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# Survey of Developments in North Carolina Law, 1977

Susie Spruill Simpson

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# SURVEY OF DEVELOPMENTS IN NORTH CAROLINA LAW, 1977\*

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\* The purpose of this Survey is to explain significant developments in North Carolina decisional and statutory law during 1977. It includes discussions of decisions rendered during calendar year 1977 by the North Carolina Supreme Court, North Carolina Court of Appeals and federal courts construing North Carolina law. In addition, significant legislation enacted during the 1977 session of the North Carolina General Assembly is discussed.

The North Carolina General Statutes are referred to in text as "G.S."

NOTE: Citations to cases have been Shepardized through May 1978. Readers are advised to consult more recent updating materials for subsequent developments in cases discussed in text.

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## I. ADMINISTRATIVE LAW

## A. Regulation of Utilities

## 1. Rates

An approved method for allowing electric companies to recover extra costs for increased fossil fuel expenses apparently was established in the 1976 case of *State ex rel. Utilities Commission v. Edmisten*.<sup>1</sup> With that decision, the North Carolina Supreme Court permitted the addition of a fossil fuel adjustment charge to the basic rate charged the customer each month to allow the company to recover the additional costs attributable to each customer's power needs.<sup>2</sup> While the validity of these charges was being litigated, however, the state legislature passed a statute terminating them fully as of September 1, 1975.<sup>3</sup> Thus, effective September 1, 1975, new and higher basic rates were established to include the cost of fossil fuel and it was contemplated that companies would recover for later increases in fuel costs by seeking a general rate increase in lieu of separate monthly additional fuel charges. Along with this basic rate increase, the Utilities Commission approved a temporary surcharge to yield to the companies the full expense incurred by them for fossil fuel burned in July and August 1975.<sup>4</sup> The companies argued that they needed this extra revenue to recover money that would otherwise be lost to them as the result of a two month lag between the time fuel expenses were incurred by them and the time such costs were reflected on the customer's bill. However, a challenge by the Attorney General to this temporary surcharge was upheld by the North Carolina Supreme Court in 1977.<sup>5</sup>

In *State ex rel. Utilities Commission v. Edmisten*,<sup>6</sup> the court ruled that imposition of the surcharge exceeded the Commission's authority because it violated the clear statutory mandate that "[a]ll monthly fuel adjustment increases based solely upon the increased cost of fuel, as to each public

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1. 291 N.C. 327, 230 S.E.2d 651 (1976).

2. For an analysis of this case, see *Survey of Developments in North Carolina Law, 1976*, 55 N.C.L. REV. 895, 901-03 (1977).

3. N.C. GEN. STAT. § 62-134(e) (Cum. Supp. 1977) provides that "[a]ll monthly fuel adjustment rate increases based solely upon the increased cost of fuel, as to each public utility, as presently approved by the Commission shall fully terminate effective September 1, 1975."

4. This surcharge was intended to be collected ratably over approximately ten months. *State ex rel. Utilities Comm'n v. Edmisten*, 291 N.C. 451, 462, 232 S.E.2d 184, 191 (1977).

5. The Attorney General appealed from a court of appeals holding in favor of the Commission. The lower court opinion is reported at 30 N.C. App. 459, 227 S.E.2d 593 (1976).

6. 291 N.C. 451, 232 S.E.2d 184 (1977). This case, which concerned Duke Power Company, is a companion to two other cases with the same style concerning Virginia Electric and Power Company, 291 N.C. 477, 232 S.E.2d 199 (1977), and Carolina Power and Light Company, 291 N.C. 478, 232 S.E.2d 200 (1977).

utility, as presently approved by the Commission shall *fully terminate* effective September 1, 1975.'"<sup>7</sup> The court also rejected the argument that as of September 1, 1975, there was an accumulation of money due the companies under the approved fuel adjustment clause in addition to that collectible through the companies' regular bills for service in prior months. The clause was intended not to enable the "recovery" of past excess expenditures for fuel but to provide a measure of the reasonably anticipated costs of fuel used in generating power for the current billing month.<sup>8</sup> The court also expressed concern that the temporary surcharge would require future customers to pay for service used by past, and perhaps different, customers.<sup>9</sup> The court ordered the companies to make the appropriate refunds to their customers on account of the revenues unlawfully collected.<sup>10</sup>

Although, as the majority and dissent agreed, the language of the Commission order establishing the fuel adjustment clause could have been clearer, the mandate from the General Assembly that all such charges shall fully terminate as of a specified date was clear and unambiguous; the Commission was plainly in violation of the statute. The majority obviously considered the surcharge an injustice to the consumer and presented a persuasive argument in noting that it was inequitable to place the burden of the cost of coal burned for summer uses on those customers who, as a result, would be required to pay more for their electric power consumption during the winter months.

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7. 291 N.C. at 465, 232 S.E.2d at 192 (quoting N.C. GEN. STAT. § 62-134(e) (Cum. Supp. 1977)), (emphasis added by the court). The court added that because it was created by the legislature, "the Commission has no authority to permit that which is forbidden by statute or to extend a previously granted rate increase which the statute has declared terminated." *Id.* at 464, 232 S.E.2d at 192.

8. *Id.* at 468, 473, 232 S.E.2d at 194, 197. For example, at the time bills to reflect December's usage were mailed in January, cost figures from November were employed because they were the most recent coal cost data available at the time.

9. The court distinguished this surcharge from the approved practice of allowing companies to spread the expenses of depreciation and application for rate increase procedures over a future period of service. The court explained that the latter long term expenditures are properly recovered over the useful life of the service provided and should not be wholly charged to the customers who use the service in the month of such expenditure. The cost of coal burned in any particular month, however, is like a wage expense and should be borne by the users of the service in the month in which the expense was incurred. *Id.* at 470-71, 232 S.E.2d at 195-96.

10. Chief Justice Sharp and Justices Copeland and Moore disagreed with the majority. They construed the December 19, 1973, order of the Commission authorizing the fuel adjustment clause to implement a two month lag in the recovery of increased actual costs and concluded that the General Assembly never intended to deprive the companies of these revenues. *Id.* at 475, 232 S.E.2d at 198 (Copeland, J., dissenting). For a copy of the Commission order in question, see *id.* They were also concerned that the refunds ordered would produce financial benefits to individual members of the consuming public that would be "quite small" in comparison with the burden cast upon the utilities in making the appropriate refunds. *Id.* at 476, 232 S.E.2d at 199.

Customer surcharges for emergency natural gas purchased during the winter of 1975-76 were also the subject of litigation in 1977. In *State ex rel. Utilities Commission v. Farmers Chemical Association*,<sup>11</sup> the North Carolina Court of Appeals overruled an order of the Utilities Commission that required Farmers Chemical (FCA) to pay such a charge. FCA had agreed with North Carolina Natural Gas that instead of purchasing emergency gas it would temporarily suspend its operations when its allotment ran out.<sup>12</sup> However, the anticipated shutdown never occurred because the winter proved milder than expected and additional gas was available from the state's regular supplier. The court held that the Commission erred in disregarding evidence that FCA was neither served nor benefited by the emergency purchases.<sup>13</sup> The *Farmers Chemical* decision gives to any company that can clearly show that it did not use particular, special supplies of natural gas an argument that it should not have to subsidize the extra expenses incurred by the supplier in making such purchases. The allowance of such an exemption, however, seems illogical. The use of emergency gas by one consumer has the direct effect of making more regular gas available to another. It seems inevitable that approval of such an exemption will of necessity be confined to the peculiar facts of the *Farmers Chemical* case: use of the product as a raw material in the manufacturing process instead of merely for heating purposes<sup>14</sup> and complete inability of the plant to operate either without gas or with a supply of gas that is significantly below its total requirements.<sup>15</sup>

In a case involving a proposed rate increase for Nantahala Power Company,<sup>16</sup> the Attorney General challenged a modification by the Commission on its own motion of an earlier rate order. The Commission increased the company's rates to permit it to earn 5.30%, instead of the initially approved return of 3.72%, on the fair value of its properties "used and useful" in rendering service in North Carolina.<sup>17</sup> The supreme court

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11. 33 N.C. App. 433, 235 S.E.2d 398, *cert. denied*, 293 N.C. 258, 237 S.E.2d 539 (1977).

12. In recent years, there have been substantial curtailments in the amount of natural gas available to North Carolina. In order to allocate the existing supply of gas, the Utilities Commission adopted a system of priorities that applied to all customers. Residential customers, the highest priority, were not subject to curtailment, but industrial and commercial users were. To benefit the latter groups, North Carolina Natural Gas arranged to purchase additional emergency supplies of the product. *See id.* at 435, 438, 235 S.E.2d at 399, 401.

13. *Id.* at 445, 235 S.E.2d at 405.

14. FCA uses natural gas entirely for "feedstock" and "process" purposes, as a raw material that is converted into nitrogen fertilizer and as a super heating fuel to effectuate this conversion. *Id.* at 433, 235 S.E.2d at 398.

15. Apparently, alternate use of other fuels would not be of assistance to FCA. *See id.* at 434, 235 S.E.2d at 399.

16. *State ex rel. Utilities Comm'n v. Edmisten*, 291 N.C. 575, 232 S.E.2d 177 (1977).

17. *Id.* at 583, 232 S.E.2d at 182. The standard used by the Utilities Commission in setting rates is set forth in N.C. GEN. STAT. § 62-133 (1975), which requires the Commission to

upheld the Commission, stating:

We find no error of law in the Commission's determination to reconsider the matter prior to the expiration of the time allowed by the statute for the taking of an appeal from its original order, or in its revision of its original finding of fact as to the reasonableness of allowing Nantahala to set rates sufficient to enable it to earn 5.30 per cent on the fair value of its properties used and useful in rendering utility service in the State.<sup>18</sup>

The court added that the original order of the Commission was based in part upon an error of law because in arriving at its first rate of return figure the Commission took notice of the fact that Nantahala had no need to attract new capital in the marketplace at that time. However, even though a utility contemplates no substantial expansion and so presently does not anticipate the issuance of either stocks or bonds, it is still "entitled to charge rates sufficient to enable it to earn a fair rate of return."<sup>19</sup>

This decision may prove to be of little precedential value because Nantahala, as a wholly owned subsidiary of a large corporation, Aluminum Company of America (ALCOA), from which it presently receives all of its invested capital,<sup>20</sup> occupies a unique position in this state. The court noted

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"[a]scertain the fair value of the public utility's property used and useful in providing the service." *Id.* § 62-133(b)(1). The purpose of using this valuation is "to assure the utility of earnings sufficient to attract capital and also . . . to limit its charges for service to levels sufficient for that purpose." *State ex rel. Utilities Comm'n v. General Tel. Co.*, 281 N.C. 318, 338, 189 S.E.2d 705, 718 (1972). In 1977 the legislature altered ratesetting procedures (effective with respect to rate applications filed on and after July 1, 1979) to change the manner of identifying the property that is "used and useful." In addition to plants that are already in operation, the utility will be allowed to include as property "used and useful" facilities that are currently under construction. *See* Law of June 23, 1977, ch. 691, §§ 2-4, 1977 N.C. Sess. Laws 838. The effect of this change is to allow the utility to recover compensation from present ratepayers as construction progresses but before the plant is generating revenues, thereby accelerating the utility's cash flow. For a discussion favoring the alternative method of deferring all compensation until plants are in service, see *In re Communications Satellite Corp.*, 56 F.C.C.2d 1101, 1111 (1975).

18. *State ex rel. Utilities Comm'n v. Edmisten*, 291 N.C. 575, 585, 232 S.E.2d 177, 183 (1977).

19. *Id.* at 586, 232 S.E.2d at 183.

In addition to private companies with the status of public utilities, some municipalities that own or operate generating systems furnish electric service. In 1977 the legislature authorized a constitutional amendment that would allow such municipalities to share ownership of power facilities with private groups engaged in the generation, transmission or distribution of electricity for resale. Law of June 10, 1977, ch. 170, § 1, 1977 N.C. Sess. Laws 157. The amendment also authorized the issuance of revenue bonds to finance the municipalities' share of the cost of jointly owned facilities. This amendment was approved by the voters of North Carolina in November 1977. A new statute was also passed that authorizes municipalities owning or operating electric distribution systems to adopt peak load pricing and to place into effect service devices that will temporarily curtail or cut off certain types of appliances "whenever an unusual peak demand threatens to overload the electric system or economies would result." N.C. GEN. STAT. § 160A-323 (Supp. 1977).

20. *State ex rel. Utilities Comm'n v. Edmisten*, 291 N.C. 575, 583, 232 S.E.2d 177, 182 (1977).

that Nantahala was granted rates that yielded it a lower rate of return than other utilities in the state and indicated, without expressing an opinion, that this was due to the company's special status as a subsidiary of ALCOA.<sup>21</sup> The principle set forth in the court's holding, however, is a fair one that should be applied to all utilities: present expansion plans, or the lack thereof, should have no bearing on the determination of the appropriate rate of return to be earned on the property the utility currently employs to furnish its service.

## 2. Communications

In *North Carolina Utilities Commission v. Federal Communications Commission*,<sup>22</sup> the Fourth Circuit reaffirmed a 1976 ruling upholding an FCC decision that under the Communications Act of 1934<sup>23</sup> the FCC is empowered to preempt conflicting state regulation of telephone terminal equipment used for both interstate and local communications.<sup>24</sup> This decision resolved a continuing controversy<sup>25</sup> over the authority of state commissions to forbid or impair the interconnection of noncarrier-supplied terminal equipment with telephone company facilities.<sup>26</sup> As a result, the FCC program, which permits customers to use any terminal equipment registered with the FCC by the manufacturer rather than rent an interface device from the telephone company, will be given effect.<sup>27</sup> Because customers will not have to pay the telephone company a monthly charge for an interface device for customer-purchased equipment, it is likely that more people will choose to buy communications equipment directly from retailers than to continue renting it from the telephone company. The court dismissed the importance of arguments that significant revenue loss would be suffered by the utility companies and that their ability to subsidize residential service through higher charges for business service would be impaired.<sup>28</sup> In dissent, Judge

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21. *Id.* at 585, 232 S.E.2d at 183.

22. 552 F.2d 1036 (4th Cir.), *cert. denied*, 98 S. Ct. 222 (1977).

23. 47 U.S.C. §§ 151-609 (1970 & Supp. V. 1975).

24. *North Carolina Util. Comm'n v. F.C.C.*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976).

25. 552 F.2d at 1042-44.

26. Terminal equipment is that which the customer has in his home or business. Examples include residential telephones, key telephones, answering devices and computer terminals. *Id.* at 1040.

27. The federal tariff in operation prior to this case permitted interconnection of customer-owned terminal equipment so long as interface devices—equipment designed to protect telephone company facilities and personnel from power surges and other damage from customer-owned machinery to the utility's network—were installed. *Id.* at 1043.

28. *Id.* at 1052-56. The court also stressed that exemptions are available from the FCC's interconnection policy whenever a carrier demonstrates that compliance with it "has already resulted in or will result in direct, substantial and immediate economic injury to [the] telephone system and detriment to the public interest." *Id.* at 1056 (quoting *In re Mebane Home Tel. Co.*, 53 F.C.C.2d 473, 480 (1975)) (emphasis added by court).

Widener expressed his concern that the public interest would not be served by the court's decision because there had not been sufficient investigation to counterbalance the estimates supplied by the telephone industry of the high cost to consumers that would result from the increased rates that would have to be levied in compensation for revenues lost in decreased equipment installation and rental revenues. He added that the "fundamental issue involved here may well require resolution by Congress, rather than the FCC, for Congress has determined that the public interest is better served in the field of telephone service by a regulated monopoly than by competition."<sup>29</sup> In facilitating the customer purchase of telephone equipment, the court took a stand popular with many consumer groups.<sup>30</sup> However, it remains to be seen whether consumers will actually benefit from this action or will instead end up paying higher rates for local and long distance service.<sup>31</sup>

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29. *Id.* at 1060 (Widener, J., dissenting).

30. Telephone interview with Harry D. Barnes, Jr., Marketing Department, Southern Bell Telephone Company, Charlotte, North Carolina (Feb. 22, 1978).

31. Because the registration program has not been fully implemented, it is difficult at this point to predict its ultimate effect on the telephone companies. *Id.* However, the Fourth Circuit's decision is indicative of a serious problem facing the telephone companies—that of widespread administrative and court approval of the continuing erosion of their monopoly status. From the companies' viewpoint, the most alarming evidence of this trend is the opinion of the United States Court of Appeals for the District of Columbia in *MCI Telecommunications Corp. v. FCC*, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 98 S. Ct. 781 (1978). In that decision, the court reversed an FCC order that had prohibited Microwave Communications, Inc. (MCI), a private carrier selling long distance connections between 18 large cities, from expanding its service to new customers. By concentrating its efforts in limited, lucrative markets, a private carrier service, such as MCI, can charge rates considerably below those charged by the Bell system. Interview with Harry D. Barnes, Jr., *supra* note 30. Telephone companies such as the Bell Telephone Company contend that such a trend will have deleterious effects on subscribers in states such as North Carolina for two reasons. Because the Bell system has traditionally used its long distance revenues to subsidize low cost local residence rates, local rates will be adversely affected and, in addition, to compete with private long distance carriers, the Bell system will have to lower its long distance rates in those areas, thereby impairing its current program of nationwide rate averaging, which provides below cost long distance service to less densely populated areas of the country. The Bell system has continued to pursue this issue with the FCC. *AT&T Responds Quickly to Execunet Ruling*, MGMT. INFORMATION BULL., Jan. 26, 1978, at 1 (Southern Bell); *Court Denies Petition to Review Execunet*, *id.*, Jan. 20, 1978, at 1; *Execunet Service Jeopardizes Low Cost of Home Telephone Service*, N.C. REP., Jan. 11, 1978, at 3 (Southern Bell) (copies on file in office of *North Carolina Law Review*).

This decision and that of the Fourth Circuit in *North Carolina Util. Comm'n v. FCC* allow private carriers to cream-skim—that is, to provide service in a particularly high profit area and underprice the regulated common carrier, which is required to provide service in all areas. The current trend by courts, and to a lesser extent by the FCC, in this field seems to favor certain preferred customers and locales at the expense of other—usually residential and less populated—areas.

Another issue arising in the context of communications involved a medical doctor who provided radio communications services for compensation to 10 doctors in his county. In *State ex rel. Utilities Comm'n v. Simpson*, 32 N.C. App. 543, 232 S.E.2d 871, *cert. granted*, 292 N.C. 735, 235 S.E.2d 787 (1977), the court of appeals upheld a Commission ruling that the doctor came under its jurisdiction because he was operating a "public" utility within the meaning of the North Carolina statutes. The test applied by the court was whether a "significant part of the public obtains the service offered or provided." *Id.* at 546-47, 232 S.E.2d at 873. Relying on

### 3. Common Carriers

Two court decisions in 1977 dealing with a common carrier<sup>32</sup> concerned the standards used by the Utilities Commission in approving the transfer of a franchise to serve an area from one trucking company to another. The major issue pertained to whether a franchise sought to be transferred was "dormant." If such a finding were made, the franchise could not be transferred but would have to meet the more stringent test of showing a public need for the service required of new applicants for franchise authority.<sup>33</sup> In *State ex rel. Utilities Commission v. Estes Express Lines*,<sup>34</sup> a case of first impression, the court of appeals concluded that G.S. 62-112(c),<sup>35</sup> the statute dealing with dormancy, means what it says—that no activity by the franchise for thirty consecutive days is prima facie evidence of dormancy—but the Commission may give consideration to other factors in making a final decision. Thus, in the *Express Lines* case, the prima facie presumption was rebutted by evidence "that transferor continuously advertised its service, that it was ready, willing, and able to haul . . . commodities under its franchise, and that it charged published tariff rates."<sup>36</sup>

The dormancy question is a good example of the kind of issue that is best left to the discretion of an expert body such as the Utilities Commission. The franchise in dispute in *Express Lines* was for the transport of general commodities over irregular routes within Wake County, North Carolina and between Wake County and certain Piedmont and Eastern counties in the state.<sup>37</sup> Because farm products, such as the tobacco which furnishes a large part of transferor's business,<sup>38</sup> are seasonal, thirty days

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cases from other jurisdictions applying the same test to taxicab and bus companies, *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252 (1916); *Surface Transp. Corp. v. Reservoir Bus Lines, Inc.*, 271 App. Div. 556, 67 N.Y.S.2d 135 (1946), the court held that defendant met this test because he served almost one-half of the radio communications market in the county. 32 N.C. App. at 547, 232 S.E.2d at 873-74. This decision should help to delineate the kinds of enterprises that are subject to regulation by the Utilities Commission.

The General Assembly enacted a law designed to prevent telephone company customers from improperly monitoring calls received or placed by them. The statute provides that "[n]o public utility may offer or maintain telephone service to any subscriber" who installs monitoring equipment unless "said subscriber shall agree that such equipment shall be used in conformity with the standards for the use of such equipment adopted by the Commission." N.C. GEN. STAT. § 62-138(g) (Cum. Supp. 1977).

32. *State ex rel. Utilities Comm'n v. Estes Express Lines*, 33 N.C. App. 99, 234 S.E.2d 628 (1977); *State ex rel. Utilities Comm'n v. Estes Express Lines*, 33 N.C. App. 174, 234 S.E.2d 624 (1977).

33. See N.C. GEN. STAT. § 62-262(e)(1) (1975).

34. 33 N.C. App. 174, 234 S.E.2d 624 (1977).

35. N.C. GEN. STAT. § 62-112(c) (1975).

36. 33 N.C. App. at 179, 234 S.E.2d at 627.

37. See *id.* at 175, 234 S.E.2d at 624.

38. *Id.* at 175-76, 234 S.E.2d at 626.



seems too short a time in which to establish an irrebuttable presumption of dormancy. Thus, it seems only fair to take into consideration extenuating factors such as continuous efforts to serve the public within the narrow contours of the authority granted. Furthermore, the transferor's revenues from the franchise were approximately \$28,000 for the six months prior to the filing of the instant protest by Estes Express Lines.<sup>39</sup> Therefore, the Commission exercised wisely its discretion in this case; it would have been improper for the court to disturb the Commission's ruling since the evidence found by the Commission in support of its decision was "competent, material and substantial."<sup>40</sup>

### B. Employment Regulation

In *State ex rel. Employment Security Commission v. Paul's Young Men's Shop, Inc.*,<sup>41</sup> the court of appeals considered the question of how to correct past errors in reporting and paying contributions to the State Unemployment Insurance Fund. Defendant, owner of Paul's Young Men's Shop and also trading as Ricky's, had reported and remitted all contributions due on account of wages paid his employees for the entire period in question. In addition, he reported and paid contributions under the same employer account number for employees of three additional retail businesses owned by him.<sup>42</sup> Although this combined payment method had been used with the

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39. *Id.* at 175, 234 S.E.2d at 626.

40. *Id.* at 178, 234 S.E.2d at 627.

Among other developments in this area, in an effort to achieve a stable rate structure in the common carrier industry the General Assembly passed a statute allowing the Commission to approve uniform rates for the same or similar services by carriers of the same class. N.C. GEN. STAT. § 62-152.1(b) (Cum. Supp. 1977). Carriers of the same class are those engaged in the same kind of operations. For example, all air carriers are in the same class. The Commission must make a finding that such rates will further the state transportation policy and if such a finding is made, the parties to such agreements will be relieved from operation of the state antitrust laws in regard to combinations in restraint of trade.

A major change in the manner in which the public is represented before the Utilities Commission was made with the creation of a public staff empowered to make appropriate recommendations to the Commission with regard to the reasonableness of proposed rates and the quality of service rendered by any public utility. *Id.* § 62-15(a), (d)(1). The public staff is also empowered to investigate complaints directed to the Commission and to make studies and recommendations to the Commission with respect to standards, regulations, practices or service of any public utility. *Id.* § 62-15(d)(2), (7). It is intended that the staff remain independent of the Commission and it "shall not be subject to the supervision, direction, or control of the commission, the chairman, or members of the commission." *Id.* § 62-15(b). The law expressly preserves the power of the Attorney General to intervene, when he deems it advisable in the public interest, in proceedings before the Commission on behalf of the using and consuming public. *Id.* § 62-20. Unless further action is taken by the General Assembly, the public staff will terminate on August 31, 1981. Law of June 3, 1977, ch. 468, § 23, 1977 N.C. Sess. Laws 488.

41. 32 N.C. App. 23, 231 S.E.2d 157, *cert. denied*, 292 N.C. 264, 233 S.E.2d 396 (1977).

42. The three corporations were Diamond Outlet, Inc., Gems, Inc., and Paul's Young Men's Shop, Inc. Defendant and his immediate family were the sole stockholders of all four

knowledge of the Commission since at least 1961, in 1973 the Chairman ordered that under the applicable statutes all contributions erroneously paid by Ricky's for the last five years be refunded and the other three corporations be assessed for back payments as though they had never made any contribution. Upon approval of the opinion by the full Commission, defendant appealed to the superior court.

Stating that "there is nothing in the Statutes to prohibit the Commission from going back and making a proper allocation of the contributions erroneously paid by taxpayer to the proper employing units," the superior court ordered that the Commission give credit to each corporation as if separate accounts had always been in existence.<sup>43</sup> On appeal by the Commission, the court of appeals agreed with the lower court and directed the Commission retroactively to set up the separate accounts, compute the correct rates of contribution that should have been paid by each separate employing unit and make proper allocations of contributions and charges to each unit. The court apparently accorded considerable significance to the good faith exhibited by defendants<sup>44</sup> and the fact that under prior law the four corporations would have been considered a single employing unit.<sup>45</sup> Moreover, the court noted that

the Commission is deliberately ignoring, as being without legal significance, the fact that every penny of taxable wages paid to every employee of each of the corporations was actually fully reported to the Commission and contributions were paid to the Commission on account of such wages, though the reporting and payment was, by error, made under the account number of Ricky's. We find nothing in the governing statutes which requires such a harsh result.<sup>46</sup>

The court also relied on an earlier opinion by the North Carolina Supreme Court that had sanctioned correction of a similar error and transfer of the

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enterprises. Payments were made on behalf of the employees of Diamond Outlet and Gems for the years 1967 and 1968 although neither corporation was liable for those years since neither had in its employ four or more persons for twenty or more weeks during that time. The net effect of reporting all employees of the three corporations and paying contributions on their wages through a single account number was to build up the reserves in the account of Ricky's and allow the three corporations the advantage of Ricky's lower rate of contribution. The rate of contribution assigned to Ricky's account reached a low of .5% whereas each corporation, if paying separately, would have been required to pay at the standard rate of 2.7% until their separate credit reserve ratios met statutory requirements so as to entitle them to reduced rates. *Id.* at 24-25, 231 S.E.2d at 158.

43. *Id.* at 27, 231 S.E.2d at 59.

44. Defendants made extra payments not required by law. *See* note 42 *supra*.

45. *See* Unemployment Compensation Comm'n v. City Ice & Coal Co., 216 N.C. 6, 3 S.E.2d 290 (1939).

46. 32 N.C. App. at 31, 231 S.E.2d at 162.

account to the proper unit.<sup>47</sup> The *Paul's* holding indicates a willingness by the North Carolina courts to give close scrutiny to decisions of the Commission reallocating past erroneous payments and to overrule such determinations when the particular facts of each case and the interests of justice so demand.

The Employment Security Commission was also affected by legislation intended to expand coverage of the program to additional groups of workers,<sup>48</sup> to establish new procedures for contesting decisions of the Commission,<sup>49</sup> to change the taxable wage base,<sup>50</sup> and to make other alterations in the activities of the Commission to conform with federal requirements.<sup>51</sup> Among those covered for the first time are agricultural laborers,<sup>52</sup> domestic workers,<sup>53</sup> state and local government personnel,<sup>54</sup> and employees of non-profit elementary and secondary schools.<sup>55</sup> In an effort to make jobs more available to groups that have traditionally suffered discrimination in seeking employment, the legislature passed the Equal Employment Practices Act<sup>56</sup>

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47. State *ex rel.* Unemployment Compensation Comm'n v. Nissen, 227 N.C. 216, 41 S.E.2d 734 (1947). In *Nissen*, a reserve account was incorrectly listed in the name of a mortgagee although it should have been credited to the account of the mortgagor, for whom the mortgagee was acting simply as an agent in managing the mortgaged property. The *Paul's* court emphasized that although the factual situation in *Nissen* was somewhat different from the instant case, there was sufficient similarity between them because each case involved a reserve account that had erroneously reported as its own employees persons who were employees of another. 32 N.C. App. at 31-32, 231 S.E.2d at 162.

48. N.C. GEN. STAT. § 96-8(5)(n)-(g) (Cum. Supp. 1977).

49. When a protest is made to an initial determination as to eligibility or disqualification of a claimant, appeals may be taken through an informal conference, then to an appeals referee at a formal hearing, and finally to the Commission on appeal or on its own motion. *Id.* § 96-15(b)-(e).

50. *Id.* § 96-9(a)(5) changes the wage base from \$4200 to the federally required tax base.

51. *Id.* § 96-19(b) authorizes the Employment Security Commission to suspend enforcement, until the legislature next meets, of any section that is adjudged out of conformity with federal law.

52. Employers covered are those who paid wages of \$20,000 for agricultural labor or employed at least 10 individuals in such work for at least 20 days, each day being in a different calendar week. *Id.* § 96-8(5)(n).

53. Employers who paid during any calendar quarter wages of \$1000 or more for domestic services are required to contribute to the State Unemployment Insurance Fund. *Id.* § 96-8(5)(o).

54. *Id.* § 96-8(5)(p). Certain classes of workers are excluded such as elected officials and employees hired during temporary emergencies. *Id.* § 96-8(6)(i).

55. *Id.* § 96-8(5)(q). Employees in various occupations who are excluded from coverage of the law are listed in *id.* § 96-8(6) (1975 & Cum. Supp. 1977).

56. The statute states that it is the public policy of this state to "protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgment on account of race, religion, color, national origin, age, sex, or handicap by employers which regularly employ 15 or more employees." *Id.* § 143-422.2 (Cum. Supp. 1977). Upon the forwarding of charges of discrimination to it by the Equal Employment Opportunity Commission, the Human Relations Council in the Department of Administration is authorized to investigate and resolve such allegations. It is uncertain what will result from such action since the law specified that "the agency shall use its good offices to effect an amicable resolution of the charges of discrimination" and this is the only remedy for discrimination mentioned by the Act. *Id.* § 143-422.3.

and created the Jobs for Veterans Committee.<sup>57</sup> All of these measures should provide much-needed protection to many of the groups that have not received some of the advantages long taken for granted by the majority of North Carolina's working populace.<sup>58</sup>

### C. Health Care Regulation

The General Assembly in 1977 enacted major legislation concerning four areas of the health field. In an effort to strengthen community mental health services, the General Assembly passed legislation revising current procedures for providing local care for mental health, mental retardation and drug dependency problems.<sup>59</sup> Area mental health programs will be administered jointly by the Department of Human Resources, the Commission for Mental Health Services,<sup>60</sup> Area Mental Health Authorities, and Area Mental Health Boards.<sup>61</sup> Before these area programs were mandated, any county or city with a population over 25,000 or any independent community agency could be a local mental health authority. Under applicable law this often resulted in a loss of state and federal funds.<sup>62</sup> Now, however, all counties will be required to participate in state mental health programs, just as they are required to furnish public health services.<sup>63</sup>

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57. The committee assumes the duties of the Governor's Jobs for Veterans Committee. It consists of such members as the Governor shall appoint and is headed by a full time chairman selected by the Secretary of Administration. The chairman's duties include acting as a liaison between the Committee and state agencies and communities to ensure that veterans receive the employment preferences to which they are legally entitled, evaluating existing programs and assisting employers in implementing affirmative action plans for handicapped and Vietnam-era veterans. *Id.* § 143B-420.

58. While these protections were being extended to certain groups of workers, short-term employees of state government were being removed from the safeguards furnished by the State Personnel Act. All employees of the Governor and Lieutenant Governor and state personnel who had not been continuously employed by the government for the five immediately preceding years will no longer be covered by the provisions generally applicable to state personnel in regard to hiring, firing, promotion, salary and appeals from personnel decisions. *See id.* §§ 126-4 to -5.

59. *Id.* §§ 122-35.35 to .57, 143B-147.

60. *Id.* § 143B-147 changed the name of this group to the Commission for Mental Health and Mental Retardation Services. In so doing, the General Assembly sought to provide increased budget support and representation for and public awareness of mental retardation programs. The Commission consists of fifteen members, two of whom are members of the General Assembly and the remainder of whom are appointed by the Governor according to criteria established by the statute. *Id.* § 143B-148(a).

61. In addition to setting forth the various working procedures to govern the activities of these organizations, the Act establishes criteria for the selection of members of the local authorities and boards and specifies the particular purposes for which federal, state and local funds may be expended. *Id.* §§ 122-35.40, .42, .53 to .57.

62. Solberg, *Proposed Health Legislation—1977*, HEALTH L. BULL., No. 47, 1977, at 1, 4 (Institute of Government, University of North Carolina at Chapel Hill) (copy on file in office of *North Carolina Law Review*).

63. Interview with Patrice Solberg, Assistant Professor, Institute of Government, University of North Carolina at Chapel Hill, in Chapel Hill, North Carolina (Feb. 15, 1978).

New procedures have been established for adjudicating incompetency in adults,<sup>64</sup> appointing their guardians and providing for the restoration of their competency. Proceedings are held before the clerk of superior court, and the prospective ward is entitled to a number of procedural safeguards, including the right to a jury determination in a public hearing.<sup>65</sup> The clerk is empowered to appoint a guardian for the ward under detailed criteria established by the Act<sup>66</sup> and to retain continuing jurisdiction over the status of the ward.<sup>67</sup> This legislation was intended to bring North Carolina's adult guardianship laws into full compliance with the United States Constitution and to remedy specific problems with the previous statutes.<sup>68</sup> Although the old law gave the guardian unlimited control over the ward's affairs, the clerk now, based on the condition of the ward, may specify what the guardian's powers are to be. In addition, by forcing certain public officials to act as guardians when there is no other person available, the statute now ensures that people needing such assistance will receive it.<sup>69</sup> This legislation achieves a significant improvement in guaranteeing that adults will be informed, within their capabilities, of what is happening to them and in ensuring that they will retain as much control over the management of their affairs as is possible under the circumstances.

In addition, the legislature enacted a Nursing Home Patients' Bill of Rights,<sup>70</sup> which includes such nonwaivable provisions as the assurance of

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64. N.C. GEN. STAT. §§ 35-1.6 to .41 (Supp. 1977). This is the exclusive procedure regarding incompetency in adults who are mentally retarded, epileptic, cerebral palsied or autistic; it also provides an alternative procedure, in addition to those set forth in Chapter 35, Article 2 of the General Statutes, *id.* §§ 35-2 to -9 (1976), for adjudicating mentally ill persons incompetent and for appointing guardians for them. *Id.* § 35-1.8 (Supp. 1977).

65. *Id.* §§ 35-1.10 to .20 (Supp. 1977). Appeals from actions of the clerk shall be to the superior court de novo and then to the court of appeals.

66. *See id.* §§ 35-1.28 to .39. The standard for appointing a guardian is that by the greater weight of the evidence the person is incompetent. *Id.* § 35-1.16(f).

67. The legislature also sought to improve the procedures for involuntary commitment by providing a special advocate paid by the state to represent the interests of the petitioner and the community at large. The objective of this measure is to provide a balanced presentation of the issues. State law has already provided for special counsel for the indigent respondent in involuntary commitment proceedings. *See id.* § 122-58.7(b) (Cum. Supp. 1977).

68. For an excellent background discussion, see Comment, *North Carolina Guardianship Laws—The Need for Change*, 54 N.C.L. REV. 389 (1976). For example, the procedure for appointing a guardian under prior law did not require the clerk to give notice to anyone of the pending hearing. And in the event notice was given, the statutes did not require the notice to contain any information other than the date of hearing, nor did they require the potential ward be given advance notice. Therefore, those provisions did not meet the due process requirements of adequate and timely notice. *Id.* at 392. Also, no due process protections were granted with regard to issuance of certificates of lunacy or prior to commitment to an institution for the mentally retarded. *Id.* at 405.

69. Interview with Patrice Solberg, *supra* note 63. Formerly, it was a common occurrence for persons in nursing homes in need of an operation to be prevented from undergoing the required medical treatment because of the absence of any authorized individual to give consent on behalf of the patient. *Id.*

70. N.C. GEN. STAT. §§ 130-264 to -277 (Cum. Supp. 1977). The legislature stated that its

privacy in one's own room and of the freedom to associate with others, freedom from abuse and the opportunity to present grievances to various groups including the Department of Human Resources. These rights may be enforced by a civil action for injunctive relief by any patient or by the Department acting in the patient's behalf.<sup>71</sup> Although this enactment may initially appear to be beneficial to nursing home patients, when considered in context it provides, at best, only an insignificant degree of assistance. With the exception of about a dozen nursing homes, all other homes in North Carolina are already subject to several bills of rights mandated by the federal government for those homes participating in the Medicare and Medicaid programs.<sup>72</sup> Because the North Carolina and federal bills are not identical, the new Act has created a confusing situation for both administrators and patients. In addition, the penalties imposed for violation of the Act—revocation of the home's license and a fine of ten dollars per day per patient—have been criticized as being too low to effectively deter homes from infringing patients' rights. As a result, this legislation was unfavorably reviewed by at least one scholarly publication in the field, which stated:

It is somewhat shocking that the General Assembly has valued a nursing home patient's rights at only \$10 per day. Moreover, the statutes do not specify whether the act applies to minors who are now being admitted to nursing homes. If so, it grants minors rights they would not otherwise have, such as the right to consent to experimental research and to enter into contracts. Finally, when a nursing home must comply with from four to six different and conflicting patients' rights acts, the patients' rights movement will surely suffer.<sup>73</sup>

Protection is given nursing home residents by another new statute requiring state inspections of these facilities without prior notice and categorizing as a misdemeanor the unauthorized divulgence of such notice by anyone acting under the authority of the Commission for Health Services or the Department of Human Resources.<sup>74</sup> Violations of this provision are punishable by a fine of up to five hundred dollars and/or imprisonment for

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intention in passing this statute was to ensure that "every patient's civil and religious liberties, including the right to independent personal decisions and knowledge of available choices, shall not be infringed and that the facility shall encourage and assist the patient in the fullest possible exercise of these rights." *Id.* § 130-264.

71. *Id.* §§ 130-272 to -273. Also, effective March 1, 1979, each nursing home, as a condition to its licensing, must be served by an independent community advisory committee charged with the duty of working with the home for the best interests of its residents. *Id.* § 130-9(e)(7).

72. Interview with Patrice Solberg, *supra* note 63.

73. 1977 Legislation, HEALTH L. BULL., No. 48, July 1977, at 1, 5 (Institute of Government, University of North Carolina at Chapel Hill) (copy on file in office of *North Carolina Law Review*).

74. N.C. GEN. STAT. § 130-9(e)(1), (3) (Cum. Supp. 1977).

up to thirty days.<sup>75</sup> In light of the insignificant fine imposed on nursing homes for denial of patients' rights, this penalty has been criticized as being too harsh.<sup>76</sup> In addition, this provision, like the patients' bill of rights statute, does not apply to homes for the aged, which are custodial rather than treatment facilities.<sup>77</sup> As patients are as subject to abuse in custodial facilities as in nursing ones, it seems that any protections extended to patients in one kind of home should be similarly provided for residents of the other.

In response to public recognition of the dangerous and inadequate accommodations obtaining in some day care facilities, the General Assembly passed several statutes designed to ameliorate or eliminate substandard operations.<sup>78</sup> The Department of Human Resources is empowered to inspect and license all child care institutions<sup>79</sup> except those subject to three enumerated exceptions;<sup>80</sup> prior law authorized the Department to supervise only private institutions.<sup>81</sup> More demanding standards were enacted to govern the qualifications of personnel in licensed child care facilities;<sup>82</sup> in addition, the category of facilities required to be licensed was expanded to operations that do not receive payment for their services.<sup>83</sup> Therefore, any arrangement that provides day care on a regular basis for more than four hours per day for more than five children is subject to supervision by the Child Day Care Licensing Board.<sup>84</sup> Certain operations, such as public schools, are excluded from this requirement.<sup>85</sup> Finally, an additional rem-

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75. *Id.* § 130-9(e)(3).

76. 1977 Legislation, *supra* note 73. Additionally, since these inspections are made without a search warrant, their constitutionality is unclear in light of such past decisions as *See v. Seattle*, 387 U.S. 541 (1967) (businessman could not be convicted for failure to consent to warrantless search of his locked warehouse by fire inspector), and *Camara v. Municipal Court*, 387 U.S. 523 (1967) (tenant could not be convicted for failure to consent to warrantless search of his apartment by building inspector). The United States Supreme Court has held that before an OSHA inspection can be conducted over the objection of the owner of the premises, an administrative search warrant must be obtained. *Marshall v. Barlow's, Inc.*, 46 U.S.L.W. 4483 (May 23, 1978).

77. Interview with Patrice Solberg, *supra* note 63.

78. N.C. GEN. STAT. §§ 108-78, 110-86(2) to (4), -90.1 to -98.1, -102, -104 (Cum. Supp. 1977).

79. *Id.* § 108-78.

80. *Id.* § 108-78(c).

81. Law of Apr. 10, 1869, ch. 170, § 3, 1868 N.C. Pub. Laws 415 (formerly codified as amended at N.C. GEN. STAT. § 108-78 (1975)).

82. N.C. GEN. STAT. § 110-90.1 (Cum. Supp. 1977). No day care plan shall be registered if anyone who works in it has been convicted of child-related crimes or crimes involving moral turpitude, habitually uses alcohol to excess, illegally uses drugs or is mentally impaired to the extent that he may be injurious to children. *Id.*

83. *Id.* § 110-86(2), (3).

84. *Id.* § 110-86. Existence of a day care facility was also made easier to prove. *Id.* § 110-98.1, states that operating on two or more consecutive days is prima facie evidence of the existence of such an enterprise.

85. *Id.* § 110-86(3).

edy, injunctive relief, was made available to halt immediately the operation of any facility when it is operating without a license or when there is a violation that threatens serious harm.<sup>86</sup> Although the 1977 improvements in the law should do much to upgrade day care facility operations, additional reforms are needed. A larger staff is needed within the Division of Social Services to review carefully license applications and to enforce operating standards. Also, group homes serving less than six children are not subject to current licensing requirements;<sup>87</sup> children who are being cared for in such facilities need some form of state protection, even if the standards are different from those applied to larger facilities.<sup>88</sup>

#### D. Open Meetings Law

"Government in the sunshine"—this phrase has been used to describe the philosophy underlying passage of open meetings laws in several states.<sup>89</sup> The basic purpose of these acts is to provide public access to the decision-making process of governmental bodies so that the public will know how and why decisions are made.<sup>90</sup> These laws further allow the public to influence directly this decisionmaking process by its presence at such governmental meetings.<sup>91</sup> In 1971 North Carolina enacted its own sunshine

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86. *Id.* § 110-104.

87. The definition of a "day care facility" encompasses only arrangements that provide day care "for more than five children." *Id.* § 110-86(3). Smaller institutions are not currently subject to licensing requirements.

88. See N.C. UNITED WAY, POSITION STATEMENTS RE: AREAS OF SOCIAL CONCERN 19, 20 (1976) (copy on file in office of *North Carolina Law Review*).

The General Assembly also enacted the Health Maintenance Organization Act of 1977, N.C. GEN. STAT. §§ 57A-1 to -29 (Cum. Supp. 1977), which requires persons seeking to operate such a program to obtain authorization from the Commissioner of Insurance. A health maintenance organization is defined as "any person who undertakes to provide or arrange for one or more health care plans." *Id.* § 57A-2(g). A health care plan is "any arrangement whereby any person undertakes to provide, arrange for, pay for, or reimburse any part of the cost of any health care services . . . as distinguished from mere indemnification against the cost of such services on a prepaid basis through insurance or otherwise." *Id.* § 57A-2(e). Detailed provisions concerning the plan's organization, directors and financial status must be set forth in the certificate of authority. *Id.* § 57A-3(c). In addition to the approval required of the Commissioner, the Secretary of Human Resources must also approve the quality of health services that the plan proposes to provide. *Id.* § 57A-4. Important elements of the Act designed to protect those enrolled in the plan include a system for the receipt of enrollee complaints, *id.* § 57A-12, the establishment of economically conservative guidelines on approved investments for the organization, *id.* § 57A-13, protective measures for enrollees in the event of the plan's insolvency, *id.* § 57A-14, a provision forbidding cancellation of an individual's policy solely because of deteriorating health and prohibitions against misleading marketing of the plan's services, *id.* § 57A-15. The Commissioner is empowered to issue cease and desist orders and to suspend or revoke a certificate of authority. *Id.* §§ 57A-22, -24.

89. R. PLESSER & P. PETKAS, GOVERNMENT IN THE SUNSHINE OPEN RECORDS/OPEN MEETINGS EMPHASIS: NORTH CAROLINA 4 (Southern Regional Council, 1975).

90. D. LAWRENCE, OPEN MEETINGS AND LOCAL GOVERNMENTS IN NORTH CAROLINA 1 (Institute of Government, University of North Carolina at Chapel Hill, 1976).

91. *Id.*



law<sup>92</sup> embodying the basic policy that as "governing and governmental bodies which administer the legislative and executive functions of this State . . . exist solely to conduct the people's business, it is the public policy of this State that the hearings, deliberations, and actions of said bodies be conducted openly."<sup>93</sup> The statute goes on to provide that

[a]ll official meetings of the governing and governmental bodies of this State and its political subdivisions, including all State, county, city and municipal commissions, committees, boards, authorities, and councils and any subdivision, subcommittee, or other subsidiary or component part thereof which have or claim authority to conduct hearings, deliberate or act as bodies politic and in the public interest shall be open to the public.<sup>94</sup>

Several exceptions to the application of this requirement are recognized by the statute, covering, among other matters, discussions of particular employees or officers under the jurisdiction of the governing body and student disciplinary cases being considered by any "board of education or governing body of any public educational institution."<sup>95</sup> Notwithstanding such exceptions, the General Assembly in enacting the Open Meetings Law clearly sought to provide the public comprehensive access to governmental meetings.<sup>96</sup> Unfortunately, the North Carolina Supreme Court undermined this intent of the General Assembly as well as the thrust of the Open Meetings Law in the recent case of *Student Bar Association v. Byrd*.<sup>97</sup>

Following passage of the law, several members of the Student Bar Association Board of Governors of the University of North Carolina School of Law attempted to attend a general faculty meeting.<sup>98</sup> After Robert G. Byrd, Dean of the Law School, refused to admit them,<sup>99</sup> plaintiffs sought preliminary and permanent injunctions to enjoin defendants from holding closed meetings. These injunctions were granted by the trial court,<sup>100</sup> which also required that posted written notice be given by Dean Byrd at least six

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92. N.C. GEN. STAT. §§ 143-318.1 to .7 (1974).

93. *Id.* § 143-318.1.

94. *Id.* § 143-318.2.

95. *Id.* § 143-318.3(b). See also Lawrence, *Interpreting North Carolina's Open-Meetings Law*, 54 N.C.L. REV. 777, 797-803 (1976). N.C. GEN. STAT. § 143-318.3(a) (1974) also provides that a body under § 143-318.2 may, upon a majority vote, hold an executive session to consider property purchases and sales, public employment, hospital matters, privileged relationships and litigation in which the body is a party.

96. See text accompanying notes 132-36 *infra*.

97. 293 N.C. 594, 239 S.E.2d 415 (1977). In addition to University of North Carolina School of Law Dean Robert Byrd, also named as defendants were UNC officials Chancellor Ferebee Taylor, President William L. Friday, Board of Trustees Chairman Walter R. Davis and Board of Governors Chairman William A. Dees, all in their official capacities.

98. *Id.* at 595, 239 S.E.2d at 417.

99. *Id.*

100. *Id.* at 596, 239 S.E.2d at 417.

hours prior to each meeting.<sup>101</sup> The court of appeals affirmed,<sup>102</sup> finding that the General Assembly intended that the Open Meetings Law be given a broad scope.<sup>103</sup> The court held that the Law School faculty exercises power, delegated by the Board of Governors of the University,<sup>104</sup> to conduct public business and that, therefore, it is subject to the Open Meetings Law.<sup>105</sup>

The state supreme court reversed,<sup>106</sup> holding essentially that the use of the term "body politic" denoted an intent by the General Assembly to restrict the application of the Open Meetings Law to meetings of governing and governmental bodies that exercise some sovereign powers not exercisable by private concerns.<sup>107</sup> The court further found that the term "governing and governmental" was to be read in the conjunctive; therefore, a body had to be *both* governing *and* governmental to be within the purview of the Act.<sup>108</sup> The court held that the Law School faculty was not the governing body of the Law School because its decisions were subject to review by the Board of Governors which, the court stated, was the true governing body of

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101. *Id.* The supreme court reversed this requirement of notice, finding that the statute does not expressly require notice. *Id.* at 596, 239 S.E.2d at 418. Justice Exum concurred on this issue. *Id.* at 616, 239 S.E.2d at 429 (Exum, J., dissenting). In an earlier case, the court of appeals held that the Open Meetings Law would be meaningless unless reasonable notice were given since otherwise the public would be unaware of the existence of the meeting. *News & Observer Publishing Co. v. Interim Bd. of Educ.*, 29 N.C. App. 37, 51, 223 S.E.2d 580, 589 (1976). This latter principle was also stated by the Minnesota Supreme Court in construing that state's open meetings law, MINN. STAT. ANN. § 471.705 (1977), which is also devoid of any notice requirement. *Sullivan v. Credit River Township*, 299 Minn. 170, 174, 217 N.W.2d 502, 505-06 (1974). See also Lawrence, *supra* note 95, at 786.

102. 32 N.C. App. 530, 232 S.E.2d 855 (1977).

103. *Id.* at 535, 232 S.E.2d at 858. The court of appeals noted that the language of the general provisions in N.C. GEN. STAT. § 143-318.2 (1974) is broad while the exemptions in *id.* § 143-318.4 are drawn quite narrowly.

104. 32 N.C. App. at 533, 232 S.E.2d at 857 (1977). A major point noted by the court of appeals and the dissent in the supreme court opinion, but ignored by the majority supreme court opinion, was that in failing to answer the complaint, defendants admitted plaintiffs' allegations. N.C.R. Civ. P. 8(d). Thus, whether the Board of Governors had delegated powers to the faculty was a question of fact that was, in effect, admitted by defendants. 32 N.C. App. at 533, 232 S.E.2d at 857 (1977).

105. 32 N.C. App. at 536, 232 S.E.2d at 859 (1977). The court also felt that the stated intention of the General Assembly to have the people's business conducted in public would be frustrated if public access were limited to only the highest level and denied at the point at which decisions are actually made. *Id.*

106. 293 N.C. at 594, 239 S.E.2d at 415. The court first noted that if the statute is read to include the Law School faculty meetings, it would also include strategy sessions of the University's football coaching staff. *Id.* at 598, 239 S.E.2d at 418-19.

The court also noted that discussions concerning particular students in the course of open meetings might violate federal law. *Id.* at 598-99, 239 S.E.2d at 419. The Buckley Amendment, 20 U.S.C. § 1232g(b)(1) (Supp. V 1975), cuts off federal funds for any school that maintains a practice of disclosing information about a student without that student's consent. The court stated that although this statute could not shed light on the prior intent of the General Assembly in enacting the Open Meetings Law, it was a factor to be considered in construing the law. 293 N.C. at 599, 239 S.E.2d at 419.

107. 293 N.C. at 601, 239 S.E.2d at 420.

108. *Id.*

the Law School.<sup>109</sup> The court then concluded that, although the faculty of the School of Law was a component part of the University, it was not a component part of the Board of Governors but was rather a "group of employees of the Board."<sup>110</sup> Finally, the court held that even if the faculty were a component part of the Board of Governors, the Board itself was not a "governing and governmental" body as required by the Open Meetings Law.<sup>111</sup> "Governmental" requires that the body in question exercise some powers exclusive to a sovereign political entity;<sup>112</sup> accordingly, the operation of an educational institution is not a governmental power because it can also be carried out by private concerns.<sup>113</sup> The court reasoned that as the Board of Governors possessed no governmental powers, it was not a "governmental body" and thus the faculty, even if it were a component part of the Board of Governors, was not a component part of a "governing and governmental" body<sup>114</sup> within the meaning of G.S. 143-318.2.<sup>115</sup> Thus the supreme court placed a tight rein on the Open Meetings Law by limiting its application to those bodies exercising powers held exclusively by the government as sovereign.

In his dissent, Justice Exum took issue with the majority's narrow approach, stating that the legislative intent was to be gleaned from "the language of the statute, the spirit of the act, and what the act seeks to accomplish." "<sup>116</sup> As the Act was written to ensure that the public's business is conducted in the public's view, and because the Law School faculty conducts the public's business, the Law School faculty meetings were to be

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109. *Id.* at 602, 239 S.E.2d at 421.

110. *Id.* at 602-03, 239 S.E.2d at 421.

111. *Id.* at 603, 239 S.E.2d at 422.

112. *Id.* at 603, 239 S.E.2d at 421. *But see* Raton Pub. Serv. Co. v. Hobbes, 76 N.M. 535, 417 P.2d 32 (1966), in which the court stated that "governmental" as used in the corresponding New Mexico statute, Law of Mar. 30, 1959, ch. 120, 1959 N.M. Laws 306 (repealed 1974, current version at N.M. STAT. ANN. §§ 5-6-23 to -26 (Supp. 1975)), was not used in the usual sense of distinguishing between proprietary and sovereign functions. The North Carolina Supreme Court distinguished this case, however, concluding that the New Mexico open meetings law was written much more broadly than that of North Carolina. 293 N.C. at 606, 239 S.E.2d at 423.

113. 293 N.C. at 603, 239 S.E.2d at 421-22.

114. *Id.* at 603-04, 239 S.E.2d at 422; *see* text accompanying notes 93 & 94 *supra*. The court further found that the exception relating to student disciplinary cases was included "simply to remove any possibility that a board of education, a governing body of a public educational institution or a court could believe the Open Meetings Law requires a public hearing of such disciplinary matters." 293 N.C. at 604, 239 S.E.2d at 422. The supreme court went on to state that the provision of N.C. GEN. STAT. § 143-318.3(c) (1974), allowing a board of education to hold private sessions in case of a riot, was likewise "inserted out of an abundance of caution so as to prevent members of such board from being afraid to act promptly in such emergency." 293 N.C. at 604, 239 S.E.2d at 422.

115. N.C. GEN. STAT. § 143-318.2 (1974).

116. 293 N.C. at 607, 239 S.E.2d at 424 (Exum, J., dissenting) (quoting *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972)).

covered by the Open Meetings Law.<sup>117</sup> Exum also criticized the majority's analysis concerning the "governmental" aspect of the Board of Governors. After noting that in G.S. 116-3 the Board of Governors is designated as a "body politic and corporate,"<sup>118</sup> he declared that, inasmuch as a "body politic is a governmental body and vice versa," the Board of Governors is a governmental body within the purview of the law.<sup>119</sup> The questions for Justice Exum then became whether the Law School faculty is a component part of the Board of Governors and whether it is a body politic—both of which, Exum submitted, are questions of fact.<sup>120</sup> Since defendants had admitted that the faculty is a component part of the Board and a body politic, the Law School faculty meetings were intended to be covered.<sup>121</sup> Exum further noted that even if the decisions made by the faculty were subject to review by the Board of Governors, the intent of the statute was to cover the entire decisionmaking process, not just formal approval of a decision reached in private.<sup>122</sup>

In attempting to ascertain the intent of the General Assembly in enacting the Open Meetings Law, the courts were understandably hampered by the dearth of pertinent legislative history.<sup>123</sup> Furthermore, prior North Carolina cases construing the law are not particularly enlightening in the present situation.<sup>124</sup> Courts in two other states have, however, dealt with the issue whether a law school faculty is within the purview of a sunshine law. In *Fain v. Faculty of the College of Law*,<sup>125</sup> the Tennessee Court of Appeals held that committees composed of faculty members are not governing bodies within the intent of the Tennessee Open Meetings Law because they

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117. *Id.* at 607-08, 239 S.E.2d at 424. Exum noted that the Law School is not just an institution of higher education, but is a publicly-owned institution and thus conducts the public's business. *Id.* at 608, 239 S.E.2d at 424.

118. N.C. GEN. STAT. § 116-3 (1975).

119. 293 N.C. at 610, 239 S.E.2d at 426 (Exum, J., dissenting).

120. *Id.* at 612, 239 S.E.2d at 426-27. Exum stated that the "majority mistakenly treats them as questions of law . . . . In my view the answers . . . must lie . . . in what in fact the faculty does and how in fact it is related to the Board of Governors." *Id.* at 612, 239 S.E.2d at 427.

121. *Id.* at 612-13, 239 S.E.2d at 427; see note 104 *supra*.

122. 293 N.C. at 614, 239 S.E.2d at 428 (Exum, J., dissenting). Exum also found that the exception as to disciplinary cases provided in N.C. GEN. STAT. § 143-318.3(b) (1974) indicates that these educational bodies are covered by the Law. 293 N.C. at 615, 239 S.E.2d at 428-29 (Exum, J., dissenting). For a discussion of the majority's treatment of this provision, see note 114 *supra*.

123. For some insight into the legislative process and a suggested mode of interpreting the Open Meetings Law, see Lawrence, *supra* note 95, at 777-81.

124. In *News & Observer Publishing Co. v. Interim Bd. of Educ.*, 29 N.C. App. 37, 223 S.E.2d 580 (1976), the court of appeals held that the exceptions to the Open Meetings Law are to be strictly construed and that therefore a committee of the whole of a board of education does not come within the exception. See also *Lewis v. White*, 287 N.C. 625, 216 S.E.2d 134 (1975); *Eggimann v. Wake County Bd. of Educ.*, 22 N.C. App. 459, 206 S.E.2d 754 (1974).

125. 552 S.W.2d 752 (Tenn. Ct. App. 1977).

are formed solely at the will of the law school dean and have only the power to make recommendations to the dean. This case is distinguishable from *Byrd*, however, since the trial court in *Byrd* found that the faculty of the University of North Carolina School of Law exercises various decision-making powers.<sup>126</sup> In *Cathcart v. Andersen*,<sup>127</sup> the Washington Supreme Court was faced with the identical issue as that presented in *Byrd*: whether the law school faculty at a public law school is a "governing body" within the intent of the Washington statute.<sup>128</sup> The *Cathcart* court found that the faculty there concerned exercises certain de facto powers delegated by the board of regents<sup>129</sup> and held that even though its decisions are subject to review, the faculty is a governing body within the intent of the Act.<sup>130</sup> Although the Washington statute differs from the North Carolina Open Meetings Law, the *Cathcart* decision and the analysis are applicable to the present case.<sup>131</sup>

As pointed out by Justice Exum in his dissent, the supreme court "has made unnecessarily confusing what is, in fact and in law, a relatively simple case."<sup>132</sup> Any construction of the Open Meetings Law should begin with the prefatory statement of policy—the people's business must be conducted openly.<sup>133</sup> Following this statement is a broad requirement of open access<sup>134</sup> limited only by narrow exceptions.<sup>135</sup> The format of the statute itself suggests a legislative intent to extend the Open Meetings Law to any gathering wherein any public business is conducted. Yet the majority in *Byrd* adopted

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126. See the findings of fact as enumerated in the court of appeals decision, 32 N.C. App. at 534-35, 232 S.E.2d at 857-58 (1977). Among other powers, the faculty may make final decisions concerning the enrollment level of the Law School, the formula for admissions, the curriculum and the rules for readmission.

127. 85 Wash. 2d 102, 530 P.2d 313 (1975).

128. WASH. REV. CODE ANN. § 42.30.030 (1972) requires meetings of the governing bodies of a public agency to be open. "Public agency" is defined to include an educational institution. *Id.* § 42.30.020(1)(a).

129. 85 Wash. 2d at 106, 530 P.2d at 316. These powers related to curriculum decisions, scholastic policy, approval of candidates for graduation and rules regarding faculty appointment and promotion. *Id.* at 107, 530 P.2d at 316.

130. *Id.* at 107, 530 P.2d at 316. In an earlier Georgia case, the Georgia Supreme Court held that committees of faculty and students that reviewed allocations of student funds are not within the comparable Georgia statute because they are not bodies authorized to make decisions and to act for the state. *McLarty v. Board of Regents*, 231 Ga. 22, 200 S.E.2d 117 (1973) (construing GA. CODE ANN. § 40-3301 (1972)).

131. 293 N.C. at 615-16, 239 S.E.2d at 429 (Exum, J., dissenting). The majority distinguished this case based on the differences between the two statutes. *Id.* at 605, 239 S.E.2d at 423. The true issue in *Cathcart*, however, was whether the faculty was a governing body and this was decided upon the facts, not the language of the statute. 85 Wash. 2d at 107, 530 P.2d at 316. Similar facts were present in *Byrd* but the majority in that case determined that the faculty was not a governing body as a matter of law. 293 N.C. at 604, 239 S.E.2d at 422.

132. 293 N.C. at 607, 239 S.E.2d at 423 (Exum, J., dissenting).

133. N.C. GEN. STAT. § 143-318.1 (1974).

134. *Id.* § 143-318.2; see text accompanying note 94 *supra*.

135. N.C. GEN. STAT. § 143-318.3, .4 (1974).

a superficial and literal interpretation of the statute without giving credence to the spirit and intent of the Open Meetings Law.<sup>136</sup> As one authority forewarned, this law could easily be thwarted by a literal interpretation of it that would end in "results that appear irrational."<sup>137</sup> It is apparent that the decision in *Byrd* has rendered such a result.

Regardless of whether the North Carolina Supreme Court was justified in removing the faculty meetings of the School of Law from the application of this statute, the *Byrd* holding has considerably curtailed the scope and effect of the Open Meetings Law. If this law only covers governing bodies (not subject to review) and governmental bodies (exercising sovereign powers), then the North Carolina "sunshine law" has been substantially eclipsed. For example, under the court's rationale a county board of education meeting would not be within the purview of the law unless that board exercises some governmental power because private institutions also operate primary and secondary schools<sup>138</sup>—yet there could be few matters that are of greater concern to the public than the education of its children. The supreme court has gone far beyond excluding merely law school faculty meetings from the scope of the Open Meetings Law. Now the decision rests, once again, with the General Assembly—to allow the supreme court's interpretation to stand or to revise the Open Meetings Law to require more sunshine on public decisionmaking in North Carolina.<sup>139</sup>

#### E. State Government<sup>140</sup>

In 1977 North Carolina joined the growing list of states that have

136. Furthermore, as explained by Justice Exum, the majority opinion ignores the statutory definition of the Board of Governors as a "body politic and corporate." See text accompanying notes 118 & 119 *supra*. If the court insists upon taking a purely literal approach, it should at least take cognizance of other pertinent statutory provisions.

137. Lawrence, *supra* note 95, at 820-21.

138. It has also been suggested that other governmental bodies such as planning committees, committees of city commissioners and the Board of Governors of the University of North Carolina are not covered by the Open Meetings Law under the supreme court's interpretation. Christensen, *Panel Seeking to Fix Loopholes in Meeting Law*, Raleigh, N.C., News & Observer, Feb. 18, 1978, at 19, col. 4.

139. There are indications that the General Assembly is interested in revising the law. It has been suggested that "and" be changed to "or" in "governing *and* governmental." Raleigh, N.C., News & Observer, Feb. 12, 1978, § IV, at 5, col. 5. The North Carolina League of Municipalities lobbyist predicts that a notice requirement for special meetings will be written into the Open Meetings Law. *Id.* Feb. 13, 1978, at 7, col. 1.

140. The General Assembly enacted 13 laws dealing with various aspects of the electoral process in North Carolina. All of these laws are included in Chapter 163 of the General Statutes with the exception of N.C. GEN. STAT. § 153A-60(4) (Cum. Supp. 1977). One new provision changes the time of the primary election from August to the "Tuesday next after the first Monday in May." *Id.* § 163-1(b) (Supp. 1977). Candidates for the primary are required to file for their offices between twelve o'clock noon on the first Monday in January and twelve o'clock noon on the first Monday in February preceding the primary. *Id.* § 163-106(c). The new law also provides for a presidential preference primary to be held on the same date every four

enacted sunset legislation.<sup>141</sup> The North Carolina law provides for the automatic termination of approximately one hundred agencies and programs after specified dates, the earliest of which is July 1, 1979, unless the legislature expressly continues or reestablishes the program.<sup>142</sup> A temporary state commission will conduct a performance evaluation of each program scheduled for termination under the Act.<sup>143</sup> The legislative goal is an admirable one—to continue “productive, efficient and active programs

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years beginning in 1980. *Id.* § 163-213.2. The purposes of this change are to attract more national attention to North Carolina's presidential primary by scheduling it at an earlier—and more critical—time of the year and to encourage better voter participation. The third Tuesday in August had been criticized because it was an inconvenient time for agricultural workers and because it fell during the period when many families took summer vacations. Interview with Rep. Patricia Hunt, member of N.C. House of Representatives, in Chapel Hill, N.C. (Feb. 16, 1978). N.C. GEN. STAT. § 163-213.2 (Supp. 1977) was amended to authorize those otherwise qualified voters who, though not 18 years old at the time of the primary, will have reached that age by the time of the general election to register and vote in the presidential preference primary conducted in that year.

A sweeping revision of the legislation governing absentee balloting was enacted, *id.* §§ 163-226 to -239; also, provisions regarding eligibility of voters and procedures governing many phases of the process were altered. Absentee ballot voting is permitted only to those persons who expect to be absent from the county where they are registered during the entire election period, those who are prevented from voting by sickness, misdemeanants incarcerated at the time, and employees of the county board of elections whose official duties will prevent them from having an opportunity to vote on election day. *Id.* § 163-226. The law states that the county board shall approve the application of a voter if he is found to be a qualified voter of the county, is registered in the precinct stated in his application, if the assertions in his application are true and if his application is in proper form. *Id.* § 163-230. Absentee voting for any municipal election is allowed provided the election is conducted by the county board of elections and the balloting is authorized by a resolution of the municipal governing body. *Id.* § 163-302. “One-stop” voting, an arrangement by which the voter requests and completes his application for absentee ballots, casts his votes and returns them in a sealed envelope—all in one visit to his county elections board—was authorized as an alternate procedure for absentee voting. *Id.* § 163-227.2. Military and other persons covered by Chapter 163, Article 21 may personally cast their votes at their county board of elections until six o'clock p.m. the day before the election; voting in person on election day by those eligible to cast absentee ballots under Article 21 is also made possible for the first time. *Id.* §§ 163-254 to -256.

County boards were authorized to determine those qualified to vote in referenda relating to annexations of new territory by existing cities or special districts. *Id.* § 163-288.2. The board may certify voters either by employing existing registration records or conducting a special registration for the particular election. *Id.* § 163-288.2(a).

Financial aspects of office-seeking were also addressed: political advertisers must not be charged higher rates or denied discounts available to other advertisers under comparable conditions. *Id.* § 163-278.18. In addition new disclosure provisions apply to political loans and to funds expended for political purposes in behalf of an elected official during his term of office. *Id.* §§ 163-278.8(g), .11(a)(3), .36. The new law requires the disclosure of the amount, source, period, rate of interest, security pledged if any and the names of all makers and endorsers of loans obtained for or by political candidates and committees. *Id.* §§ 163-278.8(g), .11(a)(3).

141. N.C. GEN. STAT. §§ 143-34.10 to .21 (Cum. Supp. 1977).

142. The schedules for termination are set out at *id.* §§ 143-34.11 to .13. Public hearings are mandated prior to any action by the legislature that terminates, continues or reestablishes any such program or function.

143. For a list of criteria the Governmental Evaluation Commission is required to consider in evaluating each program, see *id.* § 143-34.17.

which are in the public interest," to eliminate inactive programs and to consolidate or eliminate "overlapping or duplicating programs."<sup>144</sup>

Beginning in 1976, a number of states began enacting sunset laws in an effort to reestablish control over burgeoning state bureaucracies. The concept has been criticized by commentators who feel it is only a "'gimmick' which all too often appeals . . . as a facile solution to complex problems."<sup>145</sup> It is unclear whether, given the massive task imposed on the Commission and the General Assembly by this Act and the high level of expertise required for review of these programs, any review other than a perfunctory one will result. In making the final determination, the General Assembly will also be subject to political pressures that may make it difficult for the Assembly to terminate agencies and programs, even though they are no longer engaged in worthwhile or productive activities.

In addition, 1977 brought a number of organizational changes to state government in North Carolina.<sup>146</sup> In a comprehensive restructuring, the

144. *Id.* § 143-34.19.

145. Schwartz, *Administrative Law: The Third Century*, 29 AD. L. REV. 291, 294 (1977).

146. One of the most massive restructurings resulted in the transfer of a number of existing law enforcement and emergency services agencies into the newly created Department of Crime Control and Public Safety. The groups transferred to the department include the National Guard, Office of Civil Preparedness and State Civil Air Patrol, formerly in the Department of Military and Veterans Affairs; the State Board of Alcoholic Control Enforcement Division, formerly in the Department of Commerce; the State Highway Patrol, formerly in the Department of Transportation; and the Governor's Crime Commission, the Crime Control Division, the Criminal Justice Information System Board and the Criminal Justice Information System Security and Privacy Board, all formerly in the Department of Natural and Economic Resources. N.C. GEN. STAT. § 143B-475 (Cum. Supp. 1977). The Department of Crime Control and Public Safety is authorized to provide assigned law enforcement and emergency services, to ensure maximum cooperation between state and local law enforcement agencies in fighting crime, and to serve as the state's chief coordinating agency to control crime. *Id.* § 143B-474.

Included in this department are two organizations established in 1977, the State Fire Commission and the revised Governor's Crime Commission. *Id.* §§ 143B-257.35 to .39, -334 to -340, -478, -481. The Fire Commission is empowered to formally adopt a State Fire Education and Training Plan and a State Master Plan for Fire Prevention and Control, to increase the skills of fire-fighting personnel, to make studies and recommendations for the improvement of fire control implementation and education programs, and to be the single agency responsible for carrying out all state duties with respect to all grants from the National Fire Prevention and Control Administration of the United States Department of Commerce. *Id.* § 143B-482. An important function of this legislation is to require all fire departments to cooperate with state investigations into the causes of suspicious fires. Among its new powers, the Governor's Crime Commission is charged "(1) to serve as the chief advisory board to the Governor on the criminal justice system, (2) to develop a statewide plan for improvement of the criminal justice system, and (3) to set objectives and priorities for improvement of the system." The Crime Commission will be the single state agency responsible for planning and administering Law Enforcement Assistance Administration grants. N.C. United Way, 6 Legislative Newsletter, No. 4, at 2 (Feb. 9, 1977) (copy on file in office of *North Carolina Law Review*).

