Accordingly, there are numerous cases where the prosecutor has either failed to prosecute at all or taken a *nolle prosequi* as to one conspirator and used his testimony to convict his associates.[175] There can be no objection based upon the hearsay rule where this testimony relates facts within the knowledge of the co-conspirator. The witness is on the stand, and may be cross-examined. The testimony in such a case is necessarily self-serving, however, since the witness is himself avoiding punishment by implicating his associates. In recognition of this some states have statutes requiring corroboration of a co-conspirator's testimony.[176] In North Carolina, however, the unsupported testimony of an accomplice is suffi-

66 S.E.2d 893 (1951) (possession of whiskey); State v. Parker, 234 N.C. 236, 66 S.E.2d 907 (1951) (possession of whiskey); State v. Wrenn, 198 N.C. 260, 151 S.E. 261 (1930) (defrauding banks).

[169] See State v. Walker, 251 N.C. 465, 112 S.E.2d 61, *cert. denied*, 364 U.S. 832 (1960).

[170] 205 N.C. 735, 172 S.E. 489 (1934).

[171] *Id.* at 738, 172 S.E. at 490.

[172] State v. Wellborn, 229 N.C. 617, 50 S.E.2d 720 (1948).

[173] See State v. Wrenn, 198 N.C. 260, 151 S.E. 261 (1930).

[174] State v. Gibson, 233 N.C. 691, 697, 65 S.E.2d 508, 512 (1951).

[175] *E.g.*, State v. Kirkman, 252 N.C. 781, 114 S.E.2d 633 (1960); State v. Wells, 219 N.C. 354, 13 S.E.2d 613 (1941); State v. Anderson, 208 N.C. 771, 182 S.E. 643 (1935); State v. Ritter, 199 N.C. 116, 154 S.E. 62 (1930); State v. Turner, 119 N.C. 841, 25 S.E. 810 (1896).

[176] See, *e.g.*, CAL. PEN. CODE § 1111; N.Y. CODE CRIM. PROC. § 399.

cient to sustain a conviction.[177] When defendants complain that they have been convicted entirely upon the evidence given by their alleged accomplices, they are told, "it should be remembered the defendants were the first to respose confidence in these witnesses, and their appeal was to the jury."[178] This answer seems a classical example of assuming the conclusion, *i.e.*, the defendants are contending that they "reposed" no "confidence" in the witnesses—that they are not guilty of conspiring with them.

*The Hearsay Exception*

The hearsay exception is readily stated:

> [W]hen a conspiracy had been sufficiently established or shown, then the acts and declarations of each conspirator done or uttered in furtherance of such unlawful purpose are admissible in evidence against all.[179]

It is now well established[180] that this rule operates to admit hearsay declarations of one conspirator against his associates, although the alleged declarant is not on trial.[181]

This orthodox statement of the rule treats the acts, as well as declarations, of a conspirator as though they are admissible solely because they come within the exception to the hearsay rule. Such treatment has led to some confusion in the language of the cases. In *State v. Beal*[182] the flight of one conspirator, after the contemplated crime was complete, was held admissible against his co-conspirator. Acts done after the conspiracy has culminated and its object has been achieved are patently not "in furtherance" of the conspiracy. This apparent conflict in the statement of the rule, and the results reached by its application, would be dispelled if it were expressly recognized that acts are not hearsay, and therefore not dependent upon the exception for their

[177] State v. Saunders, 245 N.C. 338, 95 S.E.2d 876 (1957); State v. Tilley, 239 N.C. 245, 79 S.E.2d 473 (1954).

[178] State v. Anderson, 208 N.C. 771, 787, 182 S.E. 643, 653 (1935).

[179] State v. Summerlin, 232 N.C. 333, 339, 60 S.E.2d 322, 325 (1950).

[180] There was some doubt on this point at one time. See State v. Poll, 8 N.C. 442 (1821). "The rule has never been carried further than this, that when a common design is proven, the act of one in furtherance of that design is evidence against his associates; it is in some measure the act of all; but the *declarations* of one of the parties can be received only against himself." *Id.* at 446 (dictum). (Emphasis by the court.) This statement was clarified somewhat in State v. George, 29 N.C. 321 (1847). There it was said that the declarations would be admissible only if they could be viewed as *acts*, within the *res gestae*. This is a clarification in theory only. The *res gestae* requirement lends no assistance as a practical guide to admissibility. Thus the declaration must be characterized as a "verbal act."

[181] State v. Boswell, 194 N.C. 260, 139 S.E. 374 (1927); State v. Brady, 107 N.C. 822, 12 S.E. 325 (1890).

[182] 199 N.C. 278, 154 S.E. 604 (1930). See also State v. Batts, 210 N.C. 659, 18 S.E. 99 (1936), where the commission of independent crimes by one conspirator was held competent to prove the conspiracy.

admissibility.[183] Often it would be impossible to prove an agreement at all if the acts of the parties, both before and after the commission of the objective crime, were not admissible to show that agreement.[184]

Various justifications, or explanations, for the rule have been offered, most of which find support in the North Carolina cases. The theory most frequently advanced is that a mutual agency is created by the agreement.[185] Thus, a declaration of one conspirator is not hearsay as to the others because it is considered to have been made by all by virtue of the agency. This rationale has been rejected by Wigmore,[186] who insists that the evidence is hearsay but is reliable since it is normally a declaration against interest.[187] The most persuasive reason for admitting declarations of co-conspirators seems to be that of pure necessity. "The substantive law of conspiracy has vastly expanded. This created a tension solved by relaxation in the law of evidence."[188]

Whatever the justification, it must be conceded that the rule places the defendant at a great disadvantage. For example, in *State v. Walker*[189] the State's witness was permitted to testify that certain defendants had told him that one Payton did not desire to be connected with the plot but that Payton would reimburse the expenses advanced to the witness for his supposed furtherance of the conspiracy.[190] The other evidence against Payton was slight. All defendants elected not to take the stand. Thus the only means by which the testimony could practically be attacked was by cross-examination of the State's witness. The defendants who allegedly made the statements could not be called upon to refute them, without submitting themselves to incriminatory cross-examination. When it is considered that in many instances the State's witness is himself a criminal and often is either being paid by

[183] Lutwak v. United States, 344 U.S. 604 (1953).

[184] See, *e.g.*, State v. Finley, 118 N.C. 1162, 24 S.E. 495 (1896).

[185] See Van Riper v. United States, 13 F.2d 961 (2d Cir. 1926); MORGAN, *The Rationale of Vicarious Admissions*, 42 HARV. L. REV. 461 (1929). *Cf.* State v. Shipman, 202 N.C. 518, 527, 163 S.E. 657, 662 (1932) ("by agreeing with another . . . he thereby places his safety and security in the hands of every member of the conspiracy"). See also STANSBURY, NORTH CAROLINA EVIDENCE § 173 (1946).

[186] 4 WIGMORE, EVIDENCE, § 1080a (3d ed. 1940).

[187] According to Wigmore this is the rationale for all admissions. Where the declarations are made in furtherance of the conspiracy, they are considered vicarious admissions. WIGMORE, *op. cit. supra* note 186. This analysis, then, feeds upon the agency theory. See Note, 25 U. CHI. L. REV. 530 (1958).

[188] LEVIE, *Hearsay and Conspiracy*, 52 MICH. L. REV. 1159, 1166 (1954).

[189] 251 N.C. 465, 112 S.E.2d 61 (1959).

[190] See the dissent of Jusice Bobbitt, *id.* at 484, 112 S.E.2d at 75, where it is said that these declarations were incompetent. *But see*, State v. Turner, 119 N.C. 841, 25 S.E. 810 (1896). In the *Turner* case there was no opportunity to cross-examine the party who was alleged to have uttered the statements, because he was not on trial. Even so, one of the co-conspirators turned state's evidence and was permitted to relate declarations of the absent party incriminating the defendants.

the State, as in the *Walker* case, or has a personal grudge against the defendant,[191] it becomes obvious that such testimony has no inherent veracity to recommend it. The situation is fraught with the hazard of erroneous conviction.