Other important innovations in the criminal justice area were the establishment of a State Coordinator of Services for Victims of Sexual Assault, N.C. GEN. STAT. § 143B-394.2 (Cum. Supp. 1977), and a reorganization of the Parole Commission, *id.* § 143B-267. One purpose of this reorganization was to enable the Governor to place people on the Commission who would parole more of the prisoners who could be better helped by other rehabilitative programs. This



Department of Natural and Economic Resources was redesignated the Department of Natural Resources and Community Development.<sup>147</sup> The Department was given several new responsibilities, the most important of which include the administration of job training and employment programs under the direction of the newly established North Carolina Employment and Training Council.<sup>148</sup> The Department of Human Resources also acquired a significant function in being assigned primary responsibility for the development of community-based juvenile services.<sup>149</sup> By emphasizing the establishment of such services, the legislature expressed its preference for local programs for the rehabilitation of juvenile delinquents to the more traditional training school approach.<sup>150</sup>

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effort has resulted in part from federal pressure on the state to reduce its prison and training school populations. Currently, North Carolina has the highest percentage of its citizens incarcerated of any state in the nation. Interview with Rep. Patricia Hunt, *supra* note 140.

147. The Department is to undertake redefined duties, including the obligation to provide for the management and protection of the state's natural resources and environment, to promote and assist in the orderly development of North Carolina's counties and communities and to provide job training and promote employment for economically disadvantaged persons. N.C. GEN. STAT. § 143B-276 (Cum. Supp. 1977). For a list of the boards and commissions now included in the Department, see *id.* § 143B-279.

148. *Id.* § 143B-340. The Council replaces the State Manpower Services Council, which was in the Department of Administration until its abolition. Law of June 28, 1977, ch. 771, § 14, 1977 N.C. Sess. Laws 1008. One of the most important duties of the Council is to review the programs of state and local agencies operating federally funded programs related to employment and training and to make recommendations regarding the effective planning, delivery and coordination of these services throughout the state.

149. N.C. GEN. STAT. § 143B-207 (Cum. Supp. 1977). This legislation sought to eradicate the state's previously fragmented approach to this program by eliminating the Commission of Youth Services and the Technical Advisory Committee on Delinquency Prevention and Youth Services in the Department of Corrections.

150. The purpose is to remove "status offenders," those juveniles who have committed an act which, if they were adults, would not be considered a crime, from the training schools into a community environment that will assist them in making a proper adjustment to society. For a list of the wide variety of local programs contemplated, see N.C. UNITED WAY, *supra* note 88, at 6.

Duties of the Department's newly created Youth Services Advisory Committee include researching findings concerning juvenile delinquency and making recommendations regarding programs which will provide effective treatment and rehabilitation for children in institutions and community-based programs, encouraging local private groups to establish programs to meet local needs, making recommendations to the Secretary for use in developing a comprehensive plan for juvenile justice and reviewing for the Secretary any applications for federal funds for such programs. N.C. GEN. STAT. § 143B-207 (Cum. Supp. 1977).

The General Assembly also enacted legislation establishing a North Carolina Officials Qualification Board, which is charged with the responsibility of licensing building code enforcement officials throughout the state. *Id.* §§ 143-151.8 to .20. The statute provides that after July 1, 1977, no person may engage in code enforcement unless he possesses a valid certificate, which must be renewed yearly. Standard certificates will be issued only to those individuals who have passed an examination based on the North Carolina Building Code and the administrative procedures required to enforce the Code. *Id.* § 143-151.13. Grounds for revocation of the certificate include signing an inspection report if no inspection has been made by the official and willful misconduct, gross negligence or gross incompetence. *Id.* § 143-151.17. Cities and counties may establish joint inspection programs; a schedule of applicable dates by which time

*F. Professional Responsibility<sup>151</sup> and Administration of Justice<sup>152</sup>*

In *North Carolina State Bar v. Hall*,<sup>153</sup> the North Carolina Supreme Court confronted the issue whether an attorney's plea of nolo contendere to criminal charges in federal district court entitled the State Bar to summary judgment authorizing disciplinary action against the attorney in a subsequent state court proceeding in which the attorney denied the criminal charges. The court held that the nolo contendere plea did not entitle the State Bar to judgment as a matter of law, for denial of the charge raised a genuine issue of material fact in the Bar's action against the attorney.<sup>154</sup> The court discussed the "double implication" from the nolo contendere plea, stating that the court's acceptance of such a plea authorizes judgment against the defendant in the immediate case but that "so far as the defendant is concerned, he is at liberty in all other proceedings, civil and criminal, to assert his innocence."<sup>155</sup> The court then stated that the federal district court's judgment of guilt and conviction on the plea did not put the attorney beyond the aegis of this general rule.<sup>156</sup>

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local inspection programs are to be in operation is set forth on a sliding scale based on population. See *id.* §§ 153A-351; *id.* § 160A-411 (Supp. 1977). This statute should be of great assistance in bringing about more uniform enforcement of the law in an area in which local efforts have been extremely varied. It is anticipated that the activities of the Board will do much to ensure that housing throughout the state meets the standards of the North Carolina Building Code.

Other significant changes included the transfer of the Commission on Indian Affairs to the Department of Administration, *id.* § 1438-404 to -411 (Cum. Supp. 1977), establishment of a State Indian Housing Authority, Law of July 1, 1977, ch. 1112, § 1, 1977 N.C. Sess. Laws 1400, and reorganization of the Energy Division and Energy Policy Council under the Department of Commerce, N.C. GEN. STAT. § 1438-448 (Cum. Supp. 1977). In addition, new legislation narrowing the review of rules promulgated by agencies and boards of state government was adopted. A new Administrative Rules Review Committee was created to scrutinize each agency enactment to determine whether the agency has acted within its statutory authority; appeals of negative rulings will be allowed to the Legislative Research Commission. This procedure is outlined in *id.* §§ 120-30.26 to .35. There are, however, exceptions to the application of the law including provisions excepting the Industrial and Utilities Commissions, state political subdivisions and their agencies, and the University of North Carolina from coverage. *Id.* § 120-30.24(1). This law is scheduled to expire June 30, 1979. Law of July 1, 1977, ch. 915, § 10, 1977 N.C. Sess. Laws 1238.

151. Professional responsibility is an administrative law matter under North Carolina statutory law. N.C. GEN. STAT. § 84-15 (1975) makes the North Carolina State Bar "an agency of the State" for certain designated purposes. Undertaking disciplinary action against members of the North Carolina bar is one of its assigned duties as a state agency. See *id.* §§ 84-28 to -32 (Cum. Supp. 1977).

152. For developments not treated in text, see *id.* §§ 7A-146, -170 to -172 (Cum. Supp. 1977) (salary classification and training plan for magistrates); *id.* § 7A-16 (number of North Carolina Court of Appeals judges increased from nine to twelve).

153. 293 N.C. 539, 238 S.E.2d 521 (1977), *rev'g* 31 N.C. App. 166, 229 S.E.2d 39 (1976).

154. *Id.* at 545, 238 S.E.2d at 525.

155. *Id.* at 541, 238 S.E.2d at 522.

156. *Id.* at 543, 238 S.E.2d at 523; *cf.* *United States v. Reisfeld*, 188 F. Supp. 631 (D. Md. 1960) (court amended judgment on nolo contendere plea by striking out adjudication of guilt and conviction entered on printed form).

The court's holding in *Hall* is consistent with the established rule in this state<sup>157</sup> and other jurisdictions.<sup>158</sup> It is a theoretically sound rule, regardless of the nature of the subsequent proceeding, since the nolo contendere plea is of only limited effect in the case in which it is entered: "[t]he plea itself does not constitute a conviction nor hence a 'determination of guilt' " and does not dispose of the case.<sup>159</sup>

The court also refined the state's judicial disciplinary procedure.<sup>160</sup> *In re Stuhl*<sup>161</sup> and *In re Nowell*<sup>162</sup> both involved a recommendation under G.S. 7A-376<sup>163</sup> by the Judicial Standards Commission (JSC) that a North Carolina district court judge be censured by the supreme court for entering judgments in traffic court cases without the knowledge or consent of the prosecuting attorney. The court in both cases found that the judge's failure to accord the prosecutor the right to participate in the traffic cases violated North Carolina Rule of Judicial Conduct Canon 3A(4) and censured the judge for his misconduct. In *Stuhl* and *Nowell*, the court resolved constitutional questions engendered by the JSC plan, provided a useful interpretation of the statutory framework for the disciplinary procedure and established both the quantum of proof required in the proceedings and the supreme court's scope of review with regard to JSC findings.

In *Stuhl*, the court interpreted the language in G.S. 7A-376 that describes the misconduct that would make a judge subject to the sanctions provided under the statute. "[W]ilful misconduct in office,"<sup>164</sup> the court stated, denotes intentional, knowing, bad faith improprieties committed by a judge acting in his official capacity.<sup>165</sup> " 'It is more than a mere error of

157. See, e.g., *In re Stiers*, 204 N.C. 48, 167 S.E. 382 (1933).

158. See, e.g., *Tseung Chu v. Cornell*, 247 F.2d 929 (9th Cir.), cert. denied, 355 U.S. 892 (1957); *Louisiana State Bar Ass'n v. Connolly*, 206 La. 883, 20 So. 2d 168 (1944).

159. *Lott v. United States*, 367 U.S. 421, 426 (1961). At most, the plea of nolo contendere when accepted by the court becomes merely an "implied confession of guilt." *United States v. Norris*, 281 U.S. 619 (1930).

160. This procedure is provided in N.C. GEN. STAT. §§ 7A-375 to -377 (Cum. Supp. 1977). For a discussion of the procedure and its constitutionality under both the Constitution of North Carolina and the Constitution of the United States, see Note, *Judicial Discipline—The North Carolina Commission System*, 54 N.C.L. REV. 1074 (1976).

Briefly, the statutes authorize the Judicial Standards Commission to investigate charges of judicial misconduct. After a hearing in which the accused judge must be afforded due process rights, the Commission may recommend that the North Carolina Supreme Court censure or remove the judge from office "for wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute." N.C. GEN. STAT. § 7A-376 (Cum. Supp. 1977). A judge may also be removed under the same procedure for mental or physical incapacity. *Id.*

161. 292 N.C. 379, 233 S.E.2d 562 (1977).

162. 293 N.C. 235, 237 S.E.2d 246 (1977).

163. N.C. GEN. STAT. § 7A-376 (Cum. Supp. 1977).

164. *Id.*; see note 160 *supra*.

165. 292 N.C. at 389, 233 S.E.2d at 568.

judgment or an act of negligence. While the term would encompass conduct involving moral turpitude, dishonesty, or corruption, these elements need not necessarily be present.' ”<sup>166</sup> “[C]onduct prejudicial to the administration of justice that brings the judicial office into disrepute”<sup>167</sup> refers to conduct undertaken in good faith by the judge that would nevertheless appear to the objective observer to be “ ‘unjudicial’ ” and “ ‘prejudicial to public esteem for the judicial office.’ ”<sup>168</sup> Citing his dissenting opinion in *In re Crutchfield*,<sup>169</sup> Justice Lake dissented in *Stuhl*, reiterating his view that the disciplinary procedure is unconstitutional.<sup>170</sup> The procedure, according to Justice Lake in *Crutchfield*, denies accused judges their due process and equal protection rights under both the Constitution of North Carolina and the Constitution of the United States.<sup>171</sup>

The supreme court addressed an important JSC due process issue in *Nowell* and found no merit in the argument that, because of its inquisitorial nature, the procedure denied the charged party his right to due process:

Respondent's contention that Article 30 [G.S. 7A-375 to -377]<sup>172</sup>, which allows the Commission to conduct a preliminary investigation, find facts, and make a recommendation to the Supreme Court, denied him the impartial tribunal which is an essential of due process has been rejected by all jurisdictions which have considered it. It is well settled by both federal and state court decisions that a combination of investigative and judicial functions within an agency does not violate due process. An agency which has only the power to recommend penalties is not required to establish an independent investigatory and adjudicatory staff.<sup>173</sup>

The court also declared that the quantum of proof required in proceedings before the JSC is proof by clear and convincing evidence—“a burden greater than that of proof of a preponderance of the evidence and less than that of proof beyond a reasonable doubt.”<sup>174</sup> Finally, the court held that its scope of review in a JSC proceeding should entail an independent evaluation

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166. *Id.* (quoting *In re Edens*, 290 N.C. 299, 305, 226 S.E.2d 5, 9 (1976)).

167. N.C. GEN. STAT. § 7A-376 (Cum. Supp. 1977).

168. 292 N.C. at 389, 233 S.E.2d at 568 (quoting *Geiler v. Commission on Judicial Qualifications*, 10 Cal. 3d 270, 284, 515 P.2d 1, 9, 110 Cal. Rptr. 201, 209 (1973), *cert. denied*, 417 U.S. 932 (1974)).

169. 289 N.C. 597, 223 S.E.2d 822 (1975). This case is discussed in *Survey of Developments in North Carolina Law*, 1976, 55 N.C.L. REV. 895, 898-99 (1977), and Note, *supra* note 160.

170. 292 N.C. at 390, 233 S.E.2d at 569 (Lake, J., dissenting).

171. See 289 N.C. at 605-12, 223 S.E.2d at 827-31 (Lake, J., dissenting). For a discussion of Justice Lake's objections and an explanation of how the same contentions have been effectively refuted elsewhere, see Note, *supra* note 160, at 1078-81.

172. N.C. GEN. STAT. §§ 7A-375 to -377 (Cum. Supp. 1977).

173. 293 N.C. at 244, 237 S.E.2d at 252 (citations omitted).

174. *Id.* at 247, 237 S.E.2d at 254. This standard was previously adopted for judicial disciplinary proceedings in Alaska, Louisiana, Maryland and California. See *id.*

of the evidence adduced below,<sup>175</sup> citing the Supreme Court of Texas' determination under similar circumstances that "[t]his court's constitutional responsibility cannot be abandoned by the delegation of the fact-finding power to an administrative agency." <sup>176</sup>

The most significant aspect of the JSC cases consists in the court's holding in *Nowell* that the procedure comports with due process requirements. In a noncriminal disciplinary proceeding, "minimum due process," with emphasis on notice and the right to be heard, is the standard normally applied.<sup>177</sup> The weight of authority holds that an administrative body can act as judge, jury and prosecutor.<sup>178</sup> Indeed, "[t]he judge-jury-prosecutor due process objection has been rejected in every jurisdiction in which the issue was raised in a judicial commission context."<sup>179</sup> It is fortunate that the supreme court followed these precedents from other states with regard to this issue since the alternative and more traditional methods of judicial discipline—address and impeachment—are cumbersome<sup>180</sup> and have been used only infrequently.<sup>181</sup>

WILLIAM JOSEPH AUSTIN, JR.

MARY ANN DIXON HOGUE

ANN LASHLEY SAWYER

## II. CIVIL PROCEDURE

### A. Jurisdiction

In *Brondum v. Cox*<sup>1</sup> the state supreme court decided a jurisdictional issue of first impression in North Carolina when it held that a judgment purporting to establish the paternity of a child cannot be rendered by a court having only in rem jurisdiction. The court's holding came in a challenge by

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175. *Id.* This standard was previously adopted for judicial disciplinary proceedings in California, Texas, Florida and Alaska. See *id.* at 245-47, 237 S.E.2d at 253-54.

176. *Id.* at 246, 237 S.E.2d at 254 (quoting *In re Brown*, 512 S.W.2d 317, 320 (Tex. 1974)).

177. *Allen v. City of Greensboro*, 452 F.2d 489, 490 (4th Cir. 1971), cited in Note, *supra* note 160, at 1080 n.5.

178. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 13.02 (1958), cited in Note, *supra* note 160, at 1079 n.49.

179. Note, *supra* note 160, at 1079-80 n.49 (citing *In re Hanson*, 532 P.2d 303, 306 (Alas. 1975)).

180. *Id.* at 1075.

181. *Id.* at 1075 n.7.

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1. 292 N.C. 192, 232 S.E.2d 687 (1977). See also this Survey, *Domestic Relations: Uniform Reciprocal Enforcement of Support Act*.

the putative father to the award of full faith and credit to the judgment of a Hawaii court that did not have in personam jurisdiction over him when it rendered the judgment. The judgment granted his former wife, who was domiciled in Hawaii, a divorce and custody of her minor child and "adjudged" the child to be the "child of the parties."<sup>2</sup> When the wife filed a claim for support under the provisions of the Hawaii Uniform Reciprocal Enforcement of Support Act,<sup>3</sup> her complaint, with the earlier divorce decree attached, was forwarded to the district court in Guilford County, North Carolina, and a summons was served on the husband. He filed an answer denying paternity of the child and moved that the court order a blood grouping test and grant him a jury trial on the issue of paternity.<sup>4</sup> The district court judge concluded that the Hawaii court had in rem jurisdiction to enter the divorce decree and to determine custody of the child. He also concluded that "because the issue of paternity was inextricably bound up in determination of those items," the Hawaii court had jurisdiction to determine that issue as well.<sup>5</sup> Based on this conclusion, the district judge held that defendant was bound by the findings of the Hawaii court and denied his motion seeking to relitigate the issue of paternity.<sup>6</sup>

Writing for the North Carolina Supreme Court, Justice Lake rejected the trial court's determination that the Hawaii court had jurisdiction to establish the paternity of the child. According to the court, the ultimate effects of this type of determination are such that a court must have jurisdiction over the person of the putative father before it may render a paternity decree.<sup>7</sup> The determination of paternity "fixes upon the

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2. *Id.* at 194, 232 S.E.2d at 688. The summons, complaint and other papers in the wife's divorce suit were served on defendant in North Carolina by sending them to him by registered mail. He did not respond or appear in the Hawaii divorce proceeding. *Id.* at 193, 232 S.E.2d at 688. Under the applicable Hawaii statute it was clear that the court never had jurisdiction over the person of defendant despite this service of process on him by mail because he was not a domiciliary of Hawaii "(1) at the time that the cause of action which is the subject of the proceeding arose or (2) at the time of the commencement of the proceeding, or (3) at the time of service." HAW. REV. STAT. § 580-3.5 (1976). Because he had notice of the proceeding, he would, however, be bound by a determination of the Hawaii court on "all issuable matters contained in the pleadings" that the court had jurisdiction to adjudicate, including plaintiff's entitlement to a divorce and custody of the child. *See Bruton v. Carolina Power & Light Co.*, 217 N.C. 1, 6 S.E.2d 822 (1940).

3. HAW. REV. STAT. §§ 576-1 to -41 (1976).

4. 292 N.C. at 195, 232 S.E.2d at 688-89.

5. *Id.* at 195-96, 232 S.E.2d at 689.

6. *Id.*

7. The use of in rem jurisdiction to determine the nonexistence of a parent-child relationship would arguably present a different situation. *See Hartford v. Superior Court*, 47 Cal. 2d 447, 304 P.2d 1 (1956). Such an exercise of in rem jurisdiction would be limited essentially to a determination of the status of a domiciliary of the state seeking to exercise it. The state would only be seeking to "insulate its domiciliary from a relationship with one not within its jurisdiction." *Id.* at 454, 304 P.2d at 5 (citing *Dodd, Jurisdiction in Personal Actions*, 23 ILL. L. REV. 427, 429 (1929)). It would not, under the guise of determining status alone, also be

adjudicated father a personal obligation for the support of the minor child."<sup>8</sup> Although it does not determine the actual amount of the father's liability for support, a determination that clearly requires a court to have in personam jurisdiction, a judgment of paternity does determine that such a personal obligation exists and would, if given effect, prevent relitigation of the basic premise on which the amount of the obligation of support rests.<sup>9</sup> Thus, a state seeking to exercise in rem jurisdiction in such a situation is not merely determining the status of a domiciliary but is also attempting "to reach out and fasten a relationship upon a person over whom it has no jurisdiction."<sup>10</sup>

The decision in *Brondum*, although in the context of enforcement of the judgment of a foreign court, clearly establishes that in North Carolina courts as well, in rem jurisdiction is alone insufficient to determine the existence of a parent-child relationship.<sup>11</sup> The court's holding is in agreement with the majority of the courts of other states that have considered the issue, and its opinion drew heavily on them.<sup>12</sup>

In *Dillon v. Numismatic Funding Corp.*,<sup>13</sup> the North Carolina Supreme Court upheld the state's long-arm jurisdiction statute<sup>14</sup> in the face of a serious constitutional challenge. While living in South Carolina, plaintiff Dillon was offered employment by defendant, a New York corporation. After he had terminated his employment relationship in South Carolina but before he had moved to New York, he was informed by defendant that the position he had been offered was no longer available. He then moved to North Carolina, settled in Greensboro, and found other employment. He subsequently instigated a civil action in North Carolina against defendant

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attempting to impose the personal obligation that necessarily follows from a determination that a parent-child relationship exists in a person over whom it did not have personal jurisdiction. A determination that a parent-child relationship does not exist would be an analogous action to a court's exercise of in rem jurisdiction to dissolve a marriage although it does not have personal jurisdiction over one of the parties to the marriage. *Id.* at 453-54, 304 P.2d at 4-5.

8. 292 N.C. at 202, 232 S.E.2d at 693.

9. *Id.*

10. *Hartford v. Superior Court*, 47 Cal. 2d 447, 454, 304 P.2d 1, 5 (1956).

11. The holding of the court was "that such judgment is one in personam and can be rendered only by a court having jurisdiction over the person of the defendant." 292 N.C. at 202, 232 S.E.2d at 693. The conclusion that the judgment of the Hawaii court on the paternity issue was not entitled to full faith and credit because it was based on in rem jurisdiction should apply equally to a North Carolina court issuing such a judgment on the same jurisdictional basis.

12. *Id.* at 201, 232 S.E.2d at 692 (citing *In re Hindi*, 71 Ariz. 17, 222 P.2d 991 (1950); *Neill v. Ridner*, 153 Ind. App. 149, 286 N.E.2d 427 (1972)); see *Developments in the Law, State Court Jurisdiction*, 73 HARV. L. REV. 909 (1960).

13. 291 N.C. 674, 231 S.E.2d 629 (1977).

14. N.C. GEN. STAT. § 1-75.4 (1969). Section 1-75.4 (1) of the long-arm statute authorizes the assertion of personal jurisdiction by a court with jurisdiction of the subject matter "[i]n any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party . . . is engaged in substantial activity within this State." *Id.* § 1-75.4(1)(d).

seeking damages for breach of the contract of employment. Defendant responded with a motion to dismiss, alleging its contacts with the state were insufficient to provide a basis for the court's assertion of personal jurisdiction. The trial judge denied the motion.<sup>15</sup> Citing the lack of connection between plaintiff's claim and the activities of defendant within North Carolina, the relatively insubstantial nature of those activities, and the fact that plaintiff's claim arose outside the state, the court of appeals held that the assertion of personal jurisdiction over defendant in this case would be a violation of due process.<sup>16</sup> In reversing the court of appeals in *Dillon* and determining that the statute was constitutionally applied under the criteria set out by the United States Supreme Court in *International Shoe Co. v. Washington*,<sup>17</sup> the North Carolina Supreme Court focused on two considerations: the fairness to plaintiff in permitting the suit to be maintained in the state of his residence<sup>18</sup> and the quality and nature of defendant's activities within the state.<sup>19</sup>

On the issue of fairness to plaintiff, the court observed that to require him to litigate elsewhere would be to impose a "large burden" upon him and "could possibly preclude [him] from asserting his claim."<sup>20</sup> Analyzing the nature and quality of defendant's activities, which had included solicitation of orders, mass mailings and sales of some \$50,000,<sup>21</sup> with the fairness to the plaintiff concept in mind, the supreme court found that "defendant's

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15. 291 N.C. at 675, 231 S.E.2d at 630.

16. 29 N.C. App. 513, 225 S.E.2d 137 (1976), *rev'd*, 291 N.C. 674, 231 S.E.2d 629 (1977). In *Byrum v. Register's Truck & Equip. Co.*, 32 N.C. App. 135, 231 S.E.2d 39 (1977), the court of appeals subsequently upheld the assertion of long-arm jurisdiction under two other subsections of the statute, N.C. GEN. STAT. § 1-75.4(4)(b), (5)(c) (1969), whose application had been challenged on due process grounds similar to those raised in *Dillon*.

17. 326 U.S. 310 (1945).

18. 291 N.C. at 678, 231 S.E.2d at 632. North Carolina precedent for the court's approach of considering "the interests of and fairness to both the plaintiff and the defendant," *id.*, was found in *Farmer v. Ferris*, 260 N.C. 619, 133 S.E.2d 492 (1963). The court also relied on the following recent Fourth Circuit decisions that support this approach: *O'Neil v. Hicks Brokerage Co.*, 537 F.2d 1266 (4th Cir. 1976); *Lee v. Walworth Valve Co.*, 482 F.2d 297 (4th Cir. 1973); *Ratliff v. Cooper Laboratories, Inc.*, 444 F.2d 745 (4th Cir. 1971).

19. 291 N.C. at 677, 679, 231 S.E.2d at 631-32. The court found defendant's activities within the state to be as follows:

Defendant, a corporation, has actively solicited orders for its coins from residents of this State on a regular basis during a period of approximately twenty-one months. During this time, it has made several mass mailings to North Carolinians and has sold coins with a value in excess of \$50,000 to some 27 different citizens in 142 separate transactions. In each transaction, defendant employed an invoice which stated: "TITLE TO THE ABOVE MERCHANDISE DOES NOT PASS UNTIL ALL OF THE ABOVE MERCHANDISE IS PAID IN FULL." These invoices ranged from \$13.50 up to \$9,400 and represented sales in all sections of North Carolina. In addition, defendant sent a representative to visit a resident of Burlington, North Carolina, to appraise her coin collection and thereafter sold her coins valued at more than \$21,000.

*Id.* at 679, 231 S.E.2d at 632.

20. *Id.* at 679, 231 S.E.2d at 632.

21. See note 19 *supra*.



contacts with the State [were] sufficient to satisfy due process requirements."<sup>22</sup>

The court's decision in *Dillon* upheld the reach of the state's long-arm statute in a situation in which the plaintiff's cause of action did not arise within the state, the cause of action was not related to the defendant's activities within the state, and the quality and nature of those activities were arguably insufficient to meet the minimum contacts test.<sup>23</sup> The court in so doing transmuted the essentially negative factor of forum shopping into the positive element of considering fairness to the plaintiff in allowing him to bring suit where he resides.<sup>24</sup> By endorsing the consideration of that element, the North Carolina Supreme Court has both provided resident plaintiffs with a strong basis to resist challenges to the assertion of jurisdiction under the state's long-arm statute that are based on a claim of insufficient contacts with the state and again given its support to the exercise under the long-arm statute of "the full jurisdictional powers permissible under due process."<sup>25</sup>

In *Sugg v. Pollard*,<sup>26</sup> decided in 1922, the North Carolina Supreme Court held that an action to enforce a laborers' or materialmen's lien need not be brought in the county in which the land to be encumbered by the lien is situated. In *Ridge Community Investors, Inc. v. Berry*,<sup>27</sup> a 1977 case, plaintiffs contended that amendments to the laborers' and materialmen's liens statute<sup>28</sup> enacted since the decision in *Sugg* required that *Sugg* be reversed. In 1974 defendant Berry had performed labor for and supplied materials to the then owner of property in Watauga County, Mill Ridge Developers, Inc. When compensation for his work was not forthcoming, he filed a notice and claim of lien against the Watauga property in the office of

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22. 291 N.C. at 680, 231 S.E.2d at 633.

23. See *O'Neal v. Hicks Brokerage Co.*, 537 F.2d 1266, 1268 (4th Cir. 1976) ("[e]manating from [previous decisions of the Fourth Circuit] is the rule that the sufficiency of contacts threshold is elevated when the cause of action does not arise in the forum state or derive from the foreign corporation's transactions in the state"); cf. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 446 (1952) (corporate activity within state held "so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities" (quoting *International Shoe Co. v. Washington*, 326 U.S. at 318-19)). With the exception of an even lower level of activity within the state, only had he been a nonresident of North Carolina could plaintiff's case in *Dillon* been appreciably weaker.

24. Fairness to the plaintiff is a factor that has been considered by other courts. See, e.g., *Lee v. Walworth Valve Co.*, 482 F.2d 297 (4th Cir. 1973); *F. JAMES & G. HAZARD, CIVIL PROCEDURE* § 12.30, at 661 (2d ed. 1977). Indeed, the genesis of long-arm jurisdiction lies in the consideration of fairness to the plaintiff seeking to sue in his resident forum. *Dillon* can be read as merely an extension of that principle to counteract factors in the case that worked against allowing the court to exercise in personam jurisdiction over defendant.

25. *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 705, 208 S.E.2d 676, 679 (1974).

26. 184 N.C. 494, 115 S.E. 153 (1922).

27. 293 N.C. 688, 239 S.E.2d 566 (1977).

28. N.C. GEN. STAT. §§ 44A-7 to -24 (1976 & Supp. 1977).

the clerk of Watauga superior court as required by statute.<sup>29</sup> He subsequently brought an action in Mecklenburg County superior court to enforce the lien and secured a default judgment ordering execution against the Watauga property of Mill Ridge Developers, Inc.<sup>30</sup> Meanwhile, the holder of a note given by Mill Ridge Developers and secured by a deed of trust on the Watauga property brought a foreclosure action pursuant to which portions of the property were purchased at sale by plaintiffs.<sup>31</sup> Upon learning of the lien on their property held by defendant Berry, plaintiffs brought an action to have the judgment of the Mecklenburg court declared null and void, contending that the court that rendered it had been without jurisdiction to enforce the lien on the Watauga County property.

Plaintiffs' contention was based on G.S. 44A-13(a), a segment of a 1969 amendment to the statutory scheme for enforcement of laborers' and materialmen's liens that provides: "An action to enforce the lien created by this Article may be instituted in any county in which the lien is filed."<sup>32</sup> Plaintiffs argued that as a lien against real property must be filed in the county where such property is located,<sup>33</sup> only the courts of such county have jurisdiction to enforce the lien. In rejecting this construction of G.S. 44A-13(a) and reaffirming its prior holding, the supreme court held that the legislature's failure to create explicitly a jurisdictional requirement that an action to foreclose a lien be brought in the county where the lien was filed by using clear language to that effect was evidence of its lack of intent to do so.<sup>34</sup> Furthermore, the court held that the legislature's passage of another amendment to G.S. 44A-13<sup>35</sup> during the 1977 session clarified its intent with respect to the 1969 amendment.<sup>36</sup> The 1977 amendment provides that

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29. 293 N.C. at 690-91, 239 S.E.2d at 567. N.C. GEN. STAT. § 44A-12(a) (1976) requires that "[a]ll claims of lien against any real property must be filed in the office of the clerk of superior court in each county wherein the real property subject to the claim of lien is located."

30. 293 N.C. at 690, 239 S.E.2d at 567-68.

31. *Id.* at 690, 239 S.E.2d at 568.

32. N.C. GEN. STAT. § 44A-13(a) (1976).

33. *See* note 29 *supra*.

34. 293 N.C. at 695, 239 S.E.2d at 570. Even if the court had construed the 1969 amendment to § 44A-13(a) as requiring that an action to enforce a laborers' or materialmen's lien must be brought in the county wherein the real property subject to the lien is located, it is likely that the court would have found such requirement to be one of venue rather than jurisdiction. In construing N.C. GEN. STAT. § 1-76 (1976) which requires that certain actions must be tried in the county in which the subject of the action is situated, the court has held that the statute imposes a venue rather than a jurisdictional requirement and that failure to object when the action is not brought in the proper county results in a waiver of the requirement. *See* Thompson v. Horrel, 272 N.C. 503, 158 S.E.2d 633 (1968). If the 1969 amendment to § 44A-13(a) had been held to create only a venue requirement, the failure of defendants in *Berry* to object to the improper venue would thereby have precluded a later challenge to the judgment of the Mecklenburg court grounded on improper venue.

35. N.C. GEN. STAT. § 44A-13(c) (Supp. 1977).

36. 293 N.C. at 694-95, 239 S.E.2d at 570.

unless a labor and material lien is enforced by a court in the county where the lien was filed, a purchaser of the property at a sale to foreclose the lien will not take title good against the claims of persons filed or arising after the first furnishing of labor or material unless a notice of *lis pendens* is filed in the county where the real property subject to the lien is located within 180 days of the last furnishing of labor and materials.<sup>37</sup> The court reasoned that a statute so protecting "purchasers and examiners of title no matter where the action to enforce the lien is located" would not have been necessary if G.S. 44A-13(a) required that an action to enforce the lien be brought in the county where the land to be encumbered by the lien is located.<sup>38</sup> Therefore, the enactment of the 1977 amendment providing such protection was, according to the court, indicative of the legislature's lack of intent in its earlier passage of G.S. 44A-13(a) to create a jurisdictional requisite for actions brought to enforce a lien.

The effect of the court's decision is to continue to treat problems under G.S. 44A-13 as ones of venue. When an action is brought to enforce a laborers' or materialmen's lien elsewhere than in the county where the real property encumbered by the lien is located, the defendant may move for a change of venue and, in the proper circumstances, will be granted such a change.<sup>39</sup> The court's reliance on the 1977 amendment to G.S. 44A-13 was appropriate as that amendment clearly contemplates that actions to enforce a laborers' or materialmen's lien may be brought in any county.<sup>40</sup> Any potential danger in the court's decision from lack of notice to persons examining titles was also eliminated by the provisions of the 1977 amendment that will compel the holder of a lien who chooses to bring an action to enforce it elsewhere to file a notice of *lis pendens* in the county wherein the real property subject to the lien is located.<sup>41</sup>

### B. Notice and Service of Process

In *Lewis Clarke Associates v. Tobler*<sup>42</sup> an out-of-state defendant had

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37. N.C. GEN. STAT. § 44A-13(c) (Supp. 1977).

38. 293 N.C. at 695, 239 S.E.2d at 570.

39. An action to have a laborers' or materialmen's lien enforced is a local action and arguably may be subject to the venue requirement of N.C. GEN. STAT. § 1-76 (1976) (actions for determination of interest in real property must be tried in county in which subject of action is situated). See *Penland v. Red Hill Methodist Church*, 226 N.C. 171, 37 S.E.2d 177 (1946); 1 A. McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE § 778 (2d ed. 1956 & Supp. 1970). Whether subject to that provision or to N.C. GEN. STAT. § 1-82 (1976) (providing for venue in all actions where not otherwise provided) such an action would be subject to a motion for change of venue under *id.* § 1-83.

40. The clear intent of § 44A-13(c) is to protect persons examining titles by affording them notice of a pending action when the party seeking to enforce a lien has chosen to do so in a county other than the county wherein the property subject to the lien is located. 293 N.C. at 695, 239 S.E.2d at 570.

41. See text accompanying note 37 *supra*.

42. 32 N.C. App. 435, 232 S.E.2d 458, *cert. denied*, 292 N.C. 641, 235 S.E.2d 60 (1977).

been served with process by registered mail. Defendant contended, however, that rule 4(j)(9)(b), authorizing service by registered or certified mail upon out-of-state defendants,<sup>43</sup> required that the complaint and summons be delivered to him personally and that therefore service upon him was invalid because it was signed for and received by a person other than himself.<sup>44</sup>

The court of appeals rejected defendant's contention, holding that although it does not expressly so provide, "[t]he provision in rule 4(j)(9)(b) . . . contemplates merely that the registered or certified mail be delivered to the address of the party to be served and that a person of reasonable age and discretion receive the mail and sign the return receipt on behalf of the addressee."<sup>45</sup> The court's holding comports with the intent of the drafters of the rules<sup>46</sup> and avoids the attempt to graft a technical requirement onto the well-designed provisions for service of process on out-of-state defendants by registered or certified mail.

The decision in *Lewis Clarke Associates* was subsequently codified by legislative amendment of rule 4(j)(9)(b). The amended version of the rule provides that, together with the required affidavit, the signed return receipt "raises a rebuttable presumption that the person who received the mail and signed the receipt was an agent of the addressee authorized by appointment or by law to be served or to accept service of process or was a person of suitable age and discretion residing in the defendant's dwelling, house, or usual place of abode."<sup>47</sup>

### C. Pleadings and Motions

Prior to the adoption of the new rules of civil procedure in North Carolina, the supreme court had consistently held that the doctrine of last clear chance must be pleaded by the plaintiff before the issue could be submitted to the jury.<sup>48</sup> After the new rules were adopted, plaintiffs, relying

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43. N.C.R. Civ. P. 4(j)(9)(b), N.C. GEN. STAT. § 1A-1 (Cum. Supp. 1977), provided at the time for service upon out-of-state defendants as follows:

Any party subject to service of process under this subsection (9) may be served by mailing a copy of the summons and complaint, registered or certified mail, return receipt requested, addressed to the party to be served. Service shall be complete on the day the summons and complaint are delivered to the addressee . . . .

44. 32 N.C. App. at 437, 232 S.E.2d at 459.

45. *Id.* at 438, 232 S.E.2d at 459.

46. The court was careful to point out that its holding was supported by the conclusions in an article by Professor Louis, principal author of North Carolina's rule 4(j)(9). *Id.* at 437, 232 S.E.2d at 459; see Louis, *Modern Statutory Approaches to Service of Process Outside the State—Comparing the North Carolina Rules of Civil Procedure with the Uniform Interstate and International Procedure Act*, 49 N.C.L. REV. 235, 255-56 (1971).

47. N.C.R. Civ. P. 4(j)(9)(b).

48. *E.g.*, *Exum v. Boyles*, 272 N.C. 567, 158 S.E.2d 845 (1968); *Wooten v. Cagle*, 268 N.C. 366, 150 S.E.2d 738 (1966); *Phillips v. North Carolina R.R.*, 257 N.C. 239, 125 S.E.2d 603 (1962); *Gunter v. Winders*, 256 N.C. 263, 123 S.E.2d 475 (1962).

on the earlier case law, continued to plead the theory,<sup>49</sup> usually in a reply for which permission to file had to be obtained from the court under rule 7(a).<sup>50</sup> The inconvenience of this requirement led to the recent adoption of an amendment to rule 7(a) that permits the serving of a reply alleging last clear chance without leave of court.<sup>51</sup> Confronted with this background, the North Carolina Supreme Court in *Vernon v. Crist*<sup>52</sup> reaffirmed its earlier decisions that held that last clear chance must be pleaded before the issue may be proved and submitted to the jury.<sup>53</sup>

Plaintiff Vernon sought recovery of damages from defendant for personal injuries allegedly caused by defendant's negligence. Defendant filed an answer alleging contributory negligence.<sup>54</sup> Plaintiff chose not to file a reply and later sought to prove and have submitted to the jury the doctrine of last clear chance in avoidance of the allegation of contributory negligence. Denying plaintiff's repeated motions to amend his complaint to allege last clear chance specifically, the trial court refused to submit the issue to the jury.<sup>55</sup>

In upholding the trial court's holding that last clear chance must be specifically pleaded, the supreme court relied primarily on the interaction of rules 7(a) and 8(d) of the North Carolina Rules of Civil Procedure.<sup>56</sup> Rule 8(d) provides, in relevant part, that "[a]verments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or

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49. *Vernon v. Crist*, 291 N.C. 646, 651, 231 S.E.2d 591, 594 (1977). There was apparently no requirement that they do so. N.C.R. Civ. P. 7(a) sets out the required and permissive pleadings. At the time the rules were adopted in North Carolina, rule 7(a) was an exact counterpart of F.E.D. R. Civ. P. 7(a) and did not require a reply when the defendant alleged contributory negligence in his answer. Most federal courts had held that so long as a reply was not required under federal rule 7(a) any allegations in a defendant's answer were to be deemed denied or avoided, and the plaintiff was allowed to proceed at trial as if a reply so denying or avoiding them had been filed. *E.g.*, *Crain v. Bluegrass Stockyards Co.*, 399 F.2d 868 (6th Cir. 1968); *Neeff v. Emery Transp. Co.*, 284 F.2d 432 (2d Cir. 1960). For a decision holding specifically that last clear chance need not be pleaded as a condition to the plaintiff's seeking to prove the issue at trial, see *Kline v. McCorkle*, 330 F. Supp. 1089 (E.D. Va. 1971).

50. *Vernon v. Crist*, 291 N.C. 646, 651, 231 S.E.2d 591, 594 (1977).

51. The amendment added the following provision to N.C.R. Civ. P. 7(a): "If the answer alleges contributory negligence, a party may serve a reply alleging last clear chance."

52. 291 N.C. 646, 231 S.E.2d 591 (1977); see this Survey, *Torts: Negligence*.

53. See cases cited note 48 *supra*.

54. Plaintiff, defendant and several friends had been engaging in horseplay in or about defendant's car. Shortly before he was injured, plaintiff had been leaning against the trunk of defendant's stopped car. His evidence tended to show that defendant entered the car without plaintiff's becoming aware of that fact. He also alleged that defendant, aware that plaintiff did not know he had entered the car, subsequently started it, accelerated forward quickly and negligently caused plaintiff to fall backwards and strike his head. Plaintiff's attempt to prove last clear chance was based on his allegation that defendant knew of the perilous situation plaintiff had placed himself in by leaning against the car and, despite that awareness, failed to take steps to avoid injuring plaintiff. 291 N.C. at 655, 231 S.E.2d at 596.

55. *Id.* at 656, 231 S.E.2d at 596.

56. *Id.* at 651-52, 231 S.E.2d at 594.

avoided.”<sup>57</sup> The recent amendment to rule 7(a) permits a reply alleging last clear chance to be filed when a defendant alleges contributory negligence in his answer.<sup>58</sup> As a reply alleging last clear chance is now permitted under rule 7(a), a defendant’s allegations of a plaintiff’s contributory negligence are not automatically deemed avoided by rule 8(d).<sup>59</sup> By implication, therefore, that rule requires that before a plaintiff can seek to prove last clear chance and have the issue submitted to the jury in avoidance of a defendant’s allegation of contributory negligence, he must specifically plead it.

The court limited its holding, however, by stating that a plaintiff need only plead the facts making the doctrine applicable and need not plead last clear chance by name.<sup>60</sup> The court also held that a reply under rule 7(a) is not the exclusive means of pleading such facts and that they may just as readily be pleaded in the plaintiff’s complaint.<sup>61</sup> On the strength of that holding and in adherence to the concept of notice pleading,<sup>62</sup> the court found that the facts making last clear chance applicable were sufficiently pleaded in plaintiff’s complaint in *Vernon*, and that the trial judge should have submitted the issue to the jury.<sup>63</sup>

Although there appears to be no particular policy justification for requiring that last clear chance be specifically pleaded, the court in *Vernon* was faced with little choice, given the clearly applicable provisions of amended rule 7(a) and rule 8(d). The court’s decision is therefore more a result of the unintended effect of the amendment to rule 7(a) than a decision

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57. N.C.R. Civ. P. 8(d).

58. See note 51 and accompanying text *supra*.

59. 291 N.C. at 652, 231 S.E.2d at 594.

60. *Id.* The court found precedent for its holding in this respect in *Exum v. Boyles*, 272 N.C. 567, 158 S.E.2d 845 (1968).

61. 291 N.C. at 652, 231 S.E.2d at 594.

62. *Id.* at 652-53, 231 S.E.2d at 594-95. The court’s holding was based on the similarity in language between N.C.R. Civ. P. 8(a) governing the pleading of a claim for relief and *id.* 8(b), which provides, “a party shall state in short and plain terms his defenses to each claim asserted.” Because of this similarity, the court applied the literal test of notice pleading as set out in *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970), to determine whether plaintiff’s complaint met the requirements of N.C.R. Civ. P. 8(d). See *Bell v. Traders & Mechanics Ins. Co.*, 16 N.C. App. 591, 192 S.E.2d 711 (1972).

63. Although acknowledging that the complaint was less than artfully drawn, the court observed:

The complaint alleges that the plaintiff was in a position that he could not properly protect himself; that the defendant either saw or in the exercise of reasonable care should have seen that it was necessary for him to take action to avoid injuring the plaintiff; that the defendant had ample opportunity to act to avoid injury to the plaintiff; that the defendant was negligent in failing to act, specifically in failing to warn the plaintiff before moving the car forward; and that defendant’s negligence was the proximate cause of the accident.

291 N.C. at 653, 231 S.E.2d at 595. The court also found that the one element of the last clear chance doctrine not alleged in the complaint—that plaintiff’s own negligence put him in his perilous position—was supplied by the allegation of contributory negligence in defendant’s answer. *Id.* at 653-54, 231 S.E.2d at 595.

based on any policy considerations. *Vernon* does, however, clarify the confusion that has long surrounded this issue. Although the decision creates a potential trap for the unwary plaintiff, the court wisely sought to prevent that possibility by permitting an extremely flexible method of pleading last clear chance.<sup>64</sup>

In 1974 the North Carolina Supreme Court held in *Simms v. Mason's Stores*<sup>65</sup> that the defense of lack of jurisdiction over the person is waived when a party makes a "general appearance" in an action before raising the defense either by motion under rule 12(b)<sup>66</sup> or in his answer. The court held that by making a motion for extension of time within which to file an answer defendant had made a "general appearance" and was barred from raising the defense in a subsequent motion or answer.<sup>67</sup> The holding in *Simms* was based on the provisions of G.S. 1-75.7, which provided at the time that "a court of this state having jurisdiction of the subject matter may, without serving a summons upon him exercise jurisdiction in an action over a person: (1) Who makes a general appearance in an action . . . ."<sup>68</sup> The court, in support of its holding, argued that it would be both detrimental to the judicial process and unjust to the opposing party to allow the defendant to assert the defense after he has made a voluntary appearance "by seeking some affirmative relief at the hands of the court, or by utilizing the facilities of the court in some other manner inconsistent with the defense that the court has no jurisdiction over him."<sup>69</sup> The holding of *Simms*, that when a party makes a motion for an extension of time within which to file an answer he has made a "general appearance" within the meaning of G.S. 1-75.7,

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64. Although the court found it unnecessary to consider whether the trial judge erred in denying plaintiff's repeated motions to amend his complaint to allege last clear chance, it did in dictum note that "leave to amend should be 'freely given when justice so requires' and that the burden is on the party objecting to the amendment to show that he would be prejudiced thereby." *Id.* at 654, 231 S.E.2d at 595 (quoting N.C.R. Civ. P. 15(a)). This liberal approach to the amendment of pleadings could also serve to rescue the unwary plaintiff who neglects to plead last clear chance in a reply.

65. 285 N.C. 145, 203 S.E.2d 769 (1974).

66. N.C.R. Civ. P. 12(b).

67. 285 N.C. at 158, 203 S.E.2d at 778.

68. Law of June 27, 1967, ch. 954, § 2, 1967 N.C. Sess. Laws 1274 (formerly codified at N.C. GEN. STAT. § 1-75.7(1) (1969)) (amended 1977). Indicative of the court's reliance on the statute is the following observation in the opinion: "In G.S. 1-75.7 the Legislature made the policy decision that any act which constitutes a general appearance obviates the necessity of service of summons." 285 N.C. at 157, 203 S.E.2d at 777.

69. 285 N.C. at 156, 203 S.E.2d at 776. Noting that there are sound reasons for the policy adopted by the legislature in § 1-75.7, the court concluded that

[i]n addition to the fact that courts should conserve judicial time and effort by disposing of preliminary defenses relating to personal jurisdiction before considering the merits of a controversy, to allow a party to delay raising the defense of insufficiency of service of process by securing an extension to plead may permit the statute of limitations to bar a claim for relief by a plaintiff who, through no fault of his own, is ignorant of the defense.

*Id.* at 157-58, 203 S.E.2d at 777-78.

was subsequently overruled by statutory amendment.<sup>70</sup> The broader holding of the case—that by making a “general appearance” in an action a defendant waives his right to assert the defense of lack of jurisdiction—remains in effect, however, and the policy considerations relied on by the court retain their force.

In the 1977 case of *Smith v. Pacific Intermountain Express, Co.*,<sup>71</sup> the court of appeals, faced with the issue whether *subsequent* to his timely raising of a jurisdictional defense either by motion or answer, conduct by the defendant that constitutes a “general appearance” under G.S. 1-75.7 results in a waiver of the defense,<sup>72</sup> distinguished *Simms* and held that the defense was not waived.<sup>73</sup> In response to plaintiff’s initiation of suit, defendant, Pacific Intermountain Express Co., had filed a motion to dismiss for lack of personal jurisdiction alleging insufficiency of service of process.<sup>74</sup> Before the court ruled on that motion over four months later,<sup>75</sup> defendant engaged in the following conduct: it filed an answer denying the allegations of the complaint and asserting a compulsory counterclaim in which it explicitly stated that it did not intend thereby to waive the defense raised by the initial motion; it directed interrogatories to plaintiffs; when the answers to the interrogatories were returned to defendant unverified, it made a motion to the court that plaintiffs be required to give answers to them under oath; and defendant consented to a notice of dismissal.<sup>76</sup> When defendant’s motion to dismiss for lack of jurisdiction was finally heard by the court, the court entered an order in which it concluded that service of process had indeed been insufficient.<sup>77</sup> But defendant’s motion was denied on grounds that its

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70. Section 1-75.7 now provides:

A court of this State having jurisdiction of the subject matter may, without serving a summons upon him, exercise jurisdiction in an action over a person: (1) Who makes a general appearance in an action; *provided, that obtaining an extension of time within which to answer or otherwise plead shall not be considered a general appearance*

N.C. GEN. STAT. § 1-75.7(1) (Cum. Supp. 1977) (emphasis added).

71. 34 N.C. App. 694, 239 S.E.2d 614 (1977).

72. The issue was also dealt with by the court of appeals in a decision rendered earlier this year. *Wiles v. Welparnel Constr. Co.*, 34 N.C. App. 157, 237 S.E.2d 297, *cert. granted*, 293 N.C. 743, 241 S.E.2d 515 (1977) (No. 70 PC). The court there held that by proceeding to take plaintiff’s deposition, defendant had not waived the defense of lack of jurisdiction that he had raised by motion as his first action in response to plaintiff’s suit. The supreme court, by order entered December 6, 1977, granted discretionary review of *Wiles*.

73. 34 N.C. App. at 697-98, 239 S.E.2d at 617.

74. *Id.* at 695, 239 S.E.2d at 615.

75. Plaintiff’s suit was filed on June 17, 1976. On July 19 in that same year, defendant filed a rule 12(b) motion to dismiss for lack of jurisdiction. The motion was first heard by the trial court in late November 1976, at which time plaintiffs indicated to the court that they intended to take a voluntary dismissal of the action. They subsequently reversed their position and defendant’s motion was heard again and ruled on by the court on December 3, 1976. *Id.* at 695-96, 239 S.E.2d at 615-16.

76. *Id.* at 695, 239 S.E.2d at 615.

77. *Id.* at 696, 239 S.E.2d at 616.



conduct subsequent to filing constituted a "general appearance"<sup>78</sup> and therefore resulted in waiver of the defense.<sup>79</sup>

The court of appeals ruled that "[t]he term 'general appearance' as used in G.S. 1-75.7 should be held to refer generally to appearances made either *before* the filing of jurisdictional motions under rule 12(b) before pleading or, if no such motions are filed, the appearances made *before* the defense is raised in responsive pleadings."<sup>80</sup> On the strength of that interpretation, the court reversed the trial judge's denial of the motion and held that defendant had not waived the defense of lack of jurisdiction by its conduct during the period between its filing of the motion raising the defense and the court's subsequent ruling on it.<sup>81</sup>

In so interpreting G.S. 1-75.7, the court of appeals noted that the two major policy considerations of unfair prejudice to the opposing party and waste of judicial energy that were relied on in *Simms* are satisfied<sup>82</sup> when the defendant, as it did here, raises lack of jurisdiction as a defense by motion or answer as his initial action in response to the complaint. In such a case, both the opposing party and the court are alerted to the possibility that the defendant may prevail on that defense and can respond accordingly.<sup>83</sup> The opposing party can then take steps to correct the defective basis of jurisdiction and the court can expedite its determination of the defendant's claim.

Although G.S. 1-75.7 would by a literal reading appear to require that a court reach the same result in this case as was reached in *Simms*, the limitation imposed on the statute's operation by the court of appeals is sound. To hold otherwise would be, in effect, to reinstate the requirement that a defendant enter a special appearance to challenge the jurisdiction of the court.<sup>84</sup> It also would "require a defendant either to abandon a valid

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78. See text accompanying note 76 *supra*.

79. 34 N.C. App. at 696, 239 S.E.2d at 616. The court of appeals noted that the trial judge relied on § 1-75.7 and *Simms* in his denial of the motion. *Id.* at 697-98, 239 S.E.2d at 617-18.

80. *Id.* at 699, 239 S.E.2d at 617 (emphasis added).

81. *Id.* at 699, 239 S.E.2d at 617-18.

82. See text accompanying note 69 *supra*. That the court of appeals was well aware of the policy considerations relied on in *Simms* is evidenced by the court's observation:

The reasons behind the rule [of *Simms*] are well founded. A party should not be allowed to use the court's time on the merits of a controversy and then, at a later time, unveil a jurisdictional defense. Such conduct not only wastes the court's time but may unnecessarily mislead and prejudice an opponent who, through no fault of his own, remains ignorant of the defense.

34 N.C. App. at 698, 239 S.E.2d at 617.

83. 34 N.C. App. at 698, 239 S.E.2d at 617. The court went on to say, "His opponent can then attempt to correct the jurisdictional difficulty or assume the consequences of his failure to do so. He is not misled and cannot thereafter be unfairly prejudiced by allowing defendant to proceed with prudent preparation for trial." *Id.*

84. The *Simms* court observed that

jurisdictional defense he has appropriately raised or to ignore the lawsuit and thereby forfeit the use of many legitimate tools of defense, including discovery for the preparation of responsive pleadings and trial as well as the preservation of testimony.”<sup>85</sup> The court’s holding in *Smith* thus preserves a proper balance between the rights of both plaintiffs and defendants when a defendant challenges the jurisdiction of the court as a preliminary defense.

#### D. Parties<sup>86</sup>

The court of appeals made a novel application of the rule 17<sup>87</sup> real party in interest requirement in *Reliance Insurance Co. v. Walker*.<sup>88</sup> The issue arose in a declaratory action brought by Reliance Insurance against three defendants: Kenneth Lewis, the holder of an automobile liability policy issued by Reliance; James Walker, who had been injured while preparing to step into a truck owned by Lewis; and Aetna Insurance Company, the issuer of a homeowner’s policy held by Lewis. Reliance sought to resolve the question whether any potential liability of Lewis that might arise as a result of a judgment against him in a separate action brought by Walker to recover for his injuries was covered by its liability policy and/or by the policy issued by Aetna.<sup>89</sup> The trial court held that the policy issued by Reliance would provide coverage for any potential liability but that the Aetna policy would not.<sup>90</sup> Defendant Walker sought to appeal that part of the decision holding that Aetna’s policy would not provide coverage.<sup>91</sup>

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[i]n 1951 the enactment of G.S. 1-134.1 eliminated the necessity for special appearances by permitting the objection that the court had “no jurisdiction over the person or property of the defendant” to be presented either by motion or answer. The making of other motions or the pleading of other defenses *simultaneously* with the jurisdictional objection was declared not to be a waiver of it, but the statute provided “that the making of any motion or the filing of any answer *prior to the presentation of such objection shall waive it.*”

285 N.C. at 151, 203 S.E.2d at 773-74. This was the law in North Carolina until former § 1-134.1, Law of Mar. 13, 1951, ch. 245, § 1, 1951 N.C. Sess. Laws 202, was repealed in 1967.

85. 34 N.C. App. 698-99, 239 S.E.2d at 617.

86. In *Heath v. Board of Comm’rs*, 292 N.C. 369, 233 S.E.2d 889 (1977), the supreme court considered the effect on indemnification law of the authorization of impleader in N.C.R. Civ. P. 14. The court held that the rule’s authorization to a defendant to implead “a person not a party to the action who is or may be liable to him for all or part of the plaintiff’s claim against him” has the effect of accelerating the accrual of the defendant’s claim for indemnification. 292 N.C. at 376, 233 S.E.2d at 893. The substantive law prior to the adoption of the rules that a cause of action for indemnification did not arise until the defendant had satisfied a judgment against him on which his claim was based, *American Nat’l Fire Ins. Co. v. Gibbs*, 260 N.C. 681, 133 S.E.2d 669 (1963), has been overridden for procedural purposes by the rules.

87. N.C.R. Civ. P. 17.

88. 33 N.C. App. 15, 234 S.E.2d 206, *cert. denied*, 293 N.C. 159, 236 S.E.2d 704 (1977).

89. *Id.* at 16-17, 234 S.E.2d at 207-08.

90. *Id.* at 17, 234 S.E.2d at 208.

91. *Id.* Walker’s appeal may have been prompted by a desire to avoid a result similar to that in *Mayo v. American Fire & Cas. Co.*, 282 N.C. 346, 192 S.E.2d 828 (1972). Plaintiff in *Mayo* brought an action for losses suffered when a building he owned was destroyed by fire. He brought the action against both the agent who had agreed to write a binder insuring the

The court held that Walker's appeal was barred by the rule 17 requirement that "[e]very claim shall be prosecuted in the name of the real party in interest . . . ."<sup>92</sup> In reaching this result, the court first stated that rule 17, which by its terms applies only to plaintiffs, should apply to defendants as well.<sup>93</sup> The holding that Walker's appeal was barred by the real party in interest rule was based on the contingency of his claim for liability against Lewis. Although Walker's interest in establishing in this action that Aetna's policy provided coverage was evident, his right to bring a claim against Aetna asserting coverage by Aetna's policy would not normally arise until he had established in his separate action that Lewis was liable to him for the injuries he had suffered.<sup>94</sup> Therefore, because he did not yet have "the legal right to enforce the claim in question"—a basic requirement of the real party in interest rule—his appeal was dismissed.<sup>95</sup>

As the injured party in the transaction that gave rise to the declaratory action, Walker was a proper, if not a necessary, party.<sup>96</sup> Whether he should

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building and the insurance company that the agent informed plaintiff had agreed to assume coverage. He asserted that either the insurance company was liable under the binder for the amount of his loss or the agent was liable for negligently failing to secure coverage after assuring plaintiff that he would. At the trial court level the insurance company was absolved, but the agent was held liable on the negligence theory. On appeal by the agent, the supreme court reversed the finding of liability as to the agent, but let stand that part of the judgment finding nonliability of the insurance company. *Id.* at 356, 192 S.E.2d at 834. By failing to take an appeal from the trial court's ruling on nonliability of the insurance company, plaintiff thus lost any rights to compensation from either of the defendants. *Id.*

In *Reliance*, plaintiff filed notice of intent to appeal the finding that its policy provided coverage for any potential liability of Lewis. 33 N.C. App. at 17, 234 S.E.2d at 208. Unless the trial court's finding that the policy issued by Aetna did not provide coverage was also appealed, the danger existed that *Reliance* would succeed on appeal and both insurance companies would be absolved of liability. Of course, if defendant Walker is not bound by the determination that codefendant Aetna's policy does not provide coverage, he may relitigate that issue in a subsequent action on any judgment he might secure against Lewis. See note 97 *infra*.

92. 33 N.C. App. at 18, 234 S.E.2d at 209 (quoting N.C.R. Civ. P. 17(a)). The insured, Lewis, also gave notice of appeal with respect to the trial court's finding of noncoverage by Aetna's policy. He failed to file a brief or further to prosecute his appeal, however, and on motion by Aetna, his appeal was dismissed. *Id.* at 18, 234 S.E.2d at 208-09.

93. *Id.* at 18, 234 S.E.2d at 209. In support of this holding, the court cited 3A MOORE'S FEDERAL PRACTICE ¶17.07, at 17.76 to .77 (2d ed. 1977) and federal cases cited therein.

94. Under North Carolina law, when the policy is an agreement to indemnify the insured against loss, the insured must sustain a loss before the insurer's liability arises. *Ingram v. Nationwide Mut. Ins. Co.*, 258 N.C. 632, 638, 129 S.E.2d 222, 227 (1963); *Clark v. Bonsal & Co.*, 157 N.C. 270, 272, 72 S.E. 954, 955 (1911). No action against the insurer can be maintained by one who has a claim against the insured until such claimant has secured a judgment against the insured that has been returned unexecuted. See *Griffin v. Hartford Accident & Indem. Co.*, 265 N.C. 443, 144 S.E.2d 201 (1965); *Newton v. Seely*, 177 N.C. 528, 99 S.E. 201 (1919). When the policy provides for coverage for the legal liability of the insured, the claimant still may not proceed against the insurer until he establishes the liability of the insured in a separate action in which the insurer is not a proper party. See *Taylor v. Green*, 242 N.C. 156, 87 S.E.2d 11 (1955).

95. 33 N.C. App. at 19, 234 S.E.2d at 209.

96. See *Maryland Cas. Co. v. Consumers Fin. Serv.*, 101 F.2d 514 (3d Cir. 1938) (injured parties in automobile accident and insured parties under policy covering involved motor vehicle are necessary and proper parties to action by insurance company seeking to be relieved of

have been allowed to appeal the court's determination of noncoverage by the policy issued by Aetna should have been resolved, however, by deciding under the usual rules of appellate procedure whether he was "a party aggrieved" by the court's holding.<sup>97</sup> Applying the real party in interest rule to deny his appeal is a misapplication of the policy considerations that underlie the rule.<sup>98</sup> When a defendant in Walker's position is denied the right to appeal on grounds that he is not "a party aggrieved" or by misapplication of the real party in interest rule, the denial has two potentially unsatisfactory effects. Upon later securing a judgment establishing liability against Lewis, Walker may find it necessary to bring an action against Aetna with the object of again asserting that Aetna's policy provides coverage.<sup>99</sup> Not only will this perhaps result in wasteful relitigation of the issue, but it will also raise the possibility of inconsistent results on this same issue should the court find in this potential second action that Aetna's policy provides coverage. Nevertheless, it may not be possible to avoid such duplicative litigation. Defendants Aetna and Walker were not adversarial

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liability). See also *Udike Inv. Co. v. Employers' Liab. Assurance Corp.*, 128 Neb. 295, 258 N.W.2d 470 (1935); Annot., 71 A.L.R.2d 723, 747 (1960).

97. N.C. GEN. STAT. § 1-271 (1969) provides in relevant part: "[A]ny party aggrieved may appeal in the cases prescribed in this chapter." Whether Walker was a party aggrieved should be resolved by determining whether he was "one whose right has been directly and injuriously affected by the action of the court." 2 A. MCINTOSH, *supra* note 39, § 1781, at 201 (2d ed. 1956). Once he has secured a judgment against Lewis, Walker could, if necessary, bring a separate action against Aetna and relitigate the issue of whether its policy provides coverage. See F. JAMES & G. HAZARD, *supra* note 24, § 9.11, at 419. Collateral estoppel would not appear to bar Walker since that principle operates to bar relitigation of an issue litigated by parties in a previous action only when the parties appeared as adversaries in that action. *Id.* § 11.24; RESTATEMENT OF JUDGMENTS § 82 (1942). If Walker is indeed free to relitigate the issue in a subsequent action, the effect of the court's decision on his interest is effectively minimized. He will be "aggrieved" only to the extent he bears the expense of the relitigation.

98. The real party in interest requirement has as its purpose compelling an action to be "prosecuted in the name of the party, who by the substantive law, has the right to be enforced." 6 MOORE'S FEDERAL PRACTICE, *supra* note 93, ¶ 17.02, at 17.13. "[A] principal objective of the provision was to enable the assignee of a chose in action to sue in his own name." F. JAMES & G. HAZARD, *supra* note 24, § 9.3, at 397. It was never intended to be applied in determining whether a proper party to an action should have the right to appeal a determination by the court. If, as the court held, Walker was not a real party in interest for purposes of appeal because his claim against Lewis was only contingent, Walker would similarly appear to be an improper party to the action altogether as his interest in establishing that coverage exists under the policy issued by Reliance is no greater than his interest in establishing that coverage exists under the policy issued by Aetna. Yet Walker was clearly a proper party in the declaratory action brought by Reliance. See cases cited note 96 *supra*.

99. As the court of appeals upheld the trial court's determination that Reliance would be liable to indemnify Lewis should he be held liable for this accident, the possibility of a subsequent action by Walker against Aetna is relatively remote. However, should Walker obtain a judgment against Lewis in excess of the limits on coverage under the policy issued by Reliance and be unable to get satisfaction of the excess from Lewis, he would undoubtedly seek to prove that Aetna's policy provided coverage for the excess. Had Reliance established its nonliability on appeal, a subsequent action by Walker against Aetna would have been almost inevitable once he had established the liability of Lewis.

parties in the declaratory action and, because of the noncompulsory nature of crossclaims,<sup>100</sup> they could not have been required to align themselves as such. Therefore, it is unlikely that either of them would be bound by the doctrine of collateral estoppel in a subsequent attempt to relitigate this issue.<sup>101</sup> Thus, although it would have been desirable to have a complete and binding determination of the rights of the parties in this one declaratory action, such a result may not have been attainable.

### E. Discovery

The North Carolina Supreme Court in *Tennessee-Carolina Transportation, Inc. v. Strick Corp.*<sup>102</sup> held that the mere fact that a party seeks to take a deposition after the date set in an order issued by the court fixing the time within which the parties must complete their discovery does not constitute the "good cause shown" required by rule 26<sup>103</sup> as grounds for the issuance of a protective order prohibiting the taking of the deposition. The decision came in the fourth episode at the supreme court level in a breach of warranty of merchantability litigation between the parties.<sup>104</sup> Shortly before the second trial on the issue, the trial judge issued an order providing for no further discovery "unless by the consent of the parties."<sup>105</sup> After the second

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100. N.C.R. Civ. P. 13(g) provides in part: "A pleading *may* state as a crossclaim any claim by one party against a coparty arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action." *Id.* (emphasis added); see W. SHUFORD, NORTH CAROLINA PRACTICE AND PROCEDURE § 13-10 (1975). A counterclaim by defendant Walker would likely be barred anyway by the prohibition in North Carolina on a direct action by an injured party against the insurer prior to securing a judgment against the tortfeasor. See note 94 *supra*.

101. See note 97 *supra*. Even if Walker were allowed to appeal the court's determination of Aetna's noncoverage, it is unlikely that a court would find they had been adversarial parties in the declaratory action. In *Pack v. McCoy*, 251 N.C. 590, 112 S.E.2d 118 (1960), however, the supreme court held that although no crossclaim had been asserted, collateral estoppel barred a subsequent suit by a party against his codefendant in a prior tort action when the party sought to relitigate an issue that had been decided adversely to him in that earlier action. The decision in *Pack* was widely criticized, however, as an unwarranted failure to follow the traditional adversary requirement. See, e.g., Note, *Collateral Estoppel: Application to Actions Between Former Codefendants*, 1961 DUKE L.J. 167.

102. 291 N.C. 618, 231 S.E.2d 597 (1977).

103. N.C.R. Civ. P. 26.

104. The case concerns trailers that were manufactured under contract for plaintiff, Tennessee-Carolina Transportation, Inc., in 1967. Shortly thereafter, structural defects began to manifest themselves. Plaintiff brought suit in 1970 alleging that the damages to the trailers were the result of improper design and manufacture. Plaintiff won on the initial trial of the suit, but the supreme court reversed that decision on appeal. 283 N.C. 423, 196 S.E.2d 711 (1973). On remand, plaintiff secured another favorable judgment, but again the supreme court found reversible error on appeal and remanded for a third trial. 286 N.C. 235, 210 S.E.2d 181 (1974). It was at this stage, just prior to the third trial on the issue, that the present controversy arose and was considered by the supreme court twice. 289 N.C. 587, 223 S.E.2d 346 (1976); 291 N.C. 618, 231 S.E.2d 597 (1977).

105. 289 N.C. 587, 588, 223 S.E.2d 346, 347, *rev'd on rehearing*, 291 N.C. 618, 231 S.E.2d 597 (1977).

decision was overturned on appeal and the case was remanded for a third trial, defendant unsuccessfully moved for additional time to conduct discovery.<sup>106</sup> Subsequently, defendant gave notice that it intended to take the deposition of a metallurgist who had conducted tests for plaintiff and whose existence defendant had become aware of during the course of the second trial.<sup>107</sup> In its notice, defendant stated that its purpose was merely to obtain his testimony for use as evidence at the third trial.<sup>108</sup> Plaintiff moved under rule 26 for a protective order prohibiting the taking of the deposition. Finding that taking the deposition would constitute discovery because defendant did not know what the testimony of the witness would be and citing the earlier orders limiting discovery and denying defendant's motion for an extension of time in which to conduct discovery, the trial judge issued a protective order.<sup>109</sup> In its initial decision on defendant's appeal of the judge's ruling, the supreme court held that it was not appealable and that, even if it were appealable, abuse of discretion, the only grounds for overturning the grant or denial of a protective order, had not been shown.<sup>110</sup> On rehearing, however, the court found that the ruling was appealable and reconsidered its holding with respect to the discretion of the trial judge in issuing a protective order in this instance.

Observing that the right to take a deposition under rule 30(a)<sup>111</sup> is unqualified but for the provisions of rule 26(c)<sup>112</sup> authorizing the court to issue protective orders "for good cause shown," the court proceeded to examine the basis for issuance of the protective order in this case. Because the record indicated no support for the ruling on the protective order other than the existence of the previous orders limiting discovery, the court held that "even if the purpose had been mere discovery" rather than "to obtain evidence for introduction at the trial," issuing the protective order was an

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106. 291 N.C. at 620, 231 S.E.2d at 598.

107. At the same time, defendant gave notice of intent to depose another individual whose testimony was also sought for use as evidence at the third trial. The trial court denied plaintiff's motion for a protective order prohibiting the taking of this deposition. It noted that defendant already knew essentially what the testimony of the individual sought to be deposed would be, and that the taking of his deposition would not, therefore, violate the court's earlier orders denying further discovery. *Id.* at 620-21, 231 S.E.2d at 599. The court's denial of a protective order with respect to this individual was not at issue on appeal. In light of the decision on appeal finding an abuse of discretion in the court's grant of a protective order prohibiting the taking of the other deposition, the court's action allowing the taking of this individual's deposition to proceed appears correct.

108. *Id.* at 620, 231 S.E.2d at 599.

109. *Id.* at 627, 231 S.E.2d at 602.

110. 289 N.C. 587, 591, 231 S.E.2d 346, 349 (1976), *rev'd on rehearing*, 291 N.C. 618, 231 S.E.2d 597 (1977). See also text accompanying notes 229-35 *infra*.

111. N.C.R. Civ. P. 30(a).

112. *Id.* 26(c).

abuse of discretion by the trial judge.<sup>113</sup> The court's holding requires instead that there be support in the record for the proposition that allowing the deposition to be taken, be it for purposes of obtaining evidence for use at trial or for discovery, would result in such harm to the party seeking a protective order as delay of the trial or other undue burden or expense. Under this rule, trial courts will still be able to limit the time period within which discovery must be completed,<sup>114</sup> but a party will be allowed to take a deposition after that period has expired unless on a motion for a protective order the other party makes a sufficient showing of potential harm.

The court's reversal of its earlier holding that no abuse of discretion by the trial judge had been shown preserves the proper balance between the inherent authority of the court to limit the time for discovery and the parties' occasional need to take depositions for use as evidence at trial or for discovery purposes after the time set by the court has expired.<sup>115</sup> When allowing a party to take a deposition after such time limit has expired would cause harm to the other party by delaying trial or otherwise, the court has a legitimate basis for issuing a protective order.<sup>116</sup> A refusal to allow the taking of a deposition after the time limit has expired on the basis of that fact alone without consideration of existing circumstances would, however, sacrifice the legitimate needs of litigants to the inviolability of the court's discovery limitation order.<sup>117</sup>

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113. 291 N.C. at 626-27, 231 S.E.2d at 602. The court also relied for support on N.C.R. Civ. P. 26(d), which applies specifically to the sequence and timing of discovery. 291 N.C. at 626-27, 231 S.E.2d at 602. The pertinent part of that rule provides:

Any order or rule of court setting the time within which discovery must be completed shall be construed to fix the date after which the pendency of discovery will not be allowed to delay trial . . . but shall not be construed to prevent any party from utilizing any procedures afforded under Rules 26 through 36 so long as trial . . . is not thereby delayed.

N.C.R. Civ. P. 26(d).

114. There is clear authority for such a time limitation in the federal courts. *See, e.g.,* Greyhound Lines, Inc. v. Miller, 402 F.2d 134 (8th Cir. 1968) (upholding federal district court's power to provide by local rule for approximately 100 days for discovery). N.C.R. Civ. P. 26 also contemplates the promulgation of an order limiting the time period for discovery. *See* note 113 *supra*.

115. *See* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2038 (1970) and cases cited therein.

116. Harm to the other party should not, however, be the exclusive grounds for denying the right to take a deposition. If a party seeks to take a deposition after the time set by the court for discovery has expired and its need to do so is a result of its own lack of diligence during the period set for discovery, the court should have the authority to prohibit its taking to protect the integrity of its order limiting the time for discovery. *See* Tennessee Elec. Power Co. v. Tennessee Valley Auth., 306 U.S. 118 (1939).

117. For example, during the period set for discovery in one action, counsel for one party may have been required unexpectedly to devote his time to pursuing other litigation on appeal and been unable to conduct his discovery adequately. Study by counsel of material derived from discovery conducted during the period set by the court may reveal unanswered questions, the answers to which can only be obtained by conducting further discovery. *See generally* Freehill v. Lewis, 355 F.2d 46 (4th Cir. 1966) (in setting aside order barring further discovery, court discussed proper role of order limiting time for discovery).

In another development under the discovery rules, the legislature passed an amendment to rule 30 in 1977 that obviates the need to secure an order from the court authorizing the recording of testimony at a deposition "by methods other than stenographic means, including videotape."<sup>118</sup> New subsection (b)(4) to rule 30 requires that the notice of intent to take a deposition state the method by which it is proposed to be recorded. It also provides that when the deposition is to be taken by videotape, the deposing party, upon request by any other party, shall provide for the transcribing of the testimony. Depositions used as evidence at trial are generally thought to be more useful to the trier of fact when they are recorded by audio-visual devices than when they are read into evidence from a transcript; this amendment should facilitate their use.<sup>119</sup>

### F. Default Judgment

In *Roland v. W & L Motor Lines, Inc.*<sup>120</sup> plaintiff filed a claim against his former employer for amounts allegedly owed him from the period of their employment relationship. Defendant, rather than filing a formal answer, wrote a letter to plaintiff's attorney, a copy of which he sent to the clerk of court, in which he disclosed the substance of a potential right to set-off.<sup>121</sup> After the time for filing an answer had elapsed, plaintiff moved for entry of default, and subsequently for judgment by default; both motions were granted immediately by the clerk.<sup>122</sup> On appeal, defendant contended that the letter satisfied the requirements for an answer and therefore that both the entry of default and the judgment by default were improperly granted.<sup>123</sup>

The court of appeals declined to decide whether defendant's letter was a sufficient answer, for it considered the judgment to be void because the

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118. N.C.R. Civ. P. 30(b)(4). In conjunction with this amendment, the legislature also amended rule 32(a)(4) to allow the use at trial of the deposition of "an expert witness whose testimony has been procured by videotape as provided for under Rule 30(b)(4)." N.C.R. Civ. P. 32(a)(4).

119. 8 C. WRIGHT & A. MILLER, *supra* note 115, § 2115. Prior to 1970, the federal rules provided that testimony in depositions was to be recorded stenographically and the courts were reluctant to allow recordation by other means. *See, e.g.*, *United States Steel Corp. v. United States*, 43 F.R.D. 447 (S.D.N.Y. 1968). In 1970, FED. R. Civ. P. 30(b) was amended to allow recordation by other methods when approved by order of the court. Federal courts have subsequently allowed recording by videotape and other nonstenographic means much more readily. *See, e.g.*, *In re Daniels*, 69 F.R.D. 579 (N.D. Ga. 1975); *Carson v. Burlington N., Inc.*, 52 F.R.D. 492 (D. Neb. 1971). *But see* *Perry v. Mohawk Rubber Co.*, 63 F.R.D. 603 (D.S.C. 1974). For an excellent discussion of the advantages of using videotaped depositions at trial, see Kornbum, *Videotape in Civil Cases*, 24 HASTINGS L.J. 9 (1972).

120. 32 N.C. App. 288, 231 S.E.2d 685 (1977).

121. *Id.* at 288, 231 S.E.2d at 686.

122. *Id.* at 288-89, 231 S.E.2d at 686.

123. *Id.* at 289, 231 S.E.2d at 686-87.



clerk had acted outside of his narrowly defined powers to enter judgment by default.<sup>124</sup> The court noted that rule 55(b)(1)<sup>125</sup> imposes three conditions on the valid exercise of the clerk's power to enter judgment by default: (1) the claim must be for a sum certain or for a sum that by computation can be made certain; (2) the defendant must have been defaulted for failure to appear; and (3) the defendant must not be an infant or incompetent person.<sup>126</sup> The court concluded that the second of these had not been met—that defendant had in fact appeared in the action—and that therefore default judgment could only be entered by the court pursuant to rule 55(b)(2).<sup>127</sup> Furthermore, the other procedural requirement under rule 55 that is triggered by an appearance—three days written notice of a hearing on the application for default—had not been complied with.<sup>128</sup> These defects were necessarily fatal to the judgment entered by the clerk.

The technical requirements in rule 55 are designed to safeguard a party from an automatic and possibly unwarranted denial of a trial on the merits after such party has already given some initial indication of a desire to defend the suit.<sup>129</sup> By providing the "appearing" defendant notice and a hearing before a judge prior to entry of final judgment, a judicial determination of the propriety of default judgment is assured and an opportunity is given the judge to exercise his discretion to direct the parties to proceed to trial despite the technical default.<sup>130</sup> The term "appearance" in rule 55 should thus be read in light of the policy against entering judgments by default except when clearly justified. Accordingly, it has been stated that the primary test for determining whether there has been an appearance is whether the party has "indicated to the moving party a clear purpose to defend the suit."<sup>131</sup> While an answer is always an appearance,<sup>132</sup> consistent with this interpretation, it is not necessary that a submission be made to the court in order for the party to have appeared.<sup>133</sup> Rather, such things as negotiations between parties looking towards either settlement or suit<sup>134</sup> or

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124. *Id.* at 291, 231 S.E.2d at 688.

125. N.C.R. Civ. P. 55(b)(1).

126. *See id.*

127. 32 N.C. App. at 290, 231 S.E.2d at 688.

128. *See* N.C.R. Civ. P. 55(b)(2).

129. *See* North Am. Acceptance Corp. v. Samuels, 11 N.C. App. 504, 181 S.E.2d 794 (1971); 10 C. WRIGHT & A. MILLER, *supra* note 115, § 2683, at 259-60 (1973).

130. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970); *see* N.C.R. Civ. P. 55, Comment.

131. H.F. Livermore Corp. v. Aktiengesellschaft Gebrüder Loepfe, 432 F.2d 689, 691 (D.C. Cir. 1970).

132. Quaker Furniture House, Inc. v. Ball, 31 N.C. App. 140, 228 S.E.2d 475 (1976).

133. Roland v. W & L Motor Lines, Inc., 32 N.C. App. at 289, 231 S.E.2d at 687.

134. H.F. Livermore Corp. v. Aktiengesellschaft Gebrüder Loepfe, 432 F.2d 689 (D.C. Cir. 1970); Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975).

an agreement between the parties extending the time within which to answer<sup>135</sup> have been held sufficient to trigger the notice requirements and to vest exclusive power to enter judgment by default in the judge. Clearly, in *Roland*, even if the letter did not constitute a sufficient answer,<sup>136</sup> it was such an emphatic indication of intent to defend the suit that its status as an "appearance" cannot be questioned.

### G. Summary Judgment<sup>137</sup>

In *Parker v. Bennett*,<sup>138</sup> a case involving allegedly fraudulent representations made by a seller in connection with a land transaction, the court of appeals reversed a grant of summary judgment in favor of defendant seller. The court stated its ruling as follows: "[I]n actions such as the case at bar, where motives, intent, subjective feelings and reactions, consciousness and conscience, are to be searched, the issues may not be disposed of on summary judgment."<sup>139</sup> Nevertheless, it seems fairly certain that the rule adopted by the court in *Parker* should not be read as an absolute bar to

135. *Hutton v. Fisher*, 359 F.2d 913 (3d Cir. 1966).

136. The question left undecided by the court, whether the letter was a sufficient answer, is the more interesting one. Although the letter clearly failed to comply with directives in N.C.R. Civ. P. 10 respecting the proper form for captions and the means of setting out the claim in separate paragraphs, such defects may generally be remedied by amendment. 5 C. WRIGHT & A. MILLER, *supra* note 115, § 1321, at 469 (1969).

In addition, certain important formal requirements were met in that the letter referred to the suit by file number and was signed by the answering party. Substantively, although not copied from a form book, the letter effectively disclosed a defense or counterclaim for set-off, admitted certain allegations in the complaint and specifically denied others. Certainly, less artful pleadings have been sustained. See *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944). Presented with such a document it would not seem a clerk could justifiably enter default.

137. The court of appeals in *Biddix v. Kellar Constr. Corp.*, 32 N.C. App. 120, 230 S.E.2d 796 (1977), held that summary judgment had been improperly granted by the court below because, among other reasons, issues of fact had been raised by the materials defendant submitted along with its motion. *Id.* at 125, 230 S.E.2d at 800. The trial judge, in rendering judgment, had improperly resolved these factual disputes by making findings of fact in addition to his conclusions of law. See note 269 *infra*. The court of appeals has admonished against this practice on numerous occasions, including at least twice this past year. *Reid v. Reid*, 32 N.C. App. 750, 752, 233 S.E.2d 620, 622 (1977); *Wachovia Bank & Trust Co. v. Peace Broadcasting Corp.*, 32 N.C. App. 655, 657, 233 S.E.2d 687, 688-89, *cert. denied*, 292 N.C. 734, 235 S.E.2d 788 (1977). The role of the judge in ruling on a motion for summary judgment is not to act as a fact finder but rather to determine whether on the basis of the materials offered in support of and in opposition to the motion it appears that a material issue of disputed fact exists requiring resolution at trial. *E.g.*, *Lee v. Shor*, 10 N.C. App. 231, 178 S.E.2d 101 (1970). However, once it is decided that summary judgment should be granted, it is then appropriate, in order to facilitate appellate review, for the trial court to make a summary of the facts that are considered not to be in dispute. *Wachovia Bank & Trust Co. v. Peace Broadcasting Corp.*, 32 N.C. App. at 658, 233 S.E.2d at 689. Similarly, when the motion is denied, the court may, for the purpose of expediting the rest of the litigation, summarize those facts about which there is no dispute. See N.C.R. Civ. P. 56(d).

138. 32 N.C. App. 46, 231 S.E.2d 10, *cert. denied*, 292 N.C. 264, 233 S.E.2d 393 (1977).

139. *Id.* at 54, 231 S.E.2d at 15. See *Alabama Great S.R.R. v. Louisville & N.R.R.*, 224 F.2d 1, 5 (5th Cir. 1955), for the origin of this statement. As there employed, the rule apparently was not intended to be a complete bar to summary adjudication in such cases. See *id.*

disposition by summary judgment of cases involving states of mind. To the contrary, as noted by the federal commentators, there is no exception in rule 56 precluding summary judgment in cases involving issues of state of mind; rather, the question presented by the motion is always the same: whether a genuine issue of material fact exists.<sup>140</sup> The rule stated by the court of appeals simply reflects the fact that in state of mind cases it is rare that the movant will be able to show such an absence of disputed material fact and that therefore "summary judgment is likely to be inappropriate when issues of motive, intent and other subjective feelings and reactions are material."<sup>141</sup>

State of mind cases are inherently less suitable for summary adjudication largely because the proof is often peculiarly within the knowledge of one of the parties and frequently provable only through adverse witnesses testifying to their own states of mind. Consequently, the credibility of the witnesses is especially at issue and the need for "demeanor" evidence correspondingly great.<sup>142</sup> Moreover, summary judgment is even less likely in such suits because proof of state of mind largely depends upon inference.<sup>143</sup> The directive to judges hearing motions under rule 56 to draw all reasonable inferences in favor of the party opposing the motion<sup>144</sup> and against drawing inferences that are favorable to the movant,<sup>145</sup> necessarily precludes summary judgment in many such cases. Thus, it might generally be expected that in such cases a nonmoving party will have little problem showing the existence either of a genuine issue of fact or of grounds under rule 56(f)<sup>146</sup> why summary judgment should not be granted pending further discovery.

Courts have been easily disposed towards finding an issue of credibility necessitating trial when the evidence is in the exclusive control of the

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140. See, e.g., C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 99, at 493 (3d ed. 1976). N.C.R. Civ. P. 56 and its federal counterpart are practically the same; consequently, the state courts look to federal precedent for guidance in applying the rule. E.g., *Page v. Sloan*, 281 N.C. 697, 190 S.E.2d 189 (1972); *Singleton v. Stewart*, 280 N.C. 460, 186 S.E.2d 400 (1972).

141. 6 MOORE'S FEDERAL PRACTICE, *supra* note 93, pt. 2, ¶ 56.17, at 930 (1976). See also *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464 (1962).

142. See *Croley v. Matson Navigation Co.*, 434 F.2d 73 (5th Cir. 1970).

143. See 10 C. WRIGHT & A. MILLER, *supra* note 115, § 2730, at 584 (1973).

144. E.g., *Page v. Sloan*, 281 N.C. 697, 190 S.E.2d 189 (1972); *accord*, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *United States v. Diebold*, 369 U.S. 654 (1962).

145. E.g., *Page v. Sloan*, 281 N.C. 697, 190 S.E.2d 189 (1972); *accord*, *Cochran v. United States*, 123 F. Supp. 362 (D. Conn. 1954).

146. N.C.R. Civ. P. 56(f) provides:

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

moving party, as is frequently the case in fraud suits.<sup>147</sup> Even when the nonmoving party fails to oppose the motion or justify his failure to do so under rule 56(f), the moving party in order to prevail still must show that summary judgment is "appropriate" within the meaning of rule 56(e).<sup>148</sup> Because one party generally has exclusive access to critical facts and demeanor evidence is of peculiar relevance, this showing frequently cannot be made in cases of this kind.<sup>149</sup> Nevertheless, in theory and in practice, summary judgment can be as appropriate in state of mind cases as in any other.<sup>150</sup>

In North Carolina, summary judgment might properly be entered in state of mind cases in which the movant meets the standards set out in *Kidd v. Early*<sup>151</sup> for determining when judgment can be granted on the basis of testimonial evidence.<sup>152</sup> In the unusual case in which the movant's unopposed and unimpeached evidence as to his state of mind, if true, establishes the lack of a triable issue, then under *Kidd* credibility might be assigned the movant's evidence as a matter of law.<sup>153</sup> To receive such treatment the movant's evidence would have to be internally consistent, apparently complete and give rise to no conflicting inferences or circumstantial suspicion

147. 10 C. WRIGHT & A. MILLER, *supra* note 115, § 2726, at 524 (1973); *see, e.g.*, Colby v. Klune, 178 F.2d 872 (2d Cir. 1949).

148. N.C.R. Civ. P. 56(e) provides in pertinent part:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, *if appropriate*, shall be entered against him.

*Id.* (emphasis added).

149. *E.g.*, Cross v. United States, 336 F.2d 431 (2d Cir. 1964).

150. 6 MOORE'S FEDERAL PRACTICE, *supra* note 93, pt. 2, ¶ 56.17 [41.-1], at 930-32 (1976) and cases cited at *id.* nn.2 & 3.

When the motion asserts the existence of a certain state of mind of the nonmovant the considerations are somewhat different, but a case for summary judgment might nevertheless be made. Certain factors suggest the movant could never carry its burden: specifically, the movant's dependence on circumstantial proof and his corollary inability to have direct knowledge of the facts he is asserting would usually stand in the way of his making the overwhelming showing required, particularly when the opposing party asserts the contrary respecting his *own* state of mind of which he *does* have direct knowledge. On the other hand, if the nonmovant fails to come forward with contradictory facts respecting his own state of mind, the only permissible inference from the movant's evidence might well be that the nonmovant's state of mind is as it is alleged to be. *Cf.* SEC v. Geyser Minerals Corp., 452 F.2d 876 (10th Cir. 1971) (failure of party with peculiar access to facts to oppose movant's assertions respecting nonmovant's activities taken into consideration in affirming grant of summary judgment; state of mind of nonmovant not germane to lawsuit, however).

151. 289 N.C. 343, 222 S.E.2d 392 (1976), *noted in* 55 N.C.L. REV. 232 (1976).

152. In *Kidd* the crucial issue resolved was whether credibility might in the proper case be assigned as a matter of law to a movant's testimonial evidence, thereby permitting summary adjudication. In that the issue of credibility concerns an affiant's state of mind, that is, whether his statements are consistent with what he knows to be the truth, *Kidd* arguably established that state of mind can be summarily adjudicated in the proper case in North Carolina.

153. *See* 289 N.C. at 370, 222 S.E.2d at 410.

apart from the movant's interest and exclusive access to the facts. The particularly acute issue of credibility raised in state of mind cases suggests that even when the movant fails to oppose the motion,<sup>154</sup> if summary judgment is to be appropriate there should perhaps be certain facts in the case that peculiarly suggest that the nonmovant will not be able to adduce facts in support of his claim. Thus, as in *Kidd* for instance, when the movant's assertions are strongly corroborated by the surrounding circumstances in the case and the nonmovant has not come forward with contrary or impeaching facts, a good case for summary judgment might be made.<sup>155</sup> Alternatively, if there are no facts from which an inference contrary to the movant's position can be drawn and the nonmovant has admitted his lack of contrary evidence,<sup>156</sup> or plainly has not been able to establish any factual basis for his assertions despite employment of the discovery rules,<sup>157</sup> summary judgment might be indicated.

The court of appeals decision in *Parker*, apart from the breadth of the language employed, does not undermine these observations. There, summary judgment arguably was not proper simply because there was plainly conflicting evidence respecting representations made by defendant concerning the dimensions of the tract conveyed.<sup>158</sup> Moreover, even without opposing evidence, summary judgment probably was not appropriate because, in addition to defendant's interest and exclusive access to his own state of mind, defendant's assertions did not fully negate the inference from the undisputed facts that something may well have been misrepresented in connection with the transaction. Consequently, defendant's evidence was circumstantially suspicious and in need of fuller development.<sup>159</sup> Therefore, the court in *Parker* appears to have reached the correct result.

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154. State of mind cases that, in granting summary judgment, stress the nonmovant's failure to oppose the motion may be found in 10 C. WRIGHT & A. MILLER, *supra* note 115, § 2740, at 729 n.23 (1973).

155. In *Kidd* the supreme court granted plaintiffs summary judgment on the issue of their "willingness" to perform the contract. Plaintiffs' direct assertions as to their willingness to perform and other evidence going to prove the same were uncontradicted and unimpeached by defendants. Despite the fact that the evidence was interested and exclusively within plaintiffs' knowledge because pertaining to their states of mind, summary judgment in their favor was allowed. In the course of affirming the judgment, the supreme court noted that in addition to being persuasive on its own, plaintiffs' evidence of their readiness and willingness to perform the contract was corroborated by the mere fact of bringing the suit for its enforcement. Moreover, the surrounding circumstances in *Kidd* were devoid of anything suggesting that the facts differed from those alleged by plaintiffs.

156. *Chapman v. Rudd Paint & Varnish Co.*, 409 F.2d 635 (9th Cir. 1969).

157. *Jones v. Borden Co.*, 430 F.2d 568 (5th Cir. 1970).

158. See 32 N.C. App. at 47, 231 S.E.2d at 11.

159. See *Kidd v. Early*, 289 N.C. at 370, 222 S.E.2d at 410.

In another case before the court of appeals last year, *Five Star Enterprises, Inc. v. Russell*, 34 N.C. App. 275, 237 S.E.2d 859 (1977), the court of appeals purported to affirm the

### H. *Motions for Directed Verdict and Judgment Notwithstanding the Verdict*

In two cases decided this past year the North Carolina Supreme Court had occasion to call attention to certain time and energy wasting pitfalls lurking within the complicated rule 50 procedure.<sup>160</sup> Each case involved a missed opportunity to avoid a second trial through appropriate use of the motion for judgment n.o.v. The opportunities arose, however, at different stages of the proceedings.

In *Manganello v. Permastone, Inc.*,<sup>161</sup> a suit involving an alleged breach by the owner and operator of a recreational lake of his duty to protect his invitees from injury caused by the negligent or intentional acts of others, the trial judge granted defendant's motion for a directed verdict at the close of plaintiff's evidence.<sup>162</sup> Although the court of appeals affirmed,<sup>163</sup> the supreme court reversed, ruling that plaintiff had raised an issue for the jury as to whether defendant's negligence had proximately caused plaintiff's injuries.<sup>164</sup>

On appeal, before considering the central issue of the legal sufficiency of plaintiff's evidence, Justice Copeland pointed out that when the question on a motion for directed verdict is a close one, the better practice is for the trial judge to refrain from allowing the motion and to permit the case to go to the jury.<sup>165</sup> Then, if the jury returns a verdict in favor of the movant,<sup>166</sup> the nonmoving party might not appeal and an end would be had to the litigation. By contrast, when the judge grants the motion prior to verdict instead of awaiting the jury's decision, the nonmovant will often appeal the determination that his evidence was not legally sufficient to go to the jury.

Time is also potentially saved by deferring the ruling on the motion when the verdict goes against the movant. In such a case, if the judge

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determination of the trial court that no material issue of fact existed in respect of defendant-movant's "knowledge" of an alleged scheme to defraud. Although the case therefore seemingly endorsed employment of summary judgment in state of mind cases, in substance it appears that plaintiff simply failed to raise an issue as to the existence of the scheme to defraud. *Id.* at 279, 237 S.E.2d at 862.

160. N.C.R. Civ. P. 50.

161. 291 N.C. 666, 231 S.E.2d 678 (1977).

162. *Id.* at 669, 231 S.E.2d at 680.

163. 30 N.C. App. 696, 228 S.E.2d 627 (1976), *rev'd*, 291 N.C. 666, 231 S.E.2d 678 (1977).

164. 291 N.C. at 673, 231 S.E.2d at 682.

165. *Id.* at 669-70, 231 S.E.2d at 680; *cf.* *Neasham v. Day*, 34 N.C. App. 53, 237 S.E.2d 287 (1977) (noting that a similar restraint is desirable with respect to motions for involuntary dismissal under N.C.R. Civ. P. 41(b)). In the involuntary dismissal situation, of course, when the judge acts as the finder of fact the additional consideration cautioning restraint would seem to be that the fact finding function is best performed when all the evidence can be considered. *See Steffen, The Prima Facie Case in Non-Jury Trials*, 27 U. CHI. L. REV. 94 (1959).

166. The jury should so find if the judge's tentative assessment of the legal insufficiency of nonmovant's evidence is well founded.

remains convinced that the directed verdict should have been granted, he may set aside the verdict and enter judgment n.o.v.<sup>167</sup> If on appeal the appellate court concludes that the motion for judgment n.o.v. was improvidently granted, then it may simply reverse and reinstate the verdict handed down by the jury in the nonmovant's favor. If the case is not permitted to go to the jury, however, it is clear that, should the appellate court conclude that the allowance of the motion for directed verdict was in error, its only option is to reverse and order a retrial.

While failing to defer the ruling on the motion for directed verdict can result in an unnecessary second trial in such circumstances, failure to rule on the challenge to the evidence after verdict and before reaching the appellate stage can similarly result in a pointless second trial. This twist in rule 50, embodied in subsection (b)(2), was well illustrated and explained in the supreme court's opinion in *Britt v. Allen*.<sup>168</sup> *Britt* was an action involving an alleged breach of a contract to sell land. At trial, defendant made motions for directed verdict both at the close of plaintiff's case and at the close of all the evidence. Both motions were denied.<sup>169</sup> After the jury returned a verdict for plaintiff, defendant *did not* move that judgment be entered in accordance with his motion for directed verdict.<sup>170</sup> Rather, defendant moved to set aside the verdict as contrary to the evidence and for unspecified errors of law. The trial judge granted this motion for a new trial on the grounds requested.<sup>171</sup>

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167. Technically, the judge enters judgment in accordance with the motion for directed verdict made at the close of all the evidence. See N.C.R. Civ. P. 50(b)(1).

168. 291 N.C. 630, 231 S.E.2d 607 (1977).

169. *Id.* at 632-33, 231 S.E.2d at 610.

170. *Id.* at 633, 231 S.E.2d at 611.

171. *Id.* at 633-34, 231 S.E.2d at 611. Plaintiff-appellant argued that the court erred in ordering the new trial in that the verdict was not against the weight of the evidence and that no errors of law were committed. *Id.* at 634, 231 S.E.2d at 611. Chief Justice Sharp rejected this contention as without merit on the ground that the decision to grant a new trial, being within the judge's discretionary authority, is reviewable only on a showing of abuse, which the appellant had not made. *Id.* at 634-35, 231 S.E.2d at 611. The Chief Justice maintained that the fact that the judge, in addition to basing his ruling on a determination that the verdict was "contrary to the evidence," also acknowledged committing unspecified errors of law, "detracted not one whit from the effect of his discretionary authority." *Id.* at 635, 231 S.E.2d at 612.

Of course, when the trial judge orders a new trial as a matter of law, specifying his grounds therefor (and not solely as a matter of discretion), his order is reviewable on appeal as is any conclusion of law. 2 A. MCINTOSH, *supra* note 39, § 1594 (2d ed. 1956). The proposition is unassailable, however, that when the judge invokes his discretionary authority to order a new trial, an additional legal basis, although erroneous, would not permit setting aside the order because of legal error. It is also established in North Carolina, however, that the judge cannot protect his order from legal review simply by reciting that he is acting "in his discretion" when it is clear that in fact he is basing his order on legal grounds. *Selph v. Selph*, 267 N.C. 635, 148 S.E.2d 574 (1966). Nevertheless, in light of the broad discretionary authority in North Carolina to set aside verdicts because "contrary to justice," e.g., *Bird v. Bradburn*, 131 N.C. 488, 489, 42 S.E. 936, 936-37 (1902), it would seem that a mere recital of a discretionary ground would ordinarily be sufficient, and only when it clearly appears on the record that the judge relied solely on a legal basis would the order be subject to scrutiny for legal error.

On appeal, the court of appeals reversed the order for a new trial but remanded with directions to enter judgment for defendant.<sup>172</sup>

The supreme court first noted that, since new trial awards are reviewable only for abuse of discretion, the court of appeals erred in reversing on grounds of legal error the trial judge's order of a new trial.<sup>173</sup> While the court was certainly correct in so ruling, the real fault in the proceedings that rendered defendant's verdict invalid was a failure to comply with rule 50(b)(2).<sup>174</sup> The court of appeals was not purporting to overrule the grant of the new trial for legal error, but instead was seeking to correct what it thought was an erroneous denial of defendant's motion for directed verdict.<sup>175</sup> This, however, it could not do for the reason that rule 50(b)(2) imposes a waiver of the opportunity to be awarded judgment in accordance with the motion for directed verdict unless a motion for judgment n.o.v. is made after verdict.<sup>176</sup> Thus, had the defendant coupled his motion for a new trial with one for judgment n.o.v. and had the court granted the former and denied the latter, the court of appeals would have been within its power to grant judgment in accordance with defendant's motion for directed verdict.<sup>177</sup> As the defendant moved only for a new trial, however, the court of appeals was barred from entering judgment for defendant and was bound either to permit the new trial to proceed or to reinstate the verdict for plaintiff. This case makes clear that in order to take advantage of the benefits that rule 50 confers, its directives must be scrupulously followed.

### I. Enforcement of Judgment

North Carolina's body execution statute, G.S. 1-311,<sup>178</sup> a provision that permits the arrest and imprisonment of some civil judgment debtors as a means of coercing payment of the judgment,<sup>179</sup> was revised in 1977 to incorporate new procedures mandated by a federal three-judge panel earlier

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172. 27 N.C. App. 122, 218 S.E.2d 218 (1975), *rev'd*, 291 N.C. 630, 231 S.E.2d 607 (1977).

173. 291 N.C. at 635, 231 S.E.2d at 611.

174. See N.C.R. Civ. P. 50(b)(2), which provides:

An appellate court, on finding that a trial judge should have granted a motion for directed verdict made at the close of all the evidence, may not direct entry of judgment in accordance with the motion unless the party who made the motion for a directed verdict also moved for judgment in accordance with Rule 50(b)(1) or the trial judge on his own motion granted, denied or redened the motion for a directed verdict in accordance with Rule 50(b)(1).

175. See *Britt v. Allen*, 27 N.C. App. 122, 126, 218 S.E.2d 218, 221 (1975).

176. See N.C.R. Civ. P. 50(b)(2), *quoted in* note 174 *supra*.

177. See *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317 (1967) (interpreting F.R. Civ. P. 50, the federal counterpart of N.C.R. Civ. P. 50).

178. N.C. GEN. STAT. § 1-311 (Cum. Supp. 1977).

179. The body execution procedure escapes the constitutional proscription of imprisonment for debt contained in N.C. CONST. art. I, § 28 due to the explicit exception therefrom of cases of fraud.



in that year. In the federal suit, *Grimes v. Miller*,<sup>180</sup> plaintiff charged that his arrest and imprisonment pursuant to G.S. 1-311 deprived him of his due process and equal protection rights under the fourteenth amendment, in addition to subjecting him to cruel and unusual punishment in violation of the eighth amendment to the federal constitution.<sup>181</sup> Although the court formally rejected plaintiff's challenge on all grounds, it nevertheless imposed a radical new construction on the statute that in its view was compelled by the due process clause of the fourteenth amendment.<sup>182</sup> The newly articulated procedures, later incorporated into the statute,<sup>183</sup> significantly limit the circumstances in which civil arrest may be ordered and place novel controls on the detention, release and legal representation of incarcerated debtors.<sup>184</sup>

Under the former statutory scheme,<sup>185</sup> a civil judgment debtor could be arrested if an execution against his property had been returned unsatisfied and if it was found as a fact by the judge or jury that he had committed one or more offenses against his creditor that involved, in general, malice, fraud or moral turpitude.<sup>186</sup> The incarceration that followed continued until the judgment debtor paid the debt or was released according to law.<sup>187</sup> Release could be secured under the "Discharge of Insolvent Debtors" provisions<sup>188</sup> by taking an oath of insolvency<sup>189</sup> and by giving twenty days notice to creditors of the hearing on the debtor's bona fide insolvency.<sup>190</sup> It is plain that this former scheme, while authorizing arrest in circumstances that perhaps had some relation to the trustworthiness of the defendant, was a heavy-handed measure that worked imprisonment of debtors without regard to their ability to satisfy a judgment<sup>191</sup> and irrespective of any demonstrated intent to avoid payment of the judgment.

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180. 429 F. Supp. 1350 (M.D.N.C.), *aff'd mem.*, 98 S. Ct. 600 (1977).

181. *Id.* at 1355.

182. *Id.* at 1356.

183. The following statutes incorporate the changes wrought by the *Grimes* decision: N.C. GEN. STAT. §§ 1-311, -313, -413, 7A-451, 23-30.1 (Cum. Supp. 1977).

184. 429 F. Supp. at 1356-59.

185. CODE OF CIVIL PROCEDURE § 260 (1868) (formerly codified as amended at N.C. GEN. STAT. § 1-311 (1969)) (amended 1977).

186. N.C. GEN. STAT. § 1-410 (1969). This statutory scheme reflects the origins of body execution in the common law writ of *capias ad satisfaciendum*, see Ford, *Imprisonment for Debt*, 25 MICH. L. REV. 24, 27-28 (1926), which, beginning about the thirteenth century, was available in any action in which the writ of *capias ad respondendum*, the progenitor of modern prejudgment arrest statutes, was or might have been issued. V. COUNTRYMAN, CASES AND MATERIALS ON DEBTOR AND CREDITOR 75 (1964).

187. CODE OF CIVIL PROCEDURE § 261 (1868) (formerly codified as amended at N.C. GEN. STAT. § 1-313(3) (1969 & Cum. Supp. 1976)) (amended 1977).

188. N.C. GEN. STAT. §§ 23-23 to -38 (1965 & Cum. Supp. 1977).

189. *Id.* § 23-23 (1965).

190. *Id.* § 23-32.

191. Imprisonment of a debtor for a debt that he is unable to pay may violate several

The three-judge panel, speaking through the late Judge Craven,<sup>192</sup> obviously sought to remedy these shortcomings by requiring that before arrest could be ordered it must be found that the debtor "(a) is about to flee the jurisdiction to prevent paying his creditors, (b) has concealed or diverted assets in fraud of his creditors, or (c) will do so unless immediately detained."<sup>193</sup> In addition, the court mandated that an arrested defendant be given the opportunity to secure his provisional release within three days after arrest, subject to being returned to jail later if his creditors offer proof of fraud within twenty days.<sup>194</sup> Moreover, an indigent defendant is to be given notice of his statutory right to appointed counsel either at trial, or, in the case of judgment by default, when arrested.<sup>195</sup> These new procedural features were incorporated by the General Assembly into the statutes almost precisely as set forth in the opinion.<sup>196</sup>

Although summarily affirmed on appeal to the Supreme Court<sup>197</sup> the *Grimes* holding arguably falls short of constitutional requirements. In the first place, it is not clear that a determination of debtors' solvency, seemingly a condition precedent to constitutionally valid coercive imprisonment,<sup>198</sup> is in all cases required prior to arrest.<sup>199</sup> Second, even though the

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provisions of the federal constitution. It is suggested in *Grimes* that imprisonment solely on the basis of the debtor's commission of a particular offense is a violation of the due process clause of the fourteenth amendment without the full "protections that surround one accused of crime." 429 F. Supp. at 1356. Moreover, one federal court has concluded that imprisonment without regard to ability to pay violates federal equal protection principles enunciated in *Tate v. Short*, 401 U.S. 395 (1971), and *Williams v. Illinois*, 399 U.S. 235 (1970). *Abbit v. Bernier*, 387 F. Supp. 57 (D. Conn. 1974). It has also been suggested that civil arrest constitutes cruel and unusual punishment. Note, *Imprisonment for Debt and the Constitution*, 1970 LAW & SOC. ORD. 659, 666-67.

192. J. Braxton Craven, Jr., judge of the U.S. Court of Appeals for the Fourth Circuit until his death on May 3, 1977. Volume 56, No. 2 of *North Carolina Law Review* is dedicated in honor of Judge Craven.

193. 429 F. Supp. at 1356.

194. *See id.* at 1357-58.

195. *Id.* at 1358-59.

196. *See* statutes cited note 183 *supra*.

197. The Court has taken different positions on the dispute about the precedential value to be accorded summary affirmances in the "appeal" process. *See Mandel v. Bradley*, 432 U.S. 173 (1977) (per curiam) (summary affirmances prevent lower court from reaching contrary conclusions on precise issues presented in jurisdictional statement). *But see Edelman v. Jordan*, 415 U.S. 651, 671 (1974) (summary affirmances do not have same precedential value as full opinions). Even if the rule according summary affirmances greatest weight is the prevailing one, only the issues of entitlement to a hearing on solvency and appointed counsel might be considered foreclosed by the Court's disposition.

198. *See* note 191 *supra*.

199. Although a finding that the debtor has concealed or diverted assets in fraud of his creditors, or will do so unless immediately detained, arguably encompasses a finding that the debtor possesses assets to apply against the judgment, a mere finding that the debtor is about to flee the jurisdiction to avoid paying his creditors does not necessarily reach the issue of the debtor's solvency. *See* N.C. GEN. STAT. § 1-311 (Cum. Supp. 1977). In that North Carolina makes the issue of the debtor's solvency ultimately determinative in the decision to imprison the debtor, *see id.* § 23-34, -36, -37 (1965 & Cum. Supp. 1977), exclusion of that issue from

existence of grounds justifying arrest may be established at trial, the question remains whether the hearing has been afforded at a meaningful time<sup>200</sup> since arrest can occur a significant period of time after trial.<sup>201</sup> Lastly, the provisions for affording legal counsel to indigents, in failing to guarantee representation at trial when the crucial facts are determined that provide the justification for arrest, might deprive defendants of their sixth amendment right to counsel at all critical stages of the proceedings.<sup>202</sup>

Repeal of the body execution provisions could be justified on the single ground that the procedure seems unduly harsh and repressive in today's world. Indeed, the probable reason for the careful preservation of body execution is that it is an effective means of squeezing financial aid out of friends and relatives of imperiled debtors. Of greater significance, however, is that it is unlikely the procedure is needed to serve legitimate purposes since the interests of creditors appear to be sufficiently protected by North Carolina's strengthened supplemental proceedings<sup>203</sup> and by the old creditor's bill.<sup>204</sup> These observations, seen in light of the constitutional problems

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consideration in the hearing prior to arrest could violate federal procedural due process principles expressed by the United States Supreme Court in *Bell v. Burson*, 402 U.S. 535 (1971), and *Stanley v. Illinois*, 405 U.S. 645 (1972). See also *Yoder v. County of Cumberland*, 278 A.2d 379 (Me. 1971).

200. See *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (opportunity to be heard must be afforded at meaningful time).

201. In *Grimes*, for instance, arrest was not effected until more than six months after trial. See 429 F. Supp. at 1353. The better procedure would perhaps be to hold a pre-arrest hearing in the nature of the show-cause hearing required before contempt may issue. At such a hearing the debtor would have the opportunity to show a change in circumstances since trial that rendered arrest no longer justified or to make some other explanation for not paying the judgment, perhaps for the first time if judgment had been by default. In addition to accommodating more appropriately the debtor's interest in not being erroneously deprived of his liberty, this procedure has an historical and theoretical justification. While the judgment for a certain sum of money is merely an in rem decree, the imprisoned debtor is being coercively imprisoned for his failure to perform the act of payment. Consequently, it would seem that an in personam decree ordering the defendant to pay should be required before the court may arrest and imprison the debtor for failure to make payment.

202. See *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

Although the court in *Grimes* declined to answer the question whether a constitutional right to counsel attaches in these proceedings, 429 F. Supp. at 1358, a number of courts have so held. See, e.g., *Ottom v. Zaborac*, 525 P.2d 537 (Alas. 1974) (civil contempt for nonsupport); *In re Harris*, 69 Cal. 2d 486, 446 P.2d 148, 72 Cal. Rptr. 340 (1968) (prejudgment civil arrest). See also *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (support for proposition that it is possibility of loss of liberty, and not label attached to proceeding, that is crucial factor in determining when right to counsel attaches).

203. N.C. GEN. STAT. §§ 1-352 to -368 (1969 & Cum. Supp. 1977). The provisions in this article permit the judgment creditor to compel his debtor to appear and answer concerning the debtor's property. Disobedience of a court order pursuant to this article subjects the debtor to punishment as for contempt. *Id.* § 1-368 (1969).

204. The creditor's bill, or suit, is a traditionally equitable remedy available to the judgment creditor as a means of reaching property of the debtor not subject to execution at law. See generally, Note, *Execution—Supplemental Proceedings or Creditor's Bill in North Carolina*, 35 N.C. L. REV. 414 (1957).

provoked by body execution, suggest that retention of the procedure can no longer be justified.

### J. Appeal and Error<sup>205</sup>

#### 1. Interlocutory Appeals

In *Oestreicher v. American National Stores, Inc.*,<sup>206</sup> decided by the North Carolina Supreme Court in 1976, it was held that the limitation to final judgments of appealable orders under rule 54(b)<sup>207</sup> does not restrict the ability to appeal interlocutory orders under G.S. 1-277 and G.S. 7A-27(d).<sup>208</sup> The ramifications of the concurrent operation of these somewhat

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205. In several cases before the court of appeals this past year the court exhibited its intention to insist upon rigid observance of the time schedule set out in the North Carolina Rules of Appellate Procedure. Appellants in *Byrd v. Alexander*, 32 N.C. App. 782, 233 S.E.2d 654 (1977), and *White v. Lawrence*, 33 N.C. App. 631, 236 S.E.2d 30 (1977), failed to file the record on appeal with the clerk of the court of appeals within 10 days after certification of the record on appeal as required by N.C.R. Civ. P. 12(a). In neither case does it appear that appellants were so dilatory as to exceed the maximum period of 150 days following the taking of appeal within which rule 12(a) permits the record to be filed in the appellate court. Nevertheless, the court dismissed the appeals, and in doing so restated its observations made in prior cases to the effect that the rules are mandatory but contain liberal provisions for extension of time when counsel can show good cause. 33 N.C. App. at 632, 236 S.E.2d at 31; 32 N.C. App. at 783, 233 S.E.2d at 655 (both citing *In re Allen*, 31 N.C. App. 597, 230 S.E.2d 423 (1976); *Ledwell v. County of Randolph*, 31 N.C. App. 522, 229 S.E.2d 836 (1976)). In the same spirit the court dismissed appellant's appeal in *Indian Trace Co. v. Sanders*, 33 N.C. App. 386, 235 S.E.2d 91, cert. denied, 293 N.C. 253, 237 S.E.2d 535 (1977), in which the record on appeal was filed with the clerk 156 days after he took appeal—more than the 150 days allowed for that purpose by rule 12(a). See *id.* at 387-88, 235 S.E.2d at 92.

In *Bowen v. Hodge Motor Co.*, 292 N.C. 633, 234 S.E.2d 748 (1977), the supreme court affirmed the general rule that an appeal removes a case from the jurisdiction of the trial court, subject to the exceptions that jurisdiction is retained to settle the case on appeal and during the session of court, and subject to the qualification that the trial judge may adjudge the appeal to have been abandoned. *Id.* at 635-36, 234 S.E.2d at 749. The court held, placing principal reliance on *Wiggins v. Bunch*, 280 N.C. 106, 184 S.E.2d 879 (1971), that the mere filing of a motion directed at an order or judgment from which an appeal has been taken, and the appearance at a hearing on the same, does not constitute an abandonment of the appeal. In so holding, the court attempted to distinguish *Sink v. Easter*, 288 N.C. 183, 217 S.E.2d 532 (1975). See Note, *Civil Procedure—Bowen v. Hodge Motor Co.: Abandonment of Appeal in North Carolina*, 56 N.C.L. REV. 573 (1978).

206. 290 N.C. 118, 225 S.E.2d 797 (1976).

207. N.C.R. Civ. P. 54(b) provides:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third-party claim, or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes. In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes. Similarly, in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

208. N.C. GEN. STAT. §§ 1-277, 7A-27(d) (1969 & Cum. Supp. 1977) permit an appeal to be taken from a judicial order or determination that "affects a substantial right."

incongruous appeal provisions remains to be worked out in North Carolina.<sup>209</sup> It is clear, though, that holding the interlocutory appeal provisions fully effective in rule 54(b) situations has the potential for disrupting the orderly scheme of trial court discretionary control over piecemeal appeals envisioned by rule 54(b).<sup>210</sup> This fact is illustrated by the 1977 case of *Wachovia Realty Investments v. Housing, Inc.*,<sup>211</sup> in which the supreme court invoked the interlocutory appeals statutes to entertain an appeal from a judgment that the trial judge failed to designate final under rule 54(b).

The action in *Wachovia Realty* was for a deficiency due after foreclosure on a deed of trust securing a note made by defendant to plaintiff.<sup>212</sup> Defendants alleged certain facts entitling them to a set-off of approximately the same amount plaintiff claimed remained due.<sup>213</sup> The trial judge granted summary judgment to plaintiff and adjudged plaintiff entitled to recover the full amount due as alleged in the complaint; however, the court retained the case for the purpose of determining in what amount defendant was entitled to set off plaintiff's judgment.<sup>214</sup> Nevertheless, execution issued on the judgment.<sup>215</sup>

The court of appeals dismissed defendant's appeal because the judgment was not certified for appeal by the trial judge in accordance with rule 54(b).<sup>216</sup> The supreme court took a different view, holding that even though the judgment was not final under rule 54(b), it clearly affected a substantial right of defendant and therefore was appealable under G.S. 1-277.<sup>217</sup> Specifically, the court held that a substantial right of defendant was affected due to the "substantial expense" defendant would be forced to incur in seeking a stay of execution<sup>218</sup>—the minimum response to the judgment rendered against it.

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209. While N.C.R. Civ. P. 54(b) is substantially similar to and adapted from FED. R. Civ. P. 54(b), see *Oestreicher v. American Nat'l Stores, Inc.*, 290 N.C. at 122-23, 225 S.E.2d at 800-01, there is no comparable provision in federal practice authorizing the appeal of interlocutory orders simply on the basis that a substantial right is affected.

210. Because of the potential scope and complexity of actions under the liberal joinder provisions of the Rules of Civil Procedure, rule 54(b) was adopted, according to a federal commentator, "to avoid the possible injustice of a delay in entering judgment on a distinctly separate claim or as to fewer than all of the parties until the final adjudication of the entire case by making an immediate appeal available." 10 C. WRIGHT & A. MILLER, *supra* note 115, § 2654, at 32 (1973).

211. 292 N.C. 93, 232 S.E.2d 667 (1977).

212. *Id.* at 95-96, 232 S.E.2d at 669-70.

213. *Id.* at 96, 232 S.E.2d at 670.

214. *Id.* at 97, 232 S.E.2d at 670.

215. *Id.* at 97-98, 232 S.E.2d at 670-71.

216. 28 N.C. App. 385, 221 S.E.2d 381 (1976).

217. 292 N.C. at 98-99, 232 S.E.2d at 671-72. The court first held that summary judgment on the issue of damages was erroneous because defendant's right to set-off was disputed. Summary judgment could have been appropriate at most only on the issue of liability.

218. *Id.* at 99-100, 232 S.E.2d at 671-72.

The court's holding permitting the appeal should be read in light of the fact that, as a rule, a final judgment is a prerequisite for the issuance of an execution.<sup>219</sup> Therefore, in proper practice under rule 54(b), any judgment on which execution has issued is also appealable because the judge has necessarily entered a final judgment upon an express determination that there is no just reason for delay.<sup>220</sup> The court in *Wachovia Investments* may have been of the view that this fact justified, if not compelled, hearing the appeal on the merits.

Nevertheless, it would seem that the better practice in such circumstances would be to dismiss the appeal with a directive to the trial court to make a new determination on certification in light of the necessity for certification if execution is to issue.<sup>221</sup> This approach is in line with what generally would be a desirable policy of restraint when presented with appeals asserting that uncertified orders affect substantial rights. Failure to certify presumably represents a determination that awaiting a later stage of the litigation before permitting appeal would better serve the ends of justice and judicial economy. Consequently, entertaining the appeal in the absence of certification can operate to frustrate the trial judge's attempt to serve these ends by imposing controls on appeals from orders and decisions that do not dispose of the entire suit.<sup>222</sup>

The applicability of this policy to the *Wachovia Investments* situation is complicated by the fact that the judge's erroneous authorization of execution on an uncertified order was ambiguous with regard to the desirability of certification.<sup>223</sup> Nevertheless, rather than hearing the appeal solely because the execution affects a substantial right, the better course in such circumstances would generally be to dismiss the appeal, direct vacation of the execution and force the trial judge to make an independent determination on certification.<sup>224</sup> The desirability of present execution would then be only

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219. 6 MOORE'S FEDERAL PRACTICE, *supra* note 93, pt. 1, ¶ 54.42, at 816 (1976). In North Carolina only a final judgment can constitute a lien on property. *McCaskill v. Graham*, 121 N.C. 190, 28 S.E. 264 (1897); see 10 C. WRIGHT & A. MILLER, *supra* note 115, § 2661, at 90 (1973).

220. See N.C.R. Civ. P. 54(b).

221. Ideally, the adversely affected party will have made a motion in the trial court to set aside the execution, the denial of which may then be reviewed on appeal. When no such motion has been made and denied, presumably the appellate court may, in the exercise of its supervisory powers, see generally 1 A. MCINTOSH, *supra* note 39, § 75 (Supp. 1970), direct vacation of the execution.

222. For instance, if a later appeal might bring some of the same issues before the appellate court, or later developments in the trial court could moot the appeal, rule 54(b) certification should perhaps be withheld. See 10 C. WRIGHT & A. MILLER, *supra* note 115, § 2659, at 78-79 (1973).

223. On the one hand, the judge withheld certification; on the other, he issued execution, apparently an implicit determination that there is no just reason for delay.

224. See N.C.R. Civ. P. 54(b), *quoted in* note 207 *supra*.

one of the factors to weigh in making the decision whether to certify.<sup>225</sup> The existence of a factually related, unadjudicated counterclaim, as in *Wachovia Investments*,<sup>226</sup> should then weigh heavily against certification because the claimant's right to recover on the basis of the particular transaction is still in dispute.<sup>227</sup>

If a judge declines to designate an order final either because in his judgment it is not final or because of the inappropriateness of the collateral effects of finality,<sup>228</sup> his decision should be accorded considerable respect. Accordingly, appeals under G.S. 1-277 and G.S. 7A-27(d) in cases to which rule 54(b) applies should only be permitted in circumstances of clearest need.

A case involving a question of first impression<sup>229</sup> in the area of interlocutory appeals is *Tennessee-Carolina Transportation, Inc. v. Strick Corp.*<sup>230</sup> In that case the supreme court heard an appeal from the denial by a superior court judge of defendant's request for discovery. At issue was defendant's right to take a deposition after discovery had been ordered terminated by the court. The deposition sought was that of an expert who had conducted experiments at plaintiff's request relevant to the subject matter of the lawsuit. Because plaintiff had not offered the expert's testimony into evidence at trial, defendant suspected that the evidence might well be damaging to plaintiff's case. The expert, however, was beyond the subpoena power of the court and consequently denial of discovery effectively precluded defendant from admitting the expert's testimony into evidence.<sup>231</sup>

Overruling its earlier disposition denying appeal,<sup>232</sup> the court held that the appeal was permissible because the issuance of the protective order affected a substantial right of plaintiff.<sup>233</sup> As the court noted, it would be impractical to send the case back for trial only to have it appealed again on

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225. See *Allis-Chalmers Corp. v. Philadelphia Elec. Co.*, 521 F.2d 360, 365 (3d Cir. 1975); 6 MOORE'S FEDERAL PRACTICE, *supra* note 87, pt. 1, ¶ 54.41[3], at 746-47 (1976); note 222 and accompanying text *supra*.

226. Although defendant labeled its averments establishing the right to set-off a "defense," the trial court obviously treated that part of defendant's answer as a counterclaim.

227. See *Allis-Chalmers Corp. v. Philadelphia Elec. Co.*, 521 F.2d 360, 366 (3d Cir. 1975); 10 C. WRIGHT & A. MILLER, *supra* note 115, § 2659, at 82 (1973); Note, *Civil Procedure—Trial Court Discretion in Rule 54(b) Certification: Extension of the Panichella Requirement of an Infrequent, Harsh Case*, 54 N.C.L. REV. 1265 (1976).

228. See note 222 *supra*.

229. See *Tennessee-Carolina Transp., Inc. v. Strick Corp.*, 289 N.C. 587, 590, 223 S.E.2d 346, 349 (1976), *rev'd on rehearing*, 291 N.C. 618, 231 S.E.2d 597 (1977).

230. 291 N.C. 618, 231 S.E.2d 597 (1977).

231. *Id.* at 619-25, 231 S.E.2d 598-601.

232. *Tennessee-Carolina Transp., Inc. v. Strick Corp.*, 289 N.C. 587, 223 S.E.2d 346 (1976), *rev'd on rehearing*, 291 N.C. 618, 231 S.E.2d 597 (1977).

233. 291 N.C. at 625, 231 S.E.2d at 601-02.

the precise ground then before the court.<sup>234</sup> Plainly, permitting the appeal might well obviate the additional trial that could result if it was later determined that the request was improperly denied. Because in this case the denial of the request for discovery effectively precluded defendants from presenting the expert's evidence such a retrial was a good possibility.

The court's holding in *Strick* represents a reasoned approach to the question of when an interlocutory order should be appealable. When an order is made that is destined to affect significantly the later conduct of the trial and that could form the basis for awarding the adversely affected party a new trial, the more economical course to take might well be immediate resolution of the question in the appellate courts.<sup>235</sup>

## 2. Partial New Trials

The rule governing the grant of partial new trials in North Carolina, whether by appellate or trial courts,<sup>236</sup> is that it is permitted when the "'issue to be tried is distinct and separable from the other issues, and that the new trial can be had without danger of complications with other matters.'" <sup>237</sup> While various portions of a suit might be retried alone, probably the most common partial new trials are those limited to the issue of damages.<sup>238</sup> Frequently, however, it will be improper to order such a new trial, even though the error directly relates only to the issue of damages, because the question of damages will be closely interwoven with that of liability.<sup>239</sup>

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234. *Id.*

235. See *Privette v. Privette*, 230 N.C. 52, 53, 51 S.E.2d 925, 926 (1949) (appeals from orders denying motions to strike allegations from pleadings proper on grounds that permitting pleadings containing "irrelevant or impertinent" elements to be read to jury "might impair or imperil the rights of the adversary party"). But cf. *Knight v. Duke Power Co.*, 34 N.C. App. 218, 237 S.E.2d 574 (1977) (pretrial order ruling certain evidence inadmissible at trial did not affect substantial right because order was subject to later modification in trial judge's discretion).

236. While the quoted rule, see text accompanying note 237 *infra*, suggesting the test is the same regardless of whether the issue of the propriety of a grant of a partial new trial is before the trial or appellate courts, was stated before the adoption of N.C.R. Civ. P. 59, the former practice of making no distinction dependent on which court is considering the question should be expected to continue. See 2 A. McINTOSH, *supra* note 39, § 1597(3) (Supp. 1970). Compare *Table Rock Lumber Co. v. Branch*, 158 N.C. 251, 73 S.E. 164 (1911), with *Jarrett v. High Point Trunk & Bag Co.*, 144 N.C. 299, 56 S.E. 937 (1907).

237. *Robertson v. Stanley*, 285 N.C. 561, 568-69, 206 S.E.2d 190, 195 (1974) (quoting 58 AM. JUR. 2d *New Trial* § 25, at 210 (1971)).

238. 11 C. WRIGHT & A. MILLER, *supra* note 115, § 2814, at 93 (1973); e.g., *Paris v. Carolina Portable Aggregates, Inc.*, 271 N.C. 471, 157 S.E.2d 131 (1967); *Jenkins v. Harvey C. Hines Co.*, 264 N.C. 83, 141 S.E.2d 1 (1965).

239. *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494 (1931). In a tort case, for instance, retrial on damages alone may be inappropriate if there is reason to think the verdict was a compromise between jurors with different views on liability. 11 C. WRIGHT & A. MILLER, *supra* note 115, § 2814, at 10 (Supp. 1977).



In *Weyerhaeuser Co. v. Godwin Building Supply Co.*,<sup>240</sup> the North Carolina Supreme Court ruled that a partial new trial on damages alone was inappropriate in a contract action in which claimant asserted several different breaches of duty and it was not ascertainable from the jury's verdict which breach or breaches were found by it to have occurred.<sup>241</sup> As breaches of different promises in the contract could have given rise to varying amounts of damage, the question of breach was necessarily resubmitted along with the question of damages lest "confusion and uncertainty and . . . injustice" result to one or both parties.<sup>242</sup> As the court suggested, effective use of the pretrial conference in framing the issues more precisely with respect to the breaches alleged might have saved the parties a full second trial.<sup>243</sup> Of course, even had the precise breach or breaches been specified in the jury's verdict, it may nevertheless have been necessary to resubmit the issue of breach along with that of damages if the extent of breach would still require determination.<sup>244</sup>

### K. Superior Court Judges

#### 1. Proceedings Outside the County in Which the Action is Filed

The rules governing the temporal and territorial limitations on the powers of the superior courts and their judges in North Carolina are much in need of clarification. This is particularly so in respect of the effects the 1962 constitutional abolition of formal court "terms"<sup>245</sup> and the advent of the new North Carolina Rules of Civil Procedure<sup>246</sup> have had in liberalizing some of the historical restrictions.<sup>247</sup> These relatively recent developments

240. 292 N.C. 557, 234 S.E.2d 605 (1977).

241. *Id.* at 558, 234 S.E.2d at 606.

242. *Id.* at 564-66, 234 S.E.2d at 609-10.

243. *Id.* at 566, 234 S.E.2d at 610.

244. *See, e.g., Tennessee-Carolina Transp., Inc. v. Strick Corp.*, 283 N.C. 423, 438-39, 196 S.E.2d 711, 721 (1973) ("Of necessity, a new trial on the issue of damages also requires a new trial on the issue as to breach of warranty because the jury that assesses damages should be the same jury that determines whether, and to what extent, the fitness warranty was breached.").

245. N.C. CONST. art. IV, § 9(2).

246. N.C.R. Civ. P. 6(c) provides:

The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a session of court. The continued existence or expiration of a session of court in no way affects the power of a court to do any act or take any proceeding, but no issue of fact shall be submitted to a jury out of session.

247. *See A. McINTOSH, supra* note 39, § 107 (Supp. 1970). The historical limitations are described in *id.* §§ 124-126 (2d ed. 1956). Under N.C.R. Civ. P. 6(c) all matters and proceedings provided for by the rules, except those requiring a jury, may now be heard and disposed of by the court without regard to the existence or expiration of a session of court. Presumably, therefore, all such matters now fall within the traditionally designated "in chambers" and "in vacation" jurisdiction of the courts, *see A. McINTOSH, supra* § 125 (2d ed. 1956), as do those proceedings that are still specifically authorized by statute to be so conducted, *e.g., N.C. GEN.*

pertain most directly to the temporal aspects of the powers of superior court judges. It might be expected, therefore, that the traditional territorial limitations on their powers have not been altered.<sup>248</sup>

Thus, in *House of Style Furniture Corp. v. Scronce*<sup>249</sup> the North Carolina Court of Appeals reaffirmed the old rule that

in this State a judge of the Superior Court has no authority to hear a cause or to make an order substantially affecting the rights of the parties outside of the county in which the action is pending unless authorized so to do by statute, or by consent of the parties.<sup>250</sup>

The rule was invoked in *Scronce* to hold invalid a default judgment entered against plaintiff pursuant to a hearing conducted in Iredell County in an action filed in Alexander County. Although as resident judge of the twenty-second judicial district, which includes both Iredell and Alexander counties, the judge entering the judgment was a proper authority to hear the motion,<sup>251</sup> the order and entry of default were invalid because the parties had not consented to the hearing and no statute specifically authorized hearing the matter out of county.<sup>252</sup>

In *Towne v. Cope*,<sup>253</sup> however, which came before the court of appeals earlier last year, the court took no notice of the fact that the motion for summary judgment, on which judgment later was entered, was heard outside of the county in which the action was filed. Instead the court addressed only the related issue of the resident judge's temporal power to hear the motion out of session.<sup>254</sup> If *Scronce* is correct, however, in asserting the

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STAT. § 1-440.5 (Cum. Supp. 1977) (power to order attachment). The judge who is assigned in regular succession to hold the courts of the district is empowered to hear all "in chambers" matters arising in the district, *Shepard v. Leonard*, 223 N.C. 110, 113, 25 S.E.2d 445, 447 (1943), and the resident judge of the district and any special judge residing in the district share this power with the regular judge by virtue of N.C. GEN. STAT. § 7A-47.1 (1969). Emergency judges also share this power during the period of their assignment. *See id.* § 7A-48.

248. *See McNeil v. Hodges*, 99 N.C. 248, 6 S.E. 127 (1888) (rejecting contention that statutorily conferred power to conduct proceeding for settlement of guardianship out of "term" empowered judge to act out of county).

249. 33 N.C. App. 365, 235 S.E.2d 258 (1977).

250. *Id.* at 368, 235 S.E.2d at 260 (quoting *Patterson v. Patterson*, 230 N.C. 481, 484, 53 S.E.2d 658, 661 (1949)); *accord*, A. McINTOSH, *supra* note 39, § 126, at 72-73 (2d ed. 1956). The rule and its convenience rationale were stated as early as 1888 in *McNeil v. Hodges*, 99 N.C. 248, 6 S.E. 127 (1888). It is apparently a judge-made rule. *See A Survey of the Decisions of the North Carolina Supreme Court for the Spring and Fall Terms of 1953*, 32 N.C. L. REV. 379, 414 n.1 (1954).

251. *See* note 254 *infra*.

252. 33 N.C. App. at 369, 235 S.E.2d at 261.

253. 32 N.C. App. 660, 233 S.E.2d 624 (1977).

254. *Id.* at 665-66, 233 S.E.2d at 628. The court resolved this issue by citing N.C. GEN. STAT. § 7A-47.1 (1969), which confers on the resident judge of the district concurrent "jurisdiction" with the judge regularly assigned in all matters not requiring a jury or in which a jury has been waived. For this reason, and in light of N.C.R. Civ. P. 6(c), *see* note 247 *supra*, the authority of either the regular or resident judge to hear a motion for summary judgment "in

continued vitality of territorial limitations on superior court judges' power, either statutory authorization or the consent of the parties should have been required before the judge could validly hear the motion out of county.

Although there clearly was no express statutory authorization for the action, the court in *Towne* may have implicitly found that under North Carolina precedent sufficient consent appeared of record to validate the judgment.<sup>255</sup> Both parties appeared at the hearing and submitted memoranda and affidavits in support of their positions and the appellant stated in his brief on appeal that the parties had "stipulated and agreed" to hear the matter out of the county in which the action was filed.<sup>256</sup> It can be suggested, nonetheless, that in not treating the issue the court followed what would be the better rule; although the rule limiting proceedings in superior court to the county in which the action is pending apparently has not been abolished in North Carolina, it may be doubted whether its retention can be justified. Certainly the concern that inconvenience and hardship would result without the rule, pointed to in *McNeil v. Hodges*<sup>257</sup> as the underlying policy, is a less compelling consideration now than it was in the early days of the rule when travel was a much more difficult proposition and the circuits of the judges were more wide ranging. A more logical and flexible rule would permit a matter to be heard anywhere within the district in which the action is filed, for that is the area in which the resident, regular and special judges have concurrent jurisdiction in matters not requiring a jury.<sup>258</sup> Indeed, the modern statutes prescribing the powers of district courts provide for the conduct of motions and other proceedings anywhere in the district,<sup>259</sup> suggesting that the rule relating to superior court judges has been retained more out of neglect than considered policy.

## 2. Successive Motions for Summary Judgment

It is a well-established rule in North Carolina that "ordinarily one [Superior Court] judge may not modify, overrule, or change the judgment of

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chambers" or "in vacation" should not be in doubt. See generally *W. SHUFORD*, *supra* note 100, § 6-6, at 52.

255. Compare *Menzel v. Menzel*, 254 N.C. 353, 119 S.E.2d 147 (1961) (appearance and participation at hearing on motion in the cause by guardian ad litem would constitute waiver of any objection to hearing motion before particular judge), with *Griffin v. Griffin*, 237 N.C. 404, 408, 75 S.E.2d 133, 136 (1953) (consent found where both parties appeared and joined issue at hearing on motion for child custody and record on appeal contained stipulation that "'court was properly organized and . . . the parties were duly before the court'").

256. Plaintiff-Appellant's Brief at 6.

257. 99 N.C. 248, 250, 6 S.E. 127, 128 (1888).

258. N.C. GEN. STAT. § 7A-47.1 (1969); see note 247 *supra*.

259. N.C. GEN. STAT. § 7A-191 (1969).

another Superior Court judge previously made in the same action.”<sup>260</sup> The court of appeals invoked this rule in *Biddix v. Kellar Construction Corp.*<sup>261</sup> to invalidate the lower court’s grant of summary judgment in favor of defendant because defendant had previously moved for summary judgment in the same action and had his motion denied by a different superior court judge.<sup>262</sup> The case should not, however, be broadly construed to bar all successive motions for summary judgment when made before different judges; rather, it should be read to prohibit such multiple motions only when they are based on the same grounds.

The *Biddix* suit involved a breach by defendant construction company of a contract to build a house for plaintiffs. Plaintiffs alleged that they were entitled to recover damages they suffered as the result of the late completion date.<sup>263</sup> Defendant admitted the contract but raised as one defense the execution of a release that purportedly exonerated it from all liability to plaintiffs arising out of the contract.<sup>264</sup> The validity of this release was denied by plaintiffs.<sup>265</sup> Each party then made a motion for summary judgment, supported by affidavits and other documents; both motions were denied by Judge Winner.<sup>266</sup> When the case came on for trial before Judge Kirby, defendant “moved to dismiss”;<sup>267</sup> the judge thereupon heard oral arguments from counsel, examined the documentary evidence<sup>268</sup> and entered judgment for defendant.<sup>269</sup>

Apparently because of some uncertainty as to the nature of the judgment rendered by the judge, the parties submitted a stipulation to the court of appeals stating that the judgment was based on the “plea in bar raised by the third defense in defendants’ answer” (the release).<sup>270</sup> The court of appeals concluded that the case had been disposed of without a trial on the merits, although the effect of the “plea in bar” under the new rules remained to be determined.<sup>271</sup> In reaching this conclusion, the court endorsed

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260. *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972); *State v. Neas*, 278 N.C. 506, 180 S.E.2d 12 (1971).

261. 32 N.C. App. 120, 230 S.E.2d 796 (1977).

262. *Id.* at 124-25, 230 S.E.2d at 799.

263. *Id.* at 121, 230 S.E.2d at 797.

264. *Id.*

265. *Id.* at 121, 230 S.E.2d at 797-98.

266. *Id.* at 121, 230 S.E.2d at 798.

267. Plaintiff-Appellant’s Brief at 5.

268. *Id.*

269. 32 N.C. App. at 122-23, 230 S.E.2d at 798-99. It seems likely that the judge thought he was conducting a trial without a jury because he rendered judgment based on findings of fact and conclusions of law.

270. *Id.* at 123, 230 S.E.2d at 799. The plea in bar was under common law pleading the defendant’s response to the plaintiff’s declaration that went to the merits of the plaintiff’s claim. G. CLARK, *COMMON LAW PLEADING* 154 (1931).

271. 32 N.C. App. at 123, 230 S.E.2d at 799.

the suggestion of Professor Moore that a defense or objection improperly denominated a plea, demurrer, or some other challenge abolished by rule 7(c)<sup>272</sup> should be examined for its substance and accorded the treatment of its functional equivalent under rule 12.<sup>273</sup> Thus, as defendant sought disposition of the case on the merits of its affirmative defense raised in the answer, the motion was on its face one for judgment on the pleadings.<sup>274</sup> As the motion was supported by matters outside the pleadings, however, under rule 12(c) it was to be treated as one for summary judgment under rule 56.<sup>275</sup> Having thus characterized the motion, the court of appeals ruled that because a prior summary judgment motion of defendant had been denied by Judge Winner, the allowance of the later one by Judge Kirby could not be sustained.<sup>276</sup>

The same result as that in *Biddix* should not be reached in all cases in which multiple motions for summary judgment are made. There is federal precedent to the effect that, at least when a subsequent motion is grounded on different matters than those before the court on a prior motion, denial of the earlier motion does not preclude allowing the subsequent one.<sup>277</sup> Prior North Carolina decisions in analogous areas also support this result. In *Fleming v. Mann*,<sup>278</sup> the North Carolina Court of Appeals ruled that the denial of a motion to dismiss for failure to state a claim made pursuant to rule 12(b)(6) did not prevent another judge from ruling on a subsequent motion under the same provision after the complaint had been amended. This course of action was permissible, according to the court, because the later motion did not present "the precise question" decided on the earlier motion.<sup>279</sup> In addition, in *Alltop v. J.C. Penney Co.*,<sup>280</sup> the court of appeals held that a denial of a motion to dismiss under rule 12(b)(6) does not bar a later motion for summary judgment. The simple reason for this result is that the two motions are analytically discrete: while a motion under rule 12(b)(6) challenges only the legal sufficiency of the complaint, the court on a rule 56 motion goes behind the pleadings to determine whether there exists a

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272. N.C.R. Civ. P. 7(c) provides: "*Demurrers, pleas, etc., abolished.*—Demurrers, pleas, and exceptions for insufficiency shall not be used."

273. See N.C. App. at 124, 230 S.E.2d at 799 (quoting 2A MOORE'S FEDERAL PRACTICE, *supra* note 93, ¶ 7.06, at 1550 (1975)).

274. See 5 C. WRIGHT & A. MILLER, *supra* note 115, § 1369 for a comparison of the motion for judgment on the pleadings to other rule 12 motions.

275. 32 N.C. App. at 124, 230 S.E.2d at 799.

276. *Id.*

277. 10 C. WRIGHT & A. MILLER, *supra* note 115, § 2713, at 400 (1973); see, e.g., *Middle Atl. Util. Co. v. S.M.W. Dev. Corp.*, 392 F.2d 380 (2d Cir. 1968); *Allstate Fin. Corp. v. Zimmerman*, 296 F.2d 797 (5th Cir. 1961).

278. 23 N.C. App. 418, 209 S.E.2d 366 (1974).

279. *Id.* at 423, 209 S.E.2d at 369.

280. 10 N.C. App. 694, 179 S.E.2d 885 (1971).

material issue of fact necessitating trial.<sup>281</sup> By way of analogy, it is clear that successive motions for summary judgment in the same action can rest on entirely different grounds.<sup>282</sup> In such a case, an order allowing summary judgment on the second motion would clearly not “modify, overrule, or change the judgment”<sup>283</sup> of the other judge and consequently would not offend the considerations of “orderly procedure, courtesy and comity” on which the rule in question is based.<sup>284</sup>

The inference that might be drawn from the decision in *Biddix*, that successive motions for summary judgment may never be brought before different judges, is therefore too broad. In fact, the result reached in *Biddix* is consistent with the narrower reading, for the successive motions there were indistinguishable.<sup>285</sup> It remains to be clarified, however, to what extent the successive motions must differ before they may be heard by different judges.<sup>286</sup>

DUMONT CLARKE IV  
JAMES DICKSON PHILLIPS III

### III. COMMERCIAL LAW

#### A. Uniform Commercial Code

##### 1. Warranties for Prescription Drugs

In *Batiste v. American Home Products Corp.*<sup>1</sup> the court of appeals held for the first time in North Carolina that a prescribing physician is not a merchant under the Uniform Commercial Code and that the issuance of a prescription is not a sale. A sale is defined by the Code as “the passing of

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281. *Id.* at 695, 179 S.E.2d at 887.

282. An example would be distinct affirmative defenses, each of which could constitute a complete bar to the plaintiff's action.

283. *Biddix v. Kellar Constr. Corp.*, 32 N.C. App. at 124, 230 S.E.2d at 799.

284. *Calloway v. Ford Motor Co.*, 281 N.C. 496, 504, 189 S.E.2d 484, 490 (1972).

285. It appears from the record on appeal that no new matter was presented to the court on the “motion to dismiss.”

286. In *Moore v. WOOW Inc.*, 250 N.C. 695, 110 S.E.2d 311 (1959), however, the court affirmed an order granting a second motion to set aside a default judgment. The second motion was based on evidence that was not available at the time the first motion was made. The opinion can be read to condition allowing the second motion on the unavailability of the evidence at the time of the earlier motion. It is possible that the court would adopt such an attitude towards successive motions for summary judgment and require that the movant present all grounds then available to him in each such motion, or later be barred.