In recognition of these dangers the court has imposed the "furtherance" and "pendency" requirements. One way of stating the furtherance requirement is that declarations of co-conspirators "are not admissible when in the nature of narratives, descriptions, or subsequent confessions."[192] The declarations must be made with an intent to aid in bringing about the object of the conspiracy. Thus in *State v. Wells*[193] conspirator *A* told conspirator *B* that the defendant had "gone to see about getting the key [to a school] from the janitor." In a prosecution for conspiracy to burn the school acceptance of *B's* testimony relating the declaration was held to be reversible error. Similarly, proof of statements of co-conspirators made to discourage commission of the objective crime[194] or made to officers after the arrest[195] is inadmissible. But proof of a conversation conducted in the absence of the defendant wherein as a matter of convenience his associates agreed to modify the plan to rob is admissible against the absent defendant.[196]

From these examples, it is apparent that the furtherance requirements stems from the agency theory of the exception. It would seem analogous to the "course and scope of the employment" doctrine in the law of agency. If a conspirator utters declarations not in furtherance of the common purpose, they are incompetent as evidence against his "principal" co-conspirators. But the furtherance requirement does not exclude evidence which has an independent competency. Any declaration of defendant amounting to an admission on his part is admissible against him,[197] although not made in furtherance. Similarly, if there has been direct testimony by one defendant of an agreement

[191] See State v. Whiteside, 204 N.C. 710, 169 S.E. 711 (1933).
[192] State v. Wells, 219 N.C. 354, 356, 13 S.E.2d 613, 614 (1941).
[193] *Ibid.*
[194] State v. Ritter, 197 N.C. 113, 147 S.E. 733 (1929). *But cf.* the same case on the second appeal, 199 N.C. 116, 154 S.E. 62 (1930).
[195] State v. Potter, 252 N.C. 312, 113 S.E. 573 (1960). In State v. Dean, 35 N.C. 63 (1851), it was held that admission of the testimony required reversal even though the court conceded that a conspiracy was proved by other evidence.
[196] State v. Summerlin, 232 N.C. 333, 60 S.E.2d 322 (1950). See also State v. Bennett, 237 N.C. 749, 76 S.E.2d 42 (1953), where the witness, a co-conspirator, over objection of conspirator *A*, was permitted to testify that he paid *B* and *C*, co-conspirators, for certain doors, the theft of which was the object of the conspiracy.
[197] See State v. Turner, 119 N.C. 841, 25 S.E. 810 (1896), where the witness was permitted to testify that "they" (both defendants) had told him a certain party not on trial was their agent in the conspiracy. *Cf.* State v. Davis, 87 N.C. 514 (1882).

between two defendants, statements not in furtherance may be admitted to corroborate that testimony.[198]

As noted, confessions are never in furtherance of the conspiracy and should never be admitted against a co-conspirator.[199] Nevertheless, the confession is admissible on the joint trial if the judge instructs the jury that it may be used only against the confessor.[200] Because of the nature of the crime, the confession must relate that the confessor agreed with other persons. If the confessor is a State's witness, he may of course be cross-examined. In this situation it seems that there is no particular prejudice to the defendant, other than that already noted in the discussion of co-conspirator's testimony.[201] But if the confession is held competent when the confessor is not directly examined there is a possibility of greater prejudice,[202] and the effectiveness of the judge's instruction may be legitimately questioned.[203]

Confessions may be admitted upon another theory. In *State v. Murray*[204] two defendants were indicted for murder upon the theory that the homicide was committed pursuant to a conspiracy. Each defendant confessed to an officer in the presence of the other. The trial judge instructed that each confession was competent against *both* defendants. This instruction was held proper, upon the theory that each defendant by his silence had assented to and adopted the statement of the other.

The pendency rule requires that the statements be made during the conspiracy. It seems logically impossible for declarations to be made in furtherance of the objectives of a conspiracy, but not during its pendency.[205] For example, *A*, the instigator of the plot, could approach *B* to solicit aid in a planned bank robbery. If *A* and *C* are later indicted for conspiracy to rob, will *A's* overtures to *B* be admissible against *C*?

Clearly, the declarations were made in furtherance of what *later* became the object of the conspiracy, but at the time the declarations were made there was no conspiracy. The statements could not, then,

[198] See State v. Potter, 252 N.C. 312, 113 S.E.2d 573 (1960); State v. Stancill, 178 N.C. 683, 100 S.E. 241 (1919).

[199] State v. Smith, 221 N.C. 400, 20 S.E.2d 360 (1942); State v. Bennett, 237 N.C. 749, 76 S.E.2d 42 (1953).

[200] *Ibid.*

[201] See State v. Smith, 221 N.C. 400, 20 S.E.2d 360 (1942).

[202] See State v. Anderson, 208 N.C. 771, 182 S.E. 643 (1935), where officers obtained the confession of one defendant by informing him that others had confessed, when in fact they had not. The court held that the confession should not have been admitted since it was involuntary. But the co-conspirators were not permitted to object to the admission of the confession.

[203] See LEVIE, *Hearsay and Conspiracy*, 52 MICH. L. REV. 1159 (1954).

[204] 216 N.C. 681, 6 S.E.2d 513 (1940).

[205] See State v. Wells, 219 N.C. 354, 356, 13 S.E.2d 613, 614 (1941), where the court, after stating the furtherance rule, said, "This we conceive to apply as a limitation upon the admission of evidence where the acts or declarations are made pending the conspiracy . . . ."

have been in furtherance of the conspiracy. Upon this theory, the solicitations of *A* could not be used against *C*. Likewise, statements made by one conspirator after the unlawful object has been consummated, and the agreement is therefore at an end, are not admissible against his cohorts.[206] The furtherance rule would also exclude such statements. While it may be impossible for a statement to be made in furtherance which was not also made during the pendency of a conspiracy, statements may be made during pendency which are not in furtherance. The "narrative" statement, previously discussed, is an example; such statement is inadmissible even though made during the pendency of the conspiracy. Consequently, the "pendency" formulation apparently serves no useful purpose.

*Other Evidence*

To render hearsay statements of a co-conspirator competent, "there must be evidence *aliunde* of the existence of the conspiracy at the time and the participation therein of the party against whom the evidence is offered."[207] This independent evidence requirement is a further precaution against too hasty a conviction. Thus if the only evidence in a case connecting a defendant with the conspiracy is hearsay, the court will reverse his conviction.[208] But the manner and time in which the evidence is introduced to prove a conspiracy is in the sound discretion of the trial court.[209] The trial judge may first permit the hearsay and then accept the other evidence on which its admissibility depends.[210]

If the trial judge finds the other evidence sufficient to support a conviction, then the case may be sent to the jury. Thus the hearsay is used only as corroboration of the independent evidence. But neither judge nor jury need make an independent finding of fact as to the weight of the other evidence. It seems likely that the independent evidence requirement is frequently lost in this procedural laxity.[211]

## Vicarious Liability of Conspirators

The classic examples of criminal responsibility for the act of another are found in the aider and abettor and in the accessory before the fact. To constitute one an aider and abettor, he must be at least constructively

[206] State v. Brady, 107 N.C. 822, 12 S.E. 325 (1890); State v. Earwood, 75 N.C. 210 (1876).

[207] State v. Benson, 234 N.C. 263, 264, 66 S.E.2d 893, 894 (1951). See also State v. Blanton, 227 N.C. 517, 42 S.E.2d 663 (1947).

[208] State v. Benson, *supra* note 207.

[209] State v. Brown, 204 N.C. 392, 168 S.E. 532 (1933).

[210] State v. Shipman, 202 N.C. 518, 163 S.E. 657 (1932); State v. Boswell, 194 N.C. 260, 139 S.E. 374 (1927); State v. Jackson, 82 N.C. 565 (1880).

[211] See, *e.g.*, State v. Walker, 251 N.C. 465, 112 S.E.2d 61, *cert. denied*, 364 U.S. 832 (1960), where the court uses the hearsay in substantiating its finding that there was sufficient evidence to carry the case to the jury.

present at the commission of the crime, rendering aid or encouragement to the perpetrator.[212] An accessory before the fact is defined as one who shall "counsel, procure or command any person to commit any felony."[213] Under North Carolina law, aiders and abettors are guilty as principals and may be punished to the same extent as the actual perpetrator.[214] All accessories before the fact to misdemeanors are guilty as principals,[215] but an accessory before the fact to felony is no longer punishable as a principal in North Carolina.[216]

The liability of a co-conspirator, as frequently stated, is a good deal broader than that of either of the above two categories. It is said, "Everyone who enters into a common purpose or design is equally deemed in law a party to every act which had before been done by the others, and a party to every act which may afterwards be done by any of the others, in furtherance of such common design."[217] A number of problems are inherent in this statement: whether the two terms "accessory before the fact" and a "conspirator" are synonymous when the object is felony; whether the court really means that one may be guilty of a crime committed by the group before he joined it; whether a defendant may be convicted of murder when he has agreed only to the commission of a misdemeanor.

In the early case of *State v. Hardin*[218] Chief Justice Ruffin laid down the principle that "presence, ... in its legal sense, generally distinguishes the guilt of a principal from that of an accessory."[219] In that case a conviction for stealing a slave, a capital offense, was reversed. The Chief Justice conceded that a conspiracy to steal slaves, to which the defendant was a party, had been shown. "But the concerting of such a plan does not make all the parties to it guilty as principals upon a subsequent stealing of a slave by any one of them."[220] Yet, some twenty years later the court without citation of authority, declared in a dictum, "It is a well established principle, that where two agree to do an unlawful act, each is responsible for the act of the other, provided it be done in pursuance of the original understanding, or in furtherance of the common purpose."[221]

[212] See Note, 35 N.C.L. REV. 285 (1957).
[213] N.C. GEN. STAT. § 14-5 (1953).
[214] *E.g.*, State v. Jarrell, 141 N.C. 722, 53 S.E. 127 (1906).
[215] See State v. Skeen, 182 N.C. 844, 109 S.E. 71 (1921).
[216] N.C. GEN. STAT. § 14-6 (1953). The punishment for accessories before the fact to murder, arson, burglary, or rape is life imprisonment; to horse stealing, five to twenty years; to any other felony, not more than ten years.
[217] State v. Williams, 216 N.C. 446, 448, 5 S.E.2d 314, 315 (1939). See also State v. Smith, 221 N.C. 400, 20 S.E.2d 360 (1942); State v. Anderson, 208 N.C. 771, 182 S.E. 643 (1935).
[218] 19 N.C. 407 (1837).
[219] *Id.* at 412.
[220] *Ibid.*
[221] State v. Simmons, 51 N.C. 21, 24 (1858). Substantially the same state-

In the vast majority of cases in which it has been stated that one conspirator is guilty of a crime perpetrated by his associates either the statement was addressed to the admissibility of evidence[222] or the defendant was present, aiding and abetting.[223] It is apparent that these cases are not authority for holding a conspirator vicariously liable as a principal for crimes committed in his absence, whether they are in furtherance of the conspiracy or not. In addition, if all conspirators are guilty of every crime in furtherance then one conspirator could not logically be guilty of both the conspiracy and the objective crime when a co-conspirator has been found guilty of only the conspiracy. Yet, such a conviction was affirmed by our court.[224]

The distinction between the liability of an aider and abettor and that of a conspirator deserves examination. If a conspiracy is shown, it may safely be said that a conspirator present at the commission of the crime will be held to be an aider and abettor. He is therefore guilty as a principal,[225] but his liability should be predicated upon his aiding and not upon the conspiracy. A case in point is *State v. Brooks*.[226] There it was shown that three defendants had entered a conspiracy to escape from prison. They overpowered a guard and took his rifle with which one defendant killed another guard. Upon appeal from a conviction of murder in the first degree, two defendants argued that they had agreed only to the jail-break, a misdemeanor, and should not be held for the killing perpetrated by their co-conspirator. The court observed that the defendants were active participants in the homicide, giving aid and assistance. Thus, they were guilty of the homicide under traditional concepts of vicarious liability, *i.e.*, they were present, aiders and abettors. Defendants were said to be guilty of "all acts committed by the others in the execution of the common purpose which are a natural or probable consequence of the unlawful combination or undertaking, even though such acts are not intended or contemplated as

ment was made in State v. Jackson, 82 N.C. 565 (1880), but the court was there dealing with the admissibility of acts of one conspirator to prove the conspiracy and not with vicarious liability.

[222] The crimes may be admitted in evidence against the absent conspirator but only for the purpose of proving the conspiracy. See State v. Shipman, 202 N.C. 518, 163 S.E. 657 (1932).

[223] See, *e.g.*, State v. Flowers, 211 N.C. 721, 192 S.E. 110 (1937); State v. Rideout, 189 N.C. 156, 126 S.E. 500 (1925); State v. Orr, 175 N.C. 773, 94 S.E. 721 (1917); State v. Knotts, 168 N.C. 173, 83 S.E. 972 (1914); State v. Powell, 168 N.C. 134, 83 S.E. 310 (1914); State v. Bowman, 152 N.C. 817, 67 S.E. 1058 (1910); State v. Finley, 118 N.C. 1162, 24 S.E. 495 (1896); State v. Chastain, 104 N.C. 900, 10 S.E. 519 (1889); State v. Anderson, 92 N.C. 733 (1885). In *State v. Chastain, supra*, defendant was hiding with a rifle in the bushes 150 yards away from the scene of the assault. He was held guilty as a principal in the assault, but the court expressly found that he was within rifle shot ready to render aid if it proved necessary.

[224] State v. Shipman, 202 N.C. 518, 163 S.E. 657 (1932).

[225] See Note, 35 N.C.L. REV. 285 (1957).

[226] 228 N.C. 68, 44 S.E.2d 482 (1947).

a part of the original design."[227] The question of what acts are "natural and probable" consequences, is one of considerable uncertainty.[228] But it is nevertheless clear that liability in this type of case is essentially the liability of an aider and abettor. An illustration would seem to clarify the point. Suppose that on the night before the break another prisoner had agreed to join the defendants in *Brooks*. But before the appointed time he was sent to solitary confinement and at the time of the break was nowhere in the vicinity. Would it be argued that he is guilty of murder? If the dictum is as broad as its language indicates, he would be.

The broad manner in which the basis for liability is enunciated has led to questionable results in other types of cases. Thus, in *State v. Summerlin*[229] a conspiracy to rob with firearms was charged. Defendants was charged also with aiding and abetting in the completed robbery. But the evidence showed that the defendant was not present at the time of the actual robbery. He was nevertheless found guilty on both counts. The acts of defendant's co-conspirators were admissible to prove the conspiracy, and defendant's exceptions related to the admission of these acts and declarations. The court therefore was not called upon to determine the vicarious liability of defendant for the robbery, but it nevertheless stated that he was so liable because of the conspiracy, whether present or not. If the *Summerlin* case holds the defendant punishable as a principal to the robbery, it is directly contrary to well-considered North Carolina authority.[230]

The sentence for the robbery in the *Summerlin* case, which was less than the maximum sentence prescribed for an accessory, ran concurrently with the sentence for the conspiracy. Thus, it was immaterial to the defendant whether he was convicted as an accessory or as a principal.[231] The sentence would have been the same in either case. But when the indictment charges a crime for which a principal may be punished to a greater extent than an accessory, it becomes vital to distinguish between the principal and the accessory. Although the accessory may be convicted upon a charge of the crime itself,[232] he may not be sentenced in excess of the statutory limit.

Where the object of the conspiracy is a misdemeanor, no problem is encountered in distinguishing between the liability of the several

[227] *Id.* at 71, 44 S.E.2d at 483.

[228] See, *e.g.*, State v. Finley, 118 N.C. 1162, 24 S.E. 495 (1896), where the purpose of defendants was said to be that of "annoying" the deceased by "taking his hat from him, by boxing and slapping him violently, by threatening to put him in the lockup." Both defendants were held guilty of murder, although it was not possible to determine accurately which one struck the fatal blow.