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1. 32 N.C. App. 1, 231 S.E.2d 269, *cert. denied*, 292 N.C. 466, 233 S.E.2d 921 (1977).

title from the seller to the buyer for a price."<sup>2</sup> A merchant is "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction."<sup>3</sup> These issues were important in the context of the case because plaintiff's claim was based upon a breach of an implied warranty of merchantability and only sellers who are merchants are subject to the implied warranty of merchantability set out in G.S. 25-2-314.<sup>4</sup> Courts in several jurisdictions, when faced with these issues, have held that the transfer of a drug or medical device during treatment can constitute a sale of goods under the Uniform Commercial Code.<sup>5</sup> Other courts have taken the position that such transfers are merely incidental to the physician's main business of providing professional services. As the sale of services is not covered by the Code, these courts have held that a physician is neither a merchant nor seller for Code purposes.<sup>6</sup>

Plaintiff in *Batiste* sued her doctor for breach of an implied warranty of merchantability and fitness for use after he prescribed an oral contraceptive that allegedly caused a stroke. She also sued the retail druggist who filled the prescription and the manufacturer. After the trial court dismissed the warranty claims against the physician and druggist, plaintiff appealed.<sup>7</sup>

Although the physician merely prescribed the drug sold, plaintiff argued that he was a "seller" within the meaning of the statute.<sup>8</sup> She based her argument on the role played by physicians in the distribution of drugs. Because a physician's consent is required for any drug to be legally sold, manufacturers spend large sums educating physicians as to their products. These expenditures, plaintiff argued, are aimed at encouraging doctors to prescribe or "sell" particular drugs.<sup>9</sup> Although recognizing the ingenuity of plaintiff's arguments, the court of appeals upheld the dismissal, ruling that the issuance of a prescription does not pass title to the drugs prescribed and

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2. N.C. GEN. STAT. § 25-2-106(1) (1965).

3. *Id.* § 25-2-104(1).

4. *Id.* § 25-2-314(1).

5. *See, e.g.,* *Mauran v. Mary Fletcher Hosp.*, 318 F. Supp. 297 (D. Vt. 1970) (administration of anesthesia to hospital patient involves primarily a rendering of service, but fact that sale of anesthesia is a minimal element does not mean a sale is not involved). A similar problem arises as to whether the sale of blood incident to a blood transfusion is a sale under the Code. Forty-seven states, including North Carolina, have enacted statutes providing that implied warranties are not applicable to the sale of blood. *See* N.C. GEN. STAT. § 90-220.10 (1975).

6. *See, e.g.,* *Allen v. Ortho Pharmaceutical Corp.*, 387 F. Supp. 364 (S.D. Tex. 1974); *Cheshire v. Southampton Hosp. Ass'n*, 53 Misc. 2d 355, 278 N.Y.S.2d 531 (Sup. Ct. 1967); *Foster v. Memorial Hosp. Ass'n*, 219 S.E.2d 916 (W. Va. 1975).

7. 32 N.C. App. at 2-4, 231 S.E.2d at 270-72.

8. *Id.* at 5, 231 S.E.2d at 272.

9. *Id.* at 5-6, 231 S.E.2d at 272.

that the essence of the relationship between physician and patient is the sale of professional services, not goods.<sup>10</sup>

As a matter of both statutory interpretation and public policy, the court's decision is sound. As defendant physician did not transfer any goods as part of his services, his actions clearly fall outside the scope of Article 2 of the Code. Even if he had sold the drug as part of his treatment, there would still be support for the court's position. The Code is intended to deal primarily with commercial transactions between professional businessmen and between such businessmen and their customers. Its focus is upon the goods sold. When a physician dispenses a drug or medical device to a patient, on the other hand, the "sale of goods" is subordinate to the exercise of his professional judgment. It is primarily for the exercise of that judgment and not for the sale of a good that the patient is paying the physician. Holding physicians to commercial standards also seems unwise because their training and activities are not appropriately evaluated in the merchant context. The better solution is an action for negligence or malpractice in which the physician can be judged according to the standards of his own profession.

Plaintiff also alleged that the retail druggist who filled the prescription breached implied warranties of merchantability and fitness for a particular purpose. The basis of her complaint was that the drug caused a number of side effects, including severe strokes, and was therefore unreasonably dangerous and unfit for human use.<sup>11</sup> G.S. 25-2-314<sup>12</sup> implies a warranty of merchantability when the seller is a merchant with respect to the goods sold, which the druggist unquestionably was. For goods to satisfy this warranty, they must, among other things, be "fit for the ordinary purposes for which such goods are used."<sup>13</sup> In deciding whether the drug was merchantable, the court of appeals was confronted with two conflicting lines of authority. In a number of jurisdictions, courts have upheld suits against manufacturers for injuries caused by the use of oral contraceptives.<sup>14</sup> While none of these courts has yet affirmed a judgment in favor of a consumer, they have ruled that such allegations state a cause of action. This line of authority rejects the notion that a contraceptive is "fit for use" simply because it prevents conception. Because retailers are liable under the warranty provisions of the

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10. *Id.* at 6-7, 231 S.E.2d at 272-73.

11. *Id.* at 3, 231 S.E.2d at 271.

12. N.C. GEN. STAT. § 25-2-314 (1965).

13. *Id.* § 25-2-314(c).

14. *See, e.g.,* Jorgensen v. Meade Johnson Laboratories, Inc., 483 F.2d 237 (10th Cir. 1973); Berry v. G.D. Searle & Co., 56 Ill. 2d 548, 309 N.E.2d 550 (1974). For the difficulties encountered in bringing such suits, see Frey, *The Pill and the Code*, 15 J. FAM. L. 1 (1976).



Code to the same extent as manufacturers, the rationale of these cases might have been applied here.

Other courts have held for the manufacturer on a number of grounds, including merchantability.<sup>15</sup> Even with dangerous side effects, a drug may be held merchantable under the theory that a product conforming to the quality of similar goods in the market meets standards of merchantability.<sup>16</sup> Under this theory a product that meets the manufacturer's specifications and that does not differ significantly from other goods in the market will be held merchantable. In upholding the dismissal of plaintiff's complaint, the North Carolina Court of Appeals applied this traditional rule to oral contraceptives. There being no allegation that the drugs contained any "poisonous" substance or that defendant druggist failed to comply with the instructions in the prescription, the goods were deemed merchantable.<sup>17</sup>

## 2. Statute of Frauds

In *Turner v. Atlantic Mortgage & Investment Co.*,<sup>18</sup> the North Carolina Court of Appeals was confronted with a defense based on the Code version of the Statute of Frauds.<sup>19</sup> Plaintiff, who had been hired by defendant as an investment banker, entered into an oral contract entitling him to certain commissions and giving him an option to use the commissions to purchase stock in the company.<sup>20</sup> After he was dismissed by defendant, he brought suit to collect the commissions or, in the alternative, the stock. At the end of the trial, he elected to take the commissions. Defendant argued on appeal that the contract was barred by the Statute of Frauds, G.S. 25-8-319,<sup>21</sup> because it was a contract for the sale of securities.<sup>22</sup>

The agreement between the parties would seem at first glance to present a classic example of a so-called mixed transaction.<sup>23</sup> When a performance by one party lies partially within the Code and partially without, the courts must decide whether Code rules apply. Under Article 8 a sale of securities is governed by Code regulations, including the Statute of

15. See, e.g., *Nichols v. Eli Lilly & Co.*, 501 F.2d 392 (10th Cir. 1973); *Allen v. Ortho Pharmaceutical Corp.*, 387 F. Supp. 364 (S.D. Tex. 1974).

16. J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* § 9-7, at 293 (1972).

17. 32 N.C. App. at 12, 231 S.E.2d at 276.

18. 32 N.C. App. 565, 233 S.E.2d 80, *cert. denied*, 292 N.C. 735, 235 S.E.2d 788 (1977).

19. Statute of Frauds provisions appear in the Code at both N.C. GEN. STAT. § 25-2-201 (1965) (sale of goods) and *id.* § 25-8-319 (sale of securities).

20. 32 N.C. App. at 567, 233 S.E.2d at 81.

21. N.C. GEN. STAT. § 25-8-319 (1965).

22. 32 N.C. App. at 567, 233 S.E.2d at 81.

23. See, e.g., *Spiering v. Fairmont Foods Co.*, 424 F.2d 337 (7th Cir. 1970) (sale of service contract held sale of product distributed under the contract); *Dehann v. Innes*, 356 A.2d 711 (Me. 1976) (Code applicable when contract involves both sale of goods and realty).

Frauds.<sup>24</sup> A party who contracts for the sale of his services, however, is not governed by the Code.

The court of appeals avoided both the mixed transaction problem and the Statute of Frauds defense, however, by finding the contract between the parties to be divisible.<sup>25</sup> That is, the court found two contracts: one for the sale of plaintiff's services and the other giving him an option to purchase stock. The court found that plaintiff was to receive the commissions in consideration for remaining with the company. These commissions were to be used in turn as consideration for the purchase of stock. As plaintiff was suing only to recover the commissions and not to enforce the stock purchase agreement, the court reasoned, his claim was distinguishable from those in which a single consideration is used to support multiple promises,<sup>26</sup> and thus fell outside the Code.

### 3. Secured Transactions

Under G.S. 25-9-504 a secured party may dispose of collateral in any "commercially reasonable" manner.<sup>27</sup> The disposition may be by public or private sale.<sup>28</sup> If the sale is made publicly in accordance with statutory procedures, a conclusive presumption of commercial reasonableness arises under an apparently unique North Carolina addition to the Code.<sup>29</sup> If the sale is made privately, it may still be commercially reasonable, but the statutory presumption does not apply.

In *First Union National Bank v. Tectamar, Inc.*,<sup>30</sup> plaintiff-creditor brought an action to collect the deficiency on a note after conducting a private sale of secured property. In opposition to plaintiff's motion for summary judgment, defendant testified that a higher price could have been obtained for the collateral. The court of appeals held that this testimony

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24. N.C. GEN. STAT. § 25-8-319 (1965).

25. 32 N.C. App. at 570, 233 S.E.2d at 83. The test for divisibility cited by the court is set out in *Mebane Lumber Co. v. Avery & Bullock Builders, Inc.*, 270 N.C. 337, 341, 154 S.E.2d 665, 668 (1967).

26. 32 N.C. App. at 571, 233 S.E.2d at 84. When a single consideration exists, the contract is not divisible. *Id.*

27. N.C. GEN. STAT. § 25-9-504 (Cum. Supp. 1977). Every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. *Id.* § 25-9-504(3). If the secured party either sells the collateral in the usual manner in any recognized market or if he sells at the price current in that market, he has sold in a commercially reasonable manner. *Id.* § 25-9-507(2).

28. *Id.* § 25-9-504(3).

29. *Id.* §§ 25-9-601 to -607 (Cum. Supp. 1977). If the secured creditor disposes of the collateral in "substantial compliance" with the public sale procedures, a conclusive presumption of commercial reasonableness arises. *ITT-Indus. Credit Co. v. Milo Concrete Co.*, 31 N.C. App. 450, 456-57, 229 S.E.2d 814, 819 (1976).

30. 33 N.C. App. 604, 235 S.E.2d 894 (1977).

raised no genuine issue of fact as to the reasonableness of the sale.<sup>31</sup> In support of its finding the court pointed to G.S. 25-9-507, which provides that evidence that a "better price could have been obtained . . . is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner."<sup>32</sup> As the statute prevents a debtor from enjoining a sale or collecting damages when the only evidence he presents relates to the adequacy of the price,<sup>33</sup> the court by analogy might fairly conclude that summary disposition in favor of the creditor is appropriate when the only evidence presented by the defendant involves price. Such a conclusion is in accord with the Code policy of allowing creditors maximum discretion in their disposition of secured property.<sup>34</sup>

If the court's interpretation is correct, it carves a very narrow exception to the general rule that commercial reasonableness is a question of fact to be determined in the light of the relevant circumstances of each case.<sup>35</sup> Generally, once a creditor has made a *prima facie* showing of commercial reasonableness, the debtor may be required to put forward some evidence to avoid a directed verdict. However, once the debtor has carried his burden of going forward, most courts have held that an issue is raised for the trier of fact.<sup>36</sup> In *ITT-Industrial Credit Co. v. Milo Concrete Co.*,<sup>37</sup> for example, the North Carolina Court of Appeals overturned a directed verdict for a plaintiff-creditor because of insufficient evidence as to the manner of disposition and notice provided. In the absence of the conclusive presumption established for public sales by G.S. 25-9-601,<sup>38</sup> the court held that a proper issue was raised for the jury as to whether the sale was commercially reasonable.<sup>39</sup> Citing the greater weight of authority, the court also held that

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31. *Id.* at 606, 235 S.E.2d at 896.

32. N.C. GEN. STAT. § 25-9-507(2) (Cum. Supp. 1977). This section states a "limited negative rule" that the fact that a better price could have been obtained does not by itself prove that a sale is commercially unreasonable. A disposition that is a fraction of the original price, however, may raise an issue of fact. Hogan & Coogan, *The Secured Party and Default Proceedings*, in 1 BENDER'S UNIFORM COMMERCIAL CODE SERVICE § 8.04, at 903 (1976); *see, e.g.*, Central Budget Corp. v. Garrett, 78 Misc. 2d 485, 361 N.Y.S.2d 800 (Sup. Ct. 1974). In addition, price is relevant in determining commercial reasonableness when combined with other factors. *See, e.g.*, Mercantile Fin. Corp. v. Miller, 292 F. Supp. 797 (E.D. Pa. 1968).

33. N.C. GEN. STAT. § 25-9-507(1) (Cum. Supp. 1977).

34. As has been noted, there "is a remarkable absence of stringent requirements for mandatory public sales, detailed public notices, or other specific prohibitions." Hogan & Coogan, *supra* note 32, § 8.01, at 865.

35. *See, e.g.*, California Airmotive Corp. v. Jones, 415 F.2d 554 (6th Cir. 1969); Clark Leasing Corp. v. White Sands Forest Prods., Inc., 87 N.M. 451, 535 P.2d 1077 (1975).

36. Clark Leasing Corp. v. White Sands Forest Prods., Inc., 87 N.M. 451, 454, 535 P.2d 1077, 1080 (1975).

37. 31 N.C. App. 450, 229 S.E.2d 814 (1976).

38. N.C. GEN. STAT. § 25-9-601 (Cum. Supp. 1977).

39. 31 N.C. App. at 458, 229 S.E.2d at 820.

the burden of proving reasonableness is upon the creditor.<sup>40</sup> If the court's decision in *Tectamar* is to be read consistently with the decision in *Milo Concrete*, it goes only so far as to hold that some evidence in addition to evidence of a better price must be presented to avoid summary disposition.

#### 4. Negotiable Instruments

Several 1977 North Carolina cases dealt with the negotiable instruments provisions of the Code. In *Booker v. Everhart*,<sup>41</sup> plaintiff attorneys were the assignees of a promissory note executed by defendant and assigned to them by defendant's former wife for legal services rendered. On appeal, defendant argued that the assignment was void because it was based on an illegal fee arrangement between the attorneys and his former wife.<sup>42</sup> In upholding a directed verdict for plaintiffs, the court of appeals correctly applied the Code policy of excluding most *jus tertii* defenses.<sup>43</sup> The suit before the lower court was one between the maker of a negotiable instrument (defendant) and its holder (plaintiffs). Except for defenses based on theft, the claims of third persons to a negotiable instrument are not available as a defense to the maker unless the person himself intervenes.<sup>44</sup> As the defendant's former wife did not intervene in the lawsuit, the illegal agreement defense was properly held unavailable to defendant.

The basic form of litigation contemplated by Article 3 of the Code is a suit by the holder of a note against the maker/drawee or a previous indorser. When an instrument is paid on a forged indorsement, however, the Code also allows a suit for conversion.<sup>45</sup> Such an action treats the negotiable instrument as if it were a stolen chattel and allows the true owner to recover

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40. *Id.*

41. 33 N.C. App. 1, 234 S.E.2d 46, *rev'd*, 294 N.C. 146, 240 S.E.2d 360 (1978) (supreme court reversed court of appeals on ground that because promise to pay in note conditional, instrument not negotiable; therefore, because former wife made only partial assignment of note, she was necessary party to lawsuit).

42. *Id.* at 10, 234 S.E.2d at 53.

43. *Id.* at 10-11, 234 S.E.2d at 53-54. A *jus tertii* defense is a defense based on the rights of third parties. As negotiable instruments are commercial documents, the Code policy is to encourage ease of transfer and reliability whenever possible. Thus, a holder in due course takes free of all claims to the instrument and free of most defenses. N.C. GEN. STAT. § 25-3-305 (Cum. Supp. 1977). If the holder is not in due course, he takes subject to the defenses that would be available in an action on a simple contract. *Id.* § 25-3-306(b) (1965). He still, however, takes free of defenses raised by third persons other than theft. *Id.* § 25-3-306(d). This policy encourages negotiability while allowing third parties with valid claims to intervene and assert claims on their own behalf.

44. N.C. GEN. STAT. § 25-3-306(d) (1965). As the Official Comment points out, "[t]he contract of the obligor is to pay the holder of the instrument, and the claims of other persons against the holder are generally not his concern. . . . The provision includes all claims for rescission of a negotiation, whether based on incapacity, fraud, duress, mistake, *illegality*, breach of trust or duty or any other reason." *Id.* § 25-3-306, Official Comment (emphasis added).

45. *Id.* § 25-3-419(1)(c).

its value even though he is not technically a holder.<sup>46</sup> G.S. 25-3-419,<sup>47</sup> which provides this remedy, presents a number of interpretive problems because it does not clearly specify either the parties who can sue or the persons to be sued. The one situation clearly foreseen by the draftsmen is a suit by the payee whose signature is forged against the drawee.<sup>48</sup> This was precisely the situation facing the North Carolina Court of Appeals in *North Carolina National Bank v. McCarley & Co.*<sup>49</sup> Plaintiff represented the estate of a woman whose husband had forged her signature on certain stock certificates and then forged her indorsement on the draft received from his stock broker in payment. Plaintiff, as representative of the rightful owner, brought suit against the stockbroker/drawee for conversion.<sup>50</sup> Applying G.S. 25-3-419, the court of appeals held that the broker had converted the instrument.<sup>51</sup> The court also noted that suit against him for conversion was consistent with prior North Carolina law. Under traditional negotiable instruments law, a drawee bank is expected to pay an instrument only upon the drawer's authorized signature. Even before enactment of the Code, the North Carolina Supreme Court had ruled that a payee also has a right to expect the drawee to pay an instrument according to its terms.<sup>52</sup> When the drawee pays on a forged indorsement, it has exercised rights of ownership inconsistent with the interests of the payee and is guilty of conversion.<sup>53</sup>

Plaintiff alleged a conversion not only of the draft but also of the securities themselves. G.S. 25-8-311<sup>54</sup> allows the true owner of securities that have been transferred on a forged indorsement remedies against both the issuer and the ultimate purchaser. It does not, however, provide any right of action against the broker who participated in the transaction. Applying the principle that complementary common law rules can be read into the Code,<sup>55</sup> the court of appeals nevertheless upheld a right of action against the broker. It based this holding on the common law rule that makes a broker liable in conversion when he sells personal property on behalf of a principal

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46. J. WHITE & R. SUMMERS, *supra* note 16, § 15-4, at 499.

47. N.C. GEN. STAT. § 25-3-419 (1965).

48. J. WHITE & R. SUMMERS, *supra* note 16, § 15-4, at 500.

49. 34 N.C. App. 689, 239 S.E.2d 583 (1977).

50. In most instances the drawer of an instrument and the drawee will be separate entities. In this case, however, the draft executed by the stockbroker was made "payable through" a bank. Under N.C. GEN. STAT. § 25-3-120 (1965), such instruments designate the bank as a collecting bank to make presentment but do not authorize the bank to pay the instrument as drawee. Defendant broker was therefore both the maker of the draft and the drawee responsible for payment.

51. 34 N.C. App. at 692-93, 239 S.E.2d at 586-87.

52. *Modern Homes Constr. Co. v. Tryon Bank & Trust Co.*, 266 N.C. 648, 655, 147 S.E.2d 37, 43 (1966).

53. *Id.* at 653, 147 S.E.2d at 41.

54. N.C. GEN. STAT. § 25-8-311 (1965).

55. *Id.* § 25-1-103.

who has no title. Some of the language and authorities cited by the court<sup>56</sup> suggest that a broker might be liable even when he acts in good faith. It appears, however, that such a result would be in conflict with the Code. G.S. 25-8-318, also cited by the court, clearly prevents a broker from being sued for conversion if he has acted in good faith and according to reasonable commercial standards.<sup>57</sup>

The court's decision clarifies the nature of a stockbroker's liability when he has transferred fraudulently indorsed securities. The broker may be held liable both as a drawee who has disobeyed the instructions of his drawer and as a fiduciary who has violated obligations to the rightful owner of the instrument. In the first instance, the broker may be held liable despite the fact that he has acted reasonably and in good faith. In the second, he will be liable only if the plaintiff can show bad faith. In most cases, of course, a bank and not the broker will be the drawee on the instrument used for payment. The true owner will thus ordinarily be able to recover for conversion only if he can prove that the broker transferred the fraudulent security in bad faith and in violation of reasonable commercial standards.

### 5. Warehouse Receipts

In *Branch Banking & Trust Co. v. Gill*,<sup>58</sup> the North Carolina Supreme Court reconsidered its former decision<sup>59</sup> in this complicated case involving the state's warehousing system. Plaintiff bank held warehouse receipts<sup>60</sup> to secure notes executed by Southeastern Farmers Grain Association. The notes had been issued to Southeastern by the local manager of the state's warehousing system who was also a Southeastern employee. The employee induced the bank to surrender sixteen valid warehouse receipts and substitute for them thirteen new receipts. The new receipts were fraudulent in that the state grain elevator received no grain in exchange for issuing them. In an

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56. 34 N.C. App. at 691, 239 S.E.2d at 585 (citing *Southern Ohio Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 479 F.2d 478 (6th Cir. 1973); *Patterson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 266 N.C. 489, 146 S.E.2d 390 (1966); 12 AM. JUR. 2d *Brokers* § 105 (1964)).

57. N.C. GEN. STAT. § 25-8-318 (1965) provides:

An agent or bailee who in good faith (including observance of reasonable commercial standards if he is in the business of buying, selling or otherwise dealing with securities) has received securities and sold, pledged or delivered them according to the instructions of his principal is not liable for conversion or for participation in breach of fiduciary duty although the principal had no right to dispose of them.

58. 293 N.C. 164, 237 S.E.2d 21 (1977).

59. 286 N.C. 342, 211 S.E.2d 327 (1975), *decision withdrawn*, 293 N.C. 164, 237 S.E.2d 21 (1977).

60. A warehouse receipt is a document of title issued by a warehouse on receiving goods stored. A person storing goods in a warehouse can transfer title to the goods simply by transferring the warehouse receipts covering them. He can also pledge the receipts as security for a loan. J. WHITE & R. SUMMERS, *supra* note 16, § 20-1, at 667.

action to recover the value of the grain represented by the receipts, the bank sued, among others, the local manager and Southeastern employee who issued the receipts, his surety and the custodian of the State Indemnity and Guaranty Fund.<sup>61</sup> The trial court rendered judgment in favor of defendants, finding that the bank had not acted in good faith and was not a holder by due negotiation.<sup>62</sup> The supreme court, speaking through Justice Lake, reversed.<sup>63</sup> On rehearing, the court, in an opinion written by Chief Justice Sharp, withdrew its former decision and affirmed the judgment of the trial court.<sup>64</sup>

The court in both decisions rejected the bank's claim that it had acquired the receipts through "due negotiation."<sup>65</sup> If the bank had proved that status, it would have been entitled to recover on the receipts under G.S. 25-7-502<sup>66</sup> despite the fact that its transferor obtained them through fraud. In transferring the receipts to the bank, however, Southeastern had failed to properly indorse the instruments. Before the bank had an opportunity to compel the missing indorsements under G.S. 25-7-506,<sup>67</sup> it learned of the fraud. Because the bank had notice of this defense before the receipts were indorsed, it did not take the documents by "due negotiation."<sup>68</sup> It was therefore only a "transferee" of the instruments and under G.S. 25-7-504<sup>69</sup> would ordinarily acquire only the rights and title of its transferor. Here the transferor was Southeastern, which had fraudulently obtained the receipts and thus had no rights against the elevator issuing the documents.<sup>70</sup>

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61. The State Guaranty and Indemnity Fund, the provisions of which are set out in N.C. GEN. STAT. § 106-435 (1975), is designed to "provide the financial backing which is essential to make the warehouse receipt universally acceptable as collateral." *Id.* It sets up a "special guarantee or indemnifying fund to safeguard the State warehouse system against any loss not otherwise covered." *Id.*

62. 293 N.C. at 175-76, 231 S.E.2d at 27-28.

63. 286 N.C. 342, 211 S.E.2d 327 (1975).

64. 293 N.C. 164, 237 S.E.2d 21 (1977).

65. N.C. GEN. STAT. § 25-7-501 (1965). A negotiable document of title is "duly negotiated" when it is "negotiated in the manner stated in this section to a holder who purchases it in good faith without notice of any defense against or claim to it on the part of any person." *Id.* § 25-7-501(4).

66. *Id.* § 25-7-502. Under this provision, the holder of a negotiable document of title that has been duly negotiated acquires in part: "(a) title to the document; (b) title to the goods; . . . (d) the direct obligation of the issuer to hold or deliver the goods according to the terms of the document free of any defense or claim."

67. *Id.* § 25-7-506.

68. A document of title can be "negotiated" only by "indorsement and delivery." *Id.* § 25-7-501(1).

69. *Id.* § 25-7-504. Under § 25-7-504(1), a "transferee of a document, whether negotiable or nonnegotiable, to whom the document has been delivered but not duly negotiated, acquires the title and rights which his transferor had or had actual authority to convey." *Id.* § 25-7-504(1).

70. 293 N.C. at 179, 237 S.E.2d at 29-30.

The supreme court, in its first opinion, nevertheless allowed the bank to proceed against the warehouse on the theory of ratification. According to Justice Lake, the state elevator ratified the new receipts by accepting the benefit caused by cancellation of the valid receipts and substitution of the fraudulent documents in their place.<sup>71</sup> It was therefore estopped to deny their validity in the hands of the bank.<sup>72</sup> As defendants noted in their petition for rehearing, such a reading seems to be inconsistent with the doctrine behind G.S. 25-7-504<sup>73</sup> because it clearly enlarges the rights of the transferee beyond those of his transferor.<sup>74</sup> As the comments to the section point out, the "doctrine of equitable estoppel" should not be used to increase the rights of the transferee beyond those provided by the section itself.<sup>75</sup>

On rehearing, the court "displaced"<sup>76</sup> the doctrine of ratification relied on in its first opinion and turned instead to an analysis of G.S. 25-7-203,<sup>77</sup> a Code provision that all parties had overlooked on the first appeal. This provision protects purchasers of warehouse receipts by holding the warehousemen liable when either he or his agent fraudulently or mistakenly issues receipts for nonexistent goods.<sup>78</sup> According to the court, it is this provision and not those dealing with negotiability that should govern when receipts have been issued for nonexistent goods.<sup>79</sup> G.S. 25-7-502 and G.S. 25-7-504, by contrast, are intended to deal primarily with competing claims "to valid documents and goods *actually* stored in a warehouse."<sup>80</sup> Unlike the negotiability sections, G.S. 25-7-203 does not require that the purchaser hold by "due negotiation."<sup>81</sup> Instead, it is enough that he be a purchaser "for value in good faith of a document of title"<sup>82</sup> whether negotiable or nonnegotiable. Here the bank gave value for the receipts by cancelling the old notes. If it had also proved good faith, it would have been entitled to recover on the receipts under G.S. 25-7-203 despite the fact that it did not hold by due negotiation and thus possessed only the title of its fraudulent transferor. The Code defines good faith as meaning "honesty in fact."<sup>83</sup>

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71. 286 N.C. 342, 359-60, 211 S.E.2d 327, 339 (1975).

72. *Id.*

73. N.C. GEN. STAT. § 25-7-504 (1965); see note 69 *supra*.

74. 293 N.C. at 192, 237 S.E.2d at 38 (Lake, J., dissenting).

75. See N.C. GEN. STAT. § 25-7-504, Official Comment (1965).

76. 293 N.C. at 181, 237 S.E.2d at 31.

77. N.C. GEN. STAT. § 25-7-203 (1965). This section provides in part that a "party to or purchaser for value in good faith of a document of title other than a bill of lading relying in either case upon the description therein of the goods may recover from the issuer damages caused by the non-receipt or misdescription of the goods."

78. 293 N.C. at 180-81, 237 S.E.2d at 31.

79. *Id.*

80. *Id.* at 179, 237 S.E.2d at 30.

81. See note 65 *supra*.

82. N.C. GEN. STAT. § 25-7-203 (1965).

83. *Id.* § 25-1-201(19).



The supreme court held, however, that this definition does not permit the parties to "intentionally keep themselves in ignorance of facts which, if known, would defeat their rights."<sup>84</sup> The court found from the evidence that the bank had willfully failed to look into the transaction for fear that it would discover the fraudulent nature of the receipts.<sup>85</sup> Concluding that the bank had acted in bad faith, the court withdrew its prior decision and affirmed the judgment of the trial court in favor of defendants.

### *B. Retail Installment Sales Act*

In 1975 the North Carolina legislature adopted the Retail Installment Sales Act,<sup>86</sup> thereby greatly expanding the protection offered consumers in consumer credit sales. Among other things, the Act limits the amount of interest that can be charged for credit installment sales contracts<sup>87</sup> and the kinds of property in which the seller can take a security interest.<sup>88</sup>

The 1977 General Assembly amended the Act in a number of important respects. The greatest problem in the area of consumer credit has been caused by sellers who arrange for financing through the use of negotiable promissory notes. Under these arrangements, the seller either provides financing or takes the note himself and discounts it to an affiliated corporation. When the goods prove defective and the customer attempts to stop payment, he discovers that his defenses against the seller are invalid against the holder of the note. One approach to this problem is to make holders of the instrument subject to the buyer's defenses as a matter of law. This approach is taken by the Retail Installment Sales Act and preserved under the recent amendments.<sup>89</sup> The former version of the Act allowed the buyer to waive his defenses against an assignee of the seller in certain limited circumstances. If the buyer received notice of an intended assignment and failed to notify the assignee of any defense available against the original seller within thirty days, he was considered to have waived his defenses.<sup>90</sup> The 1977 amendments strengthen the statute by eliminating waivers altogether.<sup>91</sup>

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84. 293 N.C. at 189, 237 S.E.2d at 36.

85. *Id.*

86. N.C. GEN. STAT. §§ 25A-1 to -45 (Cum. Supp. 1977).

87. *Id.* § 25A-15.

88. *Id.* § 25A-23. One amendment enacted by the legislature in 1977 allows the seller to take a security interest in property "used for agricultural purposes, if the property sold is to be used in the operation of an agricultural business." *Id.* § 25A-22(a)(6).

89. Law of July 1, 1977, ch. 921, 1977 N.C. Sess. Laws 1247 (effective June 30, 1978, to be codified at N.C. GEN. STAT. § 25A-25).

90. Law of July 8, 1971, ch. 796, § 1, 1971 N.C. Sess. Laws 1028 (formerly codified at N.C. GEN. STAT. § 25A-25 (Cum. Supp. 1977)).

91. Law of July 1, 1977, ch. 921, 1977 N.C. Sess. Laws 1247.

The problem of lost defenses can also be approached contractually. Under the Federal Trade Commission regulations, for example, a seller is guilty of an unfair trade practice if he fails to include in any consumer credit contract language subjecting holders of the contract to defenses available against the original seller.<sup>92</sup> Under the 1977 amendments to the Retail Installment Sales Act, this language will also be required as a matter of state law.<sup>93</sup> A holder of a consumer credit contract will thus be subject to the consumer's defenses as a matter of both substantive law and contractual agreement.

### C. *Savings and Loan Associations*

In 1977 the General Assembly made a number of changes in the laws governing state-chartered savings and loan associations. It expanded the scope of permissible investments by allowing investment of up to 1% of assets in corporations providing data processing services<sup>94</sup> and permitted for the first time the establishment of off-premises automated teller machines.<sup>95</sup> The legislature also expanded the power of the Administrator of the Savings and Loan Commission by giving him strict control over mutual deposit guaranty associations<sup>96</sup> as to "conduct, organization, management, business practices, reserve requirements and . . . financial and fiscal matters."<sup>97</sup> The administrator is also given the power to have any director, officer or employee of these associations discharged if he finds him to be dishonest or incompetent.<sup>98</sup>

The legislature also paved the way for a new form of financial institution in North Carolina: the "stock-owned" savings and loan association.<sup>99</sup> The main difference between these associations and the mutual institutions previously permitted is the manner of initial capitalization. In a mutual

92. 16 C.F.R. § 433.2(a) (1977). The FTC regulation makes it an unfair or deceptive act for a seller to take a consumer credit contract that fails to contain the following provision:

Notice

Any holder of this consumer credit contract is subject to all claims and defenses which the debtor could assert against the seller of goods or services obtained pursuant hereto or with the proceeds hereof. Recovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder. *Id.*

93. Law of July 1, 1977, ch. 921, 1977 N.C. Sess. Laws 1247.

94. N.C. GEN. STAT. § 54-33.3(5) (Cum. Supp. 1977).

95. *Id.* § 54-33.3(4).

96. These associations are organizations consisting of 10 or more building and loan institutions, savings and loan institutions or credit unions formed to assure the liquidity of member institutions, guarantee member deposits, loan money to member institutions and invest. *Id.* §§ 54-44.1 to .14 (1975 & Cum. Supp. 1977).

97. *Id.* § 54-44.10 (Cum. Supp. 1977). Other duties and powers of the Administrator in regard to cooperative organizations are set forth in *id.* §§ 54-24 to -33.2 (1975 & Cum. Supp. 1977).

98. *Id.* § 54-44.14 (Cum. Supp. 1977).

99. *Id.* §§ 54A-1 to -27.

savings and loan institution the capital with which the association conducts its business is loaned to the corporation by its customers in the form of savings accounts. In a capital stock corporation, shareholders contribute permanent capital in exchange for ownership interests.<sup>100</sup> In order to incorporate under the new statute a proposed corporation must obtain subscriptions for capital stock of at least \$350,000 and must also set aside an equivalent amount for permanent capital reserves. All initial stockholders must be North Carolina residents, and no stockholder can hold over 10% of the capital stock.<sup>101</sup> Finally, the corporations are made subject to the statutes and regulations governing mutual associations and private corporations and are placed under the control of the Administrator of the Savings and Loan Division.<sup>102</sup>

#### D. Interest

The legislature made a number of changes in the state's usury laws. One amendment fills a gap in existing law by applying the statutory limitations on interest to commitments for loans as well as the loans themselves.<sup>103</sup> Another provides aid for charitable organizations by limiting the interest that can be charged on loans under \$100,000 to 9% when the loan is secured by charity-owned property.<sup>104</sup> Finally, a significant change was made in the statute governing contract rates on home loans secured by first mortgages. Under previous versions of the statute, the parties to a home loan could contract for any rate of interest they agreed upon.<sup>105</sup> Under the amended version, this rule still applies to loans in excess of \$10,000.<sup>106</sup> For loans under that amount, however, it applies only if the lender falls into one of the three categories of approved lenders set out in the statute.<sup>107</sup> Otherwise, the parties cannot contract for payment of interest in excess of 10%.<sup>108</sup>

100. ABA COMM. ON SAVINGS & LOAN ASSOCIATIONS, SECTION OF CORPORATION, BANKING & BUSINESS LAW, HANDBOOK OF SAVINGS AND LOAN LAW 12-13 (1973). The stock-owned form may offer a number of advantages over the mutual form including attraction of additional capital, availability of stock options and increased ease of merger. Liebold & Wilfand, *The Conversion Process: Mutual to Stock Savings and Loan Associations*, 30 BUS. LAW. 129 (1974).

101. N.C. GEN. STAT. § 54A-10 (Cum. Supp. 1977).

102. *Id.* §§ 54A-2 to -3.

103. *Id.* § 24-1.1.

104. *Id.* § 24-1.1B.

105. Law of April 3, 1974, ch. 1119, § 1, 1973 N.C. Sess. Laws 150 (formerly codified as amended at N.C. GEN. STAT. § 24-1.1A (Cum. Supp. 1975)).

106. N.C. GEN. STAT. § 24-1.1A(1) (Cum. Supp. 1977).

107. *Id.* § 24-1.1A(a)(2). The three categories of approved lenders are those either:

(i) approved as a mortgagee by the Secretary of Housing and Urban Development, the Federal Housing Administration, the Veterans Administration, a national mortgage association or any federal agency; or (ii) a local or foreign bank, savings and loan association or service corporation wholly owned by one or more savings and loan associations and permitted by law to make home loans, credit union or insurance company; or (iii) a State or federal agency.

*Id.*

108. *Id.* § 24-1.1A(a)(3).

*E. Contracts*

## 1. Breach of Contract

Plaintiffs in *Pipkin v. Thomas & Hill, Inc.*<sup>109</sup> undertook to build a motel and sought a construction loan from Central Carolina Bank for that purpose. The bank required plaintiffs to secure a commitment for a permanent loan before the temporary construction loan would be approved.<sup>110</sup> Plaintiffs subsequently applied to defendant, Thomas & Hill, Inc., for a permanent loan.<sup>111</sup> Defendant, a mortgage broker, was in the business of arranging permanent loans for builders with other lending institutions but did not itself make permanent commercial construction loans.<sup>112</sup> The loan application did not, however, indicate that defendant would not be the actual lender.<sup>113</sup> Thomas & Hill's assistant vice president and manager of their North Carolina office assured the bank that defendant would provide a permanent loan on or before September 1, 1974.<sup>114</sup> On the basis of these representations, the bank issued a construction loan to plaintiffs, and they began work.<sup>115</sup> In August 1974, defendant denied any commitment to make the permanent loan. On and after October 1, 1974, the bank made interim loans to plaintiffs at a fluctuating rate of interest.<sup>116</sup> On these facts, the trial court found that defendant had made and breached a contract to supply a permanent loan<sup>117</sup> and awarded damages for that breach.

The evidence indicated that on October 1, 1974, the "going" commercial rate of interest was 10 1/2% but that money was not available for motel financing.<sup>118</sup> In computing the damages that plaintiffs should receive for breach of a contract to lend money, the court of appeals permitted recovery for additional expenses incurred by them in their attempt to secure a

109. 33 N.C. App. 710, 236 S.E.2d 725, *cert. granted*, 293 N.C. 361, 238 S.E.2d 149 (1977) (No. 39 PC).

110. *Id.* at 712, 236 S.E.2d at 727-28.

111. The loan sought was in the amount of \$1,162,500 payable over 25 years at 9 1/4% interest. *Id.* at 713, 236 S.E.2d at 728.

112. *Id.* at 712, 236 S.E.2d at 728.

113. *Id.* at 713, 236 S.E.2d at 728.

114. *Id.* at 714, 236 S.E.2d at 729. The loan commitment date was later changed to October 1, 1974. *Id.*

115. *Id.* at 714, 236 S.E.2d at 728-29.

116. The floating rate of interest on the demand note was initially equal to the prime rate plus 2%; later the rate became the prime rate plus 3%. Plaintiffs paid \$184,619.49 in interest between October 1, 1974, and the time of trial, but they had paid nothing on the principal. Plaintiffs were unable to secure other permanent financing. *Id.* at 715, 236 S.E.2d at 729.

117. *Id.* See text accompanying notes 239-45 *infra* for a discussion of the authority of defendant's agent to bind defendant to this contract.

118. 33 N.C. App. at 715, 236 S.E.2d at 729. October 1, 1974, was chosen because that was the date on which the bank supplied the interim loan. *Id.*

permanent loan, the interest paid on the interim loans until the time the trial began, and the difference between the interest calculated at 10 1/2% for twenty-five years *from the date of trial* and the interest calculated at 9 1/2% for twenty-five years *from October 1, 1974*, discounted to present value.<sup>119</sup> This award of damages is unsatisfactory, chiefly because of the uncertainty surrounding the calculations. The choice of the 10 1/2% interest rate is difficult to justify because this rate was not available to plaintiffs at the time of the breach. Moreover, the 10 1/2% calculation was made from the time of trial, a date chosen to avoid granting a "double" recovery of interest for the period of time between the breach and the trial, as the interest on the interim loans for this time period had been recovered separately. There was no showing, however, that a rate of 10 1/2% had any significance at the time the trial began as a measure of the cost of securing the type of financing sought by plaintiffs. In addition, while the trial court reduced the discounted difference in interest rates by more than \$20,000 as an adjustment for the likelihood of early payment, the court of appeals rejected this reduction because there was no evidence that plaintiffs intended to make early payment.<sup>120</sup> The trial court's reduction appears warranted, however, as the evidence indicated that early repayment of this type of loan is common.<sup>121</sup> Despite all these problems with the damages awarded, a better alternative may not exist. Plaintiffs built their motel in reliance on receiving a permanent loan from defendant. They have paid a larger amount of interest since the breach than they would have paid with a permanent loan, and they could face foreclosure on the interim loan from the bank, which is unpaid. The award of damages, restructured by the court of appeals, while imprecise, at least has the virtue of achieving a rough sort of equity in a difficult situation.

119. *Id.* at 721-22, 236 S.E.2d at 732-33. The award of expenses incurred to obtain other financing is not unusual. See *Fischman v. Schultz*, 55 S.W.2d 313, 318 (Mo. Ct. App. 1932); *Price v. Van Lint*, 46 N.M. 58, 68, 120 P.2d 611, 617 (1941). Plaintiffs have also been allowed to recover the difference in interest rates when another loan was obtained. See *Columbian Mut. Life Assurance Soc'y v. Whitehead*, 193 Ark. 598, 599-600, 101 S.W.2d 455, 456 (1937); *Bank of N.M. v. Rice*, 78 N.M. 170, 177, 429 P.2d 368, 375 (1967). In *Pipkin*, however, another loan was not obtained. When other financing is unavailable, the breaching lender has been held in other jurisdictions to have reasonably foreseen foreclosure as a result of the failure to lend money and has been required to pay any deficiency judgment lodged against the borrower. See *Stanish v. Polish Roman Catholic Union*, 484 F.2d 713, 724-25 (7th Cir. 1973) (noting that the borrower did not seek the usual measure of damages, "the increased cost of borrowing from another source," because there was no substitute loan). See also *St. Paul at Chase Corp. v. Manufacturers Life Ins. Co.*, 262 Md. 192, 250, 278 A.2d 12, 40, *cert. denied*, 404 U.S. 857 (1971). Another possible remedy, specific performance, was not available in *Pipkin*; defendant was capitalized in excess of one million dollars and had lines of credit with lending institutions for several millions more, but the lines of credit were limited to use in financing residential construction. 33 N.C. App. at 712-13, 236 S.E.2d at 728.

120. 33 N.C. App. at 722, 236 S.E.2d at 733.

121. *Id.*

In *Whitley's Electric Service, Inc. v. Sherrod*,<sup>122</sup> the transactions between plaintiff and defendant (plaintiff had furnished goods and services to defendant from 1958 to 1971<sup>123</sup>) constituted a current or running account.<sup>124</sup> On May 14, 1971, defendant made a payment; on October 23, 1973, plaintiff brought suit for the outstanding balance,<sup>125</sup> and defendant pleaded the three year statute of limitations on contract claims.<sup>126</sup> The court of appeals decided that the May payment revived only that part of the debt accruing three years before the payment,<sup>127</sup> but the supreme court reversed, holding that when the circumstances surrounding a payment on a current account show that the debtor *intended* to acknowledge the entire account by making a payment,<sup>128</sup> the entire amount is revived.<sup>129</sup> The purpose of statutory limitations of actions is to protect the defendant from stale claims.<sup>130</sup> If the defendant makes a partial payment and recognizes his obligation to pay the balance, his need of protection is not as compelling. Thus, as the court recognized, a new promise to pay should be implied from each voluntary acknowledgment of the debt.<sup>131</sup>

Under G.S. 44A-18(1),<sup>132</sup> a first-tier subcontractor who furnishes labor or materials at the site of an improvement is entitled to a lien on funds *owed* by the owner to the contractor.<sup>133</sup> In *Lewis-Brady Builders Supply, Inc. v. Bedros*,<sup>134</sup> plaintiff, a subcontractor who had supplied materials to a

122. 293 N.C. 498, 238 S.E.2d 607 (1977).

123. *Id.* at 500, 238 S.E.2d at 609.

124. *Id.* at 503, 238 S.E.2d at 611. A current or running account exists "where the parties intend that the individual transactions are to be considered a connected series rather than as independent of each other, a balance is kept by adjustment of debits and credits, and further dealings between the parties are contemplated." *Id.* Plaintiff's evidence showed that he had furnished the goods and services to defendant for various construction jobs. In 1967 defendant executed a note to be applied to the debt then owed to plaintiff in order to allow further extension of credit. From the long course of dealing and the borrowing to pay the debt, the court inferred a connected series of transactions with further dealings contemplated in the future. *Id.* at 503-04, 238 S.E.2d at 611.

125. *Id.* at 499, 238 S.E.2d at 609.

126. See N.C. GEN. STAT. § 1-52 (1969).

127. *Whitley's Elec. Serv., Inc. v. Sherrod*, 32 N.C. App. 338, 342-43, 232 S.E.2d 223, 226, *rev'd*, 293 N.C. 498, 238 S.E.2d 607 (1977).

128. The payments made by defendant on the note he executed to refinance his account were held sufficient by the court to support a finding that he acknowledged the debt. In addition the court relied on evidence that showed that after the payment was made defendant discussed the account with plaintiff and promised to pay the balance. 293 N.C. at 506, 238 S.E.2d at 612-13.

129. *Id.* at 507, 238 S.E.2d at 613.

130. See *Shearin v. Lloyd*, 246 N.C. 363, 371, 98 S.E.2d 508, 514 (1957); *Butler v. Bell*, 181 N.C. 85, 90, 106 S.E. 217, 220 (1921).

131. 293 N.C. at 505, 238 S.E.2d at 612.

132. N.C. GEN. STAT. § 44A-18(1) (1976).

133. A contractor is a person who contracts with an owner to improve real property. A first-tier subcontractor contracts with the contractor. *Id.* § 44A-17(1), (2).

134. 32 N.C. App. 209, 231 S.E.2d 199 (1977).

contractor for the construction of the owner's residence, sought a lien.<sup>135</sup> The contractor had breached the contract with the owner, and the damages to the owner were in excess of any funds that might have otherwise become due to the contractor.<sup>136</sup> Under these facts, the court of appeals affirmed the trial court and reasoned that no funds were "owed" by the owner to which the subcontractor's lien could attach.<sup>137</sup> Though the result reached seems harsh to the subcontractor, it appears to be correct.<sup>138</sup> The statute does not make the owner personally liable unless he fails, after notice from the subcontractor, to retain funds owed to the contractor.<sup>139</sup>

## 2. Contractor-Subcontractor Agreements

In *RGK, Inc. v. United States Fidelity & Guaranty Co.*,<sup>140</sup> the supreme court held that in order to state a claim upon which relief may be granted in a subcontractor's suit on a prime contractor's payment bond,<sup>141</sup> the complaint need not set forth the prime contract.<sup>142</sup> The majority, however, went beyond finding a sufficient claim to discuss what effect a breach by the owner of the prime contract<sup>143</sup> would have on the subcontractor's right to recover on the payment bond and concluded that such a breach would not as a matter of law bar the subcontractor's claim.<sup>144</sup> The concurring justices responded by calling this conclusion "premature" and "*obiter dictum*"<sup>145</sup> and argued that the question of the effect of a breach of the prime contract required consideration of the terms of the prime contract itself.<sup>146</sup> These two

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135. *Id.* at 209-10, 231 S.E.2d at 199.

136. *Id.* at 213, 231 S.E.2d at 201.

137. A progress payment to the contractor had been approved by the architect who retrieved and withheld the approval after learning that the contractor had failed to pay the subcontractors in accordance with the terms of the main contract. *Id.* at 211-12, 231 S.E.2d at 200-01.

138. The subcontractor provisions, N.C. GEN. STAT. §§ 44A-17 to -23 (1976), were enacted in 1971, but there has been very little case law interpretation.

139. *Id.* § 44A-20; see Urban & Miles, *Mechanics' Liens for the Improvement of Real Property: Recent Developments in Perfection, Enforcement, and Priority*, 12 WAKE FOREST L. REV. 283, 356, 368-70 (1976).

140. 292 N.C. 668, 235 S.E.2d 234 (1977).

141. The payment bond required the surety (United States Fidelity & Guaranty Co.) and the principal (the general contractor) to pay all claimants for labor and materials. A subcontractor is included in the definition of claimants. *Id.* at 671, 235 S.E.2d at 236.

142. *Id.* at 676, 235 S.E.2d at 238. The prime contract is the contract between the owner and the general contractor. In *RGK* the general contractor agreed to build an apartment complex on the owner's land. *RGK*, the subcontractor, agreed to clear and grade the land and install storm sewers. *Id.* at 676, 235 S.E.2d at 239.

143. There was some indication of a default by the owner in making payments to the general contractor (the bond's principal). *Id.* at 687, 235 S.E.2d at 245 (Exum, J., concurring).

144. *Id.* at 678, 235 S.E.2d at 240.

145. *Id.* at 690, 235 S.E.2d at 247 (Exum, J., concurring).

146. *Id.*

opinions reflect the conflict between two lines of authority in the construction of surety contracts.<sup>147</sup>

The prime contract in *RGK* was incorporated by reference into the bond; nevertheless, the majority of the court concluded that the contract should be looked to only in the construction of ambiguous language in the bond. The majority, characterizing the bond as a "clear, direct, unambiguous undertaking to pay laborers and materialmen,"<sup>148</sup> rejected the surety's contention that it was not liable for payments to subcontractors on the bond because the owner had defaulted on the prime contract.<sup>149</sup> The majority grounded its rejection of this claim on the failure of the bond to state that performance by the owner was a condition to the surety's obligation to pay claimants.<sup>150</sup> The concurring justices, by contrast, maintained that as the prime contract was incorporated by reference, the nature of the surety's obligation to the subcontractor (which is either conditioned on owner's payments or unconditional) cannot be determined without reference to the prime contract.<sup>151</sup>

Neither view is strongly supported by prior North Carolina case law.<sup>152</sup> It would seem, however, that the liberal construction in favor of the subcontractor adopted by the majority is justifiable because the surety has the capability of investigating the credit-worthiness of the parties and setting its premium to reflect the risks it is willing to undertake.<sup>153</sup> Moreover, such an approach would not require the surety to assume unconditional liability. To condition liability upon payment being made by the owner, the surety need only state the condition "in plain English" on its bond.<sup>154</sup>

Plaintiff in *Interstate Equipment Co. v. Smith*<sup>155</sup> leased machinery to a subcontractor for an excavation job. The lease agreement provided for the subcontractor to be liable for excess wear on the equipment. The subcon-

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147. See Koch, *Surety's Obligation to Pay Subcontractor Where Owner Fails to Pay Under Contract*, 11 FORUM 1212, 1213-25, 1228 (1976).

148. 292 N.C. at 679, 235 S.E.2d at 241.

149. *Id.* at 680, 235 S.E.2d at 241.

150. *Id.* at 680-81, 235 S.E.2d at 241-42. The majority distinguished *Carolina Builders Corp. v. New Amsterdam Cas. Co.*, 236 N.C. 513, 73 S.E.2d 155 (1952), which required the bond to be read in light of the prime contract, on the ground that the bond in *Carolina Builders* stated on its face that the owner's rights had priority over the rights of laborers and materialmen. 292 N.C. at 685-86, 235 S.E.2d at 244-45. The effect of the *RGK* majority's interpretation of the relation of the prime contract to the payment bond is to make it easier for the subcontractor to recover on the bond.

151. 292 N.C. at 689, 235 S.E.2d at 246 (Exum, J., concurring, joined by Sharp, C.J.).

152. The majority opinion relies primarily on the opinions of courts in other jurisdictions, see *id.* at 681-83, 235 S.E.2d at 242-43, and the concurrence relies exclusively on cases decided in other jurisdictions, see *id.* at 688-89, 235 S.E.2d at 246 (Exum, J., concurring).

153. *Id.* at 680-81, 235 S.E.2d at 241-42.

154. *Id.* at 681, 235 S.E.2d at 241-42 (1977).

155. 292 N.C. 592, 234 S.E.2d 599 (1977).



tractor had furnished a bond to his contractor to assure payments to persons supplying labor and materials to the subcontractor. The subcontractor defaulted, and the lessor brought suit claiming that the surety of the bond was liable for the unpaid balance on the lease and for the cost of damages and repairs to the machines.<sup>156</sup> The surety contended that it was not liable because the claims were not for labor or materials.<sup>157</sup> The state supreme court concluded that, as the leased machinery was essentially a substitute for labor, the unpaid rental payments for the equipment were covered by the bond<sup>158</sup> and any amounts that plaintiff proved were caused by abnormal wear could also be recovered.<sup>159</sup> Under the court's interpretation, the surety was charged with knowledge of the subcontractor's financial status and equipment and of the provisions of the contract between the subcontractor and plaintiff<sup>160</sup> that required the subcontractor to pay for abnormal wear. This analysis is consistent with the generally accepted policy of liberal construction of bonds for the protection of those supplying labor and materials to the bond's principal.<sup>161</sup>

## F. Trade Regulation

### 1. Unfair Trade Practices

In *State ex rel. Edmisten v. J.C. Penney Co.*,<sup>162</sup> the supreme court narrowly construed former G.S. 75-1.1<sup>163</sup> (making unlawful "unfair or deceptive acts or practices in the conduct of any trade or commerce"<sup>164</sup>) as applying only to acts and practices "involved in the bargain, sale, barter, exchange, or traffic"<sup>165</sup> between sellers and buyers<sup>166</sup> and not to the debt collection practices involved in the case.<sup>167</sup> The court noted that if this interpretation were incorrect, the "General Assembly may amend the statute."<sup>168</sup> In response, the General Assembly enacted the Consumer Pro-

156. *Id.* at 594, 234 S.E.2d at 600. The lease term was six months; the machines remained on the job site throughout the lease period. *Id.*

157. *Id.* at 595, 234 S.E.2d at 601.

158. *Id.* at 598, 234 S.E.2d at 602.

159. *Id.* at 601, 234 S.E.2d at 604.

160. *Id.* at 597, 234 S.E.2d at 602. The court rejected a distinction, recognized in some jurisdictions, between public and private bonds. *Id.* at 598-99, 234 S.E.2d 602-03.

161. See *Wiseman v. Lacy*, 193 N.C. 751, 753, 138 S.E. 121, 123 (1927). The commercial surety is compensated for carrying the risk that the principal will default. An individual laborer or materialman is often unable to carry this risk. See 4 A. CORBIN, CONTRACTS § 800, at 177 (1951).

162. 292 N.C. 311, 233 S.E.2d 895 (1977).

163. Law of June 12, 1969, ch. 833, § 1, 1969 N.C. Sess. Laws 930 (formerly codified at N.C. GEN. STAT. § 75-1.1 (1975)).

164. *Id.*

165. 292 N.C. at 316-17, 233 S.E.2d at 899.

166. *Id.* at 317, 233 S.E.2d at 899.

167. *Id.* at 320, 233 S.E.2d at 901.

168. *Id.*

tection Act of 1977.<sup>169</sup> The amended G.S. 75-1.1 adopts the language of section 5 of the Federal Trade Commission (FTC) Act,<sup>170</sup> thus generally broadening the scope of G.S. 75-1.1 although creating a specific exemption for "professional services rendered by a member of a learned profession."<sup>171</sup> G.S. 75-15.2 was also amended to allow the Attorney General to seek civil penalties for violations of G.S. 75-1.1 when the violations are "specifically prohibited by a court order or knowingly violative of a statute."<sup>172</sup> A new article was added specifically to regulate debt collection practices.<sup>173</sup> Five categories<sup>174</sup> of debt collection practices are prohibited: threats and coercion,<sup>175</sup> harassment,<sup>176</sup> unreasonable publication,<sup>177</sup> deceptive representation<sup>178</sup> and unconscionable means.<sup>179</sup> The remedies, however, are limited. Civil penalties may not exceed \$1,000, and neither treble damages nor attorneys' fees may be awarded.<sup>180</sup>

In *Love v. Pressley*,<sup>181</sup> a case to which the amendments did not apply,<sup>182</sup> the court of appeals made an unusual application of the *Penney* construction of former G.S. 75-1.1.<sup>183</sup> In *Love*, defendant-landlord's trespass and conversion<sup>184</sup> against plaintiff-tenants was held to constitute an unfair trade practice by defendant under G.S. 75-1.1<sup>185</sup> and to entitle plaintiffs to treble damages.<sup>186</sup> In finding defendant's activities to be within the supreme court's interpretation of former G.S. 75-1.1 in *Penney*, the court of appeals held that the lease was a sale of an interest in real estate.<sup>187</sup>

169. N.C. GEN. STAT. §§ 75-1.1, -15.2, -50 to -56 (Cum. Supp. 1977). See generally Comment, *Trade Regulation—The North Carolina Consumer Protection Act of 1977*, 56 N.C.L. REV. 547 (1978).

170. 15 U.S.C. § 45(a)(1) (1976). "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." *Id.*

171. N.C. GEN. STAT. § 75-1.1(b) (Cum. Supp. 1977).

172. *Id.* § 75-15.2.

173. *Id.* §§ 75-50 to -56.

174. Specifically prohibited conduct is listed within each category, but the lists are not exclusive.

175. N.C. GEN. STAT. § 75-51 (Cum. Supp. 1977).

176. *Id.* § 75-52.

177. *Id.* § 75-53.

178. *Id.* § 75-54.

179. *Id.* § 75-55.

180. *Id.* § 75-56.

181. 34 N.C. App. 503, 239 S.E.2d 574 (1977), cert. denied, 294 N.C. 441 (1978).

182. *Id.* at 515-16, 239 S.E.2d at 582.

183. See text accompanying notes 162-67 *supra*.

184. Plaintiffs claimed that a "clean up" man employed by defendant had entered their leased house and removed personal property belonging to Mrs. Love. 34 N.C. App. at 505, 239 S.E.2d at 576.

185. *Id.* at 517, 239 S.E.2d at 583.

186. *Id.* The treble damage provision is N.C. GEN. STAT. § 75-16 (Cum. Supp. 1977).

187. 34 N.C. App. at 516, 239 S.E.2d at 582-83 (citing *Bragg Inv. Co. v. Cumberland County*, 245 N.C. 492, 495-96, 96 S.E.2d 341, 344 (1957), for the proposition that a lease is a "species of intangible personal property").

Under this approach, the rental of residential housing fell within the *Penney* definition of trade or commerce; defendant's misconduct thus constituted unfair or deceptive acts or practices.<sup>188</sup> To buttress this conclusion, the court cited *Commonwealth v. Monumental Properties, Inc.*,<sup>189</sup> a Pennsylvania case construing a statute<sup>190</sup> identical to pre-1977 G.S. 75-1.1 as covering unfair or deceptive acts or practices in the lease of housing.<sup>191</sup> The Supreme Court of Pennsylvania, however, did not find the language differences between the FTC Act and its statute to be important,<sup>192</sup> while these language changes were crucial to the *Penney* decision.<sup>193</sup> Moreover, *Monumental Properties* concerned statements and omissions in standard lease forms that the Commonwealth maintained were deceptive.<sup>194</sup> Statements in leases are clearly related to the broad scope of landlord-tenant trade practices; a single instance of trespass and conversion is not. As debt collection activities were deemed to be separate from the buyer-seller relationship,<sup>195</sup> this trespass and conversion would seem likewise separable.<sup>196</sup>

## 2. Anti-Boycott Legislation

The 1977 General Assembly enacted other regulatory legislation aimed at curtailing the participation of North Carolina businesses in foreign trade boycotts.<sup>197</sup> The new statute makes it unlawful for any person doing business in or for North Carolina to agree not to do business in the state with any other person who is domiciled or has a usual place of business in North Carolina because of that person's "race, color, creed, religion, sex, national origin, or foreign trade relationships."<sup>198</sup> Firing or failing to hire or promote another person who is domiciled or has a usual place of business in the state as a result of such an agreement is also unlawful.<sup>199</sup> Agreements with

188. *Id.* at 516-17, 239 S.E.2d at 582-83.

189. 459 Pa. 450, 329 A.2d 812 (1974).

190. Law of Dec. 17, 1968, no. 387, § 3, 1968 Pa. Laws 1225 (current version at PA. STAT. ANN. tit. 73, § 201-3 (Purdon Cum. Supp. 1977-1978)).

191. 459 Pa. at 478, 329 A.2d at 826.

192. "[I]n all relevant aspects the language of section 3 of the Consumer Protection Law and section 5 of the FTC Act is identical." *Id.* at 462, 329 A.2d at 818 (footnotes omitted). Arguably, the Pennsylvania court's lower threshold of concern with wording would indicate a tendency toward a more expansive definition of "trade or commerce."

193. 292 N.C. at 316-17, 233 S.E.2d at 898-99.

194. 459 Pa. at 454-55, 329 A.2d at 814.

195. *State ex rel. Edmisten v. J.C. Penney Co.*, 292 N.C. at 317, 233 S.E.2d at 899.

196. Residential leases should, however, be covered under the amended version of § 75-1.1 as it is identical to § 5 of the FTC Act. See note 171 and accompanying text *supra*. In an amicus curiae brief filed in *Monumental Properties*, the FTC claimed that residential leases were covered by the broad prohibition against unfair practices. 459 Pa. at 463-66, 329 A.2d at 818-20.

197. N.C. GEN. STAT. §§ 75B-1 to -7 (Cum. Supp. 1977).

198. *Id.* § 75B-2(1) to (3).

199. *Id.* § 75B-2(4).

members of international organizations to grant preference to the citizens or products of the members are not, however, prohibited by the statute.<sup>200</sup>

The Attorney General may sue to prevent or restrain violations of the statute, and any person injured may seek an injunction, damages or both.<sup>201</sup> Treble damages with costs and attorneys' fees may be awarded for willful violations.<sup>202</sup> The availability of these actions does not restrict the applicability of state antitrust or antidiscrimination laws to the prohibited conduct.<sup>203</sup>

A potential major difficulty with the new statute is the requirement of an "agreement, contract, arrangement, combination, or understanding"<sup>204</sup> between the participant in the boycott and the foreign government, person or organization generating the boycott. Proof of such an agreement could be difficult because this type of boycott is generally implemented by "silent acquiescence" to the blacklisting.<sup>205</sup> Moreover, whether or not participation "coerced" by a foreign government is unlawful is not clear; therefore, a defense of coercion might be available.<sup>206</sup>

### 3. Sale of Business Opportunities

In order to stem fraudulent and deceptive practices in the sale of business opportunities, a new statute regulating that practice was enacted.<sup>207</sup> The sale of a business opportunity is defined as the sale or lease of products or services to allow the purchaser to start a business in which the seller will do one of the following: offer to help the buyer find locations for machines or displays;<sup>208</sup> agree to purchase the product made;<sup>209</sup> guarantee a certain income or offer a refund if the buyer is not satisfied;<sup>210</sup> or, for a fee greater than fifty dollars, provide a sales program guaranteeing the buyer an income greater than the price paid.<sup>211</sup> The statute requires disclosure by the seller of name, address, current financial status, training provided and services performed.<sup>212</sup> If the seller makes any statement concerning expected earnings, facts about other sales of this business opportunity within three years

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200. *Id.* § 75B-3(2).

201. *Id.* § 75B-4.

202. *Id.*

203. *Id.* § 75B-7.

204. *Id.* § 75B-2(1).

205. See Schwartz, *The Arab Boycott and American Responses: Antitrust Law or Executive Discretion*, 54 TEX. L. REV. 1260, 1272 (1976).

206. *Id.* at 1274-77.

207. N.C. GEN. STAT. §§ 66-94 to -100 (Cum. Supp. 1977).

208. *Id.* § 66-94(1).

209. *Id.* § 66-94(2).

210. *Id.* § 66-94(3).

211. *Id.* § 66-94(4). One sale of an ongoing business by the owner is not subject to these provisions. *Id.* § 66-94.

212. *Id.* § 66-95(1) to (10).

must be disclosed<sup>213</sup> and a surety bond obtained.<sup>214</sup> Representations about potential earnings may not be made unless documented<sup>215</sup> and the contracts of sale must be in writing and follow the statutory form.<sup>216</sup>

#### 4. Antitrust<sup>217</sup>

In *Ray v. United Family Life Insurance Co.*,<sup>218</sup> involving alleged monopolization of the burial insurance business, the United States District Court for the Western District of North Carolina concluded that the fact that defendant was an insurance company regulated under the insurance statutes,<sup>219</sup> under which the Commissioner of Insurance determines whether insurers have engaged in unfair methods of competition or unfair or deceptive trade practices,<sup>220</sup> did not preclude plaintiff from seeking treble damages under the general prohibition against such practices in former G.S. 75-1.1.<sup>221</sup> While the state insurance statutes do override federal antitrust laws to the extent allowed by the McCarran-Ferguson Act<sup>222</sup> by regulating the insurance industry, the court held that they were not intended to exempt the insurance business from other North Carolina regulation.<sup>223</sup> The effect of the decision will be to allow suits under G.S. 75-1.1 in which the injured plaintiff can recover for his damages, instead of allowing only a cease and desist order to be sought by the Commissioner.<sup>224</sup>

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213. *Id.* § 66-95(10).

214. *Id.* § 66-96.

215. *Id.* § 66-98(1).

216. *Id.* § 66-99.

217. In *Thomas v. Petro-Wash, Inc.*, 429 F. Supp. 808 (M.D.N.C. 1977), an agreement tying the sale of gasoline to the sale of certain car wash equipment was claimed to violate state antitrust provisions. The federal district court held that the statute of limitations did not bar any claim for damages occurring one year before the suit was commenced. *Id.* at 813. Defendant's claim that the statute ran from the time the agreement was signed in 1968 was rejected because each sale of gas under the agreement would trigger the statute from that date. *Id.* at 811-12. This conclusion is consistent with N.C. GEN. STAT. § 75-8 (1975), which provides that with continuous antitrust violations each week constitutes a separate offense.

218. 430 F. Supp. 1353 (W.D.N.C. 1977).

219. N.C. GEN. STAT. §§ 58-54.1 to .13 (1975 & Cum. Supp. 1977).

220. *Id.* § 58-54.5 (1975).

221. Law of June 12, 1969, ch. 833, § 1, 1969 N.C. Sess. Laws 930 (formerly codified at N.C. GEN. STAT. § 75-1.1 (1975)). Amendments were added to N.C. GEN. STAT. § 75-1.1 (Cum. Supp. 1977) in 1977. *Ray* arose prior to the amendment, but the availability of the private action should be unchanged.

222. 15 U.S.C. § 1012(b) (1976).

223. 430 F. Supp. at 1356.

224. See N.C. GEN. STAT. § 58-54.7 (1975). Effective enforcement of the prohibition against unfair or deceptive practices will be enhanced by the availability of private actions and treble damages. This result appears to be consistent with the provision that neither a cease and desist order from the Commissioner nor a court order enforcing it "shall in any way relieve or absolve any person affected by such order from any liability under any other laws of this State." *Id.* § 58-54.8(d).

*G. Business Associations*1. Officers and Directors<sup>225</sup>

The General Assembly in 1977 enacted expanded legislation concerning the indemnification of officers and directors of nonprofit corporations.<sup>226</sup> The new statute is a parallel of the indemnification provisions of the Business Corporation Act.<sup>227</sup> It makes indemnification mandatory in actions by outsiders against the director, officer, agent or employee if a defense on the merits is successful.<sup>228</sup> If the defense is successful other than on the merits, the corporation may agree to pay such expenses that the board of directors (*including* interested directors) shall deem reasonable.<sup>229</sup> If the defense is unsuccessful, indemnification is permitted by a vote of a majority of disinterested members in a nonprofit corporation with members, or by a majority of a quorum of disinterested directors<sup>230</sup> upon a determination that the person seeking indemnification acted in good faith,<sup>231</sup> or by the district court.<sup>232</sup> Indemnity in corporate actions when dereliction of duty is alleged may be made by the court only if a defense is successful or if the conduct was honest and reasonable.<sup>233</sup> The general provisions allowing indemnification under bylaw, agreement and vote of the board of directors have been retained.<sup>234</sup> This is in stark contrast to the business corporation provision that invalidates any bylaw granting indemnification unless permitted by statute.<sup>235</sup> The policy underlying this distinction is presumably to encourage acceptance of management positions in nonprofit corporations by assuaging fears of personal liability.

Furthermore, a nonprofit corporation may purchase liability insurance for its officers, directors, employees and agents to cover any liability asserted against them whether or not the corporation would have the power

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225. The criminal sanctions for misapplications of corporate funds by corporate officers and agents were strengthened by the General Assembly in 1977. The former requirement that the embezzlement or misapplication be committed with intent to defraud *any officer of the corporation*, Law of Mar. 9, 1903, ch. 275, § 15, 1903 N.C. Pub. Laws 473 (formerly codified as amended at N.C. GEN. STAT. § 14-254 (1969)), has been changed to commission with the intent to defraud *any person*, N.C. GEN. STAT. § 14-254 (Cum. Supp. 1977). This represents a substantial broadening of potential liability.

226. N.C. GEN. STAT. §§ 55A-15, -17.1 to .3 (Cum. Supp. 1977).

227. *Id.* §§ 55-19 to -21 (1975). See generally R. ROBINSON, NORTH CAROLINA CORPORATION LAW AND PRACTICE § 15-1 to -9 (2d ed. 1974).

228. N.C. GEN. STAT. § 55A-17.2(a)(1) (Cum. Supp. 1977).

229. *Id.* § 55A-17.2(a)(2).

230. *Id.* § 55A-17.2(a)(3)(a).

231. *Id.* § 55A-17.2(a)(3)(b).

232. *Id.* § 55A-17.2(a)(3)(c).

233. *Id.* § 55A-17.3.

234. *Id.* § 55A-17.1(a).

235. *Id.* § 55-19(a) (1975).

to indemnify them.<sup>236</sup> In the business corporation context, insurance provisions have been severely criticized for going too far in protecting officers and directors from the consequences of their breaches of duty.<sup>237</sup> This criticism has validity in the nonprofit corporation context also. The policy of encouraging citizens to perform as officers and directors of nonprofit corporations should not override the policy of requiring officers and directors to exercise their duties of good faith and due care. In light of the liberal indemnification provisions, the availability of insurance for nonindemnifiable breaches of duty seems unnecessary and unwise as it tends to go too far in relieving officers and directors of their responsibilities.<sup>238</sup>

## 2. Officers as Agents

In *Pipkin v. Thomas & Hill, Inc.*,<sup>239</sup> plaintiffs applied to Thomas & Hill for a permanent loan for the construction of a motel. The assistant vice president and manager of the North Carolina office of Thomas & Hill assured the bank that made the construction loan to plaintiffs that a permanent loan was forthcoming.<sup>240</sup> Thomas & Hill later denied any commitment to make a loan because its manager had no authority to make a permanent loan.<sup>241</sup> Plaintiffs, unable to find another permanent loan, brought suit. The court of appeals upheld the trial court's conclusion that, although defendant's manager had no actual authority to make loans, he did possess the apparent authority to make them and that the existence of this apparent authority bound defendant to the contract to make the loan.<sup>242</sup> Apparent authority is "that authority which the principal has held the agent out as possessing or which he has permitted the agent to represent that he possesses."<sup>243</sup> The agent's high position in Thomas & Hill was considered by the court to be evidence of this apparent authority. His authorization to execute loan applications that indicated that defendant was committed to

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236. *Id.* § 55A-17.1(c) (Cum. Supp. 1977).