[229] 232 N.C. 333, 60 S.E.2d 322 (1950).

[230] See note 213, *supra*, and accompanying text.

[231] State v. Smith, 221 N.C. 400, 20 S.E.2d 360 (1942).

[232] State v. Bryson, 173 N.C. 803, 92 S.E. 698 (1917).

conspirators for the objective crime. The facts required to constitute one an accessory to a felony will, if the crime is a misdemeanor only, render him a principal to the offense.[233] A conspirator by agreeing to aid in the commission of the offense "advises and procures" its commission. He is therefore guilty of the misdemeanor whether he was present or not. A problem may arise, however, where one of the conspirators commits a felony in the perpetration of the misdemeanor. It is at least arguable that in such a case a conspirator who was not present at the time should not be guilty of the felony purely by virtue of the conspiracy. But if the dicta of the North Carolina cases is followed, he will be.[234] If he is to be held criminally responsible for the felony, it should be upon the theory that he "advised and procured" and commission of all foreseeable crimes in pursuit of the objective misdemeanor and is therefore guilty in the commission of the felony as accessory only.[235]

When the object of the conspiracy is a felony, all conspirators are accessories before the fact to the objective crime. Accessory before the fact is a substantive felony. They should not also be guilty as principals, unless they are present at the scene of the crime.[236] Otherwise, the statutes defining accessories and their punishment would be meaningless. When a crime other than the objective crime is committed by one of the conspirators, it seems that the most logical view would hold the other conspirators guilty as accessories, so long as it was foreseeable that the crime might be committed in the perpetration of the objective felony. This result is in harmony with the North Carolina dicta except in one aspect; the dicta would hold all conspirators guilty as principals. The only result flowing from this distinction is the degree of punishment to which the defendant may be subjected. It seems that the conspiracy indictment is a sufficiently powerful deterrent to group crime. To follow the dicta and hold all conspirators to be principals would seem

[233] See State v. Barden, 12 N.C. 518 (1828).

[234] Although no North Carolina case has been found directly holding a conspirator guilty of the crime in this situation, the leading case of Pinkerton v. United States, 328 U.S. 640 (1946), seems to be authority for such a holding.

[235] See State v. Lewis, 185 N.C. 640, 116 S.E. 259 (1923); State v. Hardin, 19 N.C. 407 (1837).

[236] This has generally been the rule, but there is one exception. A conspirator to the crime of larceny, whether felony or misdemeanor, is guilty of the committed larceny as principal. "This is true because of the peculiar rule which prevails in North Carolina in respect to persons concerned in the commission of a felonious larceny." State v. Bennett, 237 N.C. 749, 752, 76 S.E.2d 42, 43 (1953). The "peculiar rule" apparently stems from the case of State v. Gaston, 73 N.C. 93 (1875), where it was pointed out that G.S. § 14-70 converted all simple larceny to misdemeanors. The rule is "peculiar" because it is applied to felonious larceny. The exception is carried over from the common law, where petit larceny and treason were the only felonies in which it was not possible to have an accessory. All who participated in these crimes were principals, whether present or not. 4 BLACKSTONE, COMMENTARIES *36.

an unwarranted extension in the face of the accessory statutes. If *A* and *B* should conspire to burn a church, for example, and in pursuance of the conspiracy *A* should burn it, *B* should be guilty as accessory. His maximum imprisonment would be ten years. If he were held guilty as principal, he could be imprisoned for forty years.[237]

JACK W. FLOYD

**Damages—Loss of Use Recoverable in an Action for the Negligent Destruction of a Chattel.**

In *Reynolds v. Bank of America*[1] plaintiff's airplane was abandoned at sea and destroyed as a result of the negligent act of the person to whom it had been leased. In an action against the negligent actor's estate plaintiff sought, in addition to the value of the plane, special damages for loss of use until a replacement could be obtained. The trial court held that loss of use was not compensable where the chattel had been completely destroyed. On appeal the California Supreme Court reversed. The court pointed out that loss of use was compensable where the chattel had been damaged but was repairable and stated,

> There appears to be no logical or practical reason why a distinction should be drawn between cases in which the property is totally destroyed and those in which it has been injured but is repairable, and . . . when the owner of a negligently destroyed commerical vehicle has suffered injury by being deprived of the use of the vehicle during the period required for replacement, he is entitled . . . to recover for loss of use in order to "compensate for all the detriment proximately caused" by the wrongful destruction.[2]

Jurisdictions have not been uniform as to the measure of damages recoverable by reason of the deprication of the use of a chattel through its wrongful injury or its destruction.[3] Furthermore, aside from this conflict where the right to recover is conceded, historically there has been a distinction made between property which is completely destroyed and property which is repairable in determining whether loss of use is an element of damages at all.

Where a chattel has been injured but is repairable, the basic measure of damages is the difference in value before and after the injury.[4]

[237] N.C. GEN. STAT. § 14-62 (1953).

[1] 53 Cal. 2d 49, 345 P.2d 926 (1959), Annot., 73 A.L.R.2d 719 (1960).

[2] *Id.* at 50, 345 P.2d at 927. It should be noted that the CAL. CIVIL CODE § 3333 provides that the basic measure of damages "for the breach of an obligation not arising from contract . . . is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

[3] *Compare* Lamb v. Landers, 67 Ga. App. 588, 21 S.E.2d 321 (1942), *with* Kopischki v. Chicago, St. P., M. & O. Ry., 40 N.W.2d 834 (Minn. 1950).

[4] 15 AM. JUR. *Damages* § 124 (1938); 25 C.J.S. *Damages* § 83 (1941).

In addition, a vast majority of jurisdictions allow special damages for loss of use of the chattel.[5] To be compensable these special damages must be the natural and probable result of the wrongful act,[6] though they need not be foreseeable.[7] The loss of use is measured by either the rental value of the property[8] or the resulting loss of profits.[9]

When a chattel has been completely destroyed, the basic measurement of damages is the value at the time of the accident less salvage value.[10] The majority of jurisdictions have not allowed loss of use in a case of complete destruction,[11] but some variations to this rule have been established. Where it was not possible to ascertain immediately whether the injured chattel was repairable, the plaintiff in some instances has been allowed damages for loss of use during the period

[5] *E.g.,* Valencia v. Shell Oil Co., 23 Cal. 2d 840, 147 P.2d 558 (1944); Barr v. Searcy, 280 Ky. 535, 133 S.W. 2d 714 (1939); Hanson v. Hall, 202 Minn. 381, 279 N.W. 227 (1938); 25 C.J.S. *Damages* § 41 (1941); Annot., 169 A.L.R. 1074 (1947).

[6] Reliable Trucking Co. v. Payne, 233 N.C. 637, 65 S.E.2d 132 (1951); Steffan v. Meiselman, 223 N.C. 154, 25 S.E.2d 626 (1943), 25 C.J.S. *Damages* § 23 (1941).

[7] Western Union Tel. Co. v. Guard, 283 Ky. 187, 139 S.W.2d 722 (1940); Johnson v. Railroad, 140 N.C. 574, 53 S.E. 362 (1906).

[8] Rental value is the preferable measure when similar property can be rented, for the plaintiff can mitigate his loss by renting a substitute. Hanson v. Hall. 202 Minn. 381, 279 N.W. 227 (1938); Francischini v. McMullen, 6 N.J. Misc. 736, 142 Atl. 651 (1928); 5A AM. JUR. *Automobiles* § 1116 (1956). Rental value would also be used when the lost profits are too speculative or remote to be ascertained with a reasonable degree of certainty. Buchanan v. Leonard, 127 F. Supp. 120 (D. Colo. 1954); Sledge v. Reid, 73 N.C. 440 (1873).

Loss of use of a pleasure vehicle is compensable in a majority of jurisdictions. See, *e.g.,* Atlanta Furniture Co. v. Walker, 51 Ga. App. 781, 181 S.E. 498 (1935); Newman v. Brown, 228 S.C. 472, 90 S.E.2d 649 (1955). See also 5A AM. JUR. *Automobiles* § 1115 (1956); Annot., 169 A.L.R. 1100 (1947). *Contra,* Hunter v. Quaintance, 69 Colo. 28, 168 Pac. 918 (1917). The measure of damages in these cases is the fair rental value of the automobile. Bates v. General Steel Tank Co., 36 Ala. App. 261, 55 So. 2d 213 (1951); Atlanta Furniture Co. v. Walker, *supra.* It is significant to note that loss of use is allowed even if no replacement was actually hired, according to the majority view. See, *e.g.,* Hansen v. Costello, 125 Conn. 386, 5 A.2d 880 (1939); Pitarri v. Madison Ave. Coach Co., 188 Misc. 614, 68 N.Y.S.2d 741 (New York City Ct. 1947); Glass v. Miller, 44 Ohio L. Abs. 278, 51 N.E.2d 299 (Ohio Ct. App. 1940); Newman v. Brown, 228 S.C. 472, 90 S.E.2d 649 (1955).

[9] Loss or profits may be recoverable if the plaintiff is unable to mitigate his damages. Knapp v. Styer, 280 F.2d 384 (8th Cir. 1960); Reliable Trucking Co. v. Payne, 233 N.C. 637, 65 S.E.2d 132 (1951). It has been held that the plaintiff must show that similar property was not available for rental before he can recover lost profits. Hanson v. Hall, *supra* note 8; Francischini v. McMullen, *supra* note 8. Loss of profits may also be proper when the plaintiff is financially unable to mitigate, Valencia v. Shell Oil Co., 23 Cal. 2d 840, 147 P.2d 558 (1944), and it is commonly recovered when the injury is to real property. See, *e.g.,* Steffan v. Meiselman, 223 N.C. 154, 25 S.E.2d 626 (1943). See generally, 34 N.C.L. REV. 357 (1956).

[10] 15 AM. JUR. *Damages* § 121 (1938); 25 C.J.S. *Damages* § 83 (1941).

[11] *E.g.,* Magnolia Petroleum Co. v. Harrell, 66 F. Supp 559 (W.D. Okla. 1946); Hunt v. Ward, 262 Ala. 379, 79 So. 2d 20 (1955); Pellegrin v. Hebert, 107 So. 2d 853 (La. App. 1959); Helin v. Egger, 121 Neb. 727, 238 N.W. 364 (1931); Hayes Freight Lines, Inc. v. Tarver, 192 Ohio St. 82, 73 N.E. 2d 192 (1947); Cogbill v. Martin, 308 S.W.2d 269 (Tex. Civ. App. 1957); 5A AM. JUR. *Automobiles* § 1115; Annot., 169 A.L.R. 1074 (1947).

necessary for this determination, even if repair subsequently proved impractical.[12] Other cases have held that loss of use was compensable when the chattel was completely destroyed, but the total recovery has been limited to the value of the chattel before the injury.[13] Since the basic measure of value before and after would cover the entire value except the salvage value, this rule would limit the amount recoverable for loss of use to the salvage value.[14]

The refusal to allow loss of use in a case of complete destruction seems to be a holdover from the common law action of trover, which was an action for conversion, and in which loss of use was not allowed. When a chattel was completely destroyed, an imaginary passing of title was effected, vesting ownership in the defendant. The plaintiff then no longer had title, and thus he could not recover for the loss of use of that which he did not own.[15]

In North Carolina the basic measure of damages is the difference in the value of the chattel before and after the injury.[16] In addition, loss of use had been allowed where the chattel was damaged but repairable.[17] But the question of whether the owner of a chattel which has been wrongfully destroyed may recover for loss of use has not been definitely decided. It appears likely, however, that our court would allow loss of use in this situation.

In *Kitchen Lumber Co. v. Tallassee Power Co.*[18] plaintiff's bridge was destroyed through the negligence of the defendant. In addition to the value of the bridge the plaintiff sought a recovery for the loss of profits resulting from his inability to remove his timber without the bridge. The court, while reversing as to proof of the lost profits, stated that both the value of the bridge and the lost profits might be

[12] Morgan v. Hartford Acc. & Indem. Co., 100 So. 2d 279 (La. App. 1958).

[13] Lamb v. Landers, 67 Ga. App. 588, 21 S.E.2d 321 (1942); Kohl v. Arp, 236 Iowa 31, 17 N.W.2d 824 (1945); Anderson v. Rexroad, 180 Kan. 505, 306 P.2d 137 (1957).

[14] Assume that the plane in the principal case, worth $30,000, had crashed on the land and had a salvage value of $500. The difference in value before the accident and that after would be $29,500. If the amount were limited to the value before the accident, loss of use could not exceed $500, as compared to the $5,000 actually claimed.

[15] 1 SEDGWICK, DAMAGES § 178 (8th ed. Sedgwick & Beale 1891). Under this theory, some jurisdictions have held that total damages for *injury* to a chattel, including loss of use, may not exceed the value of the chattel before the injury. Brooks Transp. Co. v. McCutcheon, 154 F.2d 841 (D.C. Cir. 1946); Lamb v. Landers, 67 Ga. App. 588, 21 S.E.2d 321 (1942). These courts reason that since the plaintiff could recover only the value of the chattel had it been completely destroyed, damages in a larger amount should not be allowed where the harm done to the chattel was less. *Ibid.*

[16] United States Fid. & Guar. Co. v. P. & F. Motor Express, Inc., 220 N.C. 721, 18 S.E.2d 116 (1942).

[17] Reliable Trucking Co. v. Payne, 233 N.C. 637, 65 S.E.2d 132 (1951). It is not clear whether loss of use is considered special damages. The safer method is to plead them as such. 1 MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE § 1079(3) (2d ed. 1956).

[18] 206 N.C. 515, 174 S.E. 427 (1934).

recovered. In *Binder v. General Motors Acceptance Corp.*[19] plaintiff sought damages for the *conversion* of his automobile which he used in his business. Even though there was no allegation of lost profits resulting from the conversion, the court held that loss of use was a proper element of damages. As has been noted, the apparent reason some jurisdictions do not allow loss of use for complete destruction is that loss of use was not allowed for conversion at common law. Since North Carolina allows loss of use in actions for conversion, it is arguable that loss of use should be allowed in a case of negligent destruction.

The language used by the court in *Reliable Trucking Co. v. Payne*[20] seems broad enough to allow loss of use for a destroyed chattel. In an action for injury to his tractor-trailer the plaintiff sought property damage and loss of use for two and one half months necessary for repair. The court stated, "Under the modern rule, then, it may be said that lost profits constitute a proper element of damage where such loss is the direct and necessary result of the defendant's wrongful conduct, and such profits are capable of being shown with a reasonable degree of certainty."[21]

As pointed out by the principal case, there seems to be little logic in allowing loss of use for a damaged chattel but not for a destroyed chattel. Refusal to compensate for loss of use may result in a considerable loss to the plaintiff;[22] if the destroyed property is not readily replaceable and the plaintiff suffers a loss from the deprivation, he cannot be fully compensated unless he recovers for the loss of use. The detriment to the plaintiff is no more speculative or remote than that suffered when a chattel is damaged but repairable, and in both instances he is deprived of use of the chattel by the wrongful act of the defendant. The duty of the plaintiff to mitigate will prevent useless delay in replacement.[23] It is urged that North Carolina follow the reasoning expressed in the principal case, the *Restatement of Torts*,[24] and a growing minority of jurisdictions.[25]

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[19] 222 N.C. 512, 23 S.E.2d 894 (1943).
[20] 233 N.C. 637, 65 S.E.2d 132 (1951).
[21] *Id.* at 639, 65 S.E.2d at 133. In this case the amount claimed by the plaintiff for the injury to the trailer plus that claimed for loss of use exceeded the value of the trailer prior to the injury. The court made no mention of limiting the total recovery to the value of the trailer before injury which, as has been seen (*supra* note 15), is the rule of the courts which refuse loss of use for a destroyed chattel on the common law trover theory.
[22] In the principal case the plaintiff claimed $5,000 for loss of profits as a result of the destruction of the airplane.
[23] Howard v. Adams, 246 S.W.2d 1002 (Ky. 1952); Newman v. Brown, 228 S.C. 472, 90 S.E.2d 649 (1955).
[24] RESTATEMENT, TORTS § 927 (1939).
[25] Knapp v. Styer, 280 F.2d 384 (8th Cir. 1960); Guido v. Hudson Transit Lines, Inc., 178 F.2d 740 (3d Cir. 1949); Louisville & N. R. R. v. Blanton, 304 Ky. 127, 200 S.W.2d 133 (1947); Park v. Moorman Mfg. Co., 121 Utah 339, 241 P.2d 914 (1952).