237. See Bishop, *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers*, 77 YALE L.J. 1078, 1086-1103 (1968).

238. In a separate provision nonprofit hospital corporations were specifically authorized to purchase liability insurance for officers and directors against suits alleging negligence or breach of duty. N.C. GEN. STAT. § 55A-15(a)(10) (Cum. Supp. 1977). The criticism against providing insurance in the hospital context is not as strong because the importance of compensation of the victim outweighs any danger that the existence of insurance will increase negligent actions. See Bishop, *supra* note 237, at 1093-94.

239. 33 N.C. App. 710, 236 S.E.2d 725, *cert. granted*, 293 N.C. 361, 238 S.E.2d 149 (1977) (No. 39 PC). The issue of the damages to which plaintiffs were entitled is discussed in the text accompanying notes 109-21 *supra*.

240. See text accompanying notes 112-15 *supra*.

241. 33 N.C. App. at 713-15, 236 S.E.2d at 728-29.

242. *Id.* at 716-17, 236 S.E.2d at 730.

243. *Id.* at 716, 236 S.E.2d at 729-30 (quoting *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 31, 209 S.E.2d 795, 799 (1974)). See also R. ROBINSON, *supra* note 227, § 13-8.

make the loan once the application was accepted was further evidence of authority.<sup>244</sup> Given these indicia of the power to bind, the determination that apparent authority existed seems justified as plaintiffs were unaware of any restrictions on the agent's power.<sup>245</sup>

### 3. Business Trusts

Prior to the adoption of G.S. 39-44 to -47<sup>246</sup> in 1977, North Carolina had no statutory recognition of business trusts.<sup>247</sup> The statute defines a business trust as any unincorporated association doing business under a written declaration of trust under which the beneficial interest is divided into shares.<sup>248</sup> It authorizes the trust to acquire, hold<sup>249</sup> and convey<sup>250</sup> real estate provided the conveyance is accompanied by a recordation of the declaration of trust in the county where the land lies.<sup>251</sup> All prior conveyances that conform to the statute are validated.<sup>252</sup> The new statute is aimed at allowing the operation of a real estate investment trust, an entity that is afforded certain federal income tax advantages.<sup>253</sup>

### H. Securities Regulation

In 1977 the General Assembly enacted the Tender Offer Disclosure Act,<sup>254</sup> thus joining a majority of states that now have tender offer legis-

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244. 33 N.C. App. at 716-17, 236 S.E.2d at 730.

245. *Id.* at 713, 236 S.E.2d at 728. A related case, *Whitten v. Bob King's AMC/Jeep, Inc.*, 292 N.C. 84, 231 S.E.2d 891 (1977), concerned the ability of the corporation's promoter (who later became its president and general manager) to bind the corporation in a contract made prior to incorporation. *Id.* at 89, 231 S.E.2d at 894. The court of appeals had upheld an entry of summary judgment in favor of the corporation on the theory that the corporation's promoter had no authority to make the contract. 30 N.C. App. 161, 164, 226 S.E.2d 530, 533 (1976). The supreme court reversed. 292 N.C. at 92, 231 S.E.2d at 896. A corporation cannot ratify a contract made prior to its incorporation, but it becomes bound if the benefits of the contract are accepted with knowledge of its provisions. *Id.* at 90, 231 S.E.2d at 894; see R. ROBINSON, *supra* note 227, § 2-4. The corporate defendant did use money advanced by plaintiff; although knowledge of a promoter is not imputed to the corporation, there may be an exception where, as here, the promoter becomes a director and stockholder. 292 N.C. at 91, 231 S.E.2d at 895 (citing 18 AM. JUR. 2d *Corporations* § 123 (1965)). In North Carolina, notice to the president of a corporation is notice to the corporation. *Id.* at 91, 231 S.E.2d at 895.

246. N.C. GEN. STAT. §§ 39-44 to -47 (Supp. 1977).

247. See R. ROBINSON, *supra* note 227, § 1-5. In 1930 the supreme court left undecided whether "such a trust is unlawful as contrary to public policy." *Roberts v. Aberdeen-Southern Pines Syndicate*, 198 N.C. 381, 384, 151 S.E. 865, 867 (1930).

248. N.C. GEN. STAT. § 39-44 (Supp. 1977).

249. *Id.* § 39-45.

250. *Id.* § 39-46.

251. *Id.*

252. *Id.* § 39-47.

253. I.R.C. §§ 856-858 afford real estate investment trusts the same tax treatment that regulated investment companies receive under *id.* §§ 851-855. See R. ROBINSON, *supra* note 227, § 1-5; Committee on Partnerships and Unincorporated Business Associations, *Real Estate Investment Trusts*, 16 BUS. LAW. 900 (1961).

254. N.C. GEN. STAT. §§ 78B-1 to -11 (Cum. Supp. 1977).



lation.<sup>255</sup> The North Carolina statute applies to any nonexempt offer<sup>256</sup> to purchase an amount of any class of equity securities<sup>257</sup> of a subject company<sup>258</sup> that will make the offeror the owner of more than five percent of the class.<sup>259</sup> The scope of application is basically the same as that under the federal Williams Act,<sup>260</sup> but, like many state tender offer statutes, offers made by the subject (target) company to purchase its own securities or those of a subsidiary are exempt.<sup>261</sup>

Under the statutes, tender offers are irrevocable for twenty-one days after they are made; an offeree may withdraw his acceptance or deposit up to three business days before the tender offer ends and may withdraw any unpurchased securities sixty days after the tender offer is made.<sup>262</sup> If the offer is for less than the number of securities tendered, the statute provides for pro rata acceptance,<sup>263</sup> and, if the offering price is increased before the tender offer ends, all offerees whose securities are purchased receive the higher price.<sup>264</sup>

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255. See R. ROBINSON, *supra* note 227, § 7-12 (Supp. 1977). State tender offer statutes have been attacked on constitutional grounds because of the undue burden on interstate commerce that their antitakeover bias is claimed to cause and because federal legislation may have preempted the field. See Langevoort, *State Tender-Offer Legislation: Interests, Effects, and Political Competency*, 62 CORNELL L. REV. 213, 241-57 (1977).

256. N.C. GEN. STAT. § 78B-2(7) (Cum. Supp. 1977) states that an exempt offer means:

- a. An offer made by the subject company or any issuer of equity securities to purchase its own equity securities or equity securities of its subsidiary;
- b. Offers to purchase equity securities from not more than 25 offerees within a twelve-month period;
- c. An offer, if the acquisition of any equity security pursuant to the offer, together with all other acquisitions by the offeror and his associates of securities of the same class during the preceding 12 months, would not exceed two percent (2%) of the outstanding securities of such class;
- d. An offer to purchase equity securities of a class not registered pursuant to section 12 of the Securities Exchange Act of 1934;
- e. An offer that is subject to approval by the shareholders of the subject company at a meeting for which proxies have been solicited pursuant to section 14 of the Securities Exchange Act of 1934; or
- f. Bids made by a registered broker-dealer in the ordinary course of his business and not with the purpose of changing the control of an issuer of equity securities.

257. Equity securities are defined as either voting stocks and bonds or securities convertible into voting stocks and bonds. *Id.* § 78B-2(5).

258. The subject company must be organized under the laws of North Carolina or have its principal place of business and substantial assets in North Carolina. *Id.* § 78B-2(12). If the subject company is incorporated in another state that has tender offer regulations, the offeror is likely to be subject to the provisions of both. See R. ROBINSON, *supra* note 227, § 7-12, at 15 (Supp. 1977); Langevoort, *supra* note 255, at 223.

259. N.C. GEN. STAT. § 78B-2(14) (Cum. Supp. 1977).

260. 15 U.S.C.A. § 78m(d) (West Cum. Supp. Pamphlet No. 4 1977); 15 U.S.C. § 78n(d) (1976); see R. ROBINSON, *supra* note 227, § 7-12, at 14 (Supp. 1977).

261. See N.C. GEN. STAT. § 78B-2(7)(a) (Cum. Supp. 1977), quoted in note 256 *supra*. This reflects the bias in favor of incumbent management. See Langevoort, *supra* note 255, at 225; note 268 *infra*.

262. N.C. GEN. STAT. § 78B-3(1) (Cum. Supp. 1977).

263. *Id.* § 78B-3(2).

264. *Id.* § 78B-3(3).

A "waiting period" of thirty days is required:<sup>265</sup> the offeror must make all the required disclosures<sup>266</sup> (essentially the same information as is required under the Williams Act<sup>267</sup>) to the target company thirty days prior to making the tender offer. Many state statutes have such waiting period provisions although a twenty day waiting period under the federal regulations was considered and rejected.<sup>268</sup> The North Carolina statute also contains a general antifraud provision prohibiting deceptive acts or practices in connection with a tender offer<sup>269</sup> and provides for civil<sup>270</sup> and criminal penalties.<sup>271</sup>

GARY D. CHAMBLEE  
MARIA LYNCH DENTON

#### IV. CONSTITUTIONAL LAW

##### A. Commerce Clause

In *Hunt v. Washington State Apple Advertising Commission*,<sup>1</sup> respondent commission sought an injunction against the enforcement of a North Carolina statute prohibiting the display of Washington State apple grades on closed cartons of apples shipped into North Carolina.<sup>2</sup> The United States Supreme Court unanimously rejected petitioner's assertion that the statute was a valid exercise of the police power to protect North Carolina citizens from deceptive marketing practices. The Court found that the statute raised the costs of doing business in North Carolina for out-of-state growers and deprived Washington producers of the competitive advantage they had achieved through use of their expensive grading systems.<sup>3</sup> At the same time

265. *Id.* § 78B-4(a).

266. *Id.* § 78B-4(b).

267. *See* R. ROBINSON, *supra* note 227, § 7-12, at 16 (Supp. 1977).

268. *See* Langevoort, *supra* note 255, at 228-29. One of the chief criticisms of the state statutes, that they are antitakeover, arises from this type of provision, for the waiting period clearly favors incumbent management. *Id.* at 227-29. The waiting period allows the target company to make certain moves such as issuing additional shares, arranging a "friendly" merger or making its own offer which is exempt from these provisions.

269. N.C. GEN. STAT. § 78B-5 (Cum. Supp. 1977).

270. *Id.* § 78B-6.

271. *Id.* § 78B-8.

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1. 432 U.S. 333 (1977).

2. N.C. GEN. STAT. § 106-189.1 (1973) required that closed containers of apples bear the United States Department of Agriculture grade or none at all. The statute forced Washington growers to devise costly special handling procedures for apples destined for North Carolina. 432 U.S. at 337-38.

3. 432 U.S. at 349-53.

the statute benefited local apple growers by requiring Washington State apples to be marketed under inferior United States Department of Agriculture (U.S.D.A.) grades.<sup>4</sup> The Court held that even if the statute were enacted for its alleged consumer protection purpose,<sup>5</sup> the State had failed to meet its burden of establishing that sufficient consumer benefits were derived from the statute and that no nondiscriminatory alternatives to the ban of Washington State's grades existed.<sup>6</sup> Consequently, the statute was found to be an unconstitutional burden on interstate commerce. This decision, similar to past cases concerning access of foreign sellers to local markets,<sup>7</sup> is indicative of the Court's continued determination to strike down such thinly veiled economic regulations.

## B. First Amendment

### 1. Speech

In 1977 the North Carolina General Assembly enacted several statutes concerning the regulation and sale of sexually oriented materials. A new section, G.S. 14-202.11,<sup>8</sup> provides that no building may contain more than one "adult establishment," defined to include adult book stores, adult theatres and massage parlors. In addition, no building in which sexually oriented devices are sold may house any adult establishment.<sup>9</sup> A violation of this section is a misdemeanor punishable by fine and/or imprisonment.<sup>10</sup> This new law recently was declared unconstitutional in two federal district court cases, *Hart Book Stores, Inc. v. Edmisten*<sup>11</sup> and *U.T. Inc. v. Edmisten*.<sup>12</sup> Plaintiffs in *U.T. Inc.* contended that the statute is unconstitutionally vague and that it bans protected first amendment expression in an appropriate place. The State stressed that the statute does not prohibit any activities, but merely requires that they not be located in the same building.

The State also contended that the North Carolina statute is less prohibi-

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4. In most instances the Washington State grades are superior to corresponding U.S.D.A. grades. *Id.* at 351-52.

5. The Court found it "somewhat suspect that North Carolina singled out only closed containers of apples, the very means by which apples are transported in commerce, to effectuate the statute's ostensible consumer protection purpose when apples are not generally sold at retail in their shipping containers." *Id.* at 352.

6. *Id.* at 353-54.

7. See, e.g., *Great A & P Tea Co. v. Cottrell*, 424 U.S. 366 (1976); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951).

8. N.C. GEN. STAT. § 14-202.11 (Cum. Supp. 1977) (effective Jan. 1, 1978).

9. "Adult establishment" and "sexually oriented devices" are defined in *id.* § 14-202.10.

10. *Id.* § 14-202.12.

11. No. 77-387-CIV-5 (E.D.N.C., Apr. 12, 1978).

12. No. CC-77-0365 (W.D.N.C., Feb. 14, 1978) (mem.). At the time of this writing neither the opinion in *Hart Book Stores* nor the opinion in *U.T. Inc.* had been published.

tive than a Detroit ordinance recently upheld in *Young v. American MiniTheatres, Inc.*<sup>13</sup> In that case, the ordinance provided that adult theatres could not be located within one thousand feet of any two other regulated uses, including bars, hotels, pawnshops, pool halls and other adult theatres. The United States Supreme Court, in a five-to-four decision, found the ordinance to be a valid exercise of the city's zoning power designed to stabilize neighborhoods and help prevent decay of the inner city. The Court stressed that the ordinance did not limit the content of any films or significantly restrict the public's freedom to see them, so that the first amendment right of expression was only secondarily affected.<sup>14</sup>

The North Carolina statute, although modeled after the Detroit ordinance, differs from the ordinance in that it is phrased as an exercise of the police power rather than specifically as a zoning provision, and it is aimed at preventing the establishment of "sex shops" rather than the decay of neighborhoods. In addition, because the statute is intended to discourage sex shops, it is somewhat more oriented toward regulating the activities of members of the public who patronize such establishments, and is aimed at sexual materials only. Apparently based on these and possibly other distinctions, the district court in *U.T. Inc.* found the North Carolina statute to be an unconstitutional restraint on free speech, a prior restraint on the dissemination of arguably nonobscene material and a denial of equal protection to sellers of sexually oriented matter as compared with sellers of primarily nonsexual books, magazines and films.<sup>15</sup>

At the heart of the court's analysis should be consideration of the question whether the selling of sexual literature, films and devices in the same location transforms the establishment into something radically different from stores selling the same categories of items individually—that is, whether the nature of such an establishment is to be viewed as more than the sum of its parts. In *Young v. American MiniTheatres*, the Supreme Court found that without the Detroit ordinance the zoned neighborhoods risked becoming "skid rows" rather than ordinary neighborhoods that happen to be characterized by an abundance of pool halls, bars or pawn shops.<sup>16</sup> Logically, if a store selling more than one type of sexual matter is transformed into a "sex shop," the North Carolina provision, if sufficiently related to the elimination of that risk, should have been similarly sustained.

One major concern is the extent to which the statute will restrict dissemination of constitutionally protected sexually oriented materials. If

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13. 427 U.S. 50 (1976).

14. *Id.* at 62, 71-72.

15. No. CC-77-0365, slip op. at 1.

16. 427 U.S. at 71 & n.34.

the economics of the businesses is such that restricting a seller to one type of sexual material will lead to the closing of many businesses, or if one type of protected expression is so inherently less profitable that sellers will choose not to sell it alone, then the availability to the public of such material will be restricted to a degree that outweighs the state's interest in promoting health and morality.<sup>17</sup> A second concern is the relationship between the purpose of the statute and the effects resulting from it. The purpose of the Act was to eliminate "sex shops," yet the effect is somewhat broader: as plaintiff noted, a druggist who sold a few magazines that were primarily sexually oriented could not sell contraceptives, and a newsstand selling primarily sexually oriented magazines at one end of a large shopping mall would prevent the sale of contraceptives in a drug store at the other end of the mall.<sup>18</sup>

The North Carolina General Assembly, effective August 1, 1977, amended the North Carolina nuisance law to include within the definition of nuisance "illegal possession or sale of obscene or lewd matter."<sup>19</sup> In addition, all buildings and personal property used or received in connection with an obscene film or publication are declared nuisances.<sup>20</sup> The Attorney General or a district attorney may bring a civil action in superior court to compel abatement<sup>21</sup> and may obtain a temporary restraining order on a showing of good cause to restrain removal of property or materials pending a hearing. After a hearing, a preliminary injunction may be issued restraining defendant from continuing the alleged nuisance.<sup>22</sup> Finally, after a trial on the merits, final judgment may permanently enjoin "maintaining the nuisance," and "[s]uch order may also require the effectual closing of the place against its use thereafter for the purpose of conducting any such nuisance."<sup>23</sup>

In a recent declaratory judgment action, *Fehlhaber v. State*,<sup>24</sup> section 19-5, the final judgment provision that restrains future conduct of "any such nuisance," was declared an unconstitutional prior restraint. The United States District Court for the Eastern District of North Carolina rejected plaintiff's contentions that the temporary restraining order provision and the

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17. See generally *Young v. American MiniTheatres, Inc.*, 427 U.S. at 62-63.

18. Brief for plaintiff at 19-20, 22, *U.T. Inc. v. Edmisten*, No. CC-77-0365 (W.D.N.C. Feb. 14, 1978).

19. N.C. GEN. STAT. § 19-1(a) (Cum. Supp. 1977) (amending Law of Mar. 11, 1913, ch. 761, § 25, 1913 N.C. Pub. Loc. Laws 1563 (formerly codified as amended at N.C. GEN. STAT. § 19-1(a) (1975))).

20. *Id.* §§ 19-1.2, -.3.

21. *Id.* § 19-2.1. For nuisances other than possession or sale of obscene matter a private citizen of the county may also maintain an action for abatement. *Id.*

22. *Id.* §§ 19-2.2 to .5.

23. *Id.* § 19-5.

24. No. 77-0043-CIV-3 (E.D.N.C., Jan. 4, 1978) (mem.).

requirement that an inventory be kept after issuance of the order constituted prior restraints. The court found that "the First Amendment right of the public to receive information is unaffected by the temporary restraining order, and the parallel right of the distributors to dispense the information is not discernibly chilled."<sup>25</sup> With respect to section 19-5, however, the court found that the section could only be read as authorizing the enjoining of distribution of all arguably obscene books or films rather than only those books or films already declared obscene in an abatement proceeding.<sup>26</sup> In a careful and well-reasoned opinion, the district court then held that such a statute constituted an overbroad prior restraint of free speech under *Near v. Minnesota*,<sup>27</sup> which stands for the principle that the first amendment prohibits prior restraints on publication and distribution of material even when civil or criminal liability may befall the seller after distribution. *Fehlhaber* succinctly summarized the *Near* opinion as holding that "it is unconstitutional to enjoin the dissemination of future issues of a publication because its past issues have been found offensive."<sup>28</sup> Section 19-5, when read in its entirety, clearly purports to do just that, and therefore was correctly adjudged unconstitutional.<sup>29</sup>

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25. *Id.*, slip op. at 5.

26. In making this determination, the court looked to the last paragraph of the section, which states that if obscene matter does not make up the regular business of a defendant then only the matter actually judged obscene in a nuisance action could be enjoined. *Id.*, slip op. at 8 (citing N.C. GEN. STAT. § 19-5 (Cum. Supp. 1977)). As the court noted, this exception demonstrates that the rest of the section was aimed at enjoining all obscene matter, even films and publications not previously determined to be obscene in a proceeding for abatement. *Id.*

27. 283 U.S. 697 (1931).

28. *Fehlhaber v. State*, No. 77-0043-CIV-3, slip op. at 9.

29. The General Assembly also revised N.C. GEN. STAT. § 14-190.2(h) (Cum. Supp. 1977). That section now allows criminal prosecutions for violations of obscenity laws relating to minors and nonconsenting adults even when the material involved has not previously been judicially determined to be obscene or sexually oriented. This revision arguably does not run afoul of the first amendment as an unconstitutional prior restraint because the violation involved is criminal rather than civil and thus the presumption against prior restraint is not as strong. See *Southeastern Prods., Ltd. v. Conrad*, 420 U.S. 546, 558-62 (1975).

In another free speech case, *United States Labor Party v. Knox*, 430 F. Supp. 1359 (W.D.N.C. 1977), plaintiff Labor Party was prohibited from passing out handbills and soliciting donations in the parking lot of Mecklenburg County Alcoholic Beverage Control (ABC) stores because of a 1975 resolution by the Mecklenburg ABC Board prohibiting "handbilling, soliciting or loitering on the premises." Mecklenburg ABC Board Resolution of Nov. 25, 1975, quoted in 430 F. Supp. at 1360. Plaintiff brought suit under 42 U.S.C. § 1983 (1970) to enjoin enforcement of the resolution as it applied to free-standing ABC stores after conceding the validity of enforcement at stores that were part of privately owned shopping centers. See *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972). The district court noted that plaintiff's right of free speech in a public place could be restricted only by "reasonable regulations," narrowly drawn, to protect the public interest in order and efficiency." 430 F. Supp. at 1362. The court held that because the Board's blanket prohibition was more onerous than other possible methods of avoiding congestion near entrances and exits of the stores, the resolution as applied to free-standing stores effected an unconstitutional ban of free speech. *Id.*

## 2. Privacy

Another first amendment case, *Ensminger v. Commissioner*,<sup>30</sup> argued before the United States Court of Appeals for the Fourth Circuit in May 1978, involves a challenge to the North Carolina cohabitation law.<sup>31</sup> Appellant in *Ensminger* claimed as a dependent on his 1974 federal income tax return a female friend with whom he was living. The Commissioner disallowed the exemption deduction under section 152(b)(5) of the Internal Revenue Code<sup>32</sup> after concluding that the couple's relationship violated the North Carolina cohabitation statute. The tax court found for the Commissioner<sup>33</sup> and taxpayer appealed. Before the Fourth Circuit, appellant's central argument<sup>34</sup> is that the North Carolina provision infringes his constitutionally protected right to privacy in the absence of any compelling state interest to justify such infringement. Appellant contends that the Supreme Court has implicitly stated in several privacy decisions<sup>35</sup> that the right to privacy of the home extends to sexual matters between unmarried persons.<sup>36</sup> Furthermore, the state cannot claim that the statute serves a compelling interest in requiring marriage, preventing promiscuity or promoting stable family relationships because it is not the least intrusive or most effective means of achieving those goals.<sup>37</sup> Appellant also contends that the government has the burden of proving the illegality of taxpayer's relationship because no criminal proceeding against taxpayer has been initiated by the

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30. 36 Tax Ct. Mem. Dec. 934 (CCH) (1977), *appeal filed*, No. 77-2302 (4th Cir. Sept. 12, 1977).

31. N.C. GEN. STAT. § 14-184 (1969) provides: "If any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed and cohabit together, they shall be guilty of a misdemeanor . . . ."

32. I.R.C. § 152(b)(5).

33. 36 Tax Ct. Mem. Dec. at 934.

34. Appellant also challenges the North Carolina law as being unconstitutionally vague and maintains that, even if the law is constitutional, the Commissioner has failed to prove the habitual sexual intercourse necessary to establish a violation of the statute. Brief for Appellant at 5-7, 15-18, *Ensminger v. Commissioner*, 36 Tax Ct. Mem. Dec. 934 (CCH) (1977).

35. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (right to abortion of nonviable fetus by unmarried woman); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (state statute may not deny contraceptives to unmarried persons while allowing married persons access to contraceptives); *Stanley v. Georgia*, 394 U.S. 557 (1969) (right to possession of obscene materials within privacy of own home).

36. Brief for Appellant at 7-11; Reply Brief for Appellant at 5-7.

37. The statute covers only couples who engage in *habitual* sexual relations and thus does not reach those who live together without having sex or those who do not habitually confine sexual activity to the same partner. Brief for Appellant at 11-15; Reply Brief for Appellant at 9-14; see, e.g., *State v. Kleiman*, 241 N.C. 277, 85 S.E.2d 148 (1954); *State v. Davenport*, 225 N.C. 13, 33 S.E.2d 136 (1945); *State v. McDuffie*, 107 N.C. 885, 12 S.E. 83 (1890). Appellant also notes that there have been only nine appellate decisions concerning convictions under the statute in this century, demonstrating that the provision is largely unenforced. Brief for Appellant at 3.

state for a violation of the cohabitation statute and thus the Commissioner's finding of illegality was arbitrary and irrational.<sup>38</sup>

The Commissioner maintains that the inference of illegal cohabitation arising from taxpayer's living arrangement is not arbitrary and therefore that taxpayer has the burden of proving the legality of his relationship.<sup>39</sup> In addition, the government asserts that sexual relations between consenting adults are not among the fundamental privacy interests protected by the Constitution,<sup>40</sup> and that even if such rights are protected, the state has a compelling interest in preserving morality and the orderly family unit.<sup>41</sup> Finally, the Commissioner states that even if the North Carolina cohabitation statute is unconstitutional, Congress intended to deny dependency deductions for such extramarital relationships.<sup>42</sup>

If appellant is to be successful in his constitutional challenge, the Fourth Circuit must read into the Supreme Court's privacy decisions<sup>43</sup> an implicit holding that unmarried individuals enjoy a constitutionally protected right to be free of governmental interference in sexual matters between consenting adults. Although such a reading of these cases is not unwarranted, none of the decisions compels that conclusion.<sup>44</sup>

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38. Brief for Appellant at 3-4.

39. Brief for Appellee at 5-6, 17-18.

40. *Id.* at 21.

41. *Id.* at 22-24.

42. *Id.* at 15-16.

43. *See, e.g.*, cases cited note 35 *supra*.

44. In a 1977 case concerning freedom of association, the Student Government at The University of North Carolina at Chapel Hill challenged the constitutionality of a statute that prohibited closed panel prepaid legal services. *Student Government v. Council, North Carolina State Bar*, No. C-C-76-346 (W.D.N.C., Aug. 17, 1977). Pursuant to N.C. GEN. STAT. § 84-23.1 (Cum. Supp. 1977), plaintiff Student Government submitted its legal services plan to defendant Council for its required approval. Under the plan the student recipient of prepaid service could only receive the benefits of the service by selecting an attorney from the staff of the plan. The Council rejected the plan, claiming the statute by its terms prohibited it; plaintiff then filed an action in federal district court challenging the constitutionality of the statute. The district court granted plaintiff's motion for summary judgment, finding as a matter of law that § 84-23.1(b), (c), "violates the right of plaintiffs to freely associate for the purpose . . . of obtaining and delivering legal services, in violation of the First and Fourteenth Amendments." No. C-C-76-346, slip op. at 3-4. The court also found the statute unconstitutional as "a prior restraint on the First Amendment rights of Plaintiffs." *Id.* at 4. Plaintiff was awarded reasonable attorneys' fees under 42 U.S.C. § 1988 (1970) and was granted a permanent injunction against defendant, enjoining enforcement of the statute to interfere with plaintiff's closed panel plan. Although the Supreme Court has not specifically declared statutes outlawing closed panel plans unconstitutional, the Court's vigor in defending prepaid legal service plans in general indicates that the district court correctly disallowed the exclusion of closed panel plans. As the Supreme Court noted in *United Transp. Union v. State Bar*, 401 U.S. 576 (1971): "At issue is the basic right to group legal action . . . [T]hat right would be a hollow promise if courts could deny associations of workers or others the means of enabling their members to meet the costs of legal representation." *Id.* at 585-86; *see* *UMW v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963).



### 3. Religion

In *Smith v. Board of Governors*,<sup>45</sup> the United States Supreme Court affirmed without opinion a three-judge district court decision upholding the constitutionality of three North Carolina statutes<sup>46</sup> extending scholarship aid to students attending church-related colleges. Plaintiff contended that state aid to students at Belmont Abbey College and Pfeiffer College violated the first amendment requirement that government "make no law respecting an establishment of religion."<sup>47</sup> The district court applied the guidelines specified in *Roemer v. Board of Public Works*,<sup>48</sup> a 1976 United States Supreme Court decision, and concluded that the two colleges were not "pervasively sectarian."<sup>49</sup> In reaching its decision the district court relied heavily on the factual similarity between *Roemer* and *Smith*.<sup>50</sup> In *Roemer* the Supreme Court had applied the three part test of *Lemon v. Kurtzman (Lemon I)*,<sup>51</sup> which requires "that state aid such as this have a secular purpose, a primary effect other than the advancement of religion, and no tendency to entangle the State excessively in church affairs."<sup>52</sup>

Using the *Roemer-Lemon* analysis, the district court in *Smith* examined the form and purpose of the North Carolina student aid program and the character of the aided institutions. The court found first that by the terms of the three North Carolina statutes the funds were to be used only for secular purposes.<sup>53</sup> Additionally, the two colleges involved were relatively

45. 98 S. Ct. 39, *aff'g mem.* 429 F. Supp. 871 (W.D.N.C. 1977).

46. N.C. GEN. STAT. § 116-19 (1975); Law of June 26, 1975, ch. 875, §§ 30, 36, 1975 N.C. Sess. Laws 1283.

47. U.S. CONST. amend. I.

48. 426 U.S. 736 (1976).

49. 429 F. Supp. 871 (W.D.N.C.), *aff'd*, 98 S. Ct. 39 (1977).

50. *Roemer* involved a challenge to a Maryland statute that authorized state subsidies for private colleges upon the condition that no funds be used for sectarian purposes and that recipient schools submit yearly reports showing how the funds were spent. The Court concluded that the statute as written and applied kept the state in a sufficiently neutral position. 426 U.S. at 762-67. In one respect, indicated by the fact that Justice Stewart sided with the majority in affirming *Smith* rather than dissenting as he had done in *Roemer*, the *Smith* situation is more compelling than that of *Roemer* because the courses in religion taught at the two North Carolina colleges are apparently more academic in nature. See *Smith v. Board of Governors*, 98 S. Ct. at 39; *Roemer v. Board of Pub. Works*, 426 U.S. at 773-75 (Stewart, J., dissenting); *Smith v. Board of Governors*, 429 F. Supp. 871, 875, 876-77 (W.D.N.C.), *aff'd*, 98 S. Ct. 39 (1977).

51. 403 U.S. 602 (1971).

52. 426 U.S. at 745 (citing *Lemon v. Kurtzman*, 403 U.S. at 612-13).

53. 429 F. Supp. 871, 878 (W.D.N.C.), *aff'd*, 98 S. Ct. 39 (1977). The court recognized that "in aiding a religious institution to perform a secular task, the State frees the institution's resources to be put to sectarian ends," *id.* (quoting *Roemer v. Board of Pub. Works*, 426 U.S. at 747), but held that "[i]t is enough that the state does not directly aid the sectarian activities and purposes." *Id.*

independent of their respective churches, mandatory religious courses only supplemented a broad liberal arts curriculum, student admission and faculty hiring were not based on religion, and there was no school policy encouraging classroom prayer. The court also noted that by the terms of the three statutes the funds were to be used only for secular purposes.<sup>54</sup> Finally, the statutory requirements of occasional reports and audits to trace the use of the funds constituted only a minimal amount of state entanglement with religion. Consequently, the district court found the statutes as applied to Belmont Abbey and Pfeiffer "unassailable under the First Amendment."<sup>55</sup>

### C. Fourteenth Amendment: Equal Protection

#### 1. Racial Discrimination

In *United States v. North Carolina*,<sup>56</sup> a three-judge district court withdrew and vacated its earlier decision<sup>57</sup> that North Carolina's use of minimum cut-off scores on the National Teachers Exam (NTE) for teacher certification, without proof by the State that the cut-off point was not arbitrary, constituted a violation of equal protection<sup>58</sup> because of the NTE's discriminatory impact on Blacks. The federal government was joined in the initial suit by twenty-four black teachers who alleged that the requirement of achieving minimum scores as a condition of certification was a violation of portions of the Civil Rights Act,<sup>59</sup> the Equal Employment Opportunity Act of 1972,<sup>60</sup> and the fourteenth amendment.<sup>61</sup> The court declared the state practice unconstitutional because of defendant's failure to demonstrate that the cut-off score was rationally related to the alleged purpose of certifying only qualified teachers.<sup>62</sup> Subsequent to this decision, however, the United States Supreme Court decided *Washington v. Davis*,<sup>63</sup> in which the Court held that a state practice is not unconstitutional solely because it has a racially disproportionate impact. In addition, the *Washington* Court declared the practice must reflect a discriminatory purpose before the state will be forced to bear the burden of proving nonarbitrariness to avoid having the practice invalidated.<sup>64</sup>

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54. *Id.* at 877-78.

55. *Id.* at 879.

56. 425 F. Supp. 789 (E.D.N.C. 1977).

57. 400 F. Supp. 343 (E.D.N.C. 1975).

58. U.S. CONST. amend. XIV.

59. 42 U.S.C. §§ 1981, 1983 (1970).

60. 42 U.S.C. § 2000e (1970 & Supp. V 1975).

61. U.S. CONST. amend XIV; *see* 400 F. Supp. 343, 346 (E.D.N.C. 1975).

62. 400 F. Supp. 343, 350-51 (E.D.N.C. 1975).

63. 426 U.S. 229 (1976).

64. *Id.* at 247-48.

In light of *Washington*, defendant moved for relief from judgment.<sup>65</sup> The district court found that no showing of discriminatory intent had been made and therefore vacated its earlier decision and extended discovery in preparation for reargument.<sup>66</sup> Because of a recent decision by the Supreme Court, *National Education Association v. South Carolina*,<sup>67</sup> the outcome of *United States v. North Carolina* will in all likelihood conclude in a judgment in favor of the State. In *National Education Association* the Court affirmed without opinion a federal district court finding<sup>68</sup> that South Carolina's use of comparable minimum scores from the same exam (the NTE) for the same purpose (teacher certification) did not show knowledge by the State of the ensuing discriminatory impact on Blacks or an intent to discriminate, and therefore was not unconstitutional. The district court also held, in regard to plaintiffs' statutory cause of action under Title VII,<sup>69</sup> that a South Carolina study validating the use of its minimum score requirements satisfied the State's burden of proving that the requirements were not arbitrary and were rationally related to the legitimate objective of certifying only qualified teachers.<sup>70</sup> If a recently completed North Carolina study<sup>71</sup> compares favorably with the South Carolina one, the result should again be the same.

Plaintiffs in *Uzzell v. Friday*,<sup>72</sup> students at the University of North Carolina, challenged student funding of the Black Student Movement (BSM) and minority representation requirements for the Campus Governing Council (CGC) and Student Honor Court (SHC). The district court granted summary judgment for defendant University on all three claims<sup>73</sup> and plaintiffs appealed. The Fourth Circuit affirmed the lower court on the question of funding of the BSM through student activities fees, finding the issue moot because the BSM constitution had been amended to allow membership by students of all races<sup>74</sup>—hence discrimination was no longer involved.<sup>75</sup> Concerning the requirements of minority representation on the

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65. Defendant relied primarily on FED. R. Civ. P. 60(b). The court chose, however, to revise its prior judgment under FED. R. Civ. P. 54(b). 425 F. Supp. at 791-92.

66. 425 F. Supp. at 792-94.

67. 98 S. Ct. 756 (1978) (mem.).

68. *United States v. South Carolina*, 15 Fair Empl. Prac. Cas. 1196, 1206 (D.S.C. 1977), *aff'd mem. sub nom.* *National Educ. Ass'n v. South Carolina*, 98 S. Ct. 756 (1978).

69. 42 U.S.C. § 2000e (1970 & Supp. V 1975).

70. *United States v. South Carolina*, 15 Fair Empl. Prac. Cas. 1196, 1214-16 (D.S.C. 1977), *aff'd mem. sub nom.* *National Educ. Ass'n v. South Carolina*, 98 S. Ct. 736 (1978).

71. See 425 F. Supp. at 791.

72. 547 F.2d 801 (4th Cir.), *aff'd on rehearing en banc*, 558 F.2d 727 (1977).

73. 401 F. Supp. 775 (M.D.N.C. 1975).

74. From 1967 until 1974 membership had been open only to black students. 547 F.2d at 803.

75. *Id.*

CGC and the SHC,<sup>76</sup> however, the court reversed the district court's finding<sup>77</sup> of no actual case or controversy. The Fourth Circuit held both requirements to be selection on the basis of race without a compelling interest, which "blatantly fouls the letter and the spirit of both the Civil Rights Acts and the Fourteenth Amendment."<sup>78</sup>

Whether or not the court was correct in finding a violation of the Civil Rights Acts, it was wrong in applying the same analysis to find a fourteenth amendment violation. *Washington v. Davis*<sup>79</sup> established that although a discriminatory effect alone may show a violation of the Civil Rights Act, a constitutional violation may only be shown by an additional finding of arbitrariness or discriminatory purpose.<sup>80</sup> It seems doubtful that such a purpose is indicated by the minority representation requirements; the CGC provision does not displace any white representatives and the SHC provisions are invoked only at the request of a student defendant and are equally applicable to majority and minority defendants.<sup>81</sup>

## 2. Religious Discrimination

In *Jordan v. North Carolina National Bank*,<sup>82</sup> the Fourth Circuit considered whether a potential employer's refusal to promise plaintiff that she would never have to work on her Sabbath constituted an unlawful employment practice under 42 U.S.C. § 2000e-2(a)(1).<sup>83</sup> Plaintiff in *Jordan* was a Seventh Day Adventist who, upon applying for a position with defendant NCNB, informed defendant that she could never work on Saturday. Although Saturday work was seldom if ever required, defendant refused to guarantee plaintiff that she would never have to work that day. Plaintiff brought suit under Title VII and under a corresponding provision of the Equal Employment Opportunity Commission regulations that requires

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76. The student constitution provided that the CGC "shall include at least two Councillors of a minority race." If two were not elected, the student body president was empowered to appoint minority members with the consent of the CGC. The CGC was also required to include two males and two females. *Id.* at 804. The Instrument of Student Judicial Governance of 1974 provided that, when requested by a minority defendant before the SHC, "at least four of the seven members of the trial court shall not be of the majority race." Similar provisions existed for defendants of the majority race and of each sex. *Id.* at 804 n.6.

77. *Uzzell v. Friday*, 401 F. Supp. 775, 780-82 (M.D.N.C. 1975).

78. 547 F.2d at 804. The Fourth Circuit ordered summary judgment in favor of plaintiffs even though plaintiffs had requested only that the court remand for a trial on the merits. This grant sua sponte of final judgment is criticized in a dissenting opinion. 558 F.2d at 728 (Winter, J., concurring and dissenting).

79. 426 U.S. 229 (1976).

80. *Id.* at 247-48; see text accompanying note 63 *supra*.

81. See note 76 *supra*.

82. 565 F.2d 72 (4th Cir. 1977).

83. 42 U.S.C. § 2000e-2(a)(1) (1970) provides that discrimination by an employer against an employee or prospective employee because of religion is an unlawful employment practice.

an employer "to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business."<sup>84</sup>

The district court found that defendant had not made "reasonable accommodations" and granted judgment for plaintiff.<sup>85</sup> The Fourth Circuit reversed and entered final judgment for defendant, after finding that an employee's demand of a guarantee "could not be 'reasonably' accommodated by her prospective employer at all and certainly not 'without undue hardship.'"<sup>86</sup> The dissent argued that the employee's demand of a guarantee was merely the beginning rather than the end of the case. From there the court should have inquired whether, in light of that demand, defendant made a reasonable effort to determine if any vacancy was available for which plaintiff was qualified and which required no Saturday work whatsoever.<sup>87</sup>

Ironically, both the majority and the dissent based their arguments on a recent United States Supreme Court case, *Trans World Airlines, Inc. v. Hardison*,<sup>88</sup> in which the Court held that requiring an employer to bear more than a de minimis cost in making accommodations to an employee's religious beliefs would constitute an undue hardship and thus would require no further action by the employer.<sup>89</sup> In one sense the difference of opinion apparent in *Jordan* is a factual one—the majority assuming that defendant could not guarantee against Saturday employment in any of its positions, and the dissent assuming that defendant could have found an appropriate job for plaintiff but that it made no effort to do so. The majority opinion can be read, however, as indicating that a demand for a guarantee against Saturday work by *any* potential employee from *any* employer is unreasonable *per se*.<sup>90</sup> If the opinion does stand for that proposition, it clearly misconstrues *Hardison* and the EEOC regulation. At the very least a requirement that the employer make "reasonable accommodations" must necessarily mean that the reasonableness of his efforts is to be examined under the circumstances of each case. In any event, *Jordan* certainly suggests that the *Hardison* decision did little to alleviate the disagreement that persists among lower

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84. 29 C.F.R. § 1605.1(b) (1977).

85. 399 F. Supp. 172 (W.D.N.C. 1975), *rev'd*, 565 F.2d 72 (4th Cir. 1977).

86. 565 F.2d at 74 (citing *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977)).

87. *Id.* at 77 (Winter, J., dissenting).

88. 432 U.S. 63 (1977). The employee in *Hardison* similarly refused Saturday work for religious reasons and was dismissed after the employer discussed possible solutions with him and attempted without success to find another worker with whom he could trade shifts. For a detailed analysis of this case, see Note, *Civil Rights—Title VII and the Religious Employee: Trans World Airlines v. Hardison Retrenches on the Reasonable Accommodation Requirement*, 56 N.C.L. REV. 356 (1978).

89. 432 U.S. at 84 & n.15.

90. 565 F.2d at 74, 76.

courts regarding the application of the reasonable accommodations requirement.<sup>91</sup>

### 3. Discrimination Against the Criminally Insane

In *State ex rel. Dorothea Dix Hospital v. Davis*,<sup>92</sup> the North Carolina Supreme Court held that a criminally insane person could be charged the cost of his care in a state mental hospital. Defendant in *Davis* spent five years in Dix, the mental hospital, before being declared competent to stand trial for the murder of his wife. At trial defendant was found not guilty by reason of insanity and was recommitted to Dix. Approximately nine months later he was declared sane but was not unconditionally released until fourteen months later.<sup>93</sup> The State then brought suit to recover the cost of defendant's care for the entire period of his commitment.<sup>94</sup>

The supreme court first decided that section 143-117, which requires "[a]ll persons admitted to Dorothea Dix Hospital . . . to pay the actual cost of their care, treatment, training and maintenance,"<sup>95</sup> applied to the criminally insane.<sup>96</sup> The court then rejected defendant's contention that to charge him for costs during commitment while not charging a prisoner for costs during incarceration denied defendant equal protection of the laws. The supreme court reasoned that in both pre- and post-trial commitment defendant was in no sense a prisoner because he had not been found guilty of any crime; thus he was confined merely for the protection of himself and society.<sup>97</sup> As a result, the court reasoned, defendant's situation was more like that of a civilly committed individual than a criminal. In addition, the court held that requiring payment was not a deprivation of property without due process because defendant was paying for services actually rendered and received.<sup>98</sup> Judicial decisions concerning the collection of costs from the

91. See Note, *supra* note 88, at 362.

92. 292 N.C. 147, 232 S.E.2d 698 (1977).

93. *Id.* at 150, 232 S.E.2d at 701.

94. *Id.* at 149, 232 S.E.2d at 700. The superior court granted defendant's motion for summary judgment and the North Carolina Court of Appeals reversed, 27 N.C. App. 479, 219 S.E.2d 660 (1975).

95. N.C. GEN. STAT. § 143-117 (1974).

96. 292 N.C. at 151-52, 232 S.E.2d at 702.

97. *Id.* at 152-54, 232 S.E.2d at 702-03. The court also said in dictum that requiring defendant to pay the costs of care after he was declared sane in a judicial hearing did not constitute illegal confinement because his mental ailment had been found "in remission" rather than permanently cured. *Id.* at 154-55, 232 S.E.2d at 704. North Carolina courts follow the practice of giving the hearing judge broad discretion in determining when a committed patient should be released. *Id.*; see, e.g., *United States v. Ecker*, 479 F.2d 1206, 1209 (D.C. Cir. 1973); *State v. Hesse*, 117 N.H. —, —, 373 A.2d 345, 347 (1977); *State v. Cook*, 66 Wis. 2d 25, 31, 224 N.W.2d 194, 196-97 (1974).

98. *Id.* at 156, 232 S.E.2d at 704-05. Defendant's final contentions were that N.C. GEN. STAT. §§ 143-118.1, -120 (1974) effected improper delegations of legislative authority to the

criminally insane normally turn on the interpretation of state statutes analogous to section 143-117. Although such statutes vary widely from state to state, the opinion in *Davis* apparently coincides with decisions of other courts ruling on similar provisions.<sup>99</sup>

#### 4. Summary Ejectment

Plaintiff in *Usher v. Waters Insurance & Realty Co.*<sup>100</sup> challenged the constitutionality of North Carolina's summary ejectment proceedings. After a judgment of ejectment was rendered by a magistrate against plaintiff, allegedly for noise disturbance, plaintiff filed notice of appeal to district court and at the same time sought a stay of eviction pending appeal. Because G.S. 42-34(b)<sup>101</sup> required that summary ejectment appellants post three months' rent to obtain a stay of eviction, an amount plaintiff alleged she could not pay, plaintiff's tender of one month's rent was rejected by the clerk of the district court. Plaintiff then filed suit in federal district court, which granted her request for a temporary order and a preliminary injunction restraining her eviction.<sup>102</sup>

The United States District Court for the Western District of North Carolina held portions of sections 42-34(b), 42-32,<sup>103</sup> and North Carolina Rule of Civil Procedure 62(a),<sup>104</sup> to be violative of the fourteenth amendment's guarantee of equal protection. Because the appeal followed a nonjury proceeding before a magistrate the court found that the three months' rent bond effectively denied poor tenants a jury trial since none could afford the cash outlay to stay eviction pending appeal to state district court.<sup>105</sup> In addition, the rigid three months' rent bond figure was not rationally related to the landlord's potential loss pending final judgment because the appeal to district court could take anywhere from one to twelve months—not neces-

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board of trustees or directors of the hospital, and that he had been denied due process in not having been given a hearing before the board to challenge the amount charged as "actual costs." The court found that the statutes set forth sufficient guidelines for the board and that defendant's opportunity to assert a defense at trial based on the amount charged satisfied his right to be heard. *Id.* at 157-59, 232 S.E.2d at 705-06.

99. Compare *In re Sargent*, 116 N.H. 77, 354 A.2d 404 (1976) (per curiam); *In re Estate of Schneider*, 50 Ill. 2d 152, 277 N.E.2d 870 (1971), and *State v. Kosiorek*, 5 Conn. Cir. Ct. 542, 259 A.2d 151 (1969), with *Robb v. Estate of Brown*, 518 S.W.2d 729 (Mo. Ct. App. 1974), and *Ollerton v. Diamanti*, 521 P.2d 899 (Utah 1974). See *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1191, 1365-69 (1974).

100. 438 F. Supp. 1215 (W.D.N.C. 1977). For an additional discussion of this case, dealing with its possible effects on landlord-tenant law, see this Survey, *Property: Landlord-Tenant*.

101. N.C. GEN. STAT. § 42-34(b) (1976).

102. 438 F. Supp. at 1216.

103. N.C. GEN. STAT. § 42-32 (1976).

104. N.C.R. Civ. P. 62(a).

105. 438 F. Supp. at 1218.

sarily three.<sup>106</sup> The double rent penalty required in case the appeal was found to be frivolous had the effect of discouraging meritorious as well as frivolous appeals by poor tenants while it failed to prevent frivolous appeals by well-to-do tenants.<sup>107</sup> Finally, the provision prescribing a ten day waiting period before execution of all judgments other than those in ejectment—while allowing immediate execution of summary ejectment decisions—was held to be arbitrary and a violation of equal protection.<sup>108</sup>

Throughout its opinion the court relied heavily on *Lindsey v. Normet*,<sup>109</sup> which involved a challenge to the Oregon Forcible Entry and Wrongful Detainer Statute.<sup>110</sup> In that case the United States Supreme Court noted that “[t]he objective of achieving rapid and peaceful settlement of possessory disputes between landlord and tenant has ample historical explanation and support. It is not beyond the State’s power to implement that purpose by enacting special provisions applicable only to possessory disputes between landlord and tenant.”<sup>111</sup> The *Lindsey* Court found, however, that a provision requiring a tenant to post a double rent bond as a condition upon the right to appeal arbitrarily discriminated against tenants who appealed adverse decisions and was not rationally related to the state’s purpose of protecting the landlord from financial loss.<sup>112</sup> Although the district court’s findings in *Usher* seem correct, the decision extends *Lindsey* without acknowledging that fact. The *Lindsey* Court held that once the state provides a right of appeal, that right cannot be conditioned on posting a bond unrelated to the landlord’s potential loss.<sup>113</sup> The North Carolina provisions are distinguishable in that they did not restrict the right to appeal but only the right to stay eviction pending appeal. In practical terms, admittedly, this restriction has the same effect as the Oregon statute because few tenants will pursue their right to appeal when they have already moved to other quarters following eviction. Thus it seems the district court was correct in ruling the North Carolina provisions unconstitutional; the court should, however, have noted the novel context in which it was applying the *Lindsey* principle.<sup>114</sup>

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106. *Id.* at 1218-19.

107. *Id.* at 1219.

108. *Id.*

109. 405 U.S. 56 (1972).

110. OR. REV. STAT. §§ 105.105-.160 (1953).

111. 405 U.S. at 72.

112. *Id.* at 76-77.

113. *Id.* at 78.

114. In other equal protection cases, the North Carolina Court of Appeals in *Town of Taylorsville v. Modern Cleaners*, 34 N.C. App. 146, 237 S.E.2d 484 (1977), noted that “the statutory authority of a city to fix and enforce rates for its services and to classify its customers is not a license to discriminate among customers of essentially the same character and serv-



#### D. Fourteenth Amendment: Due Process

##### 1. Property Interest in Employment

In *Faulkner v. North Carolina Department of Corrections*,<sup>115</sup> a federal district court found that a North Carolina statute prohibiting the firing of a permanent state employee without just cause, written charges, and opportunity to appeal<sup>116</sup> created a property interest in continued employment within the meaning of the fourteenth amendment. Plaintiff in *Faulkner*, a former permanent state employee, filed suit in federal district court under 42 U.S.C. § 1983<sup>117</sup> alleging that his dismissal<sup>118</sup> without a hearing deprived him of liberty and property without due process of law;<sup>119</sup> plaintiff then asked for a temporary restraining order and a preliminary injunction. The United States District Court for the Western District of North Carolina held that, because G.S. 126-35<sup>120</sup> provides that no permanent employee may be discharged or suspended except for just cause, the statute created "a reasonable expectation of continued employment and a property interest within the meaning of the due process clause."<sup>121</sup> In addition, the court found that the supervisor's published comments attacking plaintiff's honesty hampered plaintiff's ability to find other employment, thereby "infringing a constitu-

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ices." *Id.* at 149, 237 S.E.2d at 486. The court then held that Taylorsville could not charge defendant, a sewer-only user, a higher rate for sewer service than it charged its sewer and water customers for comparable service. Because the higher charge was found to bear "no rational relation to the cost of service or any other relevant factor," it was declared arbitrary and discriminatory. *Id.* In *MacDonald v. Newsome*, 437 F. Supp. 796 (E.D.N.C. 1977), a surfing enthusiast launched a freewheeling attack on the constitutionality of a Carteret County, North Carolina, ordinance that prohibited surfboard riding off private, posted areas and within 500 feet of fishing piers. The United States District Court for the Eastern District of North Carolina held that surfing was not a constitutionally protected right under the first amendment, an exchange of commodities or commercial intercourse under the commerce clause, or a property or liberty interest under the due process clause of the fourteenth amendment. *Id.* at 798-99. The court then rejected the idea that surfers were a suspect classification for purposes of the equal protection clause and found the ordinance rationally related to the purpose of protecting swimmers from surfers and surfers from fishermen. *Id.* at 799-800.

115. 428 F. Supp. 100 (W.D.N.C. 1977).

116. N.C. GEN. STAT. § 126-35 (Cum. Supp. 1977).

117. 42 U.S.C. § 1983 (1970).

118. The alleged grounds for dismissal were that plaintiff had been working at a second job in violation of department rules and had been using a state car for personal purposes. Plaintiff was not given a hearing by the director of his department or by the State Personnel Committee. 428 F. Supp. at 101.

119. Plaintiff also asserted that his suspension and dismissal were racially motivated, thus denying him equal protection of the laws. *Id.* The court did not address that issue.

120. N.C. GEN. STAT. § 126-35 (Cum. Supp. 1977).

121. 428 F. Supp. at 103. In support of its finding, the court cited *Board of Regents v. Roth*, 408 U.S. 564 (1972). In that decision the Court stated: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577.

tionally protected liberty interest."<sup>122</sup> Defendants were ordered to reinstate plaintiff until he was afforded a hearing or until a final decision was reached on the merits of the case.<sup>123</sup> The court did not award back pay, however, thus avoiding any decision on whether the eleventh amendment barred an award by a federal court of back pay that must be paid out of a state treasury.<sup>124</sup>

The court's summary treatment of the issue of property rights in continued employment fails to reflect the fact that the question is a very close one. In *Bishop v. Wood*,<sup>125</sup> a case construing a Marion, North Carolina ordinance, the United States Supreme Court implied that a statute "merely conditioning an employee's removal on compliance with certain specified procedures"<sup>126</sup> would not create a property right for fourteenth amendment purposes. Because G.S. 126-35 could be readily viewed as such a statute, the district court should have addressed that issue before ruling on the case. Recent appellate court cases construing similar statutes, however, have found a property interest created when the statute in question provides for removal for cause upon written charges, accompanied by an opportunity for appellate review.<sup>127</sup>

In a case similar to *Faulkner*, the United States Court of Appeals for the Fourth Circuit reached the opposite result in construing G.S. 115-142(m)(2),<sup>128</sup> which provides that no probationary teacher may be denied reemployment for arbitrary, capricious or discriminatory reasons. Plaintiff in *Sigmon v. Poe*<sup>129</sup> contended that the statute created a property interest in her continued employment as a teacher. The Fourth Circuit, after noting that the construction of the statute was a matter of state law,<sup>130</sup> held that the North Carolina Supreme Court's decision in *Taylor v. Crisp*<sup>131</sup> established that G.S. 115-142(m)(2) was merely advisory and therefore plaintiff could not claim a property interest for fourteenth amendment purposes.<sup>132</sup> In reaching its decision, however, the *Sigmon* court clearly misconstrued

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122. 428 F. Supp. at 103.

123. *Id.* at 104.

124. *Id.* at 103-04. In *Edelman v. Jordan*, 415 U.S. 651 (1973), the Supreme Court declared that "the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Id.* at 663.

125. 426 U.S. 341 (1976).

126. *Id.* at 345.

127. See, e.g., *Olshock v. Village of Skokie*, 541 F.2d 1254, 1256-58 (7th Cir. 1976).

128. N.C. GEN. STAT. § 115-142(m)(2) (1975).

129. 564 F.2d 1093 (4th Cir. 1977).

130. *Id.* at 1096; see *Bishop v. Wood*, 426 U.S. at 344.

131. 286 N.C. 488, 212 S.E.2d 381 (1975).

132. 564 F.2d at 1096.

*Taylor*. In that case the North Carolina Supreme Court considered whether a board of education may deny reemployment to a probationary teacher when the superintendent had recommended rehiring. The supreme court held that the superintendent's recommendation was advisory—not that the statute itself was advisory.<sup>133</sup> Thus, even if the Fourth Circuit reached the proper result in *Sigmon*,<sup>134</sup> it did so for the wrong reason.<sup>135</sup>

## 2. Involuntary Commitment

Plaintiff in *French v. Blackburn*<sup>136</sup> launched a broad attack on the

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133. Although the supreme court stated that "we hold that Section (m)(2) is advisory only," this conclusion followed an extensive discussion confined solely to whether the legislature intended the superintendent's recommendation to be mandatory. The court also stated: "The manifest purpose of G.S. § 115-142 was to provide teachers of proven ability for the children of this State by protecting such teachers from dismissal for political, personal, arbitrary or discriminatory reasons." 286 N.C. at 494-96, 212 S.E.2d at 386. The case does not rule out the possibility that a property interest was created by the statute.

134. *Accord*, *Siler v. Brady Indep. School Dist.*, 553 F.2d 385 (5th Cir. 1977); *Ryan v. Aurora City Bd. of Educ.*, 540 F.2d 222 (6th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977).

135. In another due process case, *Grimes v. Miller*, 429 F. Supp. 1350 (M.D.N.C.), *aff'd mem.*, 98 S. Ct. 600 (1977), the United States Supreme Court affirmed without opinion a three-judge district court decision upholding North Carolina's body execution statute under a limited reading that the statute is applicable only when there is probable cause to believe the debtor "(a) is about to flee the jurisdiction to prevent paying his creditors, (b) has concealed or diverted assets in fraud of his creditors, or (c) will do so unless immediately detained." 429 F. Supp. at 1356. The court did, however, strike down a statute that required an imprisoned debtor to give 20 days' notice to his creditor before a hearing may be held to determine his insolvency, holding instead that the debtor need give only reasonable notice of the hearing date and his petition for discharge. 429 F. Supp. at 1357. For a more complete discussion of this case, see this Survey, *Civil Procedure: Enforcement of Judgment*.

In *State v. Graham*, 32 N.C. App. 601, 233 S.E.2d 615 (1977), defendant appealed a conviction under N.C. GEN. STAT. § 14-72.2 (Cum. Supp. 1977) for felonious larceny in the unauthorized use of complainant's motorcycle. Defendant, the manager of a trailer court, had removed the motorcycle from a lot vacated by complainant. Complainant returned for the motorcycle but defendant refused to return it until complainant paid rent owed by his former roommate. The court of appeals found the unauthorized use statute unconstitutionally vague and overbroad. The sections of the statute were inconsistent with each other, the court held, because it was unclear whether the proscribed conduct was actual use of a vehicle or merely the temporary exercise of control over it. 32 N.C. App. at 605, 233 S.E.2d at 619. In addition some sections of the statute were limited to motor-propelled conveyances while others were not. *Id.* at 606, 233 S.E.2d at 619. As a result, § 14-72.2 was held to violate "constitutional due process standards of certainty." *Id.* at 607, 233 S.E.2d at 620.

In another "vagueness" case, *State v. Covington*, 34 N.C. App. 457, 238 S.E.2d 794 (1977), *cert. denied, appeal dismissed*, 294 N.C. 184, 241 S.E.2d 519 (1978), the court of appeals rejected a challenge to the constitutionality of Law of Apr. 14, 1951, ch. 1084, § 1, 1951 N.C. Sess. Laws 1087 (formerly codified at N.C. GEN. STAT. ch. 89 (1975)) (recodified at N.C. GEN. STAT. ch. 89c (Cum. Supp. 1977)) (repealed effective July 1, 1979, Law of June 23, 1977, ch. 712, § 2, 1977 N.C. Sess. Laws 901), which requires that a person be licensed to practice professional engineering and prescribes licensing procedures. The court held that the defendant in that case had failed to carry his burden of establishing that § 89-2(6), (7), which define "practice of professional engineering" and "professional engineer," were overly broad and vague in describing the conduct covered by the chapter. 34 N.C. App. at 460-61, 238 S.E.2d at 797.

136. 428 F. Supp. 1351 (M.D.N.C. 1977).

constitutionality of North Carolina's involuntary commitment statute.<sup>137</sup> A three-judge district court found that requiring plaintiff to remain in custody ten days before receiving a final commitment hearing was not unreasonable because some time was required for evaluation of his mental condition.<sup>138</sup> In addition, the notice given plaintiff met due process requirements because it was "reasonably calculated" to inform him of the time, place and nature of the hearing and of his right to be represented by counsel; it also allowed him sufficient time to prepare for the hearing.<sup>139</sup> The court also saw no problem in allowing plaintiff's counsel, with court permission, to waive the presence of plaintiff at the hearing.<sup>140</sup> The court found that the privilege against self-incrimination does not apply in a commitment proceeding<sup>141</sup> and that the necessity for commitment need not be proven beyond a reasonable doubt.<sup>142</sup>

137. Law of May 23, 1973, ch. 726, § 1, 1973 N.C. Sess. Laws 1074 (formerly codified at N.C. GEN. STAT. § 122-58.1 to .8 (1974)). In 1977 the General Assembly revised and added to these sections. N.C. GEN. STAT. § 122-58.1 to .21 (Cum. Supp. 1977).

138. 428 F. Supp. at 1355-56.

139. *Id.* at 1356-57. The court rejected plaintiff's contention that proper notice must also indicate the basis for detention, the standard of proof to be employed, and the names of witnesses to be called at the hearing. *Id.*

140. The court found it reasonable to assume that counsel and the hearing judge would act in the patient's best interest, allowing waiver only when it would benefit his mental or physical state. *Id.* at 1357-58. Most courts have been less trusting of the bar and more specific in their requirements. *See, e.g.,* Doremus v. Farrell, 407 F. Supp. 509, 515 (D. Neb. 1975) (counsel may waive patient's presence only after showing of incompetence); Bartley v. Kremens, 402 F. Supp. 1039, 1051 (E.D. Pa. 1975), *vacated on other grounds*, 431 U.S. 119 (1977) (waiver of presence allowed only upon finding that patient is too ill to attend); Lynch v. Baxley, 386 F. Supp. 378, 388 (M.D. Ala. 1974) (waiver by counsel allowed upon finding that patient is too ill to attend).

141. "[T]he purpose and effect of these proceedings are not the finding of facts upon which a finding of criminal guilt might be based, but treatment; therefore, the privilege does not apply." 428 F. Supp. at 1359 (citing Dower v. Boslow, 539 F.2d 969 (4th Cir. 1976); Tippet v. Maryland, 436 F.2d 1153 (4th Cir. 1971), *cert. withdrawn as improvidently granted sub nom. Murel v. Baltimore City Criminal Court*, 407 U.S. 355 (1972)).

142. The court noted the current split of authority on the burden of proof question but chose to follow the Fourth Circuit's position on this issue. 428 F. Supp. at 1359-60 & 1359 n.16. Compare *Stamus v. Leonhardt*, 414 F. Supp. 439, 449 (S.D. Iowa 1976), *Doremus v. Farrell*, 407 F. Supp. 509, 516-17 (D. Neb. 1975), *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974), and *State ex rel. Hawks v. Lazaro*, 202 S.E.2d 109, 126-27 (W. Va. 1974), with *United States ex rel. Stachulak v. Coughlin*, 520 F.2d 931 (7th Cir. 1975), *In re Ballay*, 482 F.2d 648, 653-59 (D.C. Cir. 1973), and *Suzuki v. Quisenberry*, 411 F. Supp. 1113, 1132 (D. Hawaii 1976). Courts that require proof beyond a reasonable doubt stress the importance of the patient's liberty interest and the stigma attached to commitment for mental illness. Other courts, employing the clear and convincing evidence standard, point to the difficulty of obtaining proof beyond a reasonable doubt, given the inexact nature of medical science, and to the fact that although a patient is deprived of liberty he is being aided through treatment.

N.C. GEN. STAT. § 122-58.7(i) (Cum. Supp. 1977) allows commitment only when there is "clear, cogent, and convincing evidence, that the respondent is mentally ill or inebriate, and imminently dangerous to himself or others." In two recent decisions, *In re Hatley*, 291 N.C. 693, 231 S.E.2d 633 (1977), and *In re Hogan*, 32 N.C. App. 429, 232 S.E.2d 492 (1977), the North Carolina Supreme Court and North Carolina Court of Appeals, respectively, held that commitment is justified only upon a clear finding that the patient is imminently dangerous to himself or others. In *Hatley* the supreme court found that first hand testimony of erratic driving

Finally, the district court held that requiring a jury trial in lunacy proceedings while prohibiting a jury trial in commitment proceedings did not constitute a violation of equal protection.<sup>143</sup>

Institutionalizing an individual against his will necessarily involves a finding that his need for treatment and society's need for protection outweigh the individual's liberty interest; in depriving him of that interest the state must afford the individual due process.<sup>144</sup> Thus far the United States Supreme Court has offered little guidance concerning the due process standards that must be fulfilled in this unique judicial proceeding; as a result, state laws vary widely in their procedural requirements. Although the North Carolina provisions are biased against the rights of the individual, they do compare favorably with those of most other jurisdictions.<sup>145</sup> The court's decision in *French* is in accordance with the majority of the cases on the subject.<sup>146</sup>

### 3. Disbarment

The court of appeals in *In re Palmer*<sup>147</sup> considered whether a trial judge could disbar an attorney for his misconduct during a trial without giving the attorney notice of the subject of the disbarment hearing. Respondent allegedly advised his client, the driver of a truck involved in a hit-and-run accident, to let his codefendant, a passenger in the truck, take the blame for the accident. After the jury left for deliberations in the ensuing manslaughter trial, the alleged misconduct was discovered and a hearing was held at which respondent's client testified about respondent's conduct. Respondent was given the opportunity to cross-examine his client but had no prior notice

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and previous confinements to mental institutions, along with secondhand testimony of threats of aggression against others, did not constitute clear and convincing proof that respondent was imminently dangerous under the statute. 291 N.C. at 696-99, 231 S.E.2d at 635-37. The court of appeals followed in *Hogan* with a finding that medical testimony of respondent's frequent sermonizing on public streets, together with an opinion that future sermons might provoke aggression by passers-by against respondent, failed to establish that the patient herself was dangerous. 32 N.C. App. at 434, 232 S.E.2d at 495.

143. The court reasoned that commitment hearings involved a determination of the mental state of the respondent, a decision beyond the "practical wisdom of the jury." In addition, a nonjury proceeding allowed more informality and better protection of the privacy of the respondent. 428 F. Supp. at 1361. See *Developments in the Law—Civil Commitment of the Mentally Ill*, *supra* note 99, at 1294. Cf. *Lynch v. Baxley*, 386 F. Supp. 378, 394-95, (M.D. Ala. 1974) (allowing jury trial to consider release after commitment but not prior to commitment violates equal protection).

144. See *Developments in the Law—Civil Commitment of the Mentally Ill*, *supra* note 99, at 1193, 1236-40.

145. See *id.* at 1203-05.

146. See cases collected in *id.* at 1201-13.

147. 32 N.C. App. 449, 232 S.E.2d 497 (1977).

of the subject of the hearing and no opportunity to prepare his defense.<sup>148</sup> At the conclusion of the hearing, the judge indefinitely suspended respondent's license to practice law in the state. The court of appeals, vacating the decision of the lower court, held that the license to practice law is a property right that cannot be abridged without due process, even when the misconduct relates to a matter then before the hearing judge.<sup>149</sup>

In reaching its decision, the court of appeals relied upon a 1962 North Carolina Supreme Court case, *In re Burton*,<sup>150</sup> in which the court held that when "the conduct complained of is not related to litigation pending before the court investigating [the] attorney's alleged misconduct," due process requires a sworn written complaint and an order advising the attorney of the specific charges against him, followed by a reasonable time in which to prepare his defense.<sup>151</sup> The *Palmer* court correctly extended the *Burton* rationale to include instances in which the alleged misconduct is related to litigation pending before the investigating court. The court of appeals stopped short, however, of requiring a sworn complaint and a formal order, holding only that respondent was entitled to notice of the subject of the disbarment hearing and a reasonable time to prepare his defense.<sup>152</sup>

In *Goldberg v. Kelly*,<sup>153</sup> the United States Supreme Court held that a judicial-type hearing requires notice, the opportunity to present and rebut evidence, the right to have a decision based only on evidence introduced at the hearing, a proper record of the proceeding and opportunity to obtain counsel.<sup>154</sup> With the possible exception of the right to counsel (a question not before the court), the court of appeals' decision in *Palmer* explicitly or implicitly includes each of these requirements. Although the additional prerequisite of a sworn complaint and a formal order seems desirable in a disbarment proceeding in view of the magnitude of the property right involved,<sup>155</sup> at present neither is required to satisfy the demands of due process.

#### 4. Right to Die

The fourteenth amendment forbids deprivation of life without due process of law, but few courts have recognized as a corollary a constitution-

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148. *Id.* at 449-51, 232 S.E.2d at 497-99.

149. *Id.* at 452, 232 S.E.2d at 499.

150. 257 N.C. 534, 126 S.E.2d 581 (1962).

151. *Id.* at 544, 126 S.E.2d at 588-89.

152. 32 N.C. App. at 452, 232 S.E.2d at 499.

153. 397 U.S. 254 (1970).

154. *Id.* at 269-71; see Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1279-95 (1975).

155. See generally *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

al right to end one's life in appropriate medical circumstances.<sup>156</sup> As a result, recognition of a "right to die" must normally emanate from state statutes. The General Assembly added article 23 to chapter 90 of the General Statutes, making North Carolina one of a growing number of states allowing use of the so-called "living will,"<sup>157</sup> and recognizing cessation of brain function as an indication of death. G.S. 90-321,<sup>158</sup> entitled "Right to a natural death," authorizes a physician to withhold "extraordinary means" of life support<sup>159</sup> from a terminally ill person if his condition has been confirmed by another physician and if the patient has executed a proper written statement. The statement must be dated, signed by the patient in the presence of two disinterested witnesses,<sup>160</sup> proved before a clerk or assistant clerk of superior court, and must request that no extraordinary means be used to prolong the declarant's life in the event of terminal illness. In addition, the statute offers a suggested form for declarant, witness and clerk that is "specifically determined to meet the requirements above."<sup>161</sup> Rather unusually, the statute does not require that the declarant be fully competent to execute the written declaration. Although the suggested form contains the phrase "being of sound mind," neither the witnesses nor the clerk must attest to that fact.<sup>162</sup>

G.S. 90-322<sup>163</sup> recognizes the "irreversible cessation of brain function" as an indication of death in certain circumstances. If a person is comatose, if the attending physician (with confirmation) determines that his condition is terminal, if there has been an irreversible cessation of brain function<sup>164</sup> and if a "vital function" is being sustained by extraordinary

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156. See, e.g., cases collected in Sharp & Crofts, *Death with Dignity, the Physician's Civil Liability*, 27 BAYLOR L. REV. 86, 89-95 (1975).

157. See Gurney, *Is There a Right to Die?—A Study of the Law of Euthanasia*, 3 CUM. SAN. L. REV. 235, 255 (1972); Kutner, *The Living Will—Coping with the Historical Event of Death*, 27 BAYLOR L. REV. 39 (1975).

158. N.C. GEN. STAT. § 90-321 (Cum. Supp. 1977).

159. The term "extraordinary means" is defined by the statute as "any medical procedure or intervention which in the judgment of the attending physician would serve only to postpone artificially the moment of death by sustaining, restoring, or supplanting a vital function." *Id.* § 90-321(a)(2).

160. The witnesses may not be related within the third degree to declarant or declarant's spouse, may not be the attending physician or an employee of the physician or hospital, and may not have a claim against declarant's estate or be entitled by will or intestate succession to a share in declarant's estate. *Id.* § 90-321(c)(3).