**Torts—Speed Exemption Statute—Standard of Care in Operation of Police Vehicles—Liability of City, County, or State for Negligence of Police Officers.**

The North Carolina speed exemption statute[1] provides:

> The speed limitations . . . shall not apply to vehicles when operated with due regard for safety under the direction of the police in the chase or apprehension of violators of the law or of persons . . . suspected of any such violation . . . . This exemption shall not, however, protect the driver of any such vehicle from the consequences of a reckless disregard of the safety of others.

In *Goddard v. Williams*[2] the court applied this statute and considered its effect upon the standard of care required of police officers in the performance of their official duties. The plaintiff brought an action against a deputy sheriff to recover for injuries sustained in a collision between the plaintiff's automobile and the officer's patrol vehicle. The plaintiff was proceeding down a city street at night and began to make a left turn into a driveway. The defendant, in his patrol vehicle, approached from the plaintiff's rear at a speed of seventy miles per hour and struck the plaintiff's vehicle on the left side.

The officer testified that he was driving seventy miles per hour when he was within twenty-five feet of the point of collision. He alleged in the answer, however, that at the time of the accident he was pursuing the plaintiff for failure to obey a stop sign and that the patrol vehicle's siren and red light were in operation. He filed a counterclaim alleging that the plaintiff's negligence was the sole cause of the accident.

[1] N.C. GEN. STAT. § 20-145 (1953). This statute also applies to fire department vehicles, ambulances and the vehicles of the Utilities Commission provided they are on official business. The seemingly conflicting provisions of "due regard for safety" and "reckless disregard of the safety of others" contained in speed exemption statutes have caused confusion in determining the standard of care required of police officers. In construing a statute similar to North Carolina's the Arizona Supreme Court stated: "The intent of [the speed exemption statute] . . . is not to hold the patrolman to less than the usual degree or standard of care. Instead, by its very words the section holds him to 'due regard for safety' *making exception only for the speed at which a patrolman's job sometimes requires him to travel.* The last sentence of this section [the reckless disregard provision] . . . refers only to the speed exception, and is by its own terms so limited. *It would breach all rules of construction to apply the 'reckless disregard' standard to any but this speed exception.*" Ruth v. Rhodes, 66 Ariz. 129, 137, 185 P.2d 304, 309-10 (1947). [Emphasis added.] *But cf.* Lakoduk v. Cruger, 48 Wash. 2d 642, 296 P.2d 690 (1956), where the court said that "if the driver of an emergency vehicle is at all times required to drive with due regard for the safety of the public *as all other drivers are required to do,* then all the provisions of these statutes relating to emergency vehicles become meaningless and no privileges are granted to them. But if his 'due regard' for the safety of others means that he should, *by suitable warning, give others a reasonable* opportunity to *yield the right of way,* the statutes become workable for the purposes intended." *Id.* at 661-62, 296 P.2d at 701. See ARIZ. REV. STAT. ANN. § 28-624(d) (1956); WASH. REV. CODE § 46.08.050 (1959).

[2] 251 N.C. 128, 110 S.E.2d 820 (1959).

The trial court charged that when a police officer is engaged in the discharge of his duties in an effort to apprehend an offender and the offender operates his vehicle so as to guard, hinder, and delay the arrest, the officer would not be liable upon any aspect of negligence unless his conduct was wilful and wanton or the injuries were intentionally inflicted.[3] The jury returned a verdict for the officer on his counterclaim.

On appeal the court granted the plaintiff a new trial, holding that the charge was erroneous and stating that "in such situation, an officer is liable for his negligent acts as well as for his wilful and wanton acts."[4]

As to the standard of care required of the officer while in pursuit, the court quoted two authorities to the effect that the officer is to exercise the care which a reasonable and prudent man would exercise in the discharge of official duties of a like nature under like circumstances.[5] The court then stated that "if . . . the defendant was engaged in his official duties at the time of the collision . . . mere speed alone, unaccompanied by any recklessness or disregard of the rights of others, would be insufficient to support an allegation of negligence . . . ."[6]

Many duties are imposed upon operators of motor vehicles. The general duty imposed by statute and the law of torts is to drive with due care. Virtually all jurisdictions have statutory provisions requiring

[3] It would seem that the trial court was instructing the jury that the plaintiff may have been contributorily negligent in trying to hinder or delay arrest in failing to obey the officer's siren, and in failing to yield the right of way. If the plaintiff had been found contributorily negligent, he would have been barred from recovery unless the defendant's acts amounted to wanton or intentional misconduct. Ballew v. Asheville & E. Tenn. R.R., 186 N.C. 704, 120 S.E. 334 (1923); Brendle v. Spencer, 125 N.C. 474, 34 S.E. 634 (1899).

[4] 251 N.C. at 133, 110 S.E.2d at 824. The court stated: "There is no exemption granted by G.S. 20-145 from reckless and negligent conduct by an officer *unless* such reckless and negligent conduct is wilful and wanton, intentional and purposeful, and made for the purpose of injuring the person the officer was seeking to arrest. In such situation, an officer is liable for his negligent acts as well as for his wilful and wanton acts." *Ibid.* (Emphasis added.) This statement is problematical. If the trial judge was here instructing the jury on the issue of contributory negligence, the instruction would seem sound. See note 3 *supra*. If on the other hand, the trial judge was not instructing on the issue of contributory negligence, the instruction would seem to be wrong. Apparently, the supreme court did not consider the former interpretation of the instruction. Even assuming the latter interpretation to be correct, the language of the court is not entirely clear.

[5] McKay v. Hargis, 351 Mich. 409, 88 N.W.2d 456 (1958); 60 C.J.S. *Motor Vehicles* § 375 (1949).

[6] 251 N.C. at 133, 110 S.E.2d at 824; *accord,* Goldstein v. Rogers, 93 Cal. App. 2d 201, 208 P.2d 719 (1949); McKay v. Hargis, *supra* note 5; La Marra v. Adam, 164 Pa. Super. 268, 63 A.2d 497 (1949). The court also held that the evidence of the character of the area in which the collision occurred was sufficient to require its submission to the jury for its determination as to whether it was residential. If the jury should so find, "then the plaintiff would be entitled to have the jury consider the conduct of the defendant in the light of the character of the area . . . whether he was subject to the . . . [speed limit] . . . or G.S. 20-145." 251 N.C. at 131, 110 S.E.2d at 823.

operators to observe the speed limits, obey stop signs, and yield the right of way. A violation of these duties may result in negligence. The speed exemption statute removes the requirement of obeying the speed limit when an officer is in pursuit of an offender. There is no exemption for an officer from the duty to maintain a proper lookout, to maintain proper control of the vehicle while operating it, or to maintain the patrol vehicle in proper condition. A violation of these duties would be a failure to exercise due care or a due regard for safety, and the officer would be negligent.[7] If, however, a speeding officer meets all of the other duties required of him, then, in order to hold him liable, his speed must be in reckless disregard of the safety of others. Thus where speed alone is concerned, it appears from the principal decision that a different test is to be used in determining whether the officer is liable.[8]

Two distinct views have emerged from the decisions as to the officer's standard of care under speed exemption or right of way statutes. The precise wording of the statutes varies in each jurisdiction and the court's construction necessarily depends to some degree upon the phraseology used.[9] The first view is referred to as the Maine rule.[10] Court following this rule hold that the exemptions from traffic regulations given to emergency or police vehicles do not relieve their operators from the duty to exercise due care.[11] The second view is referred to as the California rule.[12] Courts following this rule hold that the duty of the officer to use due care is met when he gives adequate warning of the police vehicle's approach. Liability of the officer may then be predicated only upon an abuse or arbitrary exercise of the privilege granted by the speed exemption and right of way statutes.[13] Speed

[7] City of Kalamazoo v. Priest, 331 Mich. 43, 49 N.W.2d 52 (1951).

[8] The court in the principal case cited Edberg v. Johnson, 149 Minn. 395, 184 N.W. 12 (1921), where the court said the conduct of the officer in pursuit of a lawbreaker is to be examined and tested by another standard. He is required to observe the care which a reasonable and prudent man would exercise in the discharge of official duties of a like nature under like circumstances.

[9] *Compare* Ruth v. Rhodes, 66 Ariz. 129, 185 P.2d 304 (1947), *with* Lakoduk v. Cruger, 48 Wash. 2d 642, 296 P.2d 690 (1956). These courts construed similar exemption statutes but reached different results.

[10] Russel v. Nadeau, 139 Me. 286, 29 A.2d 916 (1943).

[11] "They are bound to exercise reasonable precaution against the extraordinary dangers . . . duty compels them to create. They must keep in mind the speed at which their vehicle is traveling and the probable consequences of their disregard of traffic [regulations] . . . . The measure of their responsibility is due care under all circumstances." *Id.* at 288, 29 A.2d at 917; *accord,* Ruth v. Rhodes, 66 Ariz. 129, 185 P.2d 304 (1947); Johnson v. Brown, 75 Nev. 437, 345 P.2d 754 (1959); Montalto v. Fond Du Lac County, 272 Wis. 552, 76 N.W.2d 279 (1956).

[12] Lucas v. City of Los Angles, 10 Cal. 2d 476, 75 P.2d 599 (1938).

[13] *Ibid.* The California court indicated that the following would constitute an arbitrary exercise of the privilege: (1) emergency operation where there is no emergency, such as a fire truck returning from a fire or a policeman making routine runs with no criminal in sight or using the patrol vehicle for personal use; (2) where the operator sees that another has not heard or heeded the required warning given by the officer, and the officer persists in speeding or con-

alone would not constitute an arbitrary exercise of the privilege granted by such statutes.[14] It would seem that the courts following the California "arbitrary exercise" rule require a lesser degree of care on the part of the officer than those following the Maine "due care" rule.[15]

In the *Goddard* case it appears that the North Carolina court took a position which incorporated aspects of both the Maine and California rules. As under the Maine rule, the officer is required to exercise due care; nevertheless, following the California rule, mere speed alone, unless in reckless disregard of the rights of others, will not render the officer liable.

The North Carolina speed exemption statute applies only when the officer is operating his vehicle with "due regard for safety."[16] California[17] and Washington[18] have held that this provision, in their respective statutes,[19] is essentially satisfied when (1) the driver of the emergency vehicle has by suitable warning given other drivers or pedestrians an opportunity to yield the right of way and (2) having discovered the peril in which another has unknowingly or negligently become involved despite the operation of the required warning devices, the driver reasonably utilizes any last clear chance to avoid the accident. The Washington court stated that this was the only reasonable interpretation of the provision, for if the officer "is at all times required to drive with due regard for the safety of the public as all other drivers are required to do, then all the provisions of the speed exemption statute . . . become meaningless and no privileges are granted . . . ."[20]

The question arises as to the North Carolina position on the issue of what is required of the officer to satisfy the "due regard for safety" provision of the speed exemption statute.[21] It may not be safely as-

tinues through the intersection; (3) when the conduct of the driver of the emergency vehicle is so reckless that it amounts to wilful misconduct. The court compared the latter, wilful misconduct, as being analogous to the conduct under which most guest statutes fix liability. *Accord*, Lakoduk v. Cruger, 48 Wash. 2d 642, 296 P.2d 690 (1956) See, CAL. VEHICLE CODE §§ 21055, 21056; WASH. REV. CODE § 46.08.050 (1959). The Washington statute, like North Carolina's, provides that the exemption shall not protect the operator of any emergency vehicle "from the consequences of a reckless disregard for the safety of others." Apparently the Washington court considered this provision analogous to the provision of the California statute which provides that the officer is not protected from the consequences of abuse or arbitrary exercise of the privilege granted.

[14] Lucas v. City of Los Angeles, 10 Cal. 2d 476, 75 P.2d 599 (1938).

[15] *Compare* Lakoduk v. Cruger, 48 Wash. 2d 642, 296 P.2d 690 (1956), *with* Johnson v. Brown, 75 Nev. 437, 345 P.2d 754 (1959).

[16] Thus, operating the vehicle with "due regard for safety" is a condition precedent to the applicability of the exemption statute, and it would seem that the speed of an officer who had not satisfied the condition would be negligence *per se*.

[17] Balthasar v. Pacific Elec. Ry., 187 Cal. 302, 202 Pac. 37 (1921); Duff v. Schaefer Ambulance Serv., 132 Cal. App. 2d 655, 283 P.2d 91 (1955).

[18] Lakoduk v. Cruger, 48 Wash. 2d 642, 296 P.2d 690 (1956).

[19] CAL. VEHICLE CODE §§ 21055, 21056; WASH. REV. CODE § 46.08.050 (1959).

[20] Lakoduck v. Cruger, 48 Wash. 2d 642, 661-62, 296 P.2d 690, 701 (1956).

[21] "[T]he speed law exemption is effective only when the officer operates his

sumed that once he has given a warning he has satisfied the "due regard for safety" provision.[22] The California court has stated that failure to sound a siren may be considered a lack of "due regard for safety."[23] As previously stated, the officer is not exempt from the duty of keeping a proper lookout, of keeping the patrol vehicle in proper mechanical condition, or of keeping his car under control. It would appear that in order to meet the "due regard for safety" provision the officer must fulfill these duties.[24]

The only other case reaching the North Carolina Supreme Court in which an officer relied upon the speed exemption statute is *Glosson v. Trollinger*.[25] The officer was pursuing the defendant down a wet, slippery road at forty to fifty miles per hour in a thirty-five mile an hour speed zone when the defendant stopped suddenly and the officer struck the rear of the defendant's vehicle. In holding that the issue of contributory negligence was properly submitted to the jury, the court emphasized the fact that the defendant had alleged that the officer was guilty of a "reckless disregard of the rights of others." Apparently the court in the principal case distinguished the *Glosson* case on this basis.[26] It would appear that in order to be certain that the complaint is sufficient to support a finding of liability on the part of the speeding

car 'with due regard to safety' . . . ." Goddard v. Williams, 251 N.C. 128, 133, 110 S.E.2d 820, 823 (1959). Also, by the words of the statute as applied to police officers, the exemption is effective only when the officer is in pursuit of a violator of the law or one suspected of a violation. The type or character of the violation may have some effect upon the court's decision as to whether the statute is applicable. In Cavey v. City of Bethlehem, 331 Pa. 556, 1 A.2d 653 (1938) (dictum), the court said that clocking a speeding automobile is not such an emergency duty of the officer as to bring the case within the exemption provision. The court distinguished Reilly v. City of Philadelphia, 328 Pa. 563, 195 Atl. 897 (1938), on the grounds that in that case the officers were in close pursuit of a fleeing felon who was driving a stolen car. In the principal case, the plaintiff was being pursued for failure to obey a stop sign. Further, the defendant testified that he recognized the plaintiff's automobile when it passed the sign. Record, p. 41. Though the statute makes no distinction as to the type or character of the violation of which the person pursued is suspected, it would seem that it should be considered as one of the "circumstances" in deciding whether the officer is justified in speeding or disregarding other traffic violations. Some of the things to be considered should be (1) the seriousness of the offense, (2) the chances for future apprehension, especially where the officer recognizes the offender, and (3) the character of the area in which the officer is driving.