161. *Id.* § 90-321(d).

162. Conceivably, however, the requirement that the clerk be "satisfied as to the genuineness and due execution of the declaration" could be construed as including a finding that the declarant was competent. Cf. CAL. HEALTH & SAFETY CODE § 7188 (West Cum. Supp. 1977) (Declarant: "I understand the full import of this directive and I am emotionally and mentally competent to make this directive." Witness: "The declarant has been personally known to me and I believe him or her to be of sound mind.")).

163. N.C. GEN. STAT. § 90-322 (Cum. Supp. 1977).

164. *Id.* § 90-322(a)(1)c.

means,<sup>165</sup> the person may be declared dead. At that point the "extraordinary means" may be discontinued at the request of the spouse, guardian or relatives of the deceased, or by the doctor if no such person is available.<sup>166</sup> G.S. 90-322 follows the precedent of a California statute,<sup>167</sup> merely adding to the existing definitions of point of death rather than superseding them. In so doing, the General Assembly modernized the law regarding determination of death without attempting the impossible task of formulating an all-inclusive definition, as some state legislatures have sought to do.<sup>168</sup>

WILLIAM G. LEONARD

## V. CRIMINAL LAW

### A. Kidnapping

The newly enacted version of G.S. 14-39<sup>1</sup> provides that anyone who restrains, confines or removes another for one of three specified purposes,

165. *Id.* § 90-322(a)(3).

166. *Id.* § 90-322(b).

167. CAL. HEALTH & SAFETY CODE § 7180 (West Cum. Supp. 1977).

168. *See, e.g.*, KAN. STAT. § 77-202 (1977); VA. CODE § 32-364.3:1 (Cum. Supp. 1977). This all-inclusive approach is criticized in Friloux, *Death, When Does It Occur?*, 27 BAYLOR L. REV. 10, 17-18 (1975), and in Capron & Kass, *A Statutory Definition of the Standards for Determining Human Death: An Appraisal and a Proposal*, 121 U. PA. L. REV. 87, 108-11 (1972). The latter article advocates a definition of death similar to the one adopted by the North Carolina General Assembly. *See id.* at 111.

In 1977 two important amendments to the North Carolina constitution were ratified by the people of the state. In a general election held November 8, 1977, the voters amended N.C. CONST. art. III, § 2(2) to allow the Governor and Lieutenant Governor to succeed themselves in office. Prior to the amendment, neither office could be filled for successive terms by the same individual. Also in 1977, N.C. CONST. art. X, § 5 was amended to allow every person, male or female, the right to insure his or her life for the benefit of spouse or children. The amendment replaced a provision that allowed a male to insure his life for the benefit of wife or children but did not make any such allowance for females.

1. N.C. GEN. STAT. § 14-39 (Cum. Supp. 1977) provides in pertinent part:

(a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

- (1) Holding such other person for ransom or as a hostage or using such other person as a shield; or
- (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
- (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person.

(b) Any person convicted of kidnapping shall be guilty of a felony and shall be punished by imprisonment for not less than 25 years nor more than life. If the person kidnapped, as defined in subsection (a), was released by the defendant in a safe place and had not been sexually assaulted or seriously injured, the person so convicted shall be punished by imprisonment for not more than 25 years, or by a fine of not more than ten thousand dollars (\$10,000), or both, in the discretion of the court.



including facilitating the commission of a felony, commits the crime of kidnapping. The North Carolina Court of Appeals in *State v. Fulcher*<sup>2</sup> construed this statute as requiring *substantial* restraint, confinement or removal<sup>3</sup> to constitute kidnapping.<sup>4</sup> This construction is consistent with both the Model Penal Code<sup>5</sup> and the most recent North Carolina Supreme Court decisions prior to the enactment of G.S. 14-39<sup>6</sup> and avoids the potential due process and equal protection problems of subjecting a defendant to punishment for two crimes when only one has been committed.<sup>7</sup> The strength of the court of appeals' interpretation, however, may be undercut by its reliance on cases decided under the common law rather than on the basis of the actual wording and the probable intent of the new statute.<sup>8</sup> This may affect the way the supreme court treats this decision on appeal.

[EDITORIAL NOTE: *On appeal, the North Carolina Supreme Court rejected this statutory construction, 294 N.C. 503, 243 S.E.2d 338 (1978). The supreme court held that the legislature had passed G.S. 14-39 in order to redefine that court's common law definition of kidnapping, and that the legislature clearly intended any restraint, confinement or removal to be sufficient to constitute kidnapping. Because it is not unconstitutional to charge a defendant with two separate and distinct crimes, even if they closely follow one another, the court held that the statute was not unconstitutional on its face. The supreme court noted that it was not at liberty to construe the statute in a manner at variance with the legislative*

2. 34 N.C. App. 233, 237 S.E.2d 909 (1977), *aff'd*, 294 N.C. 503, 243 S.E.2d 338 (1978).

3. The court noted that both unlawful asportation and unlawful confinement must involve unlawful restraint. Thus the State may charge solely on unlawful restraint, and similarly the trial judge may limit his definition and explanation to the term "unlawful restraint." *Id.* at 238, 241-42, 237 S.E.2d at 913, 915. Compare *State v. Dammons*, 293 N.C. 263, 237 S.E.2d 834 (1977), in which the State charged defendant with "removing" the victim and the judge instructed the jury on the entire statute. For this error, the supreme court ordered a new trial.

4. 34 N.C. App. at 240, 237 S.E.2d at 914. The court set out guidelines for future trials that provided in substance that the trial judge must define the three terms to the jury as meaning substantial confinement, restraint or removal and not that merely incidental to the commission of another crime. *Id.* at 241, 237 S.E.2d at 915.

5. MODEL PENAL CODE § 212.1 (Proposed Official Draft, 1962) provides in pertinent part:

A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found, or if he unlawfully confines another for a substantial period in a place of isolation, with any of the following purposes:

- (a) to hold for ransom or reward, or as shield or hostage; or
- (b) to facilitate commission of any felony or flight thereafter; or
- (c) to inflict bodily injury on or to terrorize the victim or another; or
- (d) to interfere with the performance of any governmental or political function.

Kidnapping is a felony of the first degree unless the actor voluntarily releases the victim alive and in a safe place prior to trial, in which case it is a felony of the second degree. A removal or confinement is unlawful within the meaning of this Section if it is accomplished by force, threat or deception . . . .

6. See text accompanying notes 11-18 *infra*.

7. See text accompanying note 28 *infra*.

8. See *Criminal Law—Kidnapping in North Carolina—A Statutory Definition for the Offense*, 12 WAKE FOREST L. REV. 434 (1976), for a general commentary on § 14-39, and on how other jurisdictions have interpreted similar statutes.

*intent, even if that construction would make the statute more desirable and would free it from potential constitutional difficulties. The court did recommend, however, that the legislature rewrite the law to make asportation an essential element of kidnapping, and to require more than a minor asportation.]*

Defendant in *Fulcher* forced his way into a motel room occupied by two women. After making the women lie down, he bound their wrists and forced them to have oral sex with him. Defendant was convicted of both the crime against nature and kidnapping.<sup>9</sup> On appeal, he challenged the constitutionality of G.S. 14-39 on the ground that it violated the due process and equal protection clauses of the United States Constitution by subjecting him to convictions for two crimes when only one had been committed. The court of appeals found that each victim was bound and restrained for a substantial period of time and that the restraint was not merely incidental to the commission of the crime against nature because the restraint was committed against one victim while he was committing the crime upon the other.<sup>10</sup> Thus, the court found two distinct crimes regardless of the breadth of the definition applied to "restraint," leaving no constitutional issue on the facts of this case. Nonetheless, the court construed the statute to avoid any future constitutional challenges.

The court relied on *State v. Roberts*,<sup>11</sup> *State v. Dix*<sup>12</sup> and the Model Penal Code for guidance on what constituted kidnapping. Both *Roberts* and *Dix*, however, were decided under the former version of G.S. 14-39, which simply incorporated the common law definition of kidnapping.<sup>13</sup> The court in *Dix* repudiated the former rule that "any carrying away is sufficient,"<sup>14</sup> requiring a finding of more than "mere technical asportation" incidental to the crime.<sup>15</sup> The *Dix* court considered in depth the policy reasons for its decision, such as the need to consider the increased risk to the victim,<sup>16</sup> and carefully distinguished cases from other jurisdictions that defined asportation to include any removal by noting that they all had been decided under statutory definitions of kidnapping rather than under the common law

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9. 34 N.C. App. at 235, 237 S.E.2d at 911. Defendant was sentenced to two consecutive 10 year sentences on the crime against nature charges, to run concurrently with a 28-40 year sentence on the consolidated kidnapping charge.

10. *Id.* at 240-41, 237 S.E.2d at 914.

11. 286 N.C. 265, 210 S.E.2d 1396 (1974).

12. 282 N.C. 490, 193 S.E.2d 897 (1973).

13. See *State v. Lowry*, 263 N.C. 536, 539-41, 139 S.E.2d 870, 872-74, *cert. denied*, 382 U.S. 22 (1965).

14. This former rule was most recently stated in *State v. England*, 278 N.C. 42, 178 S.E.2d 577 (1971).

15. 282 N.C. at 502, 193 S.E.2d at 904.

16. *Id.* at 501-02, 193 S.E.2d at 903-04. Defendant in *Dix* marched a jailor 62 feet through the jail at gunpoint and then locked him in a cell. The court reversed the kidnapping conviction, holding that the asportation and detention were incidental to the principal crime and did not expose the jailor to any additional risk.

definition.<sup>17</sup> Similarly, in *Roberts* the court held that the victim must be held "for some appreciable period of time" and that he must be carried "beyond the immediate vicinity of the place of such false imprisonment."<sup>18</sup>

Although the court in *Fulcher* noted that G.S. 14-39 may have been rewritten in order to limit the impact of cases such as *Dix* and *Roberts*,<sup>19</sup> it chose not to consider this evidence of legislative intent. The new statute was passed shortly after these cases were decided and eliminated the common law requirement of asportation as an element of kidnapping. That the legislature was attempting to redefine kidnapping completely is further shown by the statute's listing of three specific purposes for which the removal or restraint must have been committed. The court of appeals, in attempting to "maintain judicial consistency without doing violence to the legislative intent to change the elements of common law kidnapping,"<sup>20</sup> relied more heavily on these earlier cases than it did on the legislative language and reasonable interpretations thereof.<sup>21</sup>

The court's reliance on the Model Penal Code further exposes the possible inconsistency between the new statute and the common law rule.<sup>22</sup> The Model Penal Code is similar to the new North Carolina statute, yet it expressly qualifies both "asportation" and "confinement." Asportation must be "a substantial distance from the vicinity"; confinement must be "for a substantial period in a place of isolation."<sup>23</sup> The North Carolina legislature chose not to include these definitions, and instead produced a statute that apparently, by not including any specific qualifications as to time or distance, made any restraint, confinement or removal sufficient to constitute kidnapping.

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17. 282 N.C. at 495, 193 S.E.2d at 900.

18. 286 N.C. at 277, 210 S.E.2d at 404. The *Roberts* court reversed a kidnapping conviction of a man who had grabbed a seven year old child from a playground and dragged her 80-90 feet.

19. As the court stated in *Fulcher*, "It is possible that the two decisions had some influence on the enactment of the new statute which defined kidnapping and eliminated asportation as a necessary element of the crime." 34 N.C. App. at 236, 237 S.E.2d at 912.

20. *Id.* at 240, 237 S.E.2d at 914.

21. *Id.* at 236-40, 237 S.E.2d at 913-15; see, e.g., *State v. Buggs*, 219 Kan. 203, 547 P.2d 720 (1976). Under statutory language similar to that in North Carolina, the Kansas Supreme Court first noted that the legislature had purposefully not used the "substantial" language of the Model Penal Code, but then held that the word "facilitate" as used in "facilitate the commission of any felony" meant more than slight, inconsequential and merely incidental taking or confining. *Id.* at 213-16, 547 P.2d at 729-31. See also *State v. Williams*, 111 Ariz. 222, 526 P.2d 1244 (1974).

22. See, e.g., *State v. Morris*, 281 Minn. 119, 222, 160 N.W.2d 715, 717 (1968) (significant that legislature chose not to follow language of Model Penal Code; since legislature had chosen to enact the statute without any qualifications as to time and distance, it was held not appropriate for court to rewrite law).

23. MODEL PENAL CODE § 212.1 (Proposed Official Draft, 1962).

The *Fulcher* court argued that without this judicial construction the statute might face constitutional problems as a violation of the due process and equal protection clauses.<sup>24</sup> As the court noted, it is difficult to imagine any felony against the person not involving some unlawful restraint and thus falling within the broad definition of kidnapping. This inclusive definition could easily lead to prosecutorial abuse, with "prosecutions for kidnapping for the sole purpose of securing the more severe statutory punishment for crimes not subject to such severe penalties."<sup>25</sup>

The recent North Carolina case *State v. Vawter*<sup>26</sup> illustrates this problem. Defendants in that case took the keys and pocketbook of a store employee and then forced him to wheel a shopping cart full of cigarettes to the front of the store. When a police car approached the store, defendant held the employee by the top of his pants in front of the store and told him to get rid of the police. Since the restraint was for the purpose of facilitating the commission of a felony and flight thereafter, one of the purposes listed in the statute, the court of appeals held the evidence sufficient to show kidnapping. The court stated that the employee "was forced to aid in the robbery of the store by pushing the carts."<sup>27</sup> In other words, the robbery was still under way when he was kidnapped. The court did not discuss the question of "substantial" removal or restraint, nor did it discuss the constitutional problems of allowing the prosecutor to choose either or both of two crimes to charge for a single set of acts. The essential elements of the two crimes were separate, so technically there were two crimes.

Despite the *Fulcher* court's concern with the constitutionality of a strict reading of G.S. 14-39, the mere possibility of prosecutorial abuse does not necessarily rise to constitutional proportions. As long as the elements of the two crimes are not identical, there is no constitutional prohibition against making one act subject to two separate statutory crimes.<sup>28</sup> Rather than

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24. 34 N.C. App. at 239, 237 S.E.2d at 914; see *Kidnapping and the Element of Asportation*, 35 S. CAL. L. REV. 212, 216 (1962) (suggesting that it could be a violation of equal protection to allow the prosecutor alone to decide whether to prosecute for one of two offenses with the same essential elements).

25. 34 N.C. App. at 238-39, 237 S.E.2d at 913.

26. 33 N.C. App. 131, 234 S.E.2d 438, cert. denied, 293 N.C. 257, 237 S.E.2d 539 (1977).

27. *Id.* at 138, 234 S.E.2d at 443 (emphasis added).

28. See, e.g., *State v. Dammons*, 293 N.C. 263, 274-76, 237 S.E.2d 834, 841-43 (1977). Only when all the essentials of the lesser offense are also included among the essentials of the greater offense will the law merge them and treat the less serious charge as a "lesser included offense." *State v. Stepney*, 280 N.C. 306, 318, 185 S.E.2d 844, 852 (1972). Thus, even when all injuries arise out of the same explosion, two separate offenses punishable under two separate statutes can occur. *State v. Sanders*, 288 N.C. 285, 293, 218 S.E.2d 352, 358 (1975), cert. denied, 423 U.S. 1091 (1976). The practical test to determine if the elements are identical is to eliminate the elements in one charge and determine whether the remaining facts would support the other charge. When, for instance, the facts of the kidnapping could be eliminated and the rape conviction still stand, and the facts of the rape could be eliminated and the kidnapping still stand, a defendant can be convicted for both offenses. *State v. Burchett*, 107 Ariz. 185, 190, 484

seeking support for its reading of the statute in a dubious constitutional argument, the court of appeals should have based its decision on rather clear policy reasons.<sup>29</sup> The maximum penalty for any crime should be determined under the applicable criminal statute, not by a discretionary additional charge of kidnapping. Thus, some courts have construed similar statutory language on the basis of legislative intent<sup>30</sup> or "common sense,"<sup>31</sup> thereby avoiding results such as an additional kidnapping conviction for forcing someone into an adjoining room in the process of committing a felony without regard to the nature of the crime or the increased risk to the victim. As the Model Penal Code points out, the "criminologically nonsignificant circumstance that the victim was detained or moved incident to the crime" should not determine "whether the offender lives or dies."<sup>32</sup>

One court has held under a similar kidnapping statute that "it is the duty of the prosecutor, the court, and the correctional authorities to modify . . . the sentence . . . so that it will be commensurate with the gravity of the crime and the harm or potential harm which is inflicted by the defendant."<sup>33</sup> By reading G.S. 14-39 in light of the common law requirement of more than a technical asportation or confinement, the North Carolina Court of Appeals has adopted a much more direct solution to this problem. The court would have stood on firmer ground, however, if it had reached its conclusion by interpreting the language of the statute or by referring to the common sense intent of the legislature rather than by trying to constitutionalize the result.

### B. Rape

A defendant's conviction for first degree rape may require a victim's submission procured by the infliction of serious bodily injury.<sup>34</sup> The North

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P.2d 181, 186 (1971). Thus, a kidnapping conviction and a rape conviction can be upheld when the victim is taken from one room to another in defendant's house and raped. *State v. Williams*, 111 Ariz. 222, 526 P.2d 1244 (1974).

29. See generally *State v. Dix*, 282 N.C. 490, 193 S.E.2d 897 (1973); MODEL PENAL CODE § 212.1, Comment, at 11-17 (Tent. Draft No. 11, 1960); Note, *A Rationale of the Law of Kidnapping*, 53 COLO. L. REV. 540 (1953).

30. See, e.g., *State v. Buggs*, 219 Kan. 203, 213-16, 547 P.2d 720, 729-31 (1976), discussed in note 21 *supra*.

31. See, e.g., *People v. Daniels*, 71 Cal. 2d 1119, 459 P.2d 225, 80 Cal. Rptr. 897 (1969); *People v. Levy*, 15 N.Y.2d 159, 204 N.E.2d 842, 256 N.Y.S.2d 793, cert. denied, 381 U.S. 938 (1965).

32. MODEL PENAL CODE § 212.1, Comment, at 14 (Tent. Draft No. 11, 1960).

33. *State v. Morris*, 281 Minn. 119, 124, 160 N.W.2d 715, 718 (1968).

34. N.C. GEN. STAT. § 14-21 (Cum. Supp. 1977), provides in pertinent part:

Every person who ravishes and carnally knows any female of the age of 12 years or more by force and against her will . . . shall be guilty of rape, and upon conviction, shall be punished as follows:

(1) First-Degree Rape—

b. If the person guilty of rape is more than 16 years of age, and the rape victim had her resistance overcome or her submission procured by the use of a deadly

Carolina Supreme Court in *State v. Roberts*<sup>35</sup> construed for the first time the rape statute's meaning of the phrase "serious bodily injury," finding the phrase to be words of ordinary significance that need not be defined by the court in its instructions to the jury.<sup>36</sup> The court's holding accords with the generally accepted construction of that phrase.<sup>37</sup>

Defendant in *Roberts* raped the prosecuting witness, overcoming her resistance by striking her two times in the jaw with his fist.<sup>38</sup> The battery knocked five teeth out of alignment and broke the root of one tooth.<sup>39</sup> Defendant, strictly interpreting G.S. 14-21(1)(b),<sup>40</sup> contended that the injury inflicted did not amount to a serious bodily injury.<sup>41</sup> The supreme court disagreed.

Justice Huskins, writing for the court, utilized case law<sup>42</sup> construing the offense of assault with a deadly weapon with intent to kill and inflicting serious injury<sup>43</sup> and analogous cases from other jurisdictions<sup>44</sup> to interpret the meaning of "serious bodily injury" in the rape statute. North Carolina law dealing with aggravated assaults was not on point in *Roberts* because

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weapon, or by the infliction of *serious bodily injury* to her, the punishment shall be death . . . .

*Id.* (emphasis added). For a discussion of evidentiary developments involving the subject of rape, see this Survey, *Evidence: Character—The Rape Shield Statute*.

35. 293 N.C. 1, 235 S.E.2d 203 (1977).

36. *Id.* at 14, 235 S.E.2d at 211-12.

37. See, e.g., *State v. Perry*, 5 Ariz. App. 315, 426 P.2d 415 (1967); *State v. McKeehan*, 91 Idaho 808, 430 P.2d 886 (1967); *Andrason v. Sheriff, Washoe County*, 88 Nev. 589, 503 P.2d 15 (1972); *Thomas v. State*, 55 Tex. Crim. 293, 116 S.W. 600 (1909); *La Barge v. State*, 74 Wis. 2d 327, 246 N.W.2d 794 (1976); 11 C.J.S. *Bodily* 374, 378 (1938).

38. 293 N.C. at 4, 235 S.E.2d at 206. "G.S. 14-21(a)(2) . . . does not mean that the victim's resistance must completely cease in order to be 'overcome' by infliction of serious bodily injury. The statute means that the assailant is guilty of first degree rape if . . . the victim's resistance is rendered ineffectual by the infliction of serious bodily injury." *Id.* at 17, 235 S.E.2d at 213.

39. *Id.* at 4, 235 S.E.2d at 206.

40. N.C. GEN. STAT. § 14-21 (1)(b) (Cum. Supp. 1977).

41. 293 N.C. at 11, 235 S.E.2d at 210.

42. *Id.* at 13, 235 S.E.2d at 211 (citing *State v. White*, 270 N.C. 78, 153 S.E.2d 774 (1967) (knife wounds requiring 64 stitches to close); *State v. Ferguson*, 261 N.C. 558, 135 S.E.2d 626 (1964) (whiplash injury); *State v. Jones*, 258 N.C. 89, 128 S.E.2d 1 (1962) (.410 shotgun wound in the back)).

43. N.C. GEN. STAT. § 14-32(a) (Cum. Supp. 1977) provides: "Any person who assaults another person with a deadly weapon with intent to kill and inflicts serious injury is guilty of a felony punishable by a fine, imprisonment for not more than 20 years, or both such fine and imprisonment."

44. See *State v. Miller*, 16 Ariz. App. 92, 491 P.2d 481 (1971) (bruise on ear, abrasions on hand and knee, and jaw fractured); *State v. Perry*, 5 Ariz. App. 315, 426 P.2d 415 (1967) (two and one-half inch cut, black eye and broken rib); *State v. McKeehan*, 91 Idaho 808, 430 P.2d 886 (1967) (bruises, swelling, cuts and eye injury); *Brooks v. Sheriff, Clark County*, 89 Nev. 260, 510 P.2d 1371 (1973) (cut on head, swollen eyes and head); *Andrason v. Sheriff, Washoe County*, 88 Nev. 589, 503 P.2d 15 (1972) (kick in groin, area swollen and black and blue); *Commonwealth v. Alexander*, 237 Pa. Super. Ct. 111, 346 A.2d 319 (1975) (broken nose, two black eyes and other head wounds requiring stitches); *La Barge v. State*, 74 Wis. 2d 327, 246 N.W.2d 794 (1976) (twelve wounds needing stitching and minor cuts, abrasions and bruises).

aggravated assault requires the infliction of a serious injury through the use of a *deadly* weapon.<sup>45</sup> Defendant in *Roberts* did not employ such a weapon in inflicting the victim's injury. As Justice Huskins apparently recognized, however, first degree rape requires merely a "submission procured by the use of a deadly weapon, *or* by the infliction of serious bodily injury,"<sup>46</sup> implying that the infliction of serious bodily injury can be achieved without the use of a lethal weapon.

In *State v. Perry*,<sup>47</sup> the North Carolina Supreme Court held that the old form of indictment for rape, used prior to the division of that crime into two degrees,<sup>48</sup> was insufficient to support a conviction of first degree rape. Although subsequently countered by legislative action,<sup>49</sup> the *Perry* court held that an indictment for first degree rape must allege that the defendant was more than sixteen years of age at the time of the offense and that he used deadly force to commit the crime.<sup>50</sup> The *Perry* court did find the old form of indictment sufficient, however, to support a conviction and sentence for second degree rape.<sup>51</sup> Defendant in *Perry* was indicted for raping his neighbor. The indictment charged only that defendant "with force and arms . . . did, unlawfully, wilfully and feloniously ravish and carnally know [the prosecuting witness] a female, by force and against her will by use and threatened use of firearm or other dangerous weapon."<sup>52</sup> The evidence at trial subsequently established that defendant was nineteen years of age.<sup>53</sup> The jury found defendant guilty of first degree rape.

Justice Lake, writing for the *Perry* court, attempted to distinguish *State v. Courtney*,<sup>54</sup> in which the North Carolina Supreme Court held that one convicted of assault upon a female may be sentenced to a longer term of

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45. See notes 34 & 43 *supra*.

46. N.C. GEN. STAT. § 14-21(1)(b) (Cum. Supp. 1977) (emphasis added), *quoted in* note 34 *supra*.

47. 291 N.C. 586, 231 S.E.2d 262 (1977).

48. There was only one degree of rape in North Carolina before § 14-21 was amended in 1974. "Rape is the carnal knowledge of a female person [more than 12 years of age] by force and against her will." *State v. Hines*, 286 N.C. 377, 380, 211 S.E.2d 201, 203 (1975). Chapter 1201 of the Session Laws of 1973, Law of Apr. 8, 1974, ch. 1201, § 2, 1973 N.C. Sess. Laws 2d Sess. 323, divided rape into separate offenses: first and second degree rape. Section 14-21 retained, however, the traditional definition of rape *per se*. *Id.* (current version codified at N.C. GEN. STAT. § 14-21 (Cum. Supp. 1977)).

49. See text accompanying notes 59 & 60 *infra*.

50. 291 N.C. at 592, 231 S.E.2d at 266.

51. *Id.* at 595, 231 S.E.2d at 267. The court held that "[a] verdict of guilty of rape in the first degree necessarily includes the jury's determination that the defendant is guilty of each element of rape in the second degree." *Id.* at 591, 231 S.E.2d at 266. N.C. GEN. STAT. § 14-21(2) (Cum. Supp. 1977) provides: "Second-Degree Rape—Any other offense of rape defined in this section shall be a lesser-included offense of rape in the first degree and shall be punished by imprisonment in the State's prison for life, or for a term of years, in the discretion of the court."

52. 291 N.C. at 592, 231 S.E.2d at 266 (emphasis omitted).

53. *Id.* at 587, 231 S.E.2d at 263.

54. 248 N.C. 447, 103 S.E.2d 861 (1958).

imprisonment if the jury finds that defendant was over eighteen years of age, even though the indictment failed to allege his age.<sup>55</sup> According to the *Courtney* court, the age requirement for sexual offenses in the assault statute was added simply to provide for punishment of the offender—not to create a new offense or to divide the existing offense into degrees.<sup>56</sup> Defendant's age was not considered an essential element of the crime and, therefore, was not held to be an essential allegation in the indictment for sexual assault. Justice Lake distinguished *Perry* from *Courtney* on the ground that a 1973 amendment to G.S. 14-21 divided the crime of rape into two distinct offenses, and defendant's age was intended to be an essential element only of first degree rape.<sup>57</sup> The distinction appears somewhat superficial, however, as the crime of rape was separated into degrees solely for *punishment* purposes.<sup>58</sup> A defendant's age is determinative of his punishment for rape and, therefore, is an essential allegation in an indictment for first degree rape. Logic dictates that if a defendant's age is determinative of his punishment for sexual assault, it also should have been an essential allegation in the *Courtney* indictment for sexual assault if defendant was to be subjected to the possibility of a longer term of imprisonment.

The General Assembly, in apparent reaction to the *Perry* decision, enacted G.S. 15-144.1<sup>59</sup> to prescribe the essentials of bills of indictment for rape. The Act provides in essence, that the old form of indictment for rape is sufficient to support a verdict of guilty of first degree rape, rape in the second degree, assault with intent to commit rape or assault on a female.<sup>60</sup> Whether the Act comports with a defendant's right, guaranteed by the North Carolina Constitution, to be informed of the accusation against him is not clear.<sup>61</sup> Although the general rule in North Carolina is that an indictment for a statutory offense is sufficient if the crime is charged in the words of the statute, the rule is inapplicable when the words of the statute fail to set forth all of the crime's essential elements.<sup>62</sup>

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55. *Id.* at 456, 103 S.E.2d at 868. The offense of assault on a female presumes a defendant to be over 18 years of age, in the absence of evidence offered by the defendant to the contrary. *Id.* at 450-51, 103 S.E.2d at 864.

56. *Id.* at 450, 103 S.E.2d at 864.

57. *Id.* at 597, 231 S.E.2d at 269; see notes 34 & 48 *supra*.

58. N.C. GEN. STAT. § 14-21 (Cum. Supp. 1977) provides in pertinent part: "Every person . . . guilty of rape . . . shall be *punished* as follows: (1) First-Degree Rape—(a) . . . the punishment shall be death. (2) Second-Degree Rape . . . punished by imprisonment in the State's prison for life, or for a term of years, in the discretion of the court." *Id.* (emphasis added).

59. N.C. GEN. STAT. § 15-144.1 (Cum. Supp. 1977).

60. *Id.* § 15-144.1(a).

61. "In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation . . . ." N.C. CONST. art. I, § 23.

62. See *State v. Barnes*, 253 N.C. 711, 117 S.E.2d 849 (1961); 7 J. STRONG, N.C. INDEX *Indictment and Warrant* § 9, at 125 (3d ed. 1976).



Section 15-144.1 appears to be modeled after section 15-144 and section 15-172, which provide that the old form of indictment for murder,<sup>63</sup> used prior to the division of that crime into two degrees, is sufficient to support a verdict of guilty of first or second degree murder without allegations of deliberation or premeditation, essential elements of murder in the first degree.<sup>64</sup> Sections 15-144 and 15-172 have withstood numerous challenges to their constitutionality.<sup>65</sup> The old form of indictment for murder, however, may be distinguishable from the old form of indictment for rape with respect to their omitted essential elements. The old murder indictment alleged that the defendant killed with "malice aforethought," which appears to satisfy the omitted elements of deliberation and premeditation. There is no analogous provision in the old rape indictment from which one may infer a defendant's age.

### C. Safecracking

*State v. Thomas*<sup>66</sup> ultimately pitted Chief Justice against Chief Judge and General Assembly against supreme court in determining exactly what constitutes the crime of safecracking. Within a five month period in 1977 the North Carolina Supreme Court strictly construed, and the General Assembly broadened, the crime of safecracking. In *Thomas* the supreme court held that safecracking required the unlawful opening of a safe by the use of safecracking implements.<sup>67</sup> In apparent reaction to the *Thomas* decision, the General Assembly amended the safecracking statute to proscribe the unlawful opening of a safe by the use of any safecracking means.<sup>68</sup>

Defendant in *Thomas* opened a safe whose combination was partially dialed (for convenience) by dialing the last digit of the combination, and was convicted for felonious larceny and safecracking.<sup>69</sup> The court of appeals

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63. See, e.g., *State v. Arnold*, 107 N.C. 861, 11 S.E. 990 (1890).

64. N.C. GEN. STAT. §§ 15-144, -172 (1975).

65. See, e.g., *State v. Watkins*, 283 N.C. 17, 194 S.E.2d 800 (1973).

66. 292 N.C. 251, 232 S.E.2d 411 (1977).

67. Law of Apr. 19, 1973, ch. 235, § 1, 1973 N.C. Sess. Laws 1st Sess. 323 (formerly codified at N.C. GEN. STAT. § 14-89.1 (Cum. Supp. 1975)) (amended 1977), provided:

Any person who shall by the use of explosives, drills, or tools unlawfully force open or attempt to force open or "pick" the combination of a safe or vault used for storing money or other valuables, shall, upon conviction thereof, receive a sentence, in the discretion of the trial judge, of not less than two years nor more than 30 years in the State penitentiary.

68. N.C. GEN. STAT. § 14-89.1(a) (Cum. Supp. 1977) provides in pertinent part:

A person is guilty of safecracking if he unlawfully opens, enters, or attempts to open or enter a safe or vault: (1) By the use of explosives, drills, or tools; or (2) Through the use of a stolen combination, key, electronic device, or other fraudulently acquired implement or means; or (3) Through the use of a master key, duplicate key or device made or obtained in an unauthorized manner, stethoscope or other listening device, electronic device used for unauthorized entry in a safe or vault, or other surreptitious means; or (4) By the use of any other safecracking implement or means.

69. 292 N.C. at 252, 232 S.E.2d at 413.

vacated the safecracking conviction for lack of evidence that some sort of safecracking implement was employed to pick or force open the safe.<sup>70</sup> Chief Judge Brock dissented, advocating a sufficiently broad definition of the verb "pick" to cover defendant's act and contending that the majority holding misconstrued and unduly limited the statute's intended purpose—to protect the property secured in a safe.<sup>71</sup>

Chief Justice Sharp, writing for the *Thomas* court, strictly construed the safecracking statute and affirmed the court of appeals' majority decision. Citing dictionary definitions of the verb "pick"<sup>72</sup> and utilizing traditional rules of grammatical and statutory construction, the court held that in order to pick a safe under the statute<sup>73</sup> one had to use "explosives, drills, or tools."<sup>74</sup> As the Chief Justice seemed to recognize, the safecracking statute, given the severity of its penalty,<sup>75</sup> was intended to punish a certain type of criminal: one with the expertise to pick or the preparation to force open a safe. Defendant in *Thomas* was not such a criminal.<sup>76</sup>

Shortly after the *Thomas* decision, the General Assembly broadened the scope of safecracking to cover the unlawful opening of a safe "[b]y the use of any . . . safecracking implement or means."<sup>77</sup> It remains unclear, however, whether defendant's act in *Thomas* would fall within the expanded scope of the statute. The statute is silent on whether the combination dial on a safe is a type of safecracking implement, or whether the mere turning of the combination dial to a position that allows the door to be opened constitutes a means of safecracking. The timing of the amendment in relation to the *Thomas* decision, however, provides a strong inference of a legislative intent to proscribe such action under the amended statute.

#### D. Habitual Offenders

The purpose of recidivist statutes is to provide enhanced punishment for those convicted of a crime who have previously been convicted of other

70. 31 N.C. App. 52, 228 S.E.2d 468 (1976), discussed in 55 N.C.L. REV. 976, 977 (1976).

71. *Id.* at 57, 228 S.E.2d at 470 (Brock, C.J., dissenting). Chief Judge Brock condemned the majority's attempt to ascribe to the General Assembly "an intent to punish for damage to the safe." *Id.*

72. The supreme court cited the definitions of the transitive verb "pick" in WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1951): "to open (a lock) by or as by a wire," and in the "more casual" WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1971): "to turn (a lock) with a wire or a pointed tool instead of the key esp. with intent to steal." 292 N.C. at 254, 232 S.E.2d at 414.

73. See note 67 *supra*.

74. 292 N.C. at 253-54, 232 S.E.2d at 413-14.

75. N.C. GEN. STAT. § 14-89.1(c) (Cum. Supp. 1977), provides: "Safecracking is a felony punishable by imprisonment for a term of not less than two nor more than 30 years."

76. Defendant in *Thomas* "demonstrated neither particular preparation nor prowess." 292 N.C. at 254, 232 S.E.2d at 414.

77. N.C. GEN. STAT. § 14-89.1(a)(4) (Cum. Supp. 1977). Compare note 67 *supra* (quoting pre-amendment statute) with note 68 *supra* (quoting post-amendment statute).

crimes.<sup>78</sup> In *State v. Allen*,<sup>79</sup> the North Carolina Supreme Court held that a proceeding under the Habitual Felons Act<sup>80</sup> (the Act) must be attached to a pending felony prosecution and cannot be brought subsequent to the felony conviction. As the Act also provides that the substantive guilt must be tried separately from the recidivist issue,<sup>81</sup> the court thus confirmed that the legislature intended to adopt the two-pronged procedure recommended by most modern authorities.<sup>82</sup>

Defendant in *Allen* pleaded guilty at different times to three successive felonies; each felony was committed after conviction for the prior one, thus satisfying the requirements of the Act.<sup>83</sup> Allen had been sentenced on all three of these convictions when the State indicted, tried and obtained a conviction under the Habitual Felons Act. He was then sentenced to an additional twenty years. On appeal, the court reversed Allen's conviction, holding that the Act does not authorize such a proceeding after all the underlying felony prosecutions have been completed and that defendant's motion to dismiss the indictment should, therefore, have been allowed.<sup>84</sup>

In seeking the recidivist conviction, the State relied on language in the Act stating that the indictment charging the habitual felon status "shall be separate from the indictment charging him with the principal felony" and that the issue "may be presented to the same jury."<sup>85</sup> The court summarily dismissed this argument as missing the point of the Act.<sup>86</sup> The court noted that there are three basic types of multiple offender procedures:<sup>87</sup> (1) the same jury simultaneously tries the substantive offense and the recidivism issue;<sup>88</sup> (2) the habitual felon charge is filed after the completion of the underlying felony prosecution;<sup>89</sup> and (3) the indictment is separated into two parts, one charging the recidivist status and one charging the substantive crime. The third type provides defendants with the greatest amount of

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78. See, e.g., *Spencer v. Texas*, 385 U.S. 554, 556 (1967). See generally Note, *Recidivist Procedures*, 40 N.Y.U.L. REV. 332 (1965).

79. 292 N.C. 431, 233 S.E.2d 585 (1977).

80. N.C. GEN. STAT. §§ 14-7.1 to .6 (1969 & Cum. Supp. 1977).

81. *Id.* § 14-7.5 (1969).

82. See, e.g., *Spencer v. Texas*, 385 U.S. 554, 567-68 (1967); Note, *supra* note 78, at 348; Note, *New Jersey's Habitual Criminal Act*, 11 RUTGERS L. REV. 654, 667-68 (1957). See also, e.g., *Frady v. United States*, 348 F.2d 84, 114-15 (D.C. Cir.) (Burger, J., concurring and dissenting), cert. denied, 382 U.S. 909 (1965); Note, *Executive Clemency in Capital Cases*, 39 N.Y.U.L. REV. 136, 167 (1964).

83. N.C. GEN. STAT. § 14-7.1 (Cum. Supp. 1977).

84. 292 N.C. at 432, 436, 233 S.E.2d at 586, 589.

85. *Id.* at 435, 233 S.E.2d at 588 (emphasis omitted).

86. *Id.* at 436, 233 S.E.2d at 588.

87. *Id.* at 434, 233 S.E.2d at 587-88; see Note, *supra* note 78.

88. This type of proceeding withstood constitutional attack in *Spencer v. Texas*, 385 U.S. 554 (1967).

89. See, e.g., *State v. Bell*, 324 So. 2d 451 (La. 1975); LA. REV. STAT. ANN. § 15:529.1 (West 1967). This type of proceeding withstood constitutional attack in *Oyler v. Boles*, 368 U.S. 448 (1962).

protection. Unlike the second type, it ensures that defendants are fully informed of the charge and potential sentence before they plead.<sup>90</sup> The third procedure also provides more protection than the first in that the jury trying substantive guilt is not influenced by a defendant's prior record.

A careful reading of the Habitual Felons Act shows that North Carolina chose this third procedure. G.S. 14-7.3 states that "[a]n indictment which charges a person . . . with the commission of any felony . . . must, in order to sustain a conviction of habitual felon, also charge that said person is an habitual felon."<sup>91</sup> G.S. 14-7.5 provides that when a defendant is indicted for both a felony and for being an habitual felon, he shall be tried for the felony without the indictment charging him with being an habitual felon being revealed to the jury until the issue of substantive guilt has been determined. For the convenience of the court, the same jury may then be used to decide the habitual felon charge, but the subsequent proceeding "shall be as if the issue of habitual felon were a principal charge."<sup>92</sup> Thus both protections for the defendant are contained in the Act.

The rationale underlying habitual felon statutes is that a defendant's prior conduct justifies increased punishment.<sup>93</sup> The supreme court's interpretation of the North Carolina statute in *Allen*, however, reflects an awareness that recidivism is for all practical purposes being treated as a crime distinct from the underlying felony.<sup>94</sup>

### E. Double Jeopardy

The North Carolina Supreme Court in *State v. McKenzie*<sup>95</sup> expressly recognized for the first time the application of the doctrine of collateral estoppel<sup>96</sup> in criminal proceedings.<sup>97</sup> In *McKenzie*, the court held that a defendant's acquittal "precludes the state from relitigating in a subsequent

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90. Failure to provide this notice when a guilty plea on a substantive crime is accepted may well vitiate the guilty plea as not being made with full understanding of the consequences. Note, *supra* note 78, at 348. The same notice requirements prevail with jury verdicts because the statute makes no distinction between guilty pleas and jury verdicts of guilt. 292 N.C. at 436, 233 S.E.2d at 588 (citing *United States v. Edwards*, 379 F. Supp. 617 (M.D. Fla. 1974)). But see *Oyler v. Boles*, 368 U.S. 448, 452 (1962) (holding that since the two determinations are essentially independent, "due process does not require advance notice that the trial on the substantive offense will be followed by an habitual criminal proceeding").

91. N.C. GEN. STAT. § 14-7.3 (1969).

92. *Id.* § 14-7.5.

93. 292 N.C. at 435, 233 S.E.2d at 588.

94. See Note, *supra* note 78, at 350.

95. 292 N.C. 170, 232 S.E.2d 424 (1977).

96. "'Collateral estoppel' . . . stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443 (1970).

97. Although the North Carolina Supreme Court apparently recognized the doctrine of collateral estoppel in *State v. Midgett*, 214 N.C. 107, 198 S.E. 613 (1938), the court actually held that the doctrine did not apply to the facts of that case, *id.* at 111, 198 S.E. at 615.

prosecution any issue *necessarily* decided in favor of the defendant in the former acquittal."<sup>98</sup> North Carolina, therefore, joins a growing number of jurisdictions applying the doctrine of collateral estoppel in criminal proceedings.<sup>99</sup>

Although defendant in *McKenzie* was originally charged in district court with operating a vehicle on the public highway while under the influence of intoxicating liquor in violation of G.S. 20-138(a),<sup>100</sup> he was convicted of the lesser included offense of operating a motor vehicle with a blood alcohol content of .10%<sup>101</sup> in violation of G.S. 20-138(b).<sup>102</sup> On appeal to superior court for trial de novo, defendant's case was consolidated for trial with an outstanding manslaughter indictment against him arising from the same incident. The jury returned a verdict of guilty on both charges.<sup>103</sup> The court of appeals affirmed, holding that defendant's acquittal of driving under the influence in district court did not bar the superior court from instructing the jury that a violation of that offense could be a basis for convicting defendant of involuntary manslaughter, provided that there was evidence that defendant was driving under the influence at the time in question.<sup>104</sup> The supreme court disagreed, but affirmed on the ground that defendant's failure to raise his district court acquittal in superior court constituted a waiver of the double jeopardy defense he would otherwise have had.<sup>105</sup>

There is a considerable degree of conflict among jurisdictions regarding whether a conviction or acquittal in an inferior court having no jurisdiction over a greater charge bars a subsequent prosecution in a superior

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98. 292 N.C. at 175, 232 S.E.2d at 428.

99. See Annot., 9 A.L.R.3d 203, 228-33 (1966).

100. N.C. GEN. STAT. § 20-138(a) (1975). The offense of driving under the influence of intoxicating liquor consists of three elements: (1) driving a vehicle; (2) upon a highway within the state; (3) while under the influence of intoxicating liquor. *State v. Kellum*, 273 N.C. 348, 349, 160 S.E.2d 76, 77 (1968) (per curiam); *State v. Haddock*, 254 N.C. 162, 165, 118 S.E.2d 411, 413 (1961).

101. 292 N.C. at 172, 232 S.E.2d at 426. Defendant's conviction of driving with the proscribed blood alcohol content level constituted an acquittal in the district court of driving under the influence. See *State v. Miller*, 272 N.C. 243, 246, 158 S.E.2d 47, 49 (1967); *State v. Broome*, 269 N.C. 661, 666, 153 S.E.2d 384, 387 (1967); N.C. GEN. STAT. § 15-170 (1975).

102. N.C. GEN. STAT. § 20-138(b) (1975). A violator of subsection (b) is eligible for limited driving privileges. *Id.* § 20-179(b) (Cum. Supp. 1977).

103. 292 N.C. at 172, 232 S.E.2d at 426.

104. *State v. McKenzie*, 29 N.C. App. 524, 528, 225 S.E.2d 151, 154 (1976), discussed in 55 N.C.L. REV. 976, 984 (1976). Judge Hedrick wrote the majority opinion, in which Chief Judge Brock concurred; Judge Clark dissented. Judge Clark relied on *State v. Heitter*, 57 Del. 595, 203 A.2d 69 (1964), in his dissenting opinion. See 29 N.C. App. at 529, 225 S.E.2d at 154. Defendant in *Heitter* was acquitted by a justice of the peace of two statutory misdemeanors of reckless driving and driving while intoxicated. The *Heitter* court held that defendant's acquittal was res judicata to a prosecution for manslaughter upon counts in the indictment alleging the same acts. 57 Del. at 601, 203 A.2d at 72.

105. 292 N.C. at 172, 232 S.E.2d at 426; see *State v. Baldwin*, 226 N.C. 295, 37 S.E.2d 898 (1946).

court on the greater charge when both offenses arose out of the same occurrence. The apparent majority view is that a defendant's prior acquittal or conviction on a lesser included or minor offense in a court with no jurisdiction over the greater offense subsequently charged against that defendant does not bar a subsequent prosecution in another court with jurisdiction over the greater offense.<sup>106</sup> The basic rationale supporting this view is that the inferior court's lack of jurisdiction over the subsequently charged offense prevents jeopardy from attaching.<sup>107</sup>

Until *McKenzie*, North Carolina courts adhered to the majority view on this issue.<sup>108</sup> In *State v. Midgett*,<sup>109</sup> defendant was acquitted in recorder's court of drunken and reckless driving, but was convicted in superior court of manslaughter. Both offenses arose from the same factual situation.<sup>110</sup> On appeal, the North Carolina Supreme Court affirmed the lower court, holding that defendant's acquittal in recorder's court did not bar his subsequent conviction in superior court on the grounds that: (1) the offenses were not the same; (2) one was not a lesser included degree of the other; (3) different proof was required in each prosecution; and (4) the jeopardy incident to the trial in the inferior court did not extend to an offense beyond its jurisdiction.<sup>111</sup> Thus, *McKenzie* casts serious doubt about the continued vitality of the *Midgett* court's decision.

Justice Exum, writing for the *McKenzie* court, relied on *Ashe v. Swenson*,<sup>112</sup> in which the United States Supreme Court held that an alleged robber of six poker players, tried on one count of robbery and acquitted for insufficient evidence, could not be subsequently prosecuted by the other players without violating the fifth amendment's guarantee against double jeopardy.<sup>113</sup> Narrowly interpreted, however, *Ashe* does not compel the *McKenzie* holding because defendant's acquittal of robbery in *Ashe* merely barred a subsequent prosecution for robbery based on the same occurrence: offenses that were identical in nature and were to be tried in the same

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106. Annot., 4 A.L.R.3d 874, 880 n.2 (1965).

107. *Id.* at 880.

108. See *State v. Birkhead*, 256 N.C. 494, 124 S.E.2d 838 (1964); *State v. Midgett*, 214 N.C. 107, 198 S.E. 613 (1938); *State v. Albertson*, 113 N.C. 633, 18 S.E. 321 (1893); *State v. Huntley*, 91 N.C. 617 (1884).

109. 214 N.C. 107, 198 S.E. 613 (1938).

110. *Id.* at 108, 198 S.E. at 613-14.

111. *Id.* at 109-11, 198 S.E. at 615.

112. 397 U.S. 436 (1970).

113. See *id.* at 445-47. In *Ashe* the Supreme Court held that the "established rule of federal law [of collateral estoppel] is embodied in the Fifth Amendment guarantee against double jeopardy," which is enforceable against the states through the fourteenth amendment. *Id.* at 445 (citing *Benton v. Maryland*, 395 U.S. 784 (1969)). The *Ashe* Court concluded that "[t]he single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not. The federal rule of law, therefore, would make a second prosecution for the robbery . . . wholly impermissible." *Id.* at 445.

tribunal. Defendant in *McKenzie* was subsequently prosecuted on a greater charge and in a higher trial court. The *McKenzie* decision, though, conforms to the general policy asserted in *Ashe* that "the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality."<sup>114</sup> Apparently recognizing the illogical result of permitting defendant in *McKenzie* to be convicted of manslaughter based upon a violation of a statute for which defendant had previously been acquitted, Justice Exum's conclusion represents a rational extension of the doctrine of collateral estoppel.

The factual situation in *McKenzie*, however, creates the prospect of conflict between collateral estoppel and trial de novo. The doctrine of collateral estoppel is based on the principle that an issue of ultimate fact cannot be relitigated between the same parties in any subsequent lawsuit once it has been determined by a valid and final judgment.<sup>115</sup> Conversely, "[t]he trial de novo represents a completely fresh determination of guilt or innocence. It is not an appeal on the record. . . . [T]he record from the lower court is not before the superior court and is irrelevant to its proceedings."<sup>116</sup> The *McKenzie* court, although willing to accord finality to defendant's acquittal in district court of driving under the influence in accordance with the doctrine of collateral estoppel, appears willing to allow defendant to relitigate his conviction in district court for driving with the proscribed blood alcohol content level in accordance with defendant's right to a trial de novo. Logical consistency, however, would bar defendant from relitigating his district court conviction upon the assertion of his double jeopardy defense in superior court. On the other hand, the principle behind the trial de novo would bar defendant from asserting his district court acquittal upon the exercise of his right to a trial de novo in the superior court. The supreme court appears willing to allow defendants to enjoy the benefits of both collateral estoppel and trial de novo. The *McKenzie* court's application of collateral estoppel in conjunction with the trial de novo is questionable.

#### F. Presumption of Compulsion

In the recent case of *State v. Smith*,<sup>117</sup> the North Carolina Court of

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114. *Id.* at 444.

115. See note 96 *supra*.

116. *State v. Brooks*, 287 N.C. 392, 405, 215 S.E.2d 111, 121 (1975) (quoting *Colten v. Kentucky*, 407 U.S. 104, 117-18 (1972)). See also N.C. GEN. STAT. § 7A-290 (Cum. Supp. 1977); 4 J. STRONG, *supra* note 62, *Criminal Law* § 18.4.

117. 33 N.C. App. 511, 235 S.E.2d 860, *appeal dismissed, cert. denied*, 293 N.C. 364, 237 S.E.2d 851 (1977).

Appeals announced that when presented with a proper case, it will abolish the presumption that a wife who commits a crime in the presence of her husband does so under compulsion.<sup>118</sup> Although various justifications for this presumption have been offered over the years,<sup>119</sup> "[t]he trend against it is so obvious and so persistent as to forecast its eventual disappearance."<sup>120</sup> In light of *Smith*, North Carolina is now apparently ready to join this trend.<sup>121</sup>

In *Smith*, a wife, her husband and another couple were convicted of breaking and entering and larceny. The evidence revealed that the two men broke into a house while the two women drove up and down an adjoining road. After the men returned to the road and were picked up by the women, they loaded the car with the stolen goods.<sup>122</sup> At trial, defendant-wife made no request for instructions on the presumption of compulsion, instead testifying that she and her husband had nothing to do with the planning or execution of the robbery. In light of this stance, the court of appeals held that defendant was not entitled to the presumption,<sup>123</sup> even if it had not "outlived its necessity and usefulness."<sup>124</sup>

In concluding that the presumption should not be applied in the future, the court relied on a simple historical analysis. The court noted that the presumption became incorporated into the common law at a time when women had almost no rights and when the wife's legal existence was almost completely suspended and incorporated into that of the husband.<sup>125</sup> Actually, the presumption first arose at common law as a result of a man's right to the "benefit of clergy" if he could read. This fictional association with the clergy often enabled men to escape capital punishment. Since women could not be clergy, however, they could not avail themselves of the benefit. Thus, without the presumption of compulsion, if a husband and wife committed the same crime, the wife could be sentenced to death while the

118. *Id.* at 518, 235 S.E.2d at 865.

119. These justifications include the legal identity of husband and wife, the duty of obedience, the status of the wife as a servant and the power and dominion of the husband over the wife. See R. PERKINS, CRIMINAL LAW 910 (2d ed. 1969).

120. *Id.* at 915; see, e.g., *Commonwealth v. Barnes*, — Mass. —, —, 340 N.E.2d 863, 867 (1976) (finally laying "this ghost to rest" after first having questioned it 50 years earlier). See also *United States v. Dege*, 364 U.S. 51, 54-55 (1960) ("[W]e cannot infuse into the conspiracy statute a fictitious attribution to Congress of regard for the medieval notion of woman's submissiveness to the benevolent coercive powers of a husband in order to relieve her of her obligation of obedience to an unqualifiedly expressed Act of Congress . . .").

121. See Note, *Criminal Law—Presumption of Coercion—Crimes Committed by Wife in Husband's Presence*, 35 N.C.L. REV. 104 (1956), for a general review of how the various jurisdictions have dealt with this presumption.

122. 33 N.C. App. at 512-13, 235 S.E.2d at 862.

123. *Id.* at 520, 235 S.E.2d at 866.

124. *Id.* at 528, 235 S.E.2d at 865.

125. *Id.* at 517, 235 S.E.2d at 864.



husband might receive only a minor penalty such as branding the thumb and imprisonment for one year.<sup>126</sup>

As is often the case, long after the reason for a rule at common law has disappeared, the rule remains.<sup>127</sup> As stated by Chief Justice Clark in 1911, "[T]hat presumption does not comport with Twentieth Century conditions. The contention that a wife has no more intelligence or responsibility than a child is now out of date. No one believes it."<sup>128</sup> Although the North Carolina Supreme Court reversed a trial court for failure to instruct on this presumption in 1956 in a prosecution for aiding and abetting in a felonious assault in a wife's presence,<sup>129</sup> the court of appeals has finally realized that "it is simply unrealistic to presume that crimes committed by a wife in the presence of her husband were executed under his dominion and control."<sup>130</sup>

The statement by the court in *Smith* does not mean, however, that a wife may never be coerced by her husband into committing an illegal act. The court properly noted that wives are now subject to the same burden of proof as anyone else claiming coercion.<sup>131</sup> They simply can no longer claim the right to a medieval presumption that they were coerced by their husbands.

MICHAEL MORRIE JONES

RICHARD P. LEVI

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126. "Benefit of clergy" refers to the common law rule that any clergy charged with a crime in the lay courts had merely to assert his "benefit of clergy" in order to have his case transferred to the ecclesiastical court, where he would rarely fail to clear himself. This privilege was gradually extended to secular clerks who assisted the clergy in the services of the church, but as the lay courts grew in prestige the time came when the privilege could only be claimed by one who had confessed the felony or been convicted by verdict. By pleading benefit of clergy, although defendant's goods were forfeited to the crown, he could avoid capital punishment. In order to counteract the severity of the penal system and the great number of offenses punishable by death, this benefit was extended to every man who could read regardless of whether he was actually ordained. It was not extended to women, however, because they were incapable of being ordained. Thus, the presumption of compulsion arose to protect women who had done no more than their pardoned husbands. R. PERKINS, *supra* note 119, at 911-12. See also Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 1011-13 (1932); Note, *supra* note 121, at 104 n.2.

127. For an argument that the rule remains for logical reasons, see Commonwealth v. Jones, 1 Pa. D. & C. 2d 269 (Lehigh County Ct. 1954).

We recognize that many jurisdictions have abandoned the rule . . . but we are not impressed by the reasons given. . . . Granting that the original actual reasons for the rule are no longer valid, the rule would not have survived so long had it not appealed to some new reason, which we are convinced is human experience of the wife's tendency to follow her husband's bidding.

[W]e have not yet reached the point where we decry the nobility, dignity or grace of a wife's deference to her husband's desires. Chivalry alone would call for this explanation of a married woman's participation in her husband's crime.

*Id.* at 274-75.

128. State v. Seahorn, 166 N.C. 373, 378, 81 S.E. 687, 689 (1911) (Clark, C.J., concurring).

129. State v. Cauley, 244 N.C. 701, 94 S.E.2d 915 (1956).

130. 33 N.C. App. at 518, 235 S.E.2d at 865.

131. *Id.*

## VI. CRIMINAL PROCEDURE

## A. Searches and Seizures

## 1. Search Incident to Arrest

In two cases the North Carolina Court of Appeals examined the search incident to a valid arrest exception to the general requirement that a valid search warrant is required to make a search reasonable. The court in *State v. Williams*<sup>1</sup> invalidated the search because the arrest had been improper, and also articulated the rights of one faced with an illegal arrest to avoid that arrest. On the other hand, in *State v. Wooten*,<sup>2</sup> the court, examining the reasons for the exception, expanded its scope to include some searches that take place prior to the arrest.<sup>3</sup>

In North Carolina the right to resist an unlawful arrest is well established.<sup>4</sup> Although the right to flee from such an arrest would seem to be a logical extension of that right, *State v. Williams* is the first North Carolina case to so hold.<sup>5</sup> In *Williams* the court of appeals held that defendant had a right to flee an unlawful arrest, and that his flight could not be used as a factor in assessing probable cause for a subsequent warrantless arrest.<sup>6</sup> The arresting officer saw defendant meet an unidentified male in an area of substantial drug traffic. Defendant joined hands with the unidentified male and put his hand in his left coat pocket and then withdrew it. The officer

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1. 32 N.C. App. 204, 231 S.E.2d 282, *appeal dismissed*, 292 N.C. 470, 233 S.E.2d 924 (1977).

2. 34 N.C. App. 85, 237 S.E.2d 301 (1977).

3. Most search and seizure cases before the North Carolina Supreme Court and Court of Appeals during 1977 involved warrantless searches. In *State v. Flynn*, 33 N.C. App. 492, 235 S.E.2d 424, *cert. denied*, 293 N.C. 255, 236 S.E.2d 708 (1977), however, the court of appeals considered a charge that a search warrant was invalid because the magistrate's signature was omitted from the jurat of the affidavit on which the warrant was issued. N.C. GEN. STAT. § 15A-244 (1975) provides that "[e]ach application for a search warrant must be made in writing upon oath or affirmation." The trial court found that the affiant was sworn to the affidavit and that the magistrate's signature was omitted by inadvertence. 33 N.C. App. at 493, 235 S.E.2d at 425. The court of appeals accepted these findings and ruled that the search was proper. *Cf. State v. Brannon*, 25 N.C. App. 635, 214 S.E.2d 213, *cert. denied, appeal dismissed*, 287 N.C. 665, 216 S.E.2d 908 (1975), *cert. denied*, 423 U.S. 1086 (1976) (even though search warrant was signed before affidavit, warrant was proper when trial judge found on competent evidence that warrant was issued upon probable cause as set out in affidavit).

4. *E.g.*, *State v. Mobley*, 240 N.C. 476, 83 S.E.2d 100 (1954).

5. In *State v. Borland*, 21 N.C. App. 559, 205 S.E.2d 340 (1974), the court upheld defendant's right to flee an attempted arrest, but *Borland* differed from the instant case in several aspects. In *Borland* a deputy sheriff in an unmarked car (without siren or blue light) attempted to make defendants, who were driving at a proper speed, pull over. Defendants did not know that their pursuer was a law officer or that he was attempting to arrest them and reasonably thought that they were being attacked. In *Williams* the officer identified himself to defendant and made his intention to arrest defendant obvious. 32 N.C. App. at 206-07, 231 S.E.2d at 284; *see* text accompanying notes 12-14 *infra*.

6. 32 N.C. App. at 208, 231 S.E.2d at 284-85.

stopped defendant, identified himself as a police officer and asked defendant for identification. After defendant stated that he had none, the officer told him that he had reason to believe that defendant had drugs on his person and ordered him to face the wall and assume a position for frisking. Defendant ran but was caught, arrested and searched. Marijuana was found and defendant, upon denial of his motion to suppress the evidence, pleaded guilty to possession.<sup>7</sup>

The State justified the warrantless search as incident to a valid arrest.<sup>8</sup> The trial court adopted this theory, finding that defendant was arrested after the chase and that there was probable cause for the arrest.<sup>9</sup> The court of appeals reversed, holding that the officer did not have probable cause for an arrest when he stopped defendant<sup>10</sup> and that the circumstances did not justify a "stop and frisk."<sup>11</sup> Although the officer could have approached and temporarily detained defendant for "purposes of investigating his possible criminal behavior,"<sup>12</sup> he resorted instead to "aggressive and unlawful behavior,"<sup>13</sup> which constituted an attempt to arrest defendant.<sup>14</sup> The court held that defendant had a right to flee from such an unlawful arrest.<sup>15</sup> Moreover, defendant's flight in this situation could not "be added to other relevant facts to give the officer probable cause for making a warrantless arrest"<sup>16</sup> because the court found that the unlawful arrest was the direct and

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7. *Id.* at 205-07, 231 S.E.2d at 283-84.

8. *Id.* at 206, 231 S.E.2d at 283.

9. *Id.* at 207, 231 S.E.2d at 284.

10. *Id.*

11. *Id.* The court noted that "[t]he frisk incident to a field interrogation must be based upon circumstances from which it can reasonably be inferred that the individual was armed and dangerous." *Id.* (citing *Sibron v. New York*, 392 U.S. 40 (1968)). In *Sibron v. New York* the United States Supreme Court noted that "[t]he suspect's mere act of talking with a number of known narcotics addicts over an eight-hour period no more gives rise to reasonable fear of life or limb on the part of the police officer than it justifies an arrest for committing a crime." 392 U.S. at 64.

In *State v. Streeter*, 283 N.C. 203, 195 S.E.2d 502 (1973), the North Carolina Supreme Court held that the lack of a "stop and frisk statute" does not prevent law enforcement officers in North Carolina from stopping suspicious persons for questioning and searching those persons for dangerous weapons. *Id.* at 209, 195 S.E.2d at 506. It is, however, necessary under *Terry v. Ohio*, 392 U.S. 1 (1968) (decided same day as *Sibron*), that the officer have "reason to believe that he is dealing with an armed and dangerous individual," and in determining the reasonableness of the officer's belief "due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Id.* at 27.

12. 32 N.C. App. at 207, 231 S.E.2d at 284. The court does not reveal the permissible scope of the investigation. It seems clear that the officer could stop and question the suspect. If, during questioning, the suspect should attempt to flee, the flight would become a relevant factor in assessing probable cause for an arrest. See note 18 and accompanying text *infra*.

13. 32 N.C. App. at 207, 231 S.E.2d at 284.

14. *Id.* at 207-08, 231 S.E.2d at 284.

15. *Id.* at 208, 231 S.E.2d at 284.

16. *Id.* at 208, 231 S.E.2d at 285; see *Wong Sun v. United States*, 371 U.S. 471, 482-84 (1962).

proximate cause of the flight.<sup>17</sup> If defendant had fled when the officer approached and identified himself, but before he resorted to aggressive and unlawful behavior, flight would have been a proper factor to consider in assessing probable cause for the subsequent arrest.<sup>18</sup> The officer in *Williams* possibly could have determined from proper questioning that defendant was in possession of marijuana,<sup>19</sup> but his overzealous actions went beyond the proper limits of law enforcement activity.

In *State v. Wooten*,<sup>20</sup> the court of appeals ruled for the first time that a search could be justified as incident to a valid arrest even though the search took place before the arrest.<sup>21</sup> In *Wooten* the police had information from a reliable informant that defendant possessed heroin. An officer approached defendant in a parking lot, informed him that he had probable cause to search defendant for heroin and frisked him. The frisk yielded a pistol but no drugs. Defendant was placed under arrest for carrying a concealed weapon and taken to the police station where the police conducted a more thorough search. After the latter search, defendant was charged with possession of heroin.<sup>22</sup> The court of appeals found that the officer had probable cause to arrest defendant and that therefore the officer could search him incident to a valid arrest.<sup>23</sup> Defendant contended that the search in the parking lot occurred before he was arrested and was therefore not "incident to an arrest."<sup>24</sup> The court ruled that

where a search of a suspect's person occurs before instead of after formal arrest, such search can be equally justified as "incident to the arrest" provided probable cause to arrest existed prior to the search and it is clear that the evidence seized was in no way necessary to establish the probable cause.<sup>25</sup>

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17. 32 N.C. App. at 208, 231 S.E.2d at 285.

18. *State v. Harrington*, 17 N.C. App. 221, 193 S.E.2d 294 (1972), *aff'd*, 283 N.C. 527, 196 S.E.2d 742 (1973), was distinguished from the *Williams* situation. In *Harrington* officers approached defendant in a dinette. They identified themselves and asked defendant if he would come outside and talk to them. He agreed, but ran away when he got outside. The court held that since there was no manual touching or seizure and the officers had not intended to arrest defendant in the dinette, that flight could be considered in assessing probable cause to arrest. *Id.* at 223-25, 193 S.E.2d at 297.

19. 32 N.C. App. at 207, 231 S.E.2d at 284.

20. 34 N.C. App. 85, 237 S.E.2d 301 (1977).

21. *Id.* at 89-90, 237 S.E.2d at 305.

22. *Id.* at 86-87, 237 S.E.2d at 303.

23. *Id.* at 88-89, 237 S.E.2d at 304.

24. *Id.* at 89, 237 S.E.2d at 305.

25. *Id.* The court noted that there was authority in this state to find a prior arrest (prior to the search) notwithstanding the absence of a formal declaration of arrest and despite the testimony of the officer that defendant was not under arrest at the time. See *State v. Jackson*, 280 N.C. 122, 125, 185 S.E.2d 202, 204 (1971); *State v. Tippet*, 270 N.C. 588, 596, 155 S.E.2d 269, 275 (1967). The court, however, declined to rely on that line of authority. 34 N.C. App. at 89, 237 S.E.2d at 304-05.

The court recognized that the justification for a search incident to an arrest is the "need for immediate action to protect the arresting officer from the use of weapons and to prevent destruction of evidence of the crime."<sup>26</sup> These considerations, according to the court, are rendered no less important by postponement of the arrest.<sup>27</sup>

Although *Wooten* is the first North Carolina case to hold specifically that a search prior to an arrest can be valid as incident to an arrest, federal precedent has long supported such a result.<sup>28</sup> As the result in *Wooten* could have been reached on other grounds more firmly rooted in North Carolina case law, such as manipulating the time of arrest,<sup>29</sup> the court's holding is apparently an attempt to open a new avenue of analysis for similar fact situations. This opening may have been made to free courts from the necessity of resorting to strained interpretations of arrest situations in order to justify a search as incident to an arrest.<sup>30</sup>

## 2. Plain View

In *State v. Blackwelder*,<sup>31</sup> the court of appeals circumscribed the power of law enforcement officers to stop suspects and conduct searches of their vehicles under the Motor Vehicle Act<sup>32</sup> by limiting the scope of the "plain view" exception to the fourth amendment's warrant requirement. In

26. 34 N.C. App. at 89-90, 237 S.E.2d at 305.

27. *Id.*

28. See cases cited at 34 N.C. App. at 90, 237 S.E.2d at 305. *United States v. Skinner*, 412 F.2d 98 (8th Cir.), *cert. denied*, 396 U.S. 967 (1969), is a good example of the approach the federal courts have taken to the *Wooten*-type situation. In that case the Eighth Circuit held that where the government sustains its burden of proving that a police officer had probable cause for arresting a suspect . . . and where it is clear that evidence seized in a contemporaneous search . . . was in no way necessary to establish probable cause, the search is incidental to the arrest. The search is valid whether it took place moments before or moments after [the arrest].

*Id.* at 103.

29. See note 25 *supra*.

30. In *United States v. Skinner*, 412 F.2d 98 (8th Cir.), *cert. denied*, 396 U.S. 967 (1969), the court said:

In our view, the announced rule [that a search before an arrest may be incident to an arrest] protects the rights of accuseds and provides a non-technical standard for police to follow. It permits trial courts and reviewing courts to determine whether a search is incidental to a valid arrest by objective standards. It relieves the courts in the proper case of the difficult task of determining the moment at which an arrest takes place, and the even more difficult task of determining the moment at which a police officer intended to make an arrest.

*Id.* at 103-04.

Application of the *Wooten* analysis should yield the same results as the line of cases that found that an arrest can take place prior to a formal declaration of arrest. See note 25 *supra*. Under either analysis the crucial factors are that the officer have probable cause to make an arrest and that the search be "substantially contemporaneous with the arrest" so as to be "incident to an arrest." *Stoner v. California*, 376 U.S. 483, 486 (1964).

31. 34 N.C. App. 352, 238 S.E.2d 190 (1977).

32. N.C. GEN. STAT. §§ 30-39 to -183 (1975 & Cum. Supp. 1977).

*Blackwelder*, law enforcement officers spotted and followed a car that had been involved in a narcotics transaction two nights before. The officers observed, however, that the operator of the car on the night of the narcotics transaction was not then in the car. When the officers attempted to stop the car they observed some "commotion" inside and saw the driver lean or bend down. One officer went to the door and pulled defendant out even though the officer knew that he was neither the person sought nor the registered owner of the car. The officer then went back to the car, reached under the seat and picked up a plastic box containing LSD tablets. He arrested defendant for felonious possession.<sup>33</sup>

The State contended that the officer had the power to stop the vehicle and remove defendant pursuant to the Motor Vehicle Act<sup>34</sup> and that the box was seized legally under the plain view exception.<sup>35</sup> The court of appeals rejected the State's contention that the plain view exception rendered the seizure of the box legal,<sup>36</sup> apparently on the basis that the officer had no "right to be there."<sup>37</sup> A small box under the seat of a car would be in plain view only if the officer had the right to be looking under the seat; usually such a view would result only from making a general exploratory search of the interior of the vehicle. Thus, the rejection of the State's plain view theory rests on a rejection of the right of the officer to remove defendant from the car and to conduct such an intrusive search. The court held that the power to stop under the Motor Vehicle Act does not include the power to search.<sup>38</sup> Since the officer, after making the stop, had no independent grounds for a search,<sup>39</sup> his subsequent search was unlawful.

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33. 34 N.C. App. at 353-54, 238 S.E.2d at 191. The trial court found that there had been no probable cause to stop the car and remove defendant and search. Thus, the LSD evidence was ordered suppressed. The State appealed from that order to bring the case before the court of appeals. *Id.*

34. N.C. GEN. STAT. § 20-183 (1975) provides that "[s]uch officers . . . shall have the power to stop any motor vehicle . . . for the purpose of determining whether the same is being operated in violation of any of the provisions of this Article."

35. 34 N.C. App. at 354-55, 238 S.E.2d at 191-92.

36. *Id.* at 355-56, 238 S.E.2d at 192.

37. There are two dimensions to the plain view exception to warrantless searches in North Carolina. Under N.C. GEN. STAT. § 15A-253 (1975) an officer conducting a search pursuant to a search warrant may seize items subject to seizure under *id.* § 15A-242 if he inadvertently discovers them during the course of the search. In addition, *id.* § 15A-231 allows constitutionally permissible searches and seizures which are not regulated by the General Statutes. The constitutional plain view exception is limited to situations when the officer has legal justification to be at the place where he inadvertently sees evidence in plain view. *See Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971).

38. 34 N.C. App. at 355, 238 S.E.2d at 192. The power to stop a vehicle is granted in N.C. GEN. STAT. § 20-183 (1975). The court observed that an officer could search incident to an arrest after a stop under § 20-183, but only for an arrest for a violation of the Motor Vehicle Act. 34 N.C. App. at 355, 238 S.E.2d at 191-92.

39. The State contended that even without the plain view exception, the officer had independent grounds for his warrantless search in that the furtive movements he observed

The court left one important issue raised by the *Blackwelder* facts unresolved. The officer in *Blackwelder* did not stop the vehicle to determine if the Motor Vehicle Act was being violated; rather, he stopped the car to see if there were contraband drugs in defendant's possession.<sup>40</sup> The trial court found that the officer lacked probable cause to stop the car,<sup>41</sup> but the court of appeals, by deciding the case on the basis of the extent of the search, glossed over whether the officer was justified in stopping the car at all. The opinion can be read as implying that if the officers were not justified in stopping the car, then even if the contraband were in plain view it would not be admissible against the driver since the officer would have no "right to be there."<sup>42</sup> Although there is no probable cause requirement for making a

while stopping the car gave him probable cause to search. 34 N.C. App. at 356, 238 S.E.2d at 192. The court of appeals rejected this notion. *Id.* at 356-57, 238 S.E.2d at 192-93. First, the court noted that the movements did not give rise to probable cause to search the automobile in the belief that the vehicle contained contraband. The State relied on *State v. Ratliff*, 281 N.C. 397, 189 S.E.2d 179 (1972). In *Ratliff*

[t]he officer observed defendant, apparently nude, in a parked car on the parking lot of a business establishment at midnight. . . . When the officer stopped, defendant tried to drive away. Then he was seen brushing something out of his lap onto the floorboard of the car. Then he appeared to kick something under the seat with his left leg and foot. Such suspicious, furtive conduct would alert any officer to the fact that defendant had something to hide.

*Id.* at 404, 189 S.E.2d at 183. The court in *Blackwelder* felt that the movements in the suspect car did not rise to the level of *Ratliff*. The court noted that the observed movement was "explicable by innocent fear and confusion at being pulled over by a police car." 34 N.C. App. at 356, 238 S.E.2d at 192.

Second, the court observed that the search might have been justified had the officer had probable cause to believe that someone in the car was committing a crime. Then there could have been a search incident to a valid arrest, a right to search that is justified on different grounds than a search of a vehicle by one with probable cause to believe it contains the instrumentality of a crime or evidence pertaining to a crime. *See Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 220-22 (1968); *State v. Ratliff*, 281 N.C. at 403, 189 S.E.2d at 182-83. To make a search incident to a valid arrest, however, the officer would have to have probable cause to believe that a crime is being committed. *See text accompanying note 25 supra*. Furtive movements are proper factors in assessing probable cause "when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime." *Sibron v. New York*, 392 U.S. 40, 66 (1968). The court of appeals found, however, that the movements were not clearly furtive and that the officer had no specific knowledge linking the passengers of the car to the narcotics trafficking under investigation. 34 N.C. App. at 357, 238 S.E.2d at 193.

40. 34 N.C. App. at 355, 238 S.E.2d at 192.

41. *Id.* at 354, 238 S.E.2d at 191.

42. The court, in rejecting the plain view theory, distinguished the *Blackwelder* situation from *State v. Smith*, 289 N.C. 143, 221 S.E.2d 247 (1976), and *State v. Allen*, 282 N.C. 503, 194 S.E.2d 9 (1973), citing both for the "right to be there" requirement. 34 N.C. App. at 355-56, 238 S.E.2d at 192. In *Smith*, an officer stopped a car for reckless driving and saw a revolver on the seat. The revolver was held admissible under the plain view theory. 289 N.C. at 149-51, 221 S.E.2d at 250-52. In *Allen*, the court found that the officers had stopped defendants to determine the validity and presence of a driver's license and registration card. The court apparently accepted the State's rationale that the primary motive in making the stop was to investigate compliance with the Motor Vehicle Act. Evidence was spotted in the front seat and was admitted under the plain view exception. 282 N.C. at 507, 194 S.E.2d at 13. It is unclear whether the court in *Blackwelder*, by distinguishing *Smith* and *Allen*, meant to imply that the officer had no right to stop the vehicle, or only that the officer had no right to look under the seat.

stop under the Motor Vehicle Act,<sup>43</sup> the statutory power to stop a vehicle is limited to stops "for the purpose of determining whether the [vehicle] is being operated in violation of any of the provisions of [the Motor Vehicle Act]." <sup>44</sup> Even if a stop must be made to determine if the Act is being violated before an officer has a "right to be there," *Blackwelder's* conclusion that the officer's purpose in making the stop was not to see if a motor vehicle statute was being violated, will likely be the exception rather than the rule. If credible evidence exists, courts are likely to find that the stop in question was made to see if a motor vehicle statute was being violated.<sup>45</sup>

### B. Right to Speedy Trial

In 1977 the North Carolina General Assembly thoroughly revised the statutory provisions for the speedy trial of criminal defendants,<sup>46</sup> adopting an entirely different approach from that taken in the 1973 amendments.<sup>47</sup> Rather than leaving the determination of whether a prompt trial should be ordered for a particular defendant to the discretion of the judge,<sup>48</sup> the new Speedy Trial Act (the Act)<sup>49</sup> provides for a defendant's absolute discharge if he is not tried within a specified time.<sup>50</sup> Certain periods of delay, most of which are attributable to the defendant, are excluded from the computation of the waiting period,<sup>51</sup> thus preventing defendants from taking advantage of the provision by means of delaying tactics. Taken as a whole, the Act is a commendable attempt to codify the constitutional requirements of the balancing test prescribed by the United States Supreme Court in *Barker v.*

43. 34 N.C. App. at 355, 238 S.E.2d at 191-92; *State v. Dark*, 22 N.C. App. 566, 207 S.E.2d 290, *cert. denied*, 285 N.C. 760, 209 S.E.2d 284 (1974); *see* N.C. GEN. STAT. § 20-183 (1975).

44. N.C. GEN. STAT. § 20-183 (1975).

45. *See, e.g.*, *State v. Smith*, 289 N.C. 143, 221 S.E.2d 247 (1976); *State v. Allen*, 282 N.C. 503, 194 S.E.2d 9 (1973); *State v. Dark*, 22 N.C. App. 566, 207 S.E.2d 290, *cert. denied*, 285 N.C. 760, 209 S.E.2d 284 (1974).

46. Law of June 29, 1977, ch. 787, § 1, 1977 N.C. Sess. Laws 1032 (to be codified at N.C. GEN. STAT. §§ 15A-701 to -704) (effective Oct. 1, 1978).

47. Law of Apr. 11, 1974, ch. 1286, § 1, 1973 N.C. Sess. Laws 2d Sess. 490 (codified at N.C. GEN. STAT. §§ 15A-701 to -706 (1975)) (repealed, effective Oct. 1, 1978).

48. *See* N.C. GEN. STAT. § 15A-702 (1975). A judge may order a prompt trial for a defendant after 60 days of confinement, or after 30 days if the defendant has petitioned the judge for a speedy trial. For a defendant awaiting trial but not confined, the respective waiting periods for a judge's action are 90 days and 60 days. A judge may order the defendant's release or dismissal of charges if he is not brought to trial in the time specified.

49. Law of June 29, 1977, ch. 787, § 1, 1977 N.C. Sess. Laws 1032 (to be codified at N.C. GEN. STAT. §§ 15A-701 to -704) (effective Oct. 1, 1978).

50. As of October 1, 1980, a defendant must be tried within 90 days of his arrest or indictment, and within 60 days following a mistrial or appeal that resulted in a remand. Between October 1, 1978, and October 1, 1980, the permissible waiting period will be 120 days. *Id.* sec. 1, § 15A-701(a), (a1).

51. *Id.* sec. 1, § 15A-701(b).



*Wingo*<sup>52</sup> for determining whether a defendant's right to a speedy trial has been abridged, while eliminating much of that test's uncertainty.

The sanctions provided in the Act for failure to provide a speedy trial significantly modify both the *Barker* test and North Carolina case law. New section 15A-703<sup>53</sup> requires the dismissal of charges on a defendant's motion if he has not been brought to trial within the specified time. A defendant claiming the protection of the Act has the burden of supporting his motion, but the State has the burden of "going forward with evidence" that any time periods should be excluded from the computation.<sup>54</sup> Since a defendant's "burden" apparently involves only a showing that the specified days have elapsed, the Act eliminates two elements of the *Barker* test: the defendant's assertion of his right to a speedy trial and his showing of prejudice from the delay.<sup>55</sup> Despite its rigidity, the statutory approach is both more practical and equitable than the *Barker* test, which, to some extent, required defendants to repeatedly demand their constitutional right in order to preserve it.<sup>56</sup> Moreover, proving prejudice from a delay has often been difficult for defendants, since courts have required more specific proof than a general assertion of faded memory.<sup>57</sup> The statute eliminates this difficulty by plac-

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52. 407 U.S. 514 (1972). The Court concluded that each claim of denial of the right to a speedy trial must be judged on its own facts, but listed four factors that should be weighed in the decisions: the length of delay; the reason for the delay; the defendant's assertion of his right; and possible prejudice to the defendant. *Id.* at 530. The Court refrained from the "legislative activity" of defining the right in terms of specific periods within which a defendant must be tried, but indicated that states were free to prescribe a reasonable period consistent with constitutional standards. *Id.* at 523.

53. Law of June 29, 1977, ch. 787, sec. 1, § 15A-703, 1977 N.C. Sess. Laws 1032 (to be codified at N.C. GEN. STAT. § 15A-703) (effective Oct. 1, 1978).

54. *Id.*

55. See note 52 *supra*.

56. See, e.g., *Morrison v. Jones*, 565 F.2d 272, 273 (4th Cir. 1977). Other constitutional rights must be afforded a defendant unless knowingly and intelligently waived. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966) (fifth amendment privilege against self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel); *Waley v. Johnston*, 316 U.S. 101 (1942) (waiver of right to trial, by guilty plea).

57. Two 1977 cases, one in the North Carolina Court of Appeals and one in the United States Court of Appeals for the Fourth Circuit, are good examples of prior case law that will be changed by this statute. In *State v. McKoy*, 33 N.C. App. 304, 235 S.E.2d 98 (1977), *rev'd*, 294 N.C. 135, 383 S.E.2d 383 (1978), the court held that a 22-month delay between a defendant's arrest and trial did not abridge his right to a speedy trial. Though the defendant claimed prejudice due to the absence of a "crucial" witness when the case was tried, the court found that it was "very doubtful that her testimony would have helped defendant" and, therefore, that he had failed to show prejudice as a result of her unavailability. *Id.* at 309, 235 S.E.2d at 101. Defendant in *Morrison v. Jones*, 565 F.2d 272 (4th Cir. 1977), waited three years to be retried and convicted after his first trial on a murder charge ended in a mistrial. The district court granted defendant's habeas corpus petition, 428 F. Supp. 86 (W.D.N.C. 1977), and the Fourth Circuit reversed stating: "While we agree with the district judge that the delay of some three years was sufficient to trigger a consideration of the other factors identified in *Barker*, in our opinion the absence of any showing of prejudice and the failure of the petitioner to assert his right to a speedy trial preclude relief in this case." 565 F.2d at 273. The State's failure to

ing the responsibility on the State to try a defendant within a reasonable time or release him, while excluding from the allowable time period any delays that are beyond the State's control.

Though the Act's effect in the area of the right to a speedy trial should be salutary, there are several potential weak points. The most important weakness concerns the time from which the waiting period will run. G.S. 15A-701(a)(1) requires a defendant's trial to begin "within 90 days from the date the defendant is arrested, served with criminal process, waives an indictment or is notified pursuant to G.S. § 15A-630 that an indictment has been filed with the superior court against him, whichever occurs last . . . ." <sup>58</sup> In *United States v. Marion* <sup>59</sup> the Supreme Court held that the sixth amendment's protection should not attach until the suspected criminal becomes an "accused." <sup>60</sup> The Court went on to note, however, that "[i]t is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge, that engage the particular protections of the speedy trial provision of the Sixth Amendment." <sup>61</sup> The statute appears to conform to this interpretation by providing arrest or indictment as alternative starting points; yet the final phrase "whichever occurs last" withdraws the Act's protection from a defendant who is arrested and *later* indicted. It is not uncommon for an indictment to be returned months after an arrest, <sup>62</sup> but a strict reading of the statute would measure the permissible waiting period only from the date of the indictment. <sup>63</sup> There is no statutory time limit on the submission of a bill of indictment for an offense; <sup>64</sup> moreover, in regard to felonies, there is no

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present a good reason for delaying retrial, *see Morrison v. Jones*, 428 F. Supp. at 86, was ignored by the court. *See also* *State v. Frank*, 284 N.C. 137, 200 S.E.2d 169 (1973); *State v. Harrell*, 281 N.C. 111, 187 S.E.2d 789 (1972); *State v. Davis*, 33 N.C. App. 487, 235 S.E.2d 424 (1977). The effect of the new statute on these results depends upon how much of the delay would fall within time periods excludable under new § 15A-701(b). Certainly, however, the focus of the judicial analysis must shift from the defendant's conduct to that of the State.

58. Law of June 29, 1977, ch. 787, sec. 1, § 15A-703, 1977 N.C. Sess. Laws 1032 (to be codified at N.C. GEN. STAT. § 15A-701(a)(1)) (effective Oct. 1, 1978).

59. 404 U.S. 307 (1971).

60. *Id.* at 313.

61. *Id.* at 320.

62. *See, e.g., Pitts v. North Carolina*, 395 F.2d 182 (4th Cir. 1968) (16 year lapse); *Courtney v. Pinion*, 420 F. Supp. 890 (W.D.N.C. 1976) (10 1/2 months); *State v. Dietz*, 289 N.C. 488, 223 S.E.2d 357 (1976) (4 1/2 months); *State v. Davis*, 33 N.C. App. 487, 235 S.E.2d 416 (1977) (5 1/2 months).

63. The statutory period begins to run only when a true bill of indictment has been returned by a grand jury and filed in superior court and the defendant has been notified of the filing. Law of June 29, 1977, ch. 787, sec. 1, § 15A-701(a)(1), 1977 N.C. Sess. Laws 1032 (to be codified at N.C. GEN. STAT. § 15A-701(a)(1)) (effective Oct. 1, 1978).

64. N.C. GEN. STAT. § 15A-627 (1975) directs the solicitor to submit a bill of indictment to a grand jury "[w]hen a defendant has been bound over for trial in the superior court." The Official Commentary to this section relates that the Commission found it was not necessary to set time limits on the solicitor's action. "It was believed that the rights granted defendants

applicable statute of limitations on prosecution in North Carolina to encourage action by the State.<sup>65</sup>

Other North Carolina statutes place time limitations on the custody of an unindicted defendant; they will, however, afford only limited protection in light of several 1977 decisions of the North Carolina courts. In *State v. Burgess*<sup>66</sup> the court of appeals interpreted the statute requiring an arrested person to be taken before a magistrate "without unnecessary delay,"<sup>67</sup> as well as the provision that a charged defendant must appear before a district court judge within ninety-six hours after being taken into custody or at the first regular session of district court in the county, whichever occurs first.<sup>68</sup> These statutes, the court held, "do not prescribe mandatory procedures affecting the validity of the trial in the absence of a showing that defendant was prejudiced thereby."<sup>69</sup> Another statute governing preliminary proceedings entitles a defendant, absent waiver, to a probable cause hearing within fifteen days following his initial appearance before the district court judge.<sup>70</sup> Defendant in *State v. Siler*<sup>71</sup> moved to dismiss the charges against him, claiming that his constitutional rights were violated because his probable cause hearing was not held within the prescribed time limits. The supreme court held that due process did not require that a probable cause hearing be held within a specific number of days following arrest, though it assumed that some "reasonable time" limit might be constitutionally imposed.<sup>72</sup> Though holding only that defendant's motion should be dismissed because he had not shown that the trial court, in granting two continuances of the hearing, failed to find "good cause shown" by the State,<sup>73</sup> the court also

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elsewhere to assure speedy trials would be sufficient to cover this matter." *Id.*, Official Commentary.

65. See, e.g., *State v. Johnson*, 275 N.C. 264, 167 S.E.2d 274 (1969).

66. 33 N.C. App. 76, 234 S.E.2d 40 (1977).

67. N.C. GEN. STAT. § 15A-511(a)(1) (1975).

68. *Id.* § 15A-601(c).

69. 33 N.C. App. at 78, 234 S.E.2d at 41. The court based its interpretation of N.C. GEN. STAT. § 15A-511(a) (1975) on the fact that the former statute, Law of Apr. 12, 1869, ch. 178, subch. I, § 1, 1868-69 N.C. Pub. Laws 447 (formerly codified at N.C. GEN. STAT. § 15-46 (1965)) (repealed 1973), had required that the arrested person be taken "immediately" before a magistrate, and the North Carolina Supreme Court had held it was not mandatory. See, e.g., *State v. McCloud*, 276 N.C. 518, 531-32, 173 S.E.2d 733, 762-63 (1973). Section 15A-601(c) was held to have the same effect since its purpose, as indicated in the Official Commentary, was found to be unobstructed by a lengthier waiting period. 33 N.C. App. at 77-78, 234 S.E.2d at 41; see N.C. GEN. STAT. § 15A-601(c), Official Commentary (1975).

70. N.C. GEN. STAT. § 15A-606 (1975). A defendant who has been indicted, however, has no right to a probable cause hearing. *State v. Dangerfield*, 32 N.C. App. 608, 233 S.E.2d 663, cert. denied, 292 N.C. 642, 235 S.E.2d 63 (1977).

71. 292 N.C. 543, 234 S.E.2d 733 (1977).

72. *Id.* at 554, 234 S.E.2d at 740.

73. *Id.* at 555, 234 S.E.2d at 741. N.C. GEN. STAT. § 15A-606(f) (1975) provides: "Upon a showing of good cause, a scheduled probable-cause hearing may be continued by the district court upon timely motion of the defendant or the State."

questioned whether these provisions "were designed to provide defendant with additional rights, rather than as rules for the orderly and efficient administration of justice."<sup>74</sup> The lack of legislative sanctions accompanying the breach of these statutes makes them meaningless as methods of enforcement of a defendant's right to a speedy trial. Perhaps they were intended to be no more than "housekeeping" rules, rather than the source of substantive rights;<sup>75</sup> yet if the new Speedy Trial Act is to afford effective protection to a defendant at the pre-indictment stage, there must be some method for enforcement of the time limits on these procedures, whether by independent sanctions or by a clarification of the period covered by the time limits of the Act itself.<sup>76</sup>

Arguably, in order to comply with constitutional requirements, the Act must be interpreted to allow an arrest, even when indictment follows, to mark the starting point of the time period. In *Dillingham v. United States*,<sup>77</sup> the United States Supreme Court held that even when a defendant proves no actual prejudice, the time between his arrest and indictment must be considered in appraising the speedy trial issue.<sup>78</sup> A defendant who is neither

74. 292 N.C. at 555, 234 S.E.2d at 741.

75. Interestingly, in a case decided later in 1977, *State v. Shook*, 293 N.C. 315, 237 S.E.2d 843 (1977), the state supreme court interpreted another statute setting procedural time limits as vesting substantive rights in a defendant. N.C. GEN. STAT. § 15A-943 (1975 & Cum. Supp. 1977) requires a solicitor to calendar arraignments on at least the first day of every other week during criminal session and provides that a defendant who pleads not guilty may not be tried without his consent in the week in which he is arraigned. Justice Exum, writing for the court, concluded that the statute created a right in defendants, the infringement of which (here, the holding of defendant's trial the same day as his arraignment over his objection) was reversible error. 293 N.C. at 319-20, 237 S.E.2d at 846-47. His conclusion that the statute was more than directory was based on the considerations that it promotes justice, affects the public interest and requires a defendant's consent before a different procedure can be used. Under these circumstances, he held, "[p]rejudice from a violation must necessarily be presumed." *Id.* at 319, 237 S.E.2d at 846-47. It is difficult to discern the distinction between this statute and N.C. GEN. STAT. § 15A-606(d) (1975) (requiring probable cause hearing to be held within 15 days unless waived by defendant), such that the former bestows rights on a defendant and the latter does not.

76. Another section of the statute, Law of June 29, 1977, ch. 787, sec. 1, § 15A-701(b)(7)(c), 1977 N.C. Sess. Laws 1032 (to be codified at N.C. GEN. STAT. § 15A-701(b)(7)(c)) (effective Oct. 1, 1978), indicates that the legislature may have intended that the time limits described in *id.* § 15A-701(a)(1) apply to the period between arrest and indictment. Subsection 15A-701(b)(7) provides that among the time periods to be excluded from the 90 day computation are continuances granted by the judge "in the interests of justice." *Id.* § 15A-701(b)(7). One of the factors to be considered by a judge in determining whether to grant a continuance is "whether delay after the grand jury proceedings have begun, in a case where arrest precedes indictment, is caused by the unusual complexity of the factual determination to be made by the grand jury or by events beyond the control of the court or the State." *Id.* § 15A-701(b)(7)(c). If the 90 day time period starts to run only from the later of the two events of arrest and the filing of an indictment, as § 15A-701(a)(1) provides, *see* text accompanying notes 58-63 *supra*, then any delay in grand jury proceedings, whether or not arrest has already occurred, would have no significance under the statute.

77. 423 U.S. 64 (1975) (per curiam).

78. *Id.* at 64-65. *See also* *Pitts v. North Carolina*, 395 F.2d 182 (4th Cir. 1968) (delay computed not from date of indictment but from date warrant sworn out for defendant's arrest);

arrested nor indicted at the time of his offense but who is indicted much later is also left unprotected by the North Carolina statute and, according to the United States Supreme Court decision in *Marion*, is outside the sixth amendment's protection as well.<sup>79</sup> The *Marion* Court indicated, however, that if a pre-indictment delay caused substantial prejudice to a defendant and was intentionally caused by the State, the due process clause of the fifth amendment would require dismissal of the indictment.<sup>80</sup> The North Carolina Supreme Court's decisions also furnish some recourse in extreme instances of pre-indictment delay.<sup>81</sup> Assuming, however, that the new Act was intended to provide some degree of certainty in evaluating the speedy trial issue, it would be preferable for the legislature to specify the desired effect of pre-indictment delay on its statutory scheme.

A second area in which the statute falls short of extending full sixth amendment protection to criminal defendants is in its exclusion from the computation time of any period following a voluntary dismissal of charges by a prosecutor, when new charges are later brought for the same offense.<sup>82</sup> The system of taking a "nolle prosequi" with leave to file new charges at any time was made infamous in the case of *Klopfer v. North Carolina*,<sup>83</sup> in which the United States Supreme Court held the practice unconstitutional when used to leave charges pending indefinitely against a defendant. The legislature repealed the statute in 1974,<sup>84</sup> replacing it with one that sup-

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Courtney v. Pinion, 420 F. Supp. 890 (W.D.N.C. 1976) (length of delay measured from time of arrest on manslaughter charge, not from date of indictment).

79. 404 U.S. at 313; see text accompanying notes 59-61 *supra*.

80. 404 U.S. at 324.

81. See *State v. Johnson*, 275 N.C. 264, 277, 167 S.E.2d 274, 283 (1969) (when defendant shows (1) "a typical delay" by prosecution in issuing warrant or indictment, (2) that prosecution deliberately and unnecessarily caused delay for convenience or supposed advantage of State, and (3) that length of delay created reasonable possibility of prejudice, he has been denied right to speedy trial and prosecution must be dismissed). Later decisions follow the *Johnson* formulation, but it is rare that a defendant can meet the burden of proof it imposes. See, e.g., *State v. Dietz*, 289 N.C. 488, 223 S.E.2d 357 (1976).

82. Law of June 29, 1977, ch. 787, sec. 1, § 15A-701(b), 1977 N.C. Sess. Laws 1032 (to be codified at 15A-701(b)) (effective Oct. 1, 1978) provides in pertinent part:

The following periods shall be excluded in computing the time within which the trial of a criminal offense must begin:

....

- (5) When a charge is dismissed by the prosecutor under the authority of G.S. 15A-931 and afterwards a new indictment or information is filed against the same defendant or the same defendant is arrested or served with criminal process for the same offense, or an offense based on the same act or transaction or on the same series of acts or transactions connected together or constituting parts of a single scheme or plan, any period of delay from the date the initial charge was dismissed to the date the time limits for trial under this section would have commenced to run as to the subsequent charge.

83. 386 U.S. 213 (1967).

84. Law of Mar. 2, 1905, ch. 360, § 1, 1905 N.C. Pub. Laws 395 (formerly codified at N.C. GEN. STAT. § 15-175 (1965)) (repealed 1974).

posedly remedied the defects disapproved by the Court.<sup>85</sup> That replacement statute, and now the new Speedy Trial Act, in actuality leave the old "nol pros" procedure largely intact. G.S. 15A-931(a) allows the solicitor to dismiss any charges in a criminal pleading orally in open court, or by filing a written dismissal at any time. Subsection 15A-931(b) provides that no applicable statute of limitations will be tolled by a dismissal under the section.<sup>86</sup> The Official Commentary to the statute notes: "This section does not itself bar the bringing of new charges. That would be prevented if there were a statute of limitations which had run, or if jeopardy had attached when the first charges were dismissed."<sup>87</sup> Thus, the section eliminates the nol pros procedure only for misdemeanors, since there is no statute of limitations on felonies in North Carolina, and the attachment of jeopardy provides no more protection than it did under the old statute.<sup>88</sup> Since this procedure remains in use,<sup>89</sup> the new Act should have placed some limitations on its abuse rather than wholly excluding the period after a nol pros is taken from the computation of days within which a trial must take place.

The new North Carolina Speedy Trial Act represents a major step towards assuring each criminal defendant a trial within a reasonable (in the context of today's crowded courts) length of time. The approach of placing the burden on the State to try a defendant within this period or justify the delay is preferable to the balancing test that essentially gave defendants the benefit of their sixth amendment right only when they could prove injury from its denial. However, until the ambiguities concerning what type of activity in relation to a defendant actually invokes the protection of the Act are resolved, its application may prove difficult.

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85. Law of Apr. 12, 1974, ch. 1286, § 1, 1973 N.C. Sess. Laws 2d Sess. 490 (codified at N.C. GEN. STAT. § 15A-931 (1975)).

86. N.C. GEN. STAT. § 15A-931(b) (1975).

87. *Id.* § 15A-931, Official Commentary.

88. The protection afforded by the fifth amendment prohibition against a person's being twice put in jeopardy for the same offense is uncertain at best. The Supreme Court has adhered to the view that jeopardy attaches when the jury is sworn, but a retrial may still be permitted if a trial is terminated before verdict due to "manifest necessity." See *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824). There has been little agreement, however, on what circumstances amount to manifest necessity, and recent decisions have largely been limited to the facts of the individual case. See, e.g., *Illinois v. Somerville*, 410 U.S. 458 (1973); *United States v. Jorn*, 400 U.S. 470 (1971); *Downum v. United States*, 372 U.S. 734 (1963).

89. *Morrison v. Jones*, 565 F.2d 272 (4th Cir. 1977), see note 57 *supra*, affords a recent example of the use of the nol pros. The State took a nol pros with leave after defendant's murder trial ended in mistrial in 1972, reindicted him three years later, and obtained a guilty verdict. Counsel informed the court in oral argument that the procedure was no longer used since its statutory basis has been repealed in 1973. 565 F.2d at 273 n.1. It appears, however, that the State could use the same procedure today, with the difference that the nol pros would be taken immediately after the trial instead of two years later, and still be in compliance with both N.C. GEN. STAT. § 15A-931 (1975) (voluntary dismissal) and Law of June 29, 1977, ch. 787, sec. 1, § 15A-701, 1977 N.C. Sess. Laws 1032 (to be codified at N.C. GEN. STAT. § 15A-701 (effective Oct. 1, 1978) (speedy trial)).

### C. Right to Counsel

#### 1. Indigents

The North Carolina courts had several opportunities to examine the difficulties faced by indigent defendants.<sup>90</sup> In *State v. Cole*,<sup>91</sup> the supreme court considered the plight of a defendant dissatisfied with his appointed attorney, and in *State v. Sanders*,<sup>92</sup> the court of appeals denied relief to a defendant who had not been able to establish indigency before the trial court despite an unrefuted showing of severe financial difficulties.

Defendant in *State v. Cole* asked during the trial that his court-appointed counsel be dismissed.<sup>93</sup> A voir dire hearing was conducted and

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90. In *State v. McNeill*, 33 N.C. App. 317, 235 S.E.2d 274 (1977), the North Carolina Court of Appeals announced a new rule with respect to the provision of trial transcripts to indigent defendants—free transcripts are to be routinely provided to indigents not only for use on direct appeal, but also to aid in their defense if retried following a mistrial. *Id.* at 323, 235 S.E.2d at 277-78.

The United States Supreme Court, in *Britt v. North Carolina*, 404 U.S. 226 (1973), noted in 51 N.C.L. Rev. 621 (1973), had upheld the state's refusal to supply an indigent defendant with a transcript following a mistrial. The Court held that this practice did not violate the rule of *Griffin v. Illinois*, 351 U.S. 12 (1956), that when the transcript of a trial is necessary for an appeal, the state is required to supply the transcript free of charge to an indigent defendant unless adequate means are available for obtaining it, because other adequate means were available. 404 U.S. at 230. In *McNeill*, as in *Britt*, the court found that alternate sources of obtaining the needed testimony were available to defendant. 33 N.C. App. at 323, 235 S.E.2d at 277. Moreover, defendant's lack of the transcript did not prejudice him in the second trial. *Id.* at 321-22, 235 S.E.2d at 276-77. After finding no error in defendant's conviction, the court nevertheless concluded that in the future, a defendant who makes a timely request following a mistrial should be provided with the use of the trial transcript. *Id.* at 323, 235 S.E.2d at 277-78. The court's conclusion was prompted largely by the realization that in most cases it is not clear from the record whether a defendant has been damaged by the lack of a transcript. Furthermore, the state always has the use of the transcript, which, even if not vital, would undeniably be helpful to a defendant as well. *Id.* at 323, 235 S.E.2d at 277. The decision in *McNeill* thus simplifies one aspect of criminal procedure, relieving indigent defendants of the burden of showing prejudice from the lack of a transcript, and appellate courts of the task of speculating on the presence or absence of such prejudice. If, as the court suggests, the instances in which a mistrial is ordered are few, *id.*, the resulting burden on the state should be slight.

91. 293 N.C. 328, 237 S.E.2d 814 (1977).

92. 34 N.C. App. 59, 237 S.E.2d 475 (1977).

93. 293 N.C. at 335, 237 S.E.2d at 818. A somewhat similar case, *State v. Beeson*, 292 N.C. 602, 234 S.E.2d 595 (1977), also involved an indigent dissatisfied with his court-appointed attorney. Defendant in *Beeson* had been granted two continuances, one on the ground that he was in the process of retaining private counsel. The other continuance was on the ground of surprise, granted when a codefendant agreed to plead guilty and testify for the State. *Id.* at 604, 234 S.E.2d at 596. Defendant then sought another continuance, asserting that he had not cooperated with his court-appointed counsel and was still intending to retain private counsel. This third motion for continuance was denied. The court did, however, appoint another attorney to assist the original court-appointed counsel. The second counsel moved for a continuance to let him prepare. That motion was denied. *Id.* at 604-05, 234 S.E.2d at 596. On appeal, the supreme court upheld the trial court and ruled that the denial of the motion for continuance did not deny defendant effective assistance of counsel since the original attorney was thoroughly prepared and effectively represented defendant. *Id.* at 608, 234 S.E.2d at 598.

the court, finding that defendant was adequately represented, denied his request.<sup>94</sup> Defendant argued on appeal that the trial court was required to advise him of the right to proceed without counsel after his motion to replace counsel was denied.<sup>95</sup> The court held that when counsel continued to be a vigorous advocate such that no prejudice to defendant resulted, the trial court's failure to advise defendant of his right to represent himself was not reversible error.<sup>96</sup>

Federal courts have reached the same result in similar situations, holding that while it is preferable for a trial court to ask a dissatisfied defendant whether he wishes to proceed pro se, failure to do so is not reversible error when defendant fails to indicate his desire to defend himself.<sup>97</sup> Thus, the right to dismiss counsel during trial and proceed pro se is one that a defendant must assert himself, since both federal and North Carolina courts are reluctant to force trial courts to inform a defendant of his right unless he has already clearly indicated that he wishes to exercise that right.<sup>98</sup>

*State v. Sanders*<sup>99</sup> involved a defendant who, after first deciding to retain counsel, tried and failed to establish indigency. When he first sought

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As defendant was indigent, he had no right to select his attorney, and mere dissatisfaction with the appointed attorney is not a sufficient basis for removal. *State v. Sweezy*, 291 N.C. 366, 230 S.E.2d 524 (1976). The *Beeson* holding followed the holdings in several similar federal court cases. See, e.g., *United States v. Abshire*, 471 F.2d 116 (5th Cir. 1972). See also *Sykes v. Virginia*, 364 F.2d 314 (4th Cir. 1966).

94. 293 N.C. at 335, 237 S.E.2d at 818.

95. *Id.* In *State v. Robinson*, 290 N.C. 56, 224 S.E.2d 174 (1976), the trial court refused to remove appointed counsel, but limited his activities. As a result, according to the supreme court, the attorney and defendant appeared to the jury to be at odds with each other. Thus, defendant did not receive a fair trial. The supreme court pointed out that a defendant has a right to conduct his own defense and that the trial court should have instructed him of that right. *Id.* at 67-68, 224 S.E.2d at 180. Similarly, in *State v. Sweezy*, 291 N.C. 366, 230 S.E.2d 524 (1976), the court said:

It would have been the better practice for the trial judge to have excused the jury and allowed defendant to state his reasons for desiring other counsel. If no good reason was shown requiring the removal of counsel, then the court should have determined whether the defendant actually desired to conduct his own defense.

*Id.* at 372, 230 S.E.2d at 529.

96. 293 N.C. at 335-36, 237 S.E.2d at 818-19. The court did warn that the better practice is for the trial court to inquire of defendant whether he wishes to conduct his own defense. *Id.* at 336, 237 S.E.2d at 819.

97. *Williams v. United States*, 389 F.2d 34 (2d Cir. 1968) (per curiam). The *Williams* court seemed to feel that defendant was only trying to delay and really did not want to represent himself. The court said that an unequivocal request to proceed pro se was necessary to invoke the right to do so. The desire to proceed pro se must be timely asserted, *United States v. Jones*, 514 F.2d 1331, 1334 (D.C. Cir. 1975), but even a request made during the trial should be granted if doing so will not delay the trial since a defendant must have complete confidence in his counsel. *United States v. Mitchell*, 137 F.2d 1006, 1011 (2d Cir. 1943).

98. *Williams v. United States*, 389 F.2d 34 (2d Cir. 1968) (per curiam); *State v. Cole*, 293 N.C. 328, 237 S.E.2d 814 (1977).

99. 34 N.C. App. 59, 237 S.E.2d 475 (1977).



to establish indigency he asserted that he was regularly employed, earned \$100 per week, owned a house and a car, and owed \$728. The district court judge found him not indigent.<sup>100</sup> A month and a half later he filed another affidavit of indigency in superior court, this time asserting that he was unemployed and that he was paying \$500 to \$600 per month on his house and \$40 per month on his car. The superior court judge also ruled him not indigent.<sup>101</sup> Defendant appeared pro se at two subsequent trials that resulted in mistrials and at the trial at which he was finally convicted.<sup>102</sup> On appeal, defendant argued that at each of the trials the judge should have warned him of his right to appointed counsel and conducted a hearing on his financial ability. The court of appeals held that, having been advised once at the district court level and once at the superior court level of his right to appointed counsel if indigent, defendant was aware of his rights, and that by not further seeking to establish indigency he chose to proceed pro se.<sup>103</sup>

If defendant had asked for a redetermination of indigency, the court could have considered the question at any time.<sup>104</sup> *Sanders* makes it clear, however, that once a defendant has been found not indigent, he has the burden of raising the issue. This burden can be compared to the burden of one who has waived counsel to indicate to the court that he wishes to withdraw his waiver. Such a waiver, once given, is good until the proceedings finally terminate; successive waivers at every level of the proceedings are not required.<sup>105</sup>

Judge Martin, in dissent, saw *Sanders* as a case involving a waiver of right to counsel.<sup>106</sup> He argued that by finding that defendant chose to proceed pro se the court was actually finding a waiver of right to counsel. He charged that the majority presumed a knowing and voluntary waiver of defendant's right to assistance of counsel when the record did not indicate that the trial court informed him of that right or sought to determine whether the lack of counsel resulted from indigency or choice.<sup>107</sup> The facts shown by the record, according to the dissent, fell far short of showing a knowing and voluntary waiver. Furthermore, the dissent argued that the superior court judge should have found defendant indigent on defendant's second affidavit

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100. *Id.* at 60-61, 237 S.E.2d at 475.

101. *Id.* at 61, 237 S.E.2d at 476.

102. The two mistrials were declared on the initiative of the trial court. *Id.*

103. *Id.* at 62, 237 S.E.2d at 476-77.

104. N.C. GEN. STAT. § 7A-450(c) (1969).

105. *State v. Watson*, 21 N.C. App. 374, 204 S.E.2d 537, cert. denied, 285 N.C. 595, 206 S.E.2d 866 (1974). *Watson* interpreted N.C. GEN. STAT. § 7A-457(a) (Cum. Supp. 1977), concerning waiver of counsel by indigents, but the same reasoning should apply for nonindigents also.

106. 34 N.C. App. at 63-66, 237 S.E.2d at 477-78 (Martin, J., dissenting).

107. *Id.* at 63-64, 237 S.E.2d at 477-78.

of indigency,<sup>108</sup> and that failure to do so frustrated defendant's further efforts to obtain counsel.<sup>109</sup> Judge Martin would have had the superior court judge, in light of the numerous delays in the process of trying defendant<sup>110</sup> and the seriousness of the charge,<sup>111</sup> ascertain whether lack of counsel was a result of indigency or choice.<sup>112</sup> If indigency were the cause, Judge Martin would require the record to show that counsel was offered and that defendant voluntarily and intelligently refused the offer.<sup>113</sup>

## 2. Nonindigents

A situation often arises when, without fault on defendant's part, his counsel cannot be present on the scheduled day of trial. An attorney who anticipates such a problem should, of course, attempt to work the matter out beforehand with the trial judge. Occasionally, however, the attorney neglects to do so or the judge and attorney cannot come to a mutually acceptable solution. In such a situation, a trial court must decide whether to grant the defendant a continuance or proceed with the trial. Denial of a continuance risks denying defendant's right to select counsel and his right to effective representation of counsel. Granting the continuance, however, may encourage use of "unavailability" as a delaying tactic upsetting orderly judicial proceedings.<sup>114</sup>

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108. *Id.* at 64-65, 237 S.E.2d at 478. Judge Martin pointed out that defendant had made a strong showing of being "financially unable to secure legal representation and to provide all other necessary expenses of representation," N.C. GEN. STAT. § 7A-450(a) (1969), yet he was denied indigency status even though "[n]othing in the record refutes or contradicts the import of defendant's affidavit of indigency." 34 N.C. App. at 64-65, 237 S.E.2d at 478. Compare *Sanders with State v. Cradle*, 281 N.C. 198, 188 S.E.2d 296, cert. denied, 409 U.S. 1047 (1972), in which defendant entered an affidavit of indigency and the record did not refute or contradict the impact of defendant's affidavit. In that case the North Carolina Supreme Court reversed the district court judge and found the defendant indigent. *Id.* at 204, 188 S.E.2d at 300.

109. The dissent observed that it was likely that "the court's refusal to appoint counsel on August 10 upon the strong showing made by defendant thwarted any further efforts by him to establish his indigency. As a layman, defendant may well have perceived that any further remonstrance on his part would be futile." 34 N.C. App. at 66, 237 S.E.2d at 478 (Martin, J., dissenting).

110. See note 102 and accompanying text *supra*.

111. Defendant was sentenced to two years for nonfeloniously receiving stolen goods. 34 N.C. App. at 60, 237 S.E.2d at 475.

112. *Id.* at 65-66, 237 S.E.2d at 478 (Martin, J., dissenting). Such a requirement was imposed in *State v. Morris*, 275 N.C. 50, 60, 165 S.E.2d 245, 251 (1969). Arguably, in *Sanders* such a determination had been made when defendant was found not indigent. But he was found not indigent on August 10; he was convicted at trial on October 18. N.C. GEN. STAT. § 7A-450(c) (1969) provides that "[t]he question of indigency may be determined or redetermined by the court at any stage of the action or proceeding at which an indigent is entitled to representation." According to the dissent, situations such as defendant's long delay during a period of worsening financial condition illustrate one of the reasons for this statutory provision. 34 N.C. App. at 65-66, 237 S.E.2d at 478 (Martin, J., dissenting).

113. 34 N.C. App. at 65, 237 S.E.2d at 478 (Martin, J., dissenting); see *State v. Morris*, 275 N.C. 50, 60, 165 S.E.2d 245, 251 (1969).

114. Federal courts have held that whether a delay should be granted depends upon all the

In *State v. McFadden*<sup>115</sup> and *State v. Williams*<sup>116</sup> North Carolina courts confronted this dilemma. In *McFadden*, on the day of the trial, retained counsel's junior associate appeared in court and stated that counsel was engaged in a trial in federal court, that counsel was the only person prepared to try the case, that he (the associate) knew nothing about the case and that defendant wished to have his chosen counsel.<sup>117</sup> The superior judge denied the motion for continuance and ordered the associate to represent defendant. Defendant was convicted and sentenced to seven to ten years.<sup>118</sup> On appeal, the North Carolina Supreme Court held that defendant was denied both his right to select counsel of his choice and effective assistance of counsel.

According to the state supreme court, "[b]oth the State and Federal Constitutions secure to every man the right to be defended in all criminal prosecutions by counsel whom he selects and retains."<sup>119</sup> That right is not absolute; a defendant must timely exercise the right and not use it to delay intentionally the disposition of his case.<sup>120</sup> Defendant in *McFadden* had timely exercised his right and was not responsible for counsel's absence. According to the *McFadden* court, counsel's absence was not chargeable to defendant and could not be used to deny him his constitutional right to counsel of his choice.<sup>121</sup> The court also found that defendant was denied his right to effective assistance of counsel, because the associate who was ordered to try the case did not have reasonable time<sup>122</sup> to investigate, prepare and present the defense.<sup>123</sup>

In *State v. Williams*,<sup>124</sup> defendant employed a principal attorney to

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surrounding facts and circumstances. *Giacalone v. Lucas*, 445 F.2d 1238, 1240 (6th Cir. 1971). Some factors mentioned in *Giacalone* are: length of delay; whether the principal counsel has associates prepared to try the case in his absence; whether other continuances have been requested and received; convenience to litigants, witnesses, opposing counsel, and the court; and whether the delay seems to be for legitimate purposes. *Id.*

115. 292 N.C. 609, 234 S.E.2d 742 (1977).

116. 34 N.C. App. 408, 238 S.E.2d 668 (1977).

117. 292 N.C. at 610, 234 S.E.2d at 742.

118. *Id.*

119. *Id.* at 612, 234 S.E.2d at 744 (quoting *State v. Speller*, 230 N.C. 345, 351, 53 S.E.2d 294, 298 (1949)).

120. See *Lee v. United States*, 235 F.2d 219 (D.C. Cir. 1956); *People v. Brady*, 275 Cal. App. 2d 984, 80 Cal. Rptr. 418 (1969).

121. 292 N.C. at 615, 234 S.E.2d at 746-47; accord, *Lee v. United States*, 235 F.2d 219 (D.C. Cir. 1956).

122. 292 N.C. at 616, 234 S.E.2d at 747. What constitutes reasonable time depends on the circumstances of the case. *State v. Vick*, 287 N.C. 37, 213 S.E.2d 335, cert. dismissed, 423 U.S. 918 (1975).

123. The associate first met defendant 90 minutes before trial and knew nothing about the case. 292 N.C. at 610, 616, 234 S.E.2d at 742, 747. "Under these circumstances defendant was denied effective assistance of counsel because he and [the associate] did not have a reasonable time in which to prepare and present a defense." *Id.* at 616, 234 S.E.2d at 747.

124. 34 N.C. App. 408, 238 S.E.2d 668 (1977).

conduct his defense and two others to assist. When the case was called for trial the principal attorney was trying a different case, but the other two attorneys were present.<sup>125</sup> The trial judge maintained that defendant was ably represented by the two associate attorneys<sup>126</sup> and denied a motion for continuance.<sup>127</sup> The court of appeals upheld the trial judge's ruling, making the following comment on defendant's right to counsel he selects:

We do not believe this is a right without limitation. We think a reasonable line must be drawn between the rights of defendants to be represented by counsel of their choice, and the rights of society to have the many criminal courts of the State operated with a reasonable degree of efficiency. . . . [C]onsiderable discretion has to be vested in the trial judge who is on the scene and has the superior vantage point to view and consider the merits of a particular case.<sup>128</sup>

The court felt that *Williams* was easily distinguished from *McFadden* because in *Williams* defendant had two attorneys present who were "proved advocates of many years' experience, who had been employed by defendant for several months prior to the trial and who had every reason to be thoroughly familiar with the case."<sup>129</sup>

It is not clear, however, whether the *Williams* court was asserting that defendant had not been denied his right to select counsel of his choice or his right to have effective assistance of counsel.<sup>130</sup> Although defendant in *Williams* probably had effective assistance of counsel, under the *McFadden* reasoning he may nevertheless have been denied the right to be represented by counsel of his choice.<sup>131</sup> However, as he was represented by attorneys whom he had employed, even though not his chosen principal attorney, his right to be represented by counsel of his choice may not have been violated.

#### *D. Defendant's Right To Be Present at Trial*

In *State v. Montgomery*,<sup>132</sup> the court of appeals held that a defendant not represented by counsel could waive his right to be present at his trial by absenting himself from the proceedings. Defendant in *Montgomery* had

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125. *Id.* at 411-12, 238 S.E.2d at 670.

126. *Id.* at 412, 238 S.E.2d at 670.

127. One such continuance had already been granted. *Id.*

128. *Id.* at 413, 238 S.E.2d at 671. The court of appeals did not reverse the trial court ruling but did recognize that another judge might have ruled differently. *Id.*

129. *Id.* at 413-14, 238 S.E.2d at 671.

130. The court in *State v. McFadden*, 292 N.C. 609, 234 S.E.2d 742 (1977), found both of these rights violated. See text accompanying notes 119-23 *supra*.

131. See text accompanying notes 117-23 *supra*.

132. 33 N.C. App. 693, 236 S.E.2d 390, *cert. denied, appeal dismissed*, 293 N.C. 256, 237 S.E.2d 258 (1977).

elected to conduct his own defense<sup>133</sup> in a trial at which he and two codefendants were charged with felonious larceny and receiving of checks and money.<sup>134</sup> Defendant participated in jury selection but left during a court-ordered break for lunch before the jury was impaneled. Defendant, who apparently was free on bail, did not reappear after the recess. The court proceeded with the trial and defendant was convicted.<sup>135</sup>

The court of appeals held that the trial had already begun when defendant voluntarily left,<sup>136</sup> and that by leaving he waived his right to be present.<sup>137</sup> In North Carolina a defendant may waive his right to be present during a trial for a noncapital offense by voluntarily absenting himself from court after the trial begins.<sup>138</sup> *Montgomery*, however, is apparently the first North Carolina case to consider whether such absence during almost the entire course of the trial constitutes an effective waiver when defendant is representing himself. In *Montgomery* the court accepted defendant's absence as an effective waiver.

One problem with finding a waiver in *Montgomery* is that it is not clear that the court was sure that defendant had made a knowing and voluntary waiver and was aware of the consequences of his action.<sup>139</sup> Finding an effective waiver in this situation is justified by the probable result of a different conclusion. If the court had held otherwise, defendant would have, by electing to proceed pro se and then disappearing, effectively circumvented the trial court's proper denial of his earlier motion for continuance.<sup>140</sup>

Finding a waiver in the *Montgomery* situation, however, extends the waiver by absence rule beyond its ordinary scope. If the concern in whether

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133. *Id.* at 696-97, 236 S.E.2d at 392. Defendant "elected" to proceed pro se by discharging his counsel immediately before trial and after his motion for continuance to obtain other counsel was denied. He was told that he would have to proceed with his then-retained counsel or represent himself. *Id.*

134. *Id.* at 694, 236 S.E.2d at 390.

135. *Id.*

136. *Id.* at 695, 236 S.E.2d at 392. In *Pratt v. Bishop*, 257 N.C. 486, 504, 126 S.E.2d 597, 610 (1972), the court held that the trial began when the process of selecting jurors began. The court noted, however, that while it was following the general rule, "[t]he answer [to when a trial begins] may vary according to the . . . circumstances in a particular case." *Id.*

137. 33 N.C. App. at 696, 236 S.E.2d at 392.

138. *State v. Kelly*, 97 N.C. 404, 2 S.E. 185 (1887), seems to be the first North Carolina case to so hold, and *Kelly* has been consistently followed. See, e.g., *State v. Harris*, 27 N.C. App. 15, 217 S.E.2d 729, appeal dismissed, 288 N.C. 512, 219 S.E.2d 347 (1975) (defendant waived right to be present and to have his attorney present when both defendant and counsel absented themselves for rendering of verdict); *State v. Stockton*, 13 N.C. App. 15, 217 S.E.2d 459 (1971).

139. If the court had ruled that absence was not an effective waiver, then in the future trial courts might be required to explain to defendants that unexcused absences could result in waivers.

140. See 33 N.C. App. at 696-97, 236 S.E.2d at 392.

to apply the rule is that the defendant's case not be unduly prejudiced,<sup>141</sup> waiver by absence would be justified only when either (1) defendant is represented by counsel<sup>142</sup> or (2) defendant is absent during a noncritical stage of the trial.<sup>143</sup> *Montgomery* embraces neither situation; it seems based instead on the right of society to have its courts conducted with a reasonable degree of efficiency.<sup>144</sup>

### E. Trial Publicity

In addition to the rules prohibiting the finding of contempt on the basis of the content of a broadcast or publication,<sup>145</sup> the 1977 General Assembly adopted G.S. 7A-276.1, which prevents North Carolina's courts from issuing orders "banning, prohibiting, or restricting the publication or broadcast" of proceedings in open court or the contents of any public record.<sup>146</sup> The recent United States Supreme Court case of *Nebraska Press Association v. Stuart*<sup>147</sup> provided the incentive for this statute. In *Stuart*, prior to the trial of a defendant charged with a sensational mass murder, the trial judge entered an order that prohibited the publication or broadcasting of any facts "strongly implicative" of the accused.<sup>148</sup> Although the Nebraska Supreme Court narrowed the scope of the order,<sup>149</sup> the United States Supreme Court held that such a prohibition could not be justified in the face of constitutional guarantees of freedom of expression and the presumption against the use of prior restraints.<sup>150</sup> The Court refused to say that a "gag" order could never be justified, but before the entering of such an order, there would have to be a showing that there were no effective alternatives and that the "gag" order would serve its intended purpose.<sup>151</sup> Recognizing the

141. *State v. Kelly*, 97 N.C. 404, 2 S.E. 185 (1887) (Smith, C.J., dissenting).

142. See *id.* at 407, 2 S.E. at 186, where the court observed: "We can conceive of no just reason why [defendant] may not [absent himself], especially when he is represented by counsel . . . who . . . can generally take care of his rights better than he could do himself." Generally, in these situations, counsel has been present during the time when defendant was absent. *E.g.*, *State v. Stockton*, 13 N.C. App. 287, 185 S.E.2d 459 (1971). *But cf.* *State v. Harris*, 27 N.C. App. 15, 217 S.E.2d 729, *appeal dismissed*, 288 N.C. 512, 219 S.E.2d 347 (1975) (counsel and defendant were both absent, but only for rendering of verdict).

143. Few cases seem to have considered this second ground for finding waiver by absence independently of the first ground, since in most cases the defendant's attorney is present. Even if the defendant is proceeding pro se, however, absence during a noncritical stage would not prejudice his rights.

144. *Cf.* *State v. Williams*, 34 N.C. App. 408, 238 S.E.2d 668 (1977) (right to be represented by counsel of defendant's choice must be balanced against right of society to have criminal courts operated with reasonable degree of efficiency).

145. See text accompanying notes 458 & 459 *infra*.

146. N.C. GEN. STAT. § 7A-276.1 (Cum. Supp. 1977).

147. 427 U.S. 539 (1976).

148. *Id.* at 541.

149. *Id.* at 545.

150. *Id.* at 570.

151. *Id.* at 569-70.

difficulty of ever meeting the requirements of *Stuart*, the General Assembly chose to prohibit the issuance of such orders altogether.

#### F. *Pretrial Identification of Defendant*

In *State v. Sanders*,<sup>152</sup> the North Carolina Court of Appeals measured the pretrial identification procedure involved in that case against the statutory provisions for procedures to be followed after arrest set out in G.S. 15A-501<sup>153</sup> and concluded that, because of substantial violations of that statute, the pretrial identification testimony had to be suppressed.<sup>154</sup>

G.S. 15A-501 provides that upon arrest, a law enforcement officer must take the person arrested before a judicial official without unnecessary delay. The officer may, however, prior to taking the person before a judicial officer, take him to some other place "if such action is *reasonably necessary* for the purpose of having that person identified."<sup>155</sup> Defendant in *Sanders* was arrested without a warrant at 11:45 p.m. five miles from the scene of the robbery, which had occurred forty-five minutes earlier. He was taken to the local police station, where officers called a magistrate and asked him to come to the station. Before the magistrate arrived, the officers took defendant to the police station in the town where the robbery had occurred for a show-up, at which he was identified as the robber.<sup>156</sup>

The issue before the court was whether it was "reasonably necessary," within the meaning of the statute, to take defendant to the show-up before taking him to the magistrate. The State argued that "in view of the late hour, the difficulty in procuring a magistrate and the benefits of prompt identification," the officers had acted reasonably.<sup>157</sup> The court seemed to agree with the State that the officers had acted reasonably, but held that the legislature intended "reasonably necessary" to set a much stricter standard. The court suggested that only exigent circumstances, such as when an identification by a person in imminent danger of death or loss of faculties is needed, would justify obtaining an identification prior to an appearance before a judicial officer.<sup>158</sup> The *Sanders* court found no constitutional violation in the show-

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152. 33 N.C. App. 284, 235 S.E.2d 94, *cert. denied*, 293 N.C. 257, 237 S.E.2d 539 (1977).

153. N.C. GEN. STAT. § 15A-501 (1975 & Cum. Supp. 1977).

154. 33 N.C. App. at 288-89, 235 S.E.2d at 97. North Carolina appellate courts have been criticized for engaging in only cursory review of pretrial identification procedures. *See Survey of Developments in North Carolina Law, 1976*, 55 N.C.L. REV. 895, 1004-05 (1977). If that criticism is valid, then *Sanders* may mark a turn toward closer analysis of pretrial identification procedures, which may in turn encourage law enforcement officials to avoid procedures that do not comport with statutory standards or that are impermissibly suggestive. *See id.*

155. N.C. GEN. STAT. § 15A-501 (1975 & Cum. Supp. 1977) (emphasis added).

156. 33 N.C. App. at 285-86, 235 S.E.2d at 95.

157. *Id.* at 289, 235 S.E.2d at 97.

158. *Id.* at 288-89, 235 S.E.2d at 97. N.C. GEN. STAT. § 15A-501(4) (1975), according to the

up,<sup>159</sup> but held that testimony concerning the pretrial identification should have been suppressed because it was evidence "obtained as a result of a *substantial* violation' of the Criminal Procedure Act."<sup>160</sup>

### G. Criminal Discovery

North Carolina courts had several occasions to interpret the state's rules of criminal discovery.<sup>161</sup> The supreme court decided two cases that may significantly affect the right of criminal defendants to pretrial discovery of the identity and statements of the State's witnesses. In *State v. Smith*,<sup>162</sup> the supreme court held that the State's witnesses should not be prohibited from testifying because their names were omitted from a witness list furnished defendant pursuant to a pretrial discovery motion. In *State v. Hardy*,<sup>163</sup> after an extensive discussion of criminal discovery in North Carolina, the supreme court determined that a defendant has no right to the pretrial dis-

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Official Commentary, is based upon the ALI MODEL CODE OF PRE-ARREST PROCEDURE § 3.09(1) (Tent. Draft No. 1, 1966) (alternate provision) and *Stovall v. Denno*, 388 U.S. 293 (1967). The Model Code uses "reasonably necessary" to mean "reasonably necessary for the purpose of having such person identified by a person in imminent danger of death or loss of faculties." In *Stovall v. Denno* the Court found no due process violation in a show-up when the only witness was in the hospital and no one knew how long she would live. 388 U.S. at 302. The *Sanders* court observed that if a magistrate were not able to come in the middle of the night, the officers would be justified under N.C. GEN. STAT. § 15A-501(2) (Cum. Supp. 1977), in holding defendant until morning since he had been arrested on adequate probable cause. 33 N.C. App. at 289, 235 S.E.2d at 97.

159. 33 N.C. App. at 287-88, 235 S.E.2d at 96.

160. *Id.* at 289, 235 S.E.2d at 97 (quoting N.C. GEN. STAT. § 15A-974 (1975) (emphasis in original)). Section 15A-974(2) provides that factors to be considered in determining whether a violation is substantial are: the importance of the particular interest violated; the extent of the deviation from lawful conduct; the extent to which the violation was willful; and the extent to which exclusion will tend to deter future violations. N.C. GEN. STAT. § 15A-974(2) (1975). The court did not explain its reason for concluding that the violation was substantial, but because it found no constitutional violation and because it seemed to feel that the officers acted reasonably, it seems likely that an important factor for the court was the deterrence value of exclusion. This conclusion is especially likely since in *Sanders* it was not necessary to overturn the conviction because the court found beyond a reasonable doubt that admission of the evidence was harmless. 33 N.C. App. at 289-90, 235 S.E.2d at 97-98.

161. *See, e.g.*, *State v. Shaw*, 293 N.C. 616, 625, 239 S.E.2d 439, 444 (1977) (relief is discretionary for noncompliance with discovery order); *State v. Hardy*, 293 N.C. 105, 122-28, 235 S.E.2d 828, 838-42 (1977) (discovery of witnesses' statements) (*see* text accompanying notes 190-203 *infra*); *State v. Cross*, 293 N.C. 296, 303-04, 237 S.E.2d 734, 739-40 (1977) (discovery of material and exculpatory evidence); *State v. Dollar*, 292 N.C. 344, 351, 233 S.E.2d 521, 525 (1977) (discovery of State's witnesses); *State v. May*, 292 N.C. 644, 657-58, 235 S.E.2d 178, 186-87, *cert. denied*, 98 S. Ct. 414 (1977) (discovery of material and exculpatory evidence); *State v. Britt*, 291 N.C. 528, 533-34, 231 S.E.2d 644, 649 (1977) (discovery of State's witnesses); *State v. Thomas*, 291 N.C. 687, 692, 231 S.E.2d 585, 588 (1977) (relief is discretionary for noncompliance with discovery order); *State v. Smith*, 291 N.C. 505, 523-24, 231 S.E.2d 663, 674-75 (1977) (discovery of State's witnesses) (*see* text accompanying notes 164-76 *infra*); *State v. Kessack*, 32 N.C. App. 536, 541, 232 S.E.2d 859, 862 (1977) (relief is discretionary for noncompliance with discovery order).

162. 291 N.C. 505, 231 S.E.2d 663 (1977).

163. 293 N.C. 105, 235 S.E.2d 828 (1977).



covery of the statements of the State's witnesses although there may be a right to such statements at trial if they are exculpatory and material to the defense.

In *Smith*, the trial court issued a pretrial order requiring the State to disclose a list of its witnesses to defendant. The trial court later permitted the State to call two witnesses whose names were omitted from the list.<sup>164</sup> In ruling that permitting the witnesses to testify did not constitute error, the North Carolina Supreme Court cited the legislative history of G.S. 15A-903<sup>165</sup> as specifically excluding the right to the discovery of witnesses' names.<sup>166</sup> Although the *Smith* court refused to say that it was beyond the power of the trial court to order such discovery, the court felt that "trial judges should not encourage, by court order, what the Legislature specifically rejected during the consideration of the legislation."<sup>167</sup>

Although the American Bar Association has recommended that defendants be permitted to discover the names and addresses of the prosecution's witnesses,<sup>168</sup> a similar provision in a proposed version of G.S. 15A-903 proved so controversial when presented to the General Assembly that it was deleted.<sup>169</sup> There is no provision for discovery of witnesses' names in the Federal Rules of Criminal Procedure,<sup>170</sup> and the federal courts have held that the rules neither authorize nor forbid the discovery of the government's witnesses.<sup>171</sup> Federal district judges, however, do possess an inherent power to order disclosure of the government's witnesses. Such an order is reviewable only for an abuse of discretion.<sup>172</sup> In at least one case, a United States Court of Appeals found such an abuse when the district court ordered disclosure of witnesses' names even though two of the defendants were charged with beating a grand jury witness.<sup>173</sup>

The primary reason for denying discovery of the State's witnesses is a fear of reprisals against them by defendants.<sup>174</sup> Although this concern may be very real in some cases, it must be balanced against the importance of

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164. 291 N.C. at 523, 231 S.E.2d at 674.

165. N.C. GEN. STAT. § 15A-903 (1975).

166. 291 N.C. at 523-24, 231 S.E.2d at 675; *accord*, State v. Dollar, 292 N.C. 344, 233 S.E.2d 521 (1977); State v. Britt, 291 N.C. 528, 231 S.E.2d 644 (1977).

167. 291 N.C. at 524, 231 S.E.2d at 675.

168. See ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL § 2.1(a)(i), at 13 (Tent. Draft, 1969).

169. See N.C. GEN. STAT. § 15A-903, Official Commentary (1975).

170. See FED. R. CRIM. P. 16.

171. See United States v. Cannone, 528 F.2d 296 (2d Cir. 1975); United States v. Jackson, 508 F.2d 1001 (7th Cir. 1975).

172. United States v. Cannone, 528 F.2d 296, 299 (2d Cir. 1975); United States v. Jackson, 508 F.2d 1001, 1007 (7th Cir. 1975).

173. United States v. Cannone, 528 F.2d 296 (2d Cir. 1975).

174. See N.C. GEN. STAT. § 15A-903, Official Commentary (1975).

granting defendants a fair trial. For example, an eyewitness to a crime may be unknown to the defendant but crucial to establishing a defense to the charge.<sup>175</sup> In such a situation, it would seem that discovery of the witnesses' names should be allowed. Since the *Smith* case does not strictly prohibit pretrial discovery of the State's witnesses, it should perhaps be interpreted as reserving such discovery for unusual circumstances rather than allowing such discovery as a matter of course. When there is a genuine threat of harassment, the State can seek a protective order to prevent discovery.<sup>176</sup>

In *State v. Hardy*,<sup>177</sup> the supreme court also took note of the problem of witness intimidation in concluding that North Carolina's criminal discovery laws<sup>178</sup> specifically prohibit pretrial orders for the discovery of statements made by the prosecution's witnesses. The court also held, however, that specifically requested statements could be discovered at trial if, after inspection, the trial judge determines that they were both favorable to the defendant and material to his guilt or punishment.

In *Hardy*, the trial judge ordered disclosure of "papers, documents, photographs, mechanical or electronic recordings, [and] tangible objects in control of the State relative to said case."<sup>179</sup> Upon discovering that the State had failed to disclose a recorded and transcribed statement of one of the witnesses who had testified at trial, defendant moved to strike the witness' testimony. The trial judge ruled that the recording and transcript were the work product of the State and not subject to discovery.<sup>180</sup> On appeal, defendant argued that the pretrial order encompassed the discovery of the statements of witnesses. The State's position was that the trial judge had exceeded his authority and that the order was therefore a nullity.

Relying on North Carolina's criminal discovery rules,<sup>181</sup> the supreme court interpreted the order as excluding the discovery of witnesses' statements.<sup>182</sup> Admitting that G.S. 15A-903(d) seemed to allow discovery of any

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175. This was the situation in *People v. Harrison*, 81 Misc. 2d 144, 364 N.Y.S.2d 760 (J. Ct. 1975). In that case, the court allowed discovery both of the identity of the State's witnesses and of their statements taken at the scene of the crime.

176. N.C. GEN. STAT. § 15A-908 (1975) provides in relevant part that "the court may at any time order that discovery or inspection be denied, restricted, or deferred, or may make other appropriate orders."

177. 293 N.C. 105, 235 S.E.2d 828 (1977).

178. N.C. GEN. STAT. §§ 15A-901 to -910 (1975); see text accompanying note 174 *supra*.

179. 293 N.C. at 122, 235 S.E.2d at 838.

180. *Id.* at 123, 235 S.E.2d at 839.

In several cases decided during 1977, North Carolina courts held that when the State fails to comply with discovery orders, the relief granted is within the discretion of the trial judge and not reviewable absent an abuse of discretion. See *State v. Shaw*, 293 N.C. 616, 239 S.E.2d 439 (1977); *State v. Thomas*, 291 N.C. 687, 231 S.E.2d 585 (1977); *State v. Kessack*, 32 N.C. App. 536, 232 S.E.2d 859 (1977).

181. N.C. GEN. STAT. §§ 15A-903 to -904 (1975).

182. 293 N.C. at 125, 235 S.E.2d at 840.

documents and tangible objects held by the State,<sup>183</sup> the court found that G.S. 15A-904(a) specifically excluded from pretrial discovery "statements made by witnesses or prospective witnesses of the State to anyone acting on behalf of the State."<sup>184</sup> The court did not decide whether a judge had authority to order discovery of materials not protected by statute but concluded that the discovery of the statements of State witnesses was expressly prohibited by statute and that the trial court had no inherent authority to order discovery of such statements.<sup>185</sup> The court reasoned that this prohibition was consistent with the legislature's desire to shield the State's witnesses from possible harassment.<sup>186</sup>

According to the Official Commentary to G.S. 15A-904(a), however, the primary purpose of this section is the protection of the work product of the State.<sup>187</sup> Certainly an attorney's impressions, opinions, conclusions and legal theories should be protected from discovery under this section, but the statements of witnesses are not work product in the same sense as legal memoranda<sup>188</sup> and it is questionable whether the legislature meant to exclude discovery of the statements of witnesses in all circumstances. Since assuring defendants a fair trial is the primary purpose of criminal discovery, trial judges should be permitted to order the discovery of witnesses' statements when they are crucial to the defense's trial preparation. Since the North Carolina Supreme Court has decided that trial courts cannot order the disclosure of the State's witnesses and their statements, however, defendants must rely on voluntary disclosure by the prosecutor<sup>189</sup> or seek discovery at trial.

The *Hardy* court also ruled that the prohibitions of G.S. 15A-904(a) were applicable only to pretrial discovery and that the statements of the State's witnesses could be discovered at trial if such statements were not otherwise privileged.<sup>190</sup> Although in *Hardy* the trial court had ruled that

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183. *Id.* at 123, 235 S.E.2d at 839. N.C. GEN. STAT. § 15A-903(d) (1975) provides:

Upon motion of the defendant, the court must order the solicitor to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, tangible objects, or copies or portions thereof which are within the possession, custody, or control of the State and which are material to the preparation of his defense, are intended for use by the State as evidence at the trial, or were obtained from or belong to the defendant.

184. N.C. GEN. STAT. § 15A-904(a) (1975).

185. 293 N.C. at 125, 235 S.E.2d at 840. The court's interpretation is in accord with the interpretation given to similar provisions in the Federal Rules of Criminal Procedure by the federal courts. See *United States v. Percevault*, 490 F.2d 126 (2d Cir. 1974); *United States v. McMillen*, 489 F.2d 229 (7th Cir. 1972).

186. 293 N.C. at 124, 235 S.E.2d at 839.

187. See N.C. GEN. STAT. § 15A-904(a), Official Commentary (1975).

188. 293 N.C. at 126, 235 S.E.2d at 841.

189. N.C. GEN. STAT. § 15A-904(b) (1975) makes it clear that nothing in the statutes is meant to discourage voluntary disclosure by the State.

190. 293 N.C. at 125, 235 S.E.2d at 840. To support this proposition, the court relied on a

witnesses' statements were protected by the work product privilege, the supreme court held that the privilege was waived whenever the "defendant or the State [sought] at trial to make a testimonial use of the work product."<sup>191</sup> Even though the State had waived the work product privilege by calling the witness whose pretrial statement was in question to testify, the supreme court refused to hold that the statements of witnesses should routinely be disclosed at trial. Before disclosure is required, the statements must also be favorable and material either to the guilt or punishment of the defendant.<sup>192</sup>

Recognizing that it was a violation of due process for the prosecution to suppress favorable and material evidence,<sup>193</sup> the North Carolina Supreme Court interpreted the decision of the United States Supreme Court in *United States v. Agurs*<sup>194</sup> as requiring the disclosure of such material evidence only at trial.<sup>195</sup> In *Agurs*, however, the Supreme Court discussed the standard of materiality that must be met before there is a duty to disclose and did not directly discuss the timing of the prosecutor's disclosure.<sup>196</sup> The *Agurs*

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similar holding in *United States v. Nobles*, 422 U.S. 225 (1975). In *Nobles* the defense used an investigator's report to impeach one of the prosecution's witnesses. When the defense called the investigator to the stand, the trial judge ordered that the report be given to the prosecutor. In holding for the government, the Supreme Court stated that there was nothing in the federal criminal discovery rules that limited the court's power to order production once the trial has begun. *Id.* at 235; see FED. R. CRIM. P. 16.

191. 293 N.C. at 126, 235 S.E.2d at 841. The North Carolina Supreme Court again relied on *United States v. Nobles*, 422 U.S. 225 (1973), in which the Court said that even though the work product doctrine shelters the mental processes of the attorney and materials prepared by agents of the attorney, the privilege was waived in respect to the statements of persons who testify at trial. *Id.* at 238-39.

192. 293 N.C. at 128, 235 S.E.2d at 842. Under the Jencks Act, 18 U.S.C. § 3500 (1976), defendants in federal courts are automatically entitled to the statements of the prosecution's witnesses when they testify at trial.

193. See *Brady v. Maryland*, 373 U.S. 83 (1963). The defense in *Brady* had made a specific request for all of the statements made by defendant's accomplice. After defendant was found guilty of first degree murder and sentenced to death, the defense learned that the State had failed to disclose a statement of the accomplice in which he had confessed to the crime. The United States Supreme Court ordered defendant resentenced since this information could have influenced the jury's sentence determination. The Supreme Court held that when specific evidence has been requested by the defense, "[t]he suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87; accord, *State v. Gaines*, 283 N.C. 33, 194 S.E.2d 839 (1973).

194. 427 U.S. 97 (1976). In *Agurs*, the United States Supreme Court ruled that even absent a request for specific evidence, the prosecution has a duty to disclose exculpatory and material evidence. Nondisclosure in this situation would be constitutional error "if the omitted evidence create[d] a reasonable doubt that did not otherwise exist." *Id.* at 112.

195. 293 N.C. at 127, 235 S.E.2d at 841. In requiring discovery of material and exculpatory statements only at trial, the North Carolina Supreme Court followed the majority view that developed after *Brady v. Maryland*, 373 U.S. 83 (1963). See generally Nakell, *Criminal Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations*, 50 N.C.L. REV. 437, 452-53 (1972); Annot., 7 A.L.R.3d 8, 122-29 (1966).

196. See generally Note, *The Prosecutor's Duty to Disclose After United States v. Agurs*, 1977 U. ILL. L.F. 690, 710-11.

Court said that the applicable standard of materiality would apply "in advance of trial, and perhaps during the course of a trial" when the prosecutor must determine what "he should voluntarily submit to defense counsel."<sup>197</sup> Although the *Agurs* decision does not specifically require pretrial discovery, this dictum would seem at least to encourage the prosecutor to disclose any material evidence prior to trial. Certainly if evidence is so favorable and material that it creates a reasonable doubt about the guilt of a defendant, the defense should be apprised of it in time to make effective use of it at trial.

Under *Agurs*, before there is a duty to disclose the evidence in question must be both exculpatory and material. Since the lawyers working on a case are most familiar with its facts, many courts permit the prosecuting attorney to decide whether evidence is material.<sup>198</sup> When the prosecuting attorney determines the question of materiality, however, there is often no basis for appellate review unless the defense is fortunate enough to discover the omitted evidence.<sup>199</sup> Recognizing this problem in *Hardy*, the North Carolina Supreme Court said that when a defendant makes a request for specific information, such as the statements of a State's witness, the trial judge should hold an *in camera* inspection and make appropriate findings of fact. When the decision is against disclosure, the judge must place a sealed copy of the statement in the record.<sup>200</sup> This procedure ensures that the information sought by a defendant will be preserved for appellate review.

The North Carolina Supreme Court did not extend this procedure to situations not involving a request for specific information by the defendant.<sup>201</sup> However, since the disclosure of material, exculpatory evidence is required by due process even in the absence of a request for specific evidence, it would seem that appellate review of the nondisclosure of arguably material evidence should not be left to happenstance. Nevertheless, it is impossible to preserve the State's entire case file for appellate review, and judges should not be required to sift through the prosecution's files.<sup>202</sup> The prosecution does not have a duty to make routine disclosure of its entire file to the defense,<sup>203</sup> but in this situation, justice might be better served if the State disclosed any arguably material evidence or submitted such evidence for an *in camera* inspection by the trial judge.

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197. 427 U.S. at 107.

198. See, e.g., *People v. Harrison*, 81 Misc. 2d 144, 364 N.Y.S.2d 760 (J. Ct. 1975).

199. See examples cited in Nakell, *supra* note 195, at 453-58.

200. 293 N.C. at 128, 235 S.E.2d at 842.

201. *Id.* at 127, 235 S.E.2d at 842.

202. *Id.*

203. See *Moore v. Illinois*, 408 U.S. 786 (1972).

The *Hardy* court found no error by the trial judge because defendant made no request for the witness' statements at trial and the statement was not in the record for review on materiality. Nevertheless the court's discussion did answer several questions about criminal discovery in North Carolina. It is now clear that under G.S. 15A-904(a) the statements of a prosecutor's witness are not subject to pretrial discovery orders. Such statements, however, may be discovered at trial if not protected by the work product privilege. When a witness has testified, the State does not have to disclose his pretrial statements as a matter of course, but once the defense requests such statements as exculpatory, the trial court must inspect the evidence *in camera* and make appropriate findings of fact. It is unclear whether this procedure will be followed when the defense has not made a request for specific material.

#### H. Burden of Proof

In a 1975 decision, *Mullaney v. Wilbur*,<sup>204</sup> the United States Supreme Court held that the prosecution, to obtain a criminal conviction, must persuade the jury beyond a reasonable doubt on *all elements* of the crime charged. The State of Maine's procedure, whereby defendant was required to prove by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce a murder charge to manslaughter, was held to be a violation of the due process clause of the fourteenth amendment.<sup>205</sup> After *Mullaney*, any procedure that placed the burden of proof on a criminal defendant to disprove any element of his crime became questionable.<sup>206</sup> Later that year, in *State v. Hankerson*,<sup>207</sup> the North

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204. 421 U.S. 684 (1975).

205. *Id.* at 703-04.

206. In *State v. Batdorf*, 293 N.C. 486, 238 S.E.2d 497 (1977), for example, the North Carolina Supreme Court chose to change the state's long-standing rule that a challenge to the court's jurisdiction and venue in a criminal trial is an affirmative defense, with the burden of proof on the defendant. Though it was uncertain whether such a revision was required by *Mullaney* and *In re Winship*, 397 U.S. 358 (1970) (reasonable doubt standard of proof required in juvenile cases), the court stated that the change was warranted by policy considerations. Not only did a question as basic as jurisdiction seem most suitably proved by the State, but also other states would be more likely to accept a North Carolina court's determination of jurisdiction if the highest standard of proof had been applied, thus reducing the danger of double jeopardy for defendants. 293 N.C. at 493-94, 238 S.E.2d at 502-03. The court reasoned that proof of venue by a preponderance of the evidence would be sufficient because that issue did not affect the question of a defendant's guilt or the power of the court to try him. *Id.* at 496, 238 S.E.2d at 503-04. The court's holding did not require a reversal of the conviction in *Batdorf*, since the trial judge's charge had in fact placed the burden of proving jurisdiction on the State, and the jury found it had met that burden. Defendant's claim that the State's evidence was insufficient to establish jurisdiction and venue was rejected, the court ruling that the undisputed fact that the victim's body was found in North Carolina, weighted and tied with materials from the North Carolina home of defendant's girl friend, constituted a *prima facie* showing of jurisdiction sufficient for the jury to infer that the killing took place within the state. *Id.* at 494-95, 238 S.E.2d at 503.

207. 288 N.C. 632, 220 S.E.2d 575 (1975), *rev'd*, 432 U.S. 233 (1977). The North Carolina Supreme Court decision was noted in 54 N.C.L. Rev. 1020 (1976).

Carolina Supreme Court considered the question whether the *Mullaney* rule should be applied to require the State, when the defendant in a homicide case claims self-defense, to prove beyond a reasonable doubt that the killing was *not* in self-defense. Although the court held that a defendant could not constitutionally be required, as Hankerson was by the judge's jury instructions, to "satisfy" the jury that he had acted in self-defense,<sup>208</sup> the court nevertheless affirmed Hankerson's conviction, concluding that the *Mullaney* rule was inapplicable in this case because it was announced after defendant's conviction.<sup>209</sup>

In *Hankerson v. North Carolina*,<sup>210</sup> the United States Supreme Court reversed the North Carolina Supreme Court's decision that *Mullaney* would not be applied retroactively. *Hankerson*, the Court ruled, was controlled by the decision in *Ivan V. v. City of New York*,<sup>211</sup> in which the Court held that *In re Winship*<sup>212</sup> would be retroactively applied. In *Winship* the Court had ruled that the reasonable doubt standard must be used in state juvenile proceedings.<sup>213</sup> Announcing the retroactivity of *Winship*, the Court said:

Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.<sup>214</sup>

In *Hankerson* the Court held that the *Mullaney* rule, like that of *Winship*, "was designed to diminish the probability that an innocent person would be convicted and thus to overcome an aspect of a criminal trial that 'substantially impairs the truthfinding function.'"<sup>215</sup>

The North Carolina Supreme Court recognized the closeness of *Winship* and *Hankerson* on the question of the purpose to be served by the new rule and the importance of that factor in past decisions of the United States Supreme Court on retroactivity.<sup>216</sup> The court nevertheless concluded that

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208. *Id.* at 643, 220 S.E.2d at 584.

209. *Id.*

210. 432 U.S. 233 (1977).

211. 407 U.S. 203 (1972) (per curiam).

212. 397 U.S. 358 (1970).

213. *Id.* at 368.

214. 407 U.S. at 204 (quoting *Williams v. United States*, 401 U.S. 646, 653 (1971)).

215. 432 U.S. at 242 (quoting *Williams v. United States*, 401 U.S. 646, 653 (1971)).

216. 288 N.C. at 652, 220 S.E.2d at 590.

because the two cases were “poles apart” in terms of two other factors—the extent of the courts’ reliance on previous decisions and the effect of retroactive application on the administration of justice—a different result on the retroactivity question was justified.<sup>217</sup>

The United States Supreme Court disagreed. Conceding that it had considered both the fact of reliance on the old rule and the fact that the new rule would have a significant impact on the administration of justice even though it would affect only marginally the integrity of the fact-finding process, the court confirmed that when the impact of the rule on the truth-finding function of the criminal trial was “substantial,” it *must* be given retroactive application.<sup>218</sup>

In considering the arguments advanced by the State in support of the state supreme court ruling, Justice White, writing for the Court, noted that the State did *not* argue that self-defense could be designated an affirmative defense that the prosecution need not disprove beyond a reasonable doubt.<sup>219</sup> Such a procedure was upheld by the Court in *Patterson v. New York*,<sup>220</sup> a decision handed down the same day as *Hankerson*. The New York law challenged in *Patterson* provided that when someone is charged with murder, the State must prove every element of the accused’s guilt beyond a reasonable doubt: “[e]xtreme emotional disturbance,” however, was designated an affirmative defense that a defendant must prove by a preponderance of the evidence in order to reduce the crime to manslaughter.<sup>221</sup> The Court upheld this practice on a due process challenge, distinguishing *Mullaney* on the ground that the State did not shift the burden to defendant to disprove any fact essential to the offense charged, since this affirmative defense bore no direct relation to any element of the crime of murder.<sup>222</sup>

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217. *Id.* at 654, 220 S.E.2d at 590. The court found that there was no reliance by New York on previous rules in *Winship*, whereas North Carolina courts had relied on the presumption of unlawfulness from proof of an intentional killing for over 100 years. Additionally, the retroactive impact of *Mullaney* on the criminal justice system, the court felt, would be devastating, since it would apply to convicted murderers, many of whose convictions were years old, making retrial virtually impossible. *Id.* at 654, 220 S.E.2d at 590-91.

218. 432 U.S. at 243.

219. *Id.* at 240 n.6, 245. See also *id.* at 245 (Blackmun, J., concurring).

220. 432 U.S. 197 (1977).

221. *Id.* at 201.

222. *Id.* at 210. The Maine statute struck down in *Mullaney* designated malice as an essential element of the crime of murder, while the New York statute did not. Justice Powell, dissenting, charged that the Court’s decision was thus “formalistic rather than substantive,” allowing a state legislature “to shift, virtually at will, the burden of persuasion with respect to any factor in a criminal case, so long as it is careful not to mention the nonexistence of that factor in the statutory language that defines the crime.” *Id.* at 221, 223 (Powell, J., dissenting).



Even under *Patterson*, however, it is unclear whether North Carolina can constitutionally shift the burden of proof on self-defense to defendants by making it an affirmative defense. Though unlawfulness is not an express statutory element of the crime of murder,<sup>223</sup> it has been recognized by the North Carolina Supreme Court as an essential element of the crime.<sup>224</sup> Moreover, the Court in *Patterson* warned that there were some constitutional limits beyond which state legislatures could not go in reallocating burdens of proof by labeling various elements of a crime as affirmative defenses.<sup>225</sup> On the whole it seems that the wiser course for North Carolina is to retain its new-found place among the majority of jurisdictions,<sup>226</sup> requiring the State to disprove self-defense beyond a reasonable doubt.

The *Hankerson* Court also hinted that the states might be able to avoid much of the impact of a retroactive *Mullaney* rule by application of the general rule that failure to object to a jury instruction constitutes a waiver of any claim of error.<sup>227</sup> As the rule shifting the burden of proof to defendants on the self-defense issue was well-settled prior to this case, the Court commented that "it is unlikely that prior to *Mullaney* many defense lawyers made appropriate objections to jury instructions incorporating those presumptions."<sup>228</sup> Such a strict application of the waiver rule, however, would not comply with the provisions regulating appellate review adopted by the North Carolina General Assembly in 1977.<sup>229</sup> This statute couples a general provision that errors may not be asserted on appellate review unless previously objected to in the trial court at the appropriate time, with a list of exceptions that "may be the subject of appellate review even though no objection, exception, or motion has been made in the trial division."<sup>230</sup> This list of excepted errors includes:

(7) The conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina.

• • • • •  
(13) Error of law in the charge to the jury.

• • • • •  
(19) A significant change in law, either substantive or procedural, applies to the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required.<sup>231</sup>

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223. See N.C. GEN. STAT. § 14-17 (Cum. Supp. 1977).

224. *State v. Hankerson*, 288 N.C. at 648-52, 220 S.E.2d at 587-89.

225. 432 U.S. at 210. The Court did not, however, define those limits.

226. See *State v. Hankerson*, 288 N.C. at 654-55, 220 S.E.2d at 591.

227. 432 U.S. at 244 n.8.

228. *Id.*

229. N.C. GEN. STAT. § 15A-1446 (Cum. Supp. 1977).

230. *Id.* § 15A-1446(a), (d).

231. *Id.* § 15A-1446(d)(7), (13), (19).

Any of these exceptions should allow a petitioner convicted under an erroneous burden of proof charge to raise a claim under *Mullaney* on direct appeal. Although these provisions do not govern procedure on collateral review, a prisoner convicted under the pre-*Mullaney* procedure would appear to have a valid claim on federal habeas corpus.<sup>232</sup>

### I. Motion for Dismissal

New G.S. 15A-1227<sup>233</sup> liberalizes the rules for a motion for dismissal during trial. The statute that controlled this question before the 1977 change, G.S. 15-173,<sup>234</sup> was interpreted as requiring that, in order to preserve the motion on appeal,<sup>235</sup> the motion be made after State's evidence, and that in no event could the motion be raised for the first time after verdict.<sup>236</sup> Subsection (a) of the new statute provides that the motion can be made at the close of the State's evidence, the close of all the evidence, after a guilty verdict and before entry of judgment or after discharge of the jury without a verdict.<sup>237</sup> Subsection (b) provides that failure to make the motion at the close of either the State's evidence or all the evidence does not bar a later motion.<sup>238</sup>

### J. Jury Selection

#### 1. Racial Discrimination

In *State v. Harbison*,<sup>239</sup> the North Carolina Supreme Court restricted the application of the *State v. Perry*<sup>240</sup> mandate that criminal defendants be

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232. Although recent decisions of the United States Supreme Court have narrowed the scope of review on habeas corpus, they should not exclude a *Mullaney*-type claim. In *Francis v. Henderson*, 425 U.S. 536 (1976), the Court held that when a state procedural rule requires a defendant to raise a claim at trial or waive it, a federal court must also give effect to the waiver rule, unless the petitioner can show cause for his failure to object at the appropriate time and actual prejudice from the error. *Id.* at 542. Aside from the fact that North Carolina does not have a statutory waiver rule for this type of error, a petitioner raising a *Mullaney* claim should have good cause for not objecting to the jury instructions at trial or raising the claim on direct appeal, since such instructions would have followed the accepted pattern at the time. "Actual prejudice" from the error must be presumed since the Court itself has said that an erroneous instruction on burden of proof affects the "truth-finding function" of the criminal trial. *See text* accompanying notes 211 & 214 *supra*. For the same reason, a petitioner would not be barred by the Court's intimation in *Stone v. Powell*, 428 U.S. 465, 489-95 (1976), that only constitutional claims that question the integrity of the state fact-finding process would be considered on federal habeas corpus.

233. N.C. GEN. STAT. § 15A-1227 (Cum. Supp. 1977).

234. *Id.* § 15-173 (1975).

235. *State v. Weaver*, 228 N.C. 39, 44 S.E.2d 360 (1947).

236. *State v. Wiggs*, 269 N.C. 507, 153 S.E.2d 84 (1967).

237. N.C. GEN. STAT. § 15A-1227(a) (Cum. Supp. 1977).

238. *Id.* § 15A-1227(b).

239. 293 N.C. 474, 238 S.E.2d 449 (1977).

240. 248 N.C. 334, 103 S.E.2d 404 (1958). The circumstances in *Perry* were admittedly more objectionable than those in *Harbison*. In *Perry*, defendant was indicted by an all white

afforded a reasonable period of time to investigate alleged racial discrimination in the makeup of grand juries and jury venires. The *Harbison* court did not deny the validity of the requirement,<sup>241</sup> but put defense counsel on notice that in order to preserve the right, they must begin investigation before the problem becomes apparent. In *Harbison*, the trial judge's denial of a motion for continuance was held not to be error because a fifty-five day period had elapsed between the time the sixty member venire had been announced and the trial date.<sup>242</sup> During that period defendant's attorneys had made no investigation into the jury selection process and had introduced no evidence to support their motion.<sup>243</sup> The court concluded that:

It places no undue burden on defense counsel to require them to make investigations into jury composition and selection procedures prior to the time of trial, so long as the time between retention or appointment of counsel, the date the jury panel is drawn, and the date of trial is not so brief as to make such investigation impractical.<sup>244</sup>

Justice Exum dissented, arguing that the reasonable opportunity the Supreme Court found in the *Harbison* facts was too theoretical to be acceptable.<sup>245</sup> Justice Exum pointed out that of the sixty persons listed on the venire, only thirty-two—all whites—reported for jury duty on the day of the trial. Even if defendant had investigated all the names on the venire, he would have had no way of knowing until the trial date that he faced an all white panel from which to choose his jury.<sup>246</sup> "Faced with that circumstance . . . defendant should have been entitled to inquire into the reasons and be given an opportunity to present evidence on the point he raised."<sup>247</sup> The effect of the majority rationale is to require a defense attorney to expend time and effort in investigating a problem that may not arise.<sup>248</sup>

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grand jury from another county, and brought to trial two days later. Defendant's out-of-county counsel brought a timely motion to quash the indictment on the grounds that blacks had been systematically excluded from county grand juries; the motion was denied because defendant had produced no evidence. Defendant then moved for a continuance to allow time to investigate and submit evidence; this motion was also denied. The supreme court reversed, holding that due process required defendant be allowed a reasonable opportunity and period of time to investigate. The court held the reasonableness of the opportunity was to be judged on the facts of each case, and that in this instance the time period was inadequate.

241. 293 N.C. at 480, 238 S.E.2d at 452.

242. *Id.* at 481, 238 S.E.2d at 452-53.

243. *Id.*

244. *Id.* at 481, 238 S.E.2d at 453. The burden the supreme court has put on defense counsel is essentially a requirement that counsel examine and investigate the names on every published jury venire scheduled for the week of any minority defendant's trial date as a matter of course. For an active defense lawyer, this could prove to be a time-consuming, expensive and futile process.

245. *Id.* at 485, 238 S.E.2d at 455 (Exum, J., dissenting).

246. *Id.*

247. *Id.*

248. See note 244 *supra*.

## 2. Unified Selection Procedure

Before 1977, North Carolina had no general statutory scheme governing the process of jury selection from the voir dire panel. Consequently, the procedures for selecting juries varied in each judicial district.<sup>249</sup> The General Assembly remedied this situation by enacting a bill that unified the process of jury selection throughout the state.<sup>250</sup> The major aspects of the legislation provide for the manner of questioning prospective jurors and modify the requirements for preserving the right to appeal a denial of a challenge for cause.<sup>251</sup>

G.S. 15A-1214<sup>252</sup> requires that the State first question prospective jurors and make its challenges until satisfied with the twelve. These twelve will then be turned over to the defendant's counsel for questioning and challenge. After the defendant has exercised challenges against any of the twelve, replacement jurors will be called, questioned and challenged, first by the State and then by the defendant; this process will be repeated until the parties have either agreed on twelve or exhausted their challenges. Generally, once a party has accepted a juror, he may not reexamine or challenge that juror.<sup>253</sup>

Subsection (c) of G.S. 15A-1214 allows either counsel or defendant to question prospective jurors personally during the selection process to determine whether to exercise a challenge.<sup>254</sup> This provision overrules a North Carolina case<sup>255</sup> interpreting the previously controlling statute<sup>256</sup> as allowing

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249. N.C. GEN. STAT. § 15A-1214, Official Commentary (Cum. Supp. 1977).

250. *Id.* § 15A-1214.

251. Other changes in the selection procedure equalize the allocation of peremptory challenges between the State and defendant. *Id.* § 15A-1217 gives each defendant fourteen in a capital case and six in a noncapital one. The State has the same number for each defendant on trial. The old statute, 22 Hen. 8, ch. 14, § 6 (1530) (formerly codified as amended at N.C. GEN. STAT. § 9-21 (1969)) allowed the defendant more challenges than the State had.

N.C. GEN. STAT. § 15A-1212 (Cum. Supp. 1977) provides a list of acceptable challenges for cause. Subsection (6) works a change in the rule allowing a challenge to any juror who has formed an opinion on the question of defendant's guilt. *Id.* § 15A-1212(6). The subsection provides that the juror may not be asked to state his opinion, to prevent the expression of any opinion in the presence of other prospective jurors. Prior to the enactment, a party was required to show that a juror had formed an opinion adverse to his side before challenging for cause. *Id.* § 15A-1212, Official Commentary; see, e.g., *State v. Chavis*, 24 N.C. App. 148, 210 S.E.2d 555 (1974), *cert. denied, appeal dismissed*, 287 N.C. 261, 214 S.E.2d 434 (1975), *cert. denied*, 423 U.S. 1080 (1976).

252. N.C. GEN. STAT. § 15A-1214 (Cum. Supp. 1977).

253. See *id.* § 15A-1214(f). But see *id.* § 15A-1214(g); text accompanying notes 265, 266 & 272 *infra*.

254. N.C. GEN. STAT. § 15A-1214(c) (Cum. Supp. 1977).

255. *State v. Dawson*, 281 N.C. 645, 190 S.E.2d 196 (1972).

256. N.C. GEN. STAT. § 9-15(a) (Cum. Supp. 1977). As of July 1, 1978, § 9-15(a) was controlled in criminal trials by the more specific standards of N.C. GEN. STAT. § 15A-1214(c) (Cum. Supp. 1977).

the trial judge to require that all questions be asked by the court. This holding was apparently an effort to save court time by avoiding repetitive questioning.<sup>257</sup> The drafting commission, many of whom are trial attorneys,<sup>258</sup> obviously found this reasoning inadequate to overcome the value counsel derives from direct questioning of prospective jurors. Thus, G.S. 15A-1214(c) explicitly allows both the prosecution and the defense counsel to ask questions already put by the court. Again, this provision is contrary to North Carolina cases that have allowed a trial judge to foreclose such questions in the interest of saving court time.<sup>259</sup>

The General Assembly also made important changes in the requirements for preserving the right of appeal on denied challenges. Present case law requires a party who wishes to preserve the right to appeal a denial of a challenge for cause to exhaust first his peremptory challenges and then to assert a right to challenge an additional juror peremptorily.<sup>260</sup> G.S. 15A-1214(h)<sup>261</sup> requires only that the challenging party exhaust his peremptory challenges and then renew and have denied his challenge for cause. The change was made because of dissatisfaction with the probable result of requiring a peremptory challenge beyond those permissible—the juror who is challenged unsuccessfully will remain on the jury without understanding why he was challenged.<sup>262</sup> Such a challenge could produce unconscious hostility to the challenging party in the mind of the juror. Subsection (i)<sup>263</sup> allows the renewal of a challenge for cause required by subsection (h) to be made in writing rather than orally in the presence of the jury. This provision grew out of a belief that a juror who will probably remain on the panel<sup>264</sup> should not know that the renewal has been made, when he does not understand why it was necessary.

Subsection (g) of G.S. 15A-1214<sup>265</sup> provides an exception to the general rule that once a party has accepted a juror, he may not renew questioning of or challenge that juror.<sup>266</sup> On discovering that the juror has made an incorrect statement during voir dire, or for some other good reason, a party may further examine and exercise challenges against that juror

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257. *State v. Dawson*, 281 N.C. 645, 654, 190 S.E.2d 196, 202 (1972).

258. N.C. GEN. STAT. § 15A-1214, Official Commentary (Cum. Supp. 1977).

259. *See, e.g.*, *State v. Girley*, 27 N.C. App. 388, 219 S.E.2d 301 (1975), *cert. denied*, 289 N.C. 141, 220 S.E.2d 799 (1976).

260. *State v. Fox*, 277 N.C. 1, 175 S.E.2d 561 (1970).

261. N.C. GEN. STAT. § 15A-1214(h) (Cum. Supp. 1977).

262. *Id.* § 15A-1214, Official Commentary.

263. *Id.* § 15A-1214(i).

264. If the juror has already been challenged once for cause, the second challenge, which is required to preserve the right of appeal, will in all likelihood be denied. *Id.* § 15A-1214, Official Commentary.

265. *Id.* § 15A-1214(g).

266. *See* text accompanying note 253 *supra*.

before the jury has been impaneled. This provision effectively invalidates the 1977 decision of the court of appeals in *State v. Lee*.<sup>267</sup> The *Lee* court, relying on a 1902 civil case, *Dunn v. Wilmington & Weldon R.R.*,<sup>268</sup> held that the North Carolina rule is that the State cannot peremptorily challenge a juror it has already accepted once the defendant has exhausted his peremptory challenges. The court, noting a split of authority,<sup>269</sup> opted for the *Dunn* rule out of concern that a defendant who is improvident in having exhausted his peremptory challenges might be deprived of the right to challenge the replacement juror.<sup>270</sup> At first blush, the *Lee* court's reasoning seems to follow from the norm that the defense should always have the advantage of following the State in examining and challenging jurors. The court, however, ignored the fact that in *Lee* the trial court allowed the State to reexamine and challenge because the State showed that not being able to reexamine and challenge would result in prejudice to the State.<sup>271</sup> When prejudice can be shown, the better practice is to allow the challenge, even at the expense of the defendant's loss of the right to the last challenge. New G.S. 15A-1214(g), not in effect when *Lee* was decided, reflects this policy by allowing "any party who has not exhausted his peremptory challenges . . . [to] challenge the juror" on a showing of good cause.<sup>272</sup>

The trial court's procedure in *Lee* would probably be erroneous under an additional facet of G.S. 15A-1214(g). The jury in *Lee* was impaneled before the challenge was made and granted.<sup>273</sup> The G.S. 15A-1214(g) allowance of reopening the questioning and challenging of a juror applies only before the jury has been impaneled. The Official Commentary to the statute indicates that "[a]fter the jury is impaneled, . . . the issue is escalated to whether to declare a mistrial or not."<sup>274</sup>

As the North Carolina Supreme Court recently suggested in *State v. Kirkman*,<sup>275</sup> the impaneling of the jury may be a rather arbitrary place to draw the line. The court first noted that it is well established that a trial judge has the discretionary power to reopen examination and challenge of accept-

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267. 32 N.C. App. 591, 233 S.E.2d 87 (1977).

268. 131 N.C. 446, 42 S.E. 862 (1902).

269. 32 N.C. App. at 592, 233 S.E.2d at 88. The court cited an Arkansas case, *Nail v. State*, 231 Ark. 70, 328 S.W.2d 836 (1959), which held that before finding error in the granting of the State's challenge, defendant must show that the replacement juror is objectionable.

270. 32 N.C. App. at 592, 233 S.E.2d at 88.

271. In *Lee*, a juror who had been accepted by the State after questioning, later informed the court she was personally acquainted with defense counsel. The State did not attempt to challenge for cause because it had not yet exhausted its peremptory challenges. *Id.* at 591, 233 S.E.2d at 87.

272. N.C. GEN. STAT. § 15A-1214(g)(3) (Cum. Supp. 1977).

273. 32 N.C. App. at 591, 233 S.E.2d at 87.

274. N.C. GEN. STAT. § 15A-1214, Official Commentary (Cum. Supp. 1977).

275. 293 N.C. 447, 238 S.E.2d 456 (1977).

ed jurors before the jury is impaneled,<sup>276</sup> and continued "[w]e perceive no reason for the termination of this discretion in the trial judge at the impanelment of the jury."<sup>277</sup> This language is broader than the facts of *Kirkman* required<sup>278</sup> and will probably be restricted in light of G.S. 15A-1214(g).<sup>279</sup>

### K. Jury Instructions

The General Assembly curtailed the scope of judicial discretion involved in jury instructions;<sup>280</sup> the most noteworthy change is the provision concerning permissible instructions to a deadlocked jury. Under G.S. 15A-1235(b), the judge may instruct the jurors that they have a duty to deliberate with a view to reaching an agreement after an impartial consideration of the evidence and that the jurors should not hesitate to reexamine their views and change their opinions.<sup>281</sup> The judge is also to instruct that no juror should surrender his honest opinion because of the opinion of other jurors, or merely to return a verdict.<sup>282</sup> The section will promote well-balanced instructions by requiring that these new instructions as a whole be given to the jury. The reminder to the jury that their inability to agree on a verdict necessitates a new trial, a new jury and extra expense to the state and county, allowed by the North Carolina Supreme Court,<sup>283</sup> is not expressly permitted under the new section.<sup>284</sup>

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276. *Id.* at 453, 238 S.E.2d at 460 (citing *State v. Bowden*, 290 N.C. 702, 228 S.E.2d 444 (1976)).

277. *Id.* at 454, 238 S.E.2d at 460.

278. In *Kirkman*, the replacement juror was an alternate who had presumably been accepted by defendant and impaneled with the regular jury. Since alternate jurors may take seats vacated by death or illness of regular jurors during trial, it is arguable that there should be no reason to object to the challenge in this instance.

279. See N.C. GEN. STAT. § 15A-1214, Official Commentary (Cum. Supp. 1977). One reason for the bright line distinction in the statute may be found in the Official Commentary accompanying *id.* § 15A-1216 which codifies the procedure for impaneling the jury: "Impaneling the jury is an especially critical stage in criminal cases as jeopardy attaches at this point." *Id.*, Official Commentary.

280. *Id.* § 15A-1231(b) makes it mandatory for the trial judge to hold a recorded conference on instructions at the request of either party. The provision is tempered by the statement that failure to comply will not be grounds for appeal unless the failure materially prejudiced the defendant.

281. *Id.* § 15A-1235(b) allows the instructions:

- (1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
- (2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
- (3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
- (4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

282. *Id.*

283. See *State v. Williams*, 288 N.C. 680, 220 S.E.2d 558 (1975).

284. The language of the section does not make it clear that the listed instructions are

### L. Verdicts

The General Assembly changed several of the rules relating to jury verdicts.<sup>285</sup> One alteration, in G.S. 15A-1240, expands permissible jury impeachments of the verdict. Before the jury disperses, and upon an inquiry into the validity of the verdict, the provision prohibits only that evidence that shows the effect of any statement or conduct on the mind of the juror or relates to the thought processes of the jurors.<sup>286</sup> Subsection (c) further limits the scope of acceptable impeachment evidence; only evidence concerning matters not in evidence that came to the attention of jurors in violation of the defendant's constitutional right of confrontation or evidence of bribery or intimidation of a juror may be accepted from a juror after the jury has dispersed.<sup>287</sup> Before the enactment of this section, the position of the North Carolina Supreme Court was to disallow all impeachment evidence from a juror.<sup>288</sup>

### M. Post-Trial Relief in the Trial Court

In an attempt to maximize a trial court's ability to correct its errors and thereby avoid appeals,<sup>289</sup> the General Assembly established the motion for appropriate relief.<sup>290</sup> This motion replaces motions in arrest of judgment,<sup>291</sup>

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exclusive, and the section may not be so construed. The Official Commentary, however, seems to contemplate that these instructions are exclusive and clearly states that the *State v. Williams*, 288 N.C. 680, 220 S.E.2d 558 (1975), instruction was specifically considered and rejected by the drafters. N.C. GEN. STAT. § 15A-1235, Official Commentary (Cum. Supp. 1977).

285. N.C. GEN. STAT. § 15A-1237 (Cum. Supp. 1977) imposes two new requirements for North Carolina verdicts. Subsection (a) requires a written verdict; subsection (c) requires that verdicts of not guilty by reason of insanity must so state. Verdicts are presently given orally. See *State v. Stone*, 231 N.C. 324, 56 S.E.2d 675 (1949). The Official Commentary indicates that the drafting Commission contemplated the introduction of a verdict form to eliminate the confusion that often attends oral verdicts. N.C. GEN. STAT. § 15A-1237, Official Commentary (Cum. Supp. 1977).

286. N.C. GEN. STAT. § 15A-1240 (Cum. Supp. 1977). This is generally known as the Iowa Rule, which

is based upon the distinction between extrinsic or overt acts which may be corroborated or disproved, such as access to improper matter or an illegal method of reaching a verdict, and intrinsic matters which "inhere in the verdict itself" and hence are known only to the individual juror, such as misunderstanding or prejudice. Because . . . the thought processes and motives of the juror in reaching his decision, are not readily capable of being either corroborated or disproved they should be excluded. *Sopp v. Smith*, 59 Cal. 2d 12, 18, 377 P.2d 649, 652, 27 Cal. Rptr. 593, 596 (1963) (Peters, J., dissenting). This is probably a minority rule; most jurisdictions disallow juror verdict impeachment on the grounds of jury misconduct. 76 AM. JUR. 2d *Trial* § 1220 (1975).

287. N.C. GEN. STAT. § 15A-1240(c) (Cum. Supp. 1977).

288. *State v. Hollingsworth*, 263 N.C. 158, 139 S.E.2d 235 (1964). The stricter rule was a public policy decision in favor of the certainty of jury verdicts. This policy is continued to a lesser degree by the § 15A-1240(c) restrictions on the types of evidence receivable after the jury has been dispersed. See text accompanying note 287 *supra*.

289. N.C. GEN. STAT. ch. 15A, art. 89, Official Commentary (Cum. Supp. 1977).

290. *Id.* §§ 15A-1411 to -1422.

291. "A motion in arrest of judgment is generally made after verdict to prevent entry of



motions to set aside the verdict,<sup>292</sup> motions for new trial,<sup>293</sup> post-conviction proceedings,<sup>294</sup> *coram nobis*<sup>295</sup> and all other post-trial relief.<sup>296</sup> By affording a combination of requests for relief under one motion, the General Assembly intended to focus attention on the alleged error and avoid attaching any significance to the name of motion.<sup>297</sup> Although the motion for appropriate relief<sup>298</sup> is essentially a combination of the procedures previously applicable to motions for new trial<sup>299</sup> and relief under the Post-Conviction Hearing Act, the 1977 legislative action did result in several significant changes in this area.<sup>300</sup>

Prior to the availability of the motion for appropriate relief, a motion for a new trial had to be made within ten days of the entry of judgment. The grounds for such a motion in criminal cases were the same as in civil cases and focused on errors of law and the essential fairness of the trial.<sup>301</sup> Under the new law, these same grounds can be used to support a motion for appropriate relief made within ten days of the entry of judgment.<sup>302</sup> While in the past some motions for new trial were denied by trial courts because the defendant's notice of appeal had divested the trial court of jurisdiction,<sup>303</sup>

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judgment based on a defective indictment or some fatal defect on the face of the record proper." State v. Davis, 282 N.C. 107, 117, 191 S.E.2d 664, 670 (1972).

292. This motion is primarily used to attack a verdict as being against the greater weight of the evidence. See State v. Dull, 289 N.C. 55, 220 S.E.2d 344 (1975), *modified on other grounds*, 428 U.S. 904 (1976).

293. For the grounds for the motion for a new trial, see note 301 *infra*.

294. Under the Post-Conviction Hearing Act, Law of Apr. 14, 1951, ch. 1083, § 1, 1951 N.C. Sess. Laws 1085 (formerly codified as amended at N.C. GEN. STAT. §§ 15-217 to -222 (1975)) (repealed 1977), *noted in* 55 N.C.L. REV. 653 (1977), a petition for a hearing could be based on the denial of constitutional rights, the trial court's lack of jurisdiction to impose the sentence, the fact that the sentence exceeds the maximum allowed by law or any error previously available under habeas corpus and *coram nobis*.

295. "The writ of error *coram nobis* is an established common law writ available under our procedure to challenge the validity of a conviction by reason of matters extraneous to the record." State v. Green, 277 N.C. 188, 191, 176 S.E.2d 756, 759 (1970). This writ was previously supplanted by the Post-Conviction Hearing Act in reference to any person imprisoned. *Id.*

296. The availability of this motion does not bar relief by writ of habeas corpus. See N.C. GEN. STAT. § 15A-1411 & Official Commentary (Cum. Supp. 1977).

297. *Id.* ch. 15A, art. 89, Official Commentary.

298. *Id.* §§ 15A-1411 to -1422.

299. Previously, the grounds for new trial were the same in criminal actions as in civil actions. The grounds for new trial in civil actions appear in N.C.R. Civ. P. 59. See note 301 *infra*.

300. See note 294 *supra*.

301. The grounds for a new trial under N.C.R. Civ. P. 59 applicable to criminal cases are: (1) any irregularity that prevented a fair trial; (2) misconduct of the jury; (3) accident or surprise; (4) newly discovered evidence; (5) manifest disregard of the courts instructions by the jury; (6) insufficiency of the evidence; (7) the verdict is contrary to the law; and (8) an error in law at trial.

302. N.C. GEN. STAT. § 15A-1414 (Cum. Supp. 1977).

303. See State v. Grundler, 251 N.C. 177, 111 S.E.2d 1 (1959); N.C. GEN. STAT. § 15A-1414, Official Commentary (Cum. Supp. 1977).

trial courts are now empowered by G.S. 15A-1414(c)<sup>304</sup> to act on motions for appropriate relief made within ten days of the entry of judgment whether or not notice of appeal has been given.

Previously, a motion for new trial based on the discovery of new evidence also had to be made within ten days of the entry of judgment,<sup>305</sup> although the trial court had discretion to grant a new trial up to one year after the final judgment.<sup>306</sup> In drafting the contours of the motion for appropriate relief, the Criminal Code Commission felt that newly discovered evidence might be so crucial to the reliability of the verdict that there should be no time limit on the assertion of newly discovered evidence as grounds for a new trial. Therefore, G.S. 15A-1415(b)(6) permits a defendant to move for appropriate relief on the basis of newly discovered evidence at any time after trial.<sup>307</sup>

By replacing several previously available post-trial motions, the act establishing the motion for appropriate relief necessarily gives the trial court wide discretion in selecting the appropriate relief.<sup>308</sup> Under G.S. 15A-1417(b), if the evidence does not sustain the verdict but is sufficient to support a conviction of a lesser included offense, the trial court, with the consent of the State, may now avoid a new trial by accepting a plea of guilty to the lesser offense.<sup>309</sup>

Prior to this statutory change a superior court could accept a guilty plea to a lesser included offense only on appeal from a district court for a trial *de novo* of a misdemeanor.<sup>310</sup> G.S. 15A-1417(b) represents a broadening of that power to the correction of errors made in superior court.

New G.S. 15A-1418, which requires that motions for appropriate relief be made in the appellate courts once "a case is in the appellate division for review,"<sup>311</sup> represents a significant change from the former practice. Al-

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304. N.C. GEN. STAT. § 15A-1414(c) (Cum. Supp. 1977).

Under *id.* § 15A-1448, notice of appeal does not divest the trial court of jurisdiction until 10 days after the entry of judgment or 10 days after the trial court has ruled on any motions for appropriate relief.

305. N.C.R. Civ. P. 59(a)(4), (b).

306. *Id.* 60(b). See also *Wiggins v. Bunch*, 280 N.C. 106, 184 S.E.2d 879 (1971).

307. N.C. GEN. STAT. § 15A-1415(a) (Cum. Supp. 1977) reads: "At any time after verdict, the defendant by motion may seek appropriate relief upon any of the grounds enumerated in this section."

*Id.* § 15A-1415 represents a codification of the grounds for relief previously available under the Post-Conviction Hearing Act and the motion in arrest of judgment. There is no time limit to the assertion of a motion based on these grounds.

308. When the court grants a motion for appropriate relief, it can award a new trial, dismiss all or any of the charges, or grant any other appropriate relief. *Id.* § 15A-1417(a).

309. *Id.* § 15A-1417(b).

310. *Id.* § 7A-271 (1969).

311. *Id.* § 15A-1418 (Cum. Supp. 1977).

though previously motions in arrest of judgment could be made for the first time on appeal,<sup>312</sup> other post-trial motions such as the motion for a new trial could only be made in the trial court.<sup>313</sup> Appellate courts may now determine the motion for appropriate relief in conjunction with the appeal or remand the case to the trial court for the taking of evidence.<sup>314</sup> If the motion for appropriate relief is remanded to the trial court, the time periods for perfecting or proceeding with the appeal are tolled until the trial court has acted on the motion.<sup>315</sup>

Although the policy behind the motion for appellate relief is to avoid appeal whenever possible, the motion is not a substitute for appeal and cannot be used repeatedly to review the same trial.<sup>316</sup> Under the Post-Conviction Hearing Act,<sup>317</sup> the asserted error was waived if it had been or could have been raised in a previous petition or appeal.<sup>318</sup> To avoid the abuse of the motion for appropriate relief, G.S. 15A-1419 permits the trial court to deny a motion on the basis of prior adjudication or prior opportunity to raise the issue.<sup>319</sup>

If there has been no prior adjudication of the issue, review of the motion for appropriate relief may be by affidavit<sup>320</sup> or by an evidentiary hearing.<sup>321</sup> Unlike the practice under the Post-Conviction Hearing Act,<sup>322</sup> defendants have a waivable right to be present at any evidentiary hearing.<sup>323</sup> As under the Post-Conviction Hearing Act,<sup>324</sup> however, defendants carry the burden of showing the evidence of the asserted ground for relief, and relief will be denied unless they show prejudice.<sup>325</sup>

312. *State v. Wallace*, 25 N.C. App. 360, 213 S.E.2d 420 (1975).

313. *See State v. Nance*, 253 N.C. 424, 117 S.E.2d 3 (1960); *State v. Smith*, 245 N.C. 230, 95 S.E.2d 576 (1956).

314. N.C. GEN. STAT. § 15A-1418(b) (Cum. Supp. 1977).

315. *Id.* § 15A-1418(c).

316. *See id.* § 15A-1419.

317. *See* note 294 *supra*.

318. Law of Apr. 14, 1951, ch. 1083, § 1, 1951 N.C. Sess. Laws. 1085 (formerly codified as amended at N.C. GEN. STAT. §§ 15-217 to -218 (1975)) (repealed 1977). *See also State v. White*, 274 N.C. 220, 162 S.E.2d 473 (1968).

319. "[O]nce a matter has been litigated or there has been opportunity to litigate a matter, there will not be a right to seek relief by additional motions at a later date." N.C. GEN. STAT. § 15A-1419, Official Commentary (Cum. Supp. 1977).

320. *Id.* § 15A-1420(b)(1).

321. *Id.* § 15A-1420(c).

322. *State v. Gainey*, 265 N.C. 437, 144 S.E.2d 249 (1965), held that there was no requirement that a defendant be present at a post-conviction hearing.

323. N.C. GEN. STAT. § 15A-1420(c)(4) (Cum. Supp. 1977).

324. "In this proceeding, the burden is upon the petitioner to show a denial of some right . . . ." *Branch v. State*, 269 N.C. 642, 649-50, 153 S.E.2d 343, 349 (1967).

325. N.C. GEN. STAT. § 15A-1420(c)(6) (Cum. Supp. 1977). For the statutory definition of prejudice, see text accompanying notes 330-37 *infra*.

If a motion based on any of the grounds listed in N.C. GEN. STAT. § 15A-1414 (Cum. Supp. 1977) is granted or denied, appellate review is only by appeal since the time limit for taking an

### N. Appeal

The new statute governing appeals from criminal trial dispositions passed by the 1977 General Assembly<sup>326</sup> is primarily a codification of existing case law and statutes in this area.<sup>327</sup> Although several minor changes have been made to integrate the new motion for appropriate relief<sup>328</sup> with appellate procedures, the most interesting changes are the codification of prejudicial error standards<sup>329</sup> and the clarification of the grounds available for appeal by the State.

Under the new appeals statute, the standard to be used in determining whether an error is prejudicial to the defendant depends on the nature of the right infringed.<sup>330</sup> When the error does not relate to a constitutional right, the statute<sup>331</sup> has adopted the prejudicial error rule of the North Carolina Supreme Court's decision in *State v. Turner*.<sup>332</sup> the defendant carries the burden of showing that a "different result would have been reached at the trial" if the error had not been committed.<sup>333</sup> As the United States Supreme Court's holding in *Chapman v. California*<sup>334</sup> suggests, although a violation

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appeal does not begin to run until there has been a ruling on such a motion. *See id.* § 15A-1422(b). While rulings under the Post-Conviction Hearing Act, *see* note 294 *supra*, and on motions for new trial were reviewable only by writ of certiorari, *see State v. Shelton*, 21 N.C. App. 662, 205 S.E.2d 316 (1974), actions on motions for appropriate relief under § 15A-1415 may be reviewable by appeal if the time for appeal from conviction has not expired or if an appeal is pending when the action is entered. *See* N.C. GEN. STAT. § 15A-1422(c) (Cum. Supp. 1977).

326. N.C. GEN. STAT. §§ 15A-1441 to -1448 (Cum. Supp. 1977).

327. *Id.* § 15A-1431 provides procedures for appealing from the district court to the superior court. This statute is primarily an extension of the trial de novo provisions of *id.* § 7A-290. Unlike the prior law barring appeal and trial de novo upon compliance with the judgment, however, *id.* § 15A-1431(d) permits appeal regardless of defendants' compliance with the judgment as long as notice of appeal is given after compliance.

The State may still appeal from the district court, but under *id.* § 15A-1432 such an appeal must be made within 10 days of the entry of judgment by written motion and must be based on the same grounds as for appeal from superior court. For an explanation of the grounds on which the state can appeal, *see* text accompanying notes 338-47 *infra*.

328. N.C. GEN. STAT. §§ 15A-1411 to -1422 (Cum. Supp. 1977); *see* text accompanying notes 289-325 *supra*.

329. Under N.C. GEN. STAT. § 15A-1442 (Cum. Supp. 1977), the appellate courts have broad discretion to correct any prejudicial error. The appellate division can correct errors on the following grounds: (1) lack of jurisdiction; (2) error in the criminal pleading; (3) insufficiency of the evidence; (4) procedural errors; (5) an unconstitutional procedure or statute; and (6) any other error of law.

330. In general, under *id.* § 15A-1446, an error must be brought to the attention of the trial court before it can be asserted on appeal. A motion for appropriate relief is not a prerequisite for appeal, but such a motion can be used to bring an error to the attention of the trial court. *See id.* § 15A-1446(c).

331. *Id.* § 15A-1443(a).

332. 268 N.C. 225, 150 S.E.2d 406 (1966).

333. *Id.* at 232, 150 S.E.2d at 411.

334. 386 U.S. 18 (1967).

of a defendant's constitutional rights is not automatically ground for reversing a conviction,<sup>335</sup> such a violation shifts the burden of proof to the State and thereby makes reversal more likely. New G.S. 15A-1443(b),<sup>336</sup> essentially a codification of the *Chapman* rule, requires the State to demonstrate beyond a reasonable doubt that the constitutional error was harmless.<sup>337</sup>

Unless further prosecution is prohibited by the constitutional provision against double jeopardy,<sup>338</sup> the new appeals statute permits the State to appeal from the superior court to the appellate division.<sup>339</sup> Formerly the State was allowed to appeal upon special verdict, demurrer, motion to quash, arrest of judgment or motion for a new trial on the ground of newly discovered evidence.<sup>340</sup> Basing the State's right to appeal on the identity of the relief granted, however, led to confusion—especially when the relief granted was misnamed by the trial judge.<sup>341</sup> The new law still permits the State to appeal the granting of a new trial on the ground of newly discovered evidence<sup>342</sup> and the granting of a motion to suppress evidence.<sup>343</sup> Instead of listing the motions from which the State can appeal, however, the new provision allows the State to appeal on other grounds only when there has been a decision dismissing criminal charges against a defendant.<sup>344</sup> The wording of this statute follows closely the federal provision that permits the United States to appeal only from decisions dismissing an indictment or information.<sup>345</sup> The federal courts have interpreted this provision to mean that an appeal does not lie from a decision that rests on extraneous facts instead of the sufficiency of the indictment alone.<sup>346</sup> If this interpretation applies to the North Carolina statute, once the court receives any evidence, jeopardy attaches and the State cannot appeal.<sup>347</sup>

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335. *Id.* at 24.

336. N.C. GEN. STAT. § 15A-1443(b) (Cum. Supp. 1977).

337. *See* 386 U.S. at 24.

Under the "invited error" rule, a defendant is not prejudiced by error resulting from his own conduct. *See* *State v. Payne*, 280 N.C. 170, 185 S.E.2d 101 (1971). The "invited error" rule is codified for the first time in N.C. GEN. STAT. § 15A-1443(c) (Cum. Supp. 1977).

338. U.S. CONST. amend. V reads in pertinent part: "No person . . . shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ."

339. N.C. GEN. STAT. § 15A-1445 (Cum. Supp. 1977).

340. N.C. CODE ch. 26, § 1237 (1883) (formerly codified as amended at N.C. GEN. STAT. § 15-179 (1975)) (repealed 1977). Under N.C. GEN. STAT. § 15A-979(c) (1975) the State can appeal an order to suppress evidence entered by the court prior to trial.

341. *See, e.g., State v. Vaughn*, 268 N.C. 105, 150 S.E.2d 31 (1966); *State v. Brown*, 29 N.C. App. 180, 223 S.E.2d 572 (1976).

342. N.C. GEN. STAT. § 15A-1445(a)(2) (Cum. Supp. 1977). An appeal by the State on this ground can only be on questions of law.

343. *Id.* § 15A-979(c) (1975).

344. *Id.* § 15A-1445(a)(1) (Cum. Supp. 1977).

345. 18 U.S.C. § 3731 (1976).

346. *United States v. Southern Ry.*, 485 F.2d 309 (4th Cir. 1973).

347. *See id.* When an indictment is dismissed on the basis of extraneous facts, the dismissal

On the whole, the new appeals statute is an attempt by the General Assembly to avoid formality and focus on the error committed at trial. The appeals provisions, together with the motion for appropriate relief,<sup>348</sup> present a simplified procedure for correcting trial errors with primary emphasis on correcting errors at the trial level.

## O. Sentencing

### 1. Sentencing Procedure for Capital Punishment

In response to *Woodson v. North Carolina*<sup>349</sup> which struck down North Carolina's 1975 death penalty statute,<sup>350</sup> the General Assembly attempted to enact a constitutional statute<sup>351</sup> by tracking the provisions of the Georgia statute<sup>352</sup> approved by the United States Supreme Court in *Gregg v. Georgia*.<sup>353</sup> The Court, in upholding the *Gregg* death penalty, noted with approval that the Georgia procedure required (1) a separate sentencing procedure by the jury with adequate guidance provided by an instruction on

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is an acquittal. "[T]hen no appeal may be taken by the government because jeopardy would have attached on account of the acquittal." *Id.* at 312.

348. See text accompanying notes 289-325 *supra*.

349. 428 U.S. 280 (1976).

350. Law of Apr. 18, 1974, ch. 1201, 1973 N.C. Sess. Laws 2d Sess. 323 (formerly codified at N.C. GEN. STAT. §§ 14-2, -17, -21, -52, -58 (Cum. Supp. 1975)). The *Woodson* statute had been enacted in response to *Furman v. Georgia*, 408 U.S. 238 (1972), which struck down a Georgia statute providing for total jury discretion in the imposition of the death sentence. The *Woodson* statute attempted to correct this constitutional infirmity in the comparable North Carolina law by imposing a mandatory death penalty on conviction of certain crimes.

351. N.C. GEN. STAT. § 15A-2000 (Cum. Supp. 1977).

The legislature also made changes in the general sentencing procedure. *Id.* § 15A-1332 removes the requirement that a trial judge order and consider a presentence report on a defendant charged with a felony before placing him on probation, as required by Law of Mar. 13, 1937, ch. 132, § 2, 1936-1937 N.C. Pub. Laws 351 (formerly codified at N.C. GEN. STAT. § 15-198 (1975)) (repealed 1977), and makes such an order a matter within the court's discretion. Apparently, former § 15-198 was never strictly followed—felons put on probation did not generally object to their lenient probation sentence on the ground that the judge failed to order a presentence report. INSTITUTE OF GOVERNMENT, NORTH CAROLINA LEGISLATION 1977, at 25 (J. Brannon ed. 1977). The court may order the report only after conviction, unless the defendant moves for an earlier investigation. N.C. GEN. STAT. § 15A-1332(b) (Cum. Supp. 1977). A defendant may choose to ask for a preconviction report for plea bargaining purposes. *Id.* § 15A-1332(b) also changes the requirements of the former statute, Law of Mar. 13, 1937, ch. 132, § 2, 1936-1937 N.C. Pub. Laws 351 (formerly codified at N.C. GEN. STAT. § 15-198 (1975)) (repealed 1977), by providing that the presentence report may include sentence recommendations only if requested by the court. *Contra*, *State v. Pigg*, 13 N.C. App. 345, 185 S.E.2d 438 (1971).

To facilitate the ordering of presentence investigation, N.C. GEN. STAT. § 15A-1334 (Cum. Supp. 1977) allows a judge who orders a presentence report to hold the sentencing hearing in a county or session other than the one in which the defendant was convicted. The provision allows a rotating superior court judge to order a report when he knows he will be in another county by the time the report is prepared and the hearing can be held.

352. GA. CODE ANN. § 27-2534.1, -2537 (1978).

353. 428 U.S. 153 (1976).

the statutorily enumerated aggravating circumstances that may be considered in conjunction with mitigating circumstances,<sup>354</sup> and (2) the automatic review of the sentence by the Georgia Supreme Court.<sup>355</sup> The 1977 North Carolina capital punishment legislation requires a separate sentencing procedure before the jury to determine whether the death penalty is appropriate.<sup>356</sup> Language in *Gregg* expressly approves such a bifurcated proceeding.

Under North Carolina's new procedure, the trial judge is required by G.S. 15A-2000(b) to instruct the jurors that they must consider any aggravating or mitigating circumstances supported by the evidence and to furnish the jurors a written list of issues regarding these relevant circumstances.<sup>357</sup> Before a capital verdict can be returned, the jury must find the existence of at least one of an exclusive list of ten aggravating circumstances<sup>358</sup> beyond a reasonable doubt,<sup>359</sup> and the absence of any mitigating circumstance<sup>360</sup> that outweighs the aggravating circumstances.

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354. *Id.* at 197-98.

355. *Id.* at 198.

356. N.C. GEN. STAT. § 15A-2000(a) (Cum. Supp. 1977).

357. *Id.* § 15A-2000(b).

358. The aggravating circumstances that may be considered are:

- (1) The capital felony was committed by a person lawfully incarcerated.
- (2) The defendant had been previously convicted of another capital felony.
- (3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person.
- (4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
- (5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
- (6) The capital felony was committed for pecuniary gain.
- (7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
- (8) The capital felony was committed against a law enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duty.
- (9) The capital felony was especially heinous, atrocious, or cruel.
- (10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

*Id.* § 15A-2000(e).

359. *Id.* § 15A-2000(c)(1).

360. *Id.* § 15A-2000(c)(3). The mitigating circumstances include:

- (1) The defendant has no significant history of prior criminal activity.
- (2) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.
- (3) The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act.
- (4) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.
- (5) The defendant acted under duress or under the domination of another person.

Another feature of the new statute suggested by *Woodson*<sup>361</sup> is the provision for automatic review of any death sentence by the North Carolina Supreme Court.<sup>362</sup> On review, the court is to consider the punishment imposed and any error assigned on appeal.<sup>363</sup> If the supreme court concludes that the record does not support the jury's finding of an aggravating circumstance, that the penalty was imposed under the influence of passion, prejudice or any other arbitrary factor, or that the penalty is disproportionate, the court must impose a sentence of life imprisonment in lieu of the death penalty.<sup>364</sup> If the court finds error in the sentencing procedure, however, a new sentencing hearing must be conducted.<sup>365</sup>

The United States Supreme Court objected to North Carolina's *Woodson* statute on three grounds. First, mandatory death penalties have historically been rejected as unduly harsh and rigid.<sup>366</sup> Second, the statute failed to correct the infirmity of total jury discretion in the imposition of capital sentences. The Court pointed out that American juries persistently refuse to convict because of mandatory sentences they feel are too harsh; by a finding of guilt of a lesser offense, the jury exercises complete discretion without any guidelines or standards from the statute or instructing judge. In this situation, there is no way for the judiciary in reviewing the decision to check an arbitrary exercise of the power to impose the death penalty.<sup>367</sup> The *Woodson* Court's third objection was that the statute failed to allow particularized consideration of the relevant aspects of character and record of each defendant. The court held that this sort of consideration is required by the eighth amendment in capital cases.<sup>368</sup>

North Carolina's new death penalty procedure appears fairly certain to pass constitutional muster. Not only does it reflect the provisions of the Georgia statute highlighted by the Supreme Court in *Gregg*,<sup>369</sup> but it also effectively answers the objections raised in *Woodson*.<sup>370</sup> The statute pro-

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(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

(7) The age of the defendant at the time of the crime.

(8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.

(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value.

*Id.* § 15A-2000(f).

361. 428 U.S. at 303.

362. N.C. GEN. STAT. § 15A-2000(d) (Cum. Supp. 1977).

363. *Id.*

364. *Id.* § 15A-2000(d)(2).

365. *Id.* § 15A-2000(d)(3).

366. 428 U.S. at 301.

367. *Id.* at 302-03.

368. *Id.* at 304-05.

369. See text accompanying notes 352 & 353 *supra*.

370. See text accompanying notes 366-68 *supra*.



vides the flexibility lacking in the former statute, offers definite guidance for the sentencing body with automatic, meaningful appeal to the North Carolina Supreme Court and mandates consideration by the sentencing body of the defendant's particular characteristics through the use of the aggravating and mitigating factors device.

## 2. Sentencing Hearings

Although the general rule, continued by G.S. 15A-1334(b),<sup>371</sup> is that formal rules of evidence do not apply to sentencing hearings, the court of appeals nevertheless held in *State v. Locklear*<sup>372</sup> that "rank hearsay"<sup>373</sup> was inadmissible as the only evidence in aggravation of a sentence.<sup>374</sup>

Defendant in *Locklear*, who was under twenty-one and had no prior criminal record,<sup>375</sup> pleaded guilty to possession of marijuana with intent to sell and sale and delivery of marijuana. The only evidence unfavorable to defendant presented at the sentencing hearing was the testimony of a law enforcement officer that an "unidentified but reliable" source had told him that defendant "was doing between \$500 and \$1,000 worth of grass a week."<sup>376</sup> The trial judge found that defendant would not benefit from treatment as a youthful offender<sup>377</sup> and sentenced him to the maximum possible sentence of two consecutive five year terms.<sup>378</sup>

The court of appeals, in holding the introduction of the evidence prejudicial error, pointed out not only that defendant lacked an effective opportunity to confront the witness or contradict the testimony but also that the evidence was actually unrelated to the circumstances of the offense to

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371. N.C. GEN. STAT. § 15A-1334(b) (Cum. Supp. 1977).

372. 34 N.C. App. 37, 277 S.E.2d 289, *cert. granted*, 293 N.C. 591, 238 S.E.2d 151 (1977) (No. 111).

373. The term "rank hearsay" is taken from *State v. Pope*, 257 N.C. 326, 126 S.E.2d 126 (1962). "Unsolicited whispered representations and rank hearsay are to be disregarded." *Id.* at 335, 126 S.E.2d at 133. The *Locklear* court, recognizing that hearsay is admissible in a sentencing hearing, did not attempt to define the term "rank hearsay." 34 N.C. App. at 39, 237 S.E.2d at 291.

374. 34 N.C. App. at 39-41, 237 S.E.2d at 291-92. The *Locklear* decision finds some support in two recent decisions of the United States Court of Appeals for the Fourth Circuit. In *United States v. Looney*, 501 F.2d 1039 (4th Cir. 1974), the court overturned a sentence because the judge stated it was based on unverified information received in the presence of only some of the defendants. The information was that several guns that defendants were convicted of illegally shipping had been used in New York murders. In *United States v. Powell*, 487 F.2d 325 (4th Cir. 1973), the court struck down a lengthy sentence because it was apparently based on an unsubstantiated report that defendant was the "ringleader" of a gang that committed the crime. According to the Fourth Circuit: "[A]n unfounded assumption concerning the facts of this importance is sufficient to render the sentencing procedure invalid." *Id.* at 328.

375. 34 N.C. App. at 40, 237 S.E.2d at 291.

376. *Id.*

377. See text accompanying note 375 *supra*.

378. 34 N.C. App. at 40, 237 S.E.2d at 291.

which defendant pleaded guilty.<sup>379</sup> It was partially on the latter ground that the court distinguished *Locklear* from *State v. Perry*,<sup>380</sup> a case in which the state supreme court upheld a sentence imposed after the trial judge received aggravating hearsay evidence. In *Perry*, police officers related statements of residents of the dormitory broken into by defendant. The *Perry* court disapproved the hearsay, but held that it was not prejudicial to defendant.<sup>381</sup>

*Perry* can be distinguished from *Locklear* on other grounds as well. First, the victim's statements were not the only factors relied on by the judge in *Perry*; defendant's criminal record also served as aggravating evidence.<sup>382</sup> Second, the victims in *Perry* were not present probably merely for convenience; defendant knew who they were and probably knew their sources of information.<sup>383</sup> Thus, *Perry* had an opportunity, if not to cross-examine, at least to rebut and offer contradictory evidence. By contrast, *Locklear* knew neither the informant nor the source of information and was thus in the position of not knowing what to attack. In the absence of other aggravating evidence, the court's position seems the only acceptable way to deal with the problem.

A dissenting justice in *Locklear* argued that the trial judge who witnessed "the attitude and demeanor of the defendant"<sup>384</sup> and who is capable of "cull[ing] out the incompetent evidence and not rely[ing] upon it in reaching his judgment"<sup>385</sup> should be allowed wide discretion in imposing the sentence.<sup>386</sup> She continued, "[u]nquestionably, had the court entered the judgments without having conducted any sentencing hearing at all, we would have refused to review the sentences."<sup>387</sup>

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379. *Id.* It is not usually required that sentencing evidence relate to the crime in question; for example, courts usually consider a defendant's criminal record. *E.g.*, *State v. Perry*, 265 N.C. 517, 520, 144 S.E.2d 591, 594 (1965).

380. 265 N.C. 517, 144 S.E.2d 591 (1965).

381. *Id.* at 520-21, 144 S.E.2d at 594.

382. *Id.* at 520, 144 S.E.2d at 594.

383. The opinion does not indicate what the hearsay statements were.

384. 34 N.C. App. at 42, 237 S.E.2d at 292 (Morris, J., dissenting).

385. *Id.* at 41, 237 S.E.2d at 292.

386. *Id.*

387. *Id.* at 42, 237 S.E.2d at 292. N.C. GEN. STAT. § 15A-1334(a) (Cum. Supp. 1977) provides that a court must hold a hearing on the sentence unless the defendant waives the requirement.

The court of appeals also ruled on admissibility of evidence in a sentencing hearing in *State v. Clemmons*, 34 N.C. App. 101, 237 S.E.2d 298 (1977). In *Clemmons*, the trial judge, after hearing defendant's statement on punishment, asked a victim of the attempted armed robbery for a statement concerning defendant's punishment. *Id.* at 105, 237 S.E.2d at 301. The court of appeals held that while this was an unusual practice, it was not error. The trial judge is allowed to "look anywhere, within reasonable limits, for other facts which will enable the court to act wisely." *Id.* The statement of the victim of a violent crime concerning the appropriate punishment of the defendant seems highly prejudicial, without offering much aid in fitting the punishment to the defendant. Arguably this comes very close to the line of reasonable limits and at least should be discouraged.

### 3. Imposition of Harsher Sentences

During the past year, both the North Carolina judiciary and the legislature responded to the United States Supreme Court's holding in *North Carolina v. Pearce*<sup>388</sup> that a sentencing judge may not impose a harsher sentence in a new trial following a successful appeal unless "events subsequent to the first trial . . . have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities.'" <sup>389</sup> In *State v. Foster*,<sup>390</sup> the court of appeals somewhat grudgingly struck down the sentences defendants received at their second trials, holding that the harsher sentences violated the *Pearce* rule.<sup>391</sup> The second trial judge in *Foster* imposed these harsher sentences after considering evidence of prior convictions that was not before the first sentencing judge.<sup>392</sup> The *Foster* court held that this evidence was technically insufficient to allow a harsher second sentence because the prior convictions were not events subsequent to the first trial. The court felt "constrained by the unequivocal language of *Pearce*" and voided the sentences,<sup>393</sup> but added that it was "unsure that the policies underlying *Pearce*'s construction of the due process clause (elimination of retaliatory motivation upon resentencing) would not be equally well served by allowing consideration of any conduct unknown to the judge at the first trial, irrespective of when the conduct occurred."<sup>394</sup>

The General Assembly took a different view, possibly with an eye toward administrative ease and certainty. G.S. 15A-1335<sup>395</sup> now specifically prohibits any new sentence for the same offense, or for a different offense based on the same conduct, harsher than the original sentence.<sup>396</sup>

#### P. Punishment

The General Assembly amended several sections of the General Stat-

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388. 395 U.S. 711 (1969).

389. *Id.* at 723 (quoting *Williams v. New York*, 337 U.S. 241, 245 (1949)).

390. 33 N.C. App. 145, 234 S.E.2d 443, *cert. denied*, 293 N.C. 255, 237 S.E.2d 537 (1977).

391. *Id.* at 151, 234 S.E.2d at 447.

392. *Id.* at 150, 234 S.E.2d at 447.

393. *Id.* at 151, 234 S.E.2d at 447.

394. *Id.* Analogous to the problem of retaliatory sentences imposed because of a defendant's exercise of his right to appeal is the problem the North Carolina Supreme Court dealt with in *State v. Boone*, 293 N.C. 702, 239 S.E.2d 459, *aff'd*, 294 N.C. 702, — S.E.2d — (1977). In that case, the court affirmed the court of appeals' decision, 33 N.C. App. 378, 235 S.E.2d 74 (1977), to vacate a sentence, when the trial judge stated in open court that he would be compelled to give the defendant an active sentence because defendant had pleaded not guilty. *Id.* at 380-81, 235 S.E.2d at 77. The court of appeals noted that an "inference that a greater sentence was imposed because a defendant exercised his right to appeal," was reversible error, *id.* at 381, 235 S.E.2d at 77; the same inference concerning a defendant's exercise of his constitutional right to plead not guilty was equally objectionable. *Id.*

395. N.C. GEN. STAT. § 15A-1335 (Cum. Supp. 1977).

396. *Id.*

utes to incorporate restitution and reparation as integral parts of the criminal justice system.<sup>397</sup> According to the new statute, these changes were made because

the General Assembly recognizes that an awareness on the part of a criminal that he is responsible for his actions is an indication of his rehabilitation, and that, therefore, an agreement to make restitution and reparation should rightfully and appropriately be considered in plea negotiations and in determining parole and work release . . . .<sup>398</sup>

The major provisions and definitions are found in an amendment to G.S. 15-199(10), which provides that restitution and reparation may be ordered by the court as a condition of probation.<sup>399</sup> In ordering restitution or reparation as a probation condition, the court is instructed to consider the defendant's ability to pay, including such factors as his financial resources and number of dependents.<sup>400</sup> Such restitution and reparation may be made only to an aggrieved party<sup>401</sup> and only for an amount that reflects the damage caused by the defendant arising out of the offense for which he has been convicted.<sup>402</sup> Restitution is defined as "compensation for damage or loss as could ordinarily be recovered by an aggrieved party in a civil action . . . .";<sup>403</sup> reparation shall include but not be limited to the performing of

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397. Law of June 20, 1977, ch. 614, 1977 N.C. Sess. Laws 721 (codified in scattered sections of N.C. GEN. STAT. chs. 15, 15A, 143B, 148 (Cum. Supp. 1977)).

398. *Id.* Preamble.

399. *Id.* § 1 (formerly codified at N.C. GEN. STAT. § 15-199(10) (Cum. Supp. 1977)) (repealed 1977). The amendment became effective July 1, 1978, which is also the date repeal of the entire section became effective. Law of June 23, 1977, ch. 711, § 33, 1977 N.C. Sess. Laws 853. However, *id.* § 34 provides that "[a]ll statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose." N.C. GEN. STAT. § 15A-1343(b)(6) (Cum. Supp. 1977) is the portion of the Act that replaces former § 15-199(10).

400. Law of June 20, 1977, ch. 614, § 10, 1977 N.C. Sess. Laws 721 (formerly codified at N.C. GEN. STAT. § 15-199(10) (Cum. Supp. 1977)) (repealed 1977).

401. *Id.* An aggrieved party may be an individual, firm, corporation, association or a federal, state or local government agency. *Id.*

402. *Id.* The determination of the amount of damages must find support in the record. *Shore v. Edmisten*, 290 N.C. 628, 227 S.E.2d 553 (1976). As a further safeguard, the statute expressly provides that no government agency is to benefit from such restitution or reparation, except for damage or loss to it over normal operating costs. Law of June 20, 1977, ch. 614, § 10, 1977 N.C. Sess. Laws 721 (formerly codified at N.C. GEN. STAT. § 15-199(10) (Cum. Supp. 1977)) (repealed 1977). These provisions can be traced to the principles articulated in *Shore v. Edmisten*, 290 N.C. 628, 227 S.E.2d 553 (1976). The court also ruled that defendant could be required to reimburse the police for money they paid to him to procure the evidence to convict him, but not to pay for general law enforcement. *Id.*

403. Law of June 20, 1977, ch. 614, § 10, 1977 N.C. Sess. Laws 721 (formerly codified at N.C. GEN. STAT. § 15-199(10) (Cum. Supp. 1977)) (repealed 1977) (footnote added). The section also provides that an order for restitution or reparation will not bar the right of an aggrieved party to bring a civil action against the defendant for money damages. Any amount paid by the defendant as restitution is to be credited against the civil judgment. *Id.*

community services, volunteer work, or doing such other acts or things as shall aid the defendant in his rehabilitation."<sup>404</sup>

G.S. 15A-1021,<sup>405</sup> dealing with plea conferences, was also amended to allow the inclusion of restitution and reparation in a plea arrangement.<sup>406</sup> If the judge concurs in the arrangement, he may order that restitution or reparation be made<sup>407</sup> in compliance with G.S. 15-199(10).<sup>408</sup> If the sentencing judge imposes an active sentence, he may require that work release earnings be paid as restitution or that restitution or reparation be made a condition for parole.<sup>409</sup>

An addition to G.S. 143B-266<sup>410</sup> authorizes the Parole Commission to impose reparation or restitution as a condition of parole or work release.<sup>411</sup> Section 148-33.2<sup>412</sup> regulates restitution by prisoners with work release privileges; it confers broad powers on the judiciary in conjunction with the Secretary of the Department of Correction and the Parole Commission.<sup>413</sup> The Secretary and Commission are empowered to impose restitution or reparation as a work release condition when ordered by a court pursuant to a G.S. 15A-1021<sup>414</sup> plea arrangement,<sup>415</sup> or when such a condition is recommended by a sentencing court.<sup>416</sup> The Secretary and Commission are further

404. *Id.* The section concludes that reparation and restitution are merely "ancillary remedies to promote rehabilitation . . . and to provide compensation to victims of crime, and shall not be construed to be a fine or other punishment as provided for in the Constitution and laws of this State." *Id.*

The General Assembly also amended Law of May 22, 1975, ch. 360, sec. 1, § 15-197.1, 1975 N.C. Sess. Laws 366 (formerly codified at N.C. GEN. STAT. § 15-197.1 (Cum. Supp. 1977)) (repealed 1977), adding the reparation and restitution provisions of former § 15-199(10) as a possible condition of special probation. Section 15-197.1(c) has been repealed. Law of June 23, 1977, ch. 711, § 33, 1977 N.C. Sess. Laws 853; *see note 399 supra*. The replacement section is N.C. GEN. STAT. § 15A-1351(a) (Cum. Supp. 1977).

405. N.C. GEN. STAT. § 