[22] It should be noted that North Carolina's right of way statute does require the officer to give warning. N.C. GEN. STAT. § 20-156(b) (1953). Once this warning is given the operator of the emergency vehicle is accorded the statutory privilege of right of way. He has the right to proceed upon the assumption that when the signal is given other users of the highway will yield the right of way. Williams v. Sossoman's Funeral Home, Inc., 248 N.C. 524, 103 S.E.2d 714 (1958). Also, "every motor vehicle operated on the highways of the State by members of the State Highway Patrol shall be equipped with a siren. Whenever any such officer or member operating an unmarked car shall overtake another vehicle on the highway after sunset of any day and before sunrise for the purposes of stopping the same or apprehending the driver thereof, he shall sound said siren before stopping such other vehicle." N.C. GEN. STAT. § 20-190.1 (Supp. 1959).

[23] Raynor v. City of Arcata, 11 Cal. 2d 113, 77 P.2d 1054 (1938).

[24] City of Kalamazoo v. Priest, 331 Mich. 43, 49 N.W.2d 52 (1951).

[25] 227 N.C. 84, 40 S.E.2d 606 (1946).

[26] The plaintiff in the principal case alleged in his complaint that the officer

officer, it should allege that the officer was guilty of a "reckless disregard of the safety of others."

The police officer is generally held personally liable to the same extent as a private individual.[27] In the principal case the suit was brought against the deputy sheriff alone, and there was no attempt to join the sheriff or his surety. However, the injured plaintiff may have different sources of recovery in North Carolina, depending upon the type officer involved.

If the plaintiff is injured by a state highway patrolman he may be entitled to bring an action under the Tort Claims Act.[28] The act has been strictly construed as being applicable to situations where the state employee, by a *negligent act,* injures the plaintiff, and it is not clear whether a person injured by an officer who is speeding in "reckless disregard" would be able to recover under the act.[29]

Municipal corporations are empowered by G.S. § 160-191.1 to waive their immunity to suit by purchasing liability insurance.[30] The court has considered this statute only twice, and it is not clear whether it will apply to negligent operation of police vehicles.[31] It would appear

operated his automobile "carelessly and heedlessly, in wilful disregard of the rights and safety of others . . . ." Record, p. 4. The same allegation was made in his reply to the officer's counterclaim, apparently to set up contributory negligence on the part of the officer as a bar to recovery on the counterclaim. Record, p. 12. Therefore, it is questionable if the distinction between the principal case and the *Glosson* case is a valid one.

[27] State *ex rel.* Hayes v. Billings, 240 N.C. 78, 81 S.E.2d 150 (1954); Dunn v. Swanson, 217 N.C. 279, 7 S.E.2d 563 (1940); 47 AM. JUR. *Sheriffs, Police, and Constables* § 42 (1943).

[28] N.C. GEN. STAT. §§ 143-291 to -300 (1959).

[29] In Jenkins v. Department of Motor Vehicles, 244 N.C. 560, 94 S.E.2d 577 (1956), the patrolman intentionally shot a prisoner and recovery under the Tort Claims Act was denied, the court holding that the act does not permit recovery for wrongful and intentional injuries but limits recovery to injuries *negligently* inflicted. It has also been held that there can be no recovery for a negligent *omission* since the statute refers only to a negligent *act.* Flynn v. North Carolina State Highway and Public Works Comm'n, 244 N.C. 617, 94 S.E.2d 571 (1956). In Lowe v. Department of Motor Vehicles, 244 N.C. 353, 93 S.E.2d 448 (1956), a patrolman negligently shot the plaintiff while making an arrest. The court affirmed recovery under the act although it was argued that pointing a weapon was an statutory assault. The view stated in RESTATEMENT, TORTS § 500 (1939) is that disregard of safety is a higher degree of negligence than ordinary negligence. However, in comment *g* of the same section it is stated that this difference of degree is so marked as to amount substantially to a difference in kind of misconduct. It would seem that if the court treats acts of an officer which are in "reckless disregard of the rights of others" as only a higher degree of negligence, one so injured could recover under the act. On the other hand, if the court treats such acts as amounting to a different kind of misconduct, analogous to intentional misconduct, the Tort Claims Act would not be available to one injured by the "reckless disregard" to the officer.

[30] N.C. GEN. STAT. § 160-191.1 (1952). The city is authorized but not required to purchase liability insurance. Immunity is waived only as to the amount of insurance obtained. Once liability insurance is obtained, in the absence of affirmative action by the city's governing body, the immunity is deemed waived. The statute is silent as to what type of "affirmative action" is necessary in order to deny waiver of immunity once the insurance is obtained.

[31] In Moore v. Town of Plymouth, 249 N.C. 423, 106 S.E.2d 695 (1959), the

that the legislature so intended since the statute is directed to the "negligent operation of any motor vehicle" by a municipal employee during the course and scope of his employment.[32]

By G.S. § 153-9(44) any board of county commissioners is empowered to secure liability insurance and thereby waive the county's immunity to suit.[33] This statute is directed to any tort claim arising from the negligence of county employees;[34] it would seem, by implication, that it would apply to claims arising from the negligent operation of police vehicles.[35]

According to the provisions of G.S. § 109-34 every person injured by the neglect or misconduct of a sheriff is given a right of action against the sheriff and his surety upon the official bond.[36] In addition, a sheriff is held liable for the wrongful acts of his deputy, committed under the color of office, his liability being governed by the law applicable to principal and agent.[37] While the court has not construed G.S. § 109-34 in a case involving the negligent operation of a patrol vehicle by a sheriff or his deputy, it would seem that this provision would enable one to sue the surety for damages incurred in such a manner.[38]

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city was held liable for damages resulting from a collision caused by the negligent operation of a truck being used by the city for pest control. In Clark v. Scheld, 253 N.C. 732, 117 S.E.2d 838 (1961), the city of Lenoir was held not to be liable for damages incurred in an accident similar to that involved in the *Moore* case because there was no showing the city had secured liability insurance.

[32] The city charter should be examined prior to instituting the action against the city. Charters usually provide for certain prerequisites which must be met before bringing suit. The most common of these is the requirement of sufficient notice of the claim to the city's governing body within a prescribed time. In Carter v. City of Greensboro, 249 N.C. 328, 106 S.E.2d 564 (1959), the court said failure to give the city notice of a claim within the time prescribed by its charter would ordinarily result in a nonsuit unless the plaintiff alleges and proves justification for the delay of notice and did actually give the city notice within a reasonable time after the disability was removed.

[33] N.C. GEN. STAT. § 153-9(44) (Supp. 1959).

[34] In Walker v. County of Randolph, 251 N.C. 805, 112 S.E.2d 551 (1960), the county was sued for the negligent maintenance of its court house.

[35] It should be noted that the Motor Vehicle Safety and Financial Responsibility Act of 1953 does not apply to any motor vehicle owned by the state, to its operator, nor to the operator of a vehicle owned by a political subdivision of the state, provided the political subdivision has waived immunity. N.C. GEN. STAT. § 20-279.32 (Supp. 1959).

[36] The sheriff is required to execute an official bond payable to the state to insure the faithful execution of his office. N.C. GEN. STAT. § 162-8 (1952). In Price v. Honeycutt, 216 N.C. 270, 4 S.E.2d 611 (1939), the court held the surety liable when the sheriff used excessive force in making a wrongful arrest. In Dunn v. Swanson, 217 N.C. 279, 7 S.E.2d 563 (1940), the sheriff and his surety were held liable for the wrongful death of a prisoner which was caused by the negligence of a jailor.

[37] Cain v. Corbett, 235 N.C. 33, 69 S.E.2d 20 (1952); Dunn v. Swanson, *supra* note 36.

[38] In Cain v. Corbett, *supra* note 37, the court held that the sheriff, his surety on the official bond, the deputy, and the deputy's surety were properly joined as defendants in an action for false arrest which was made by the deputy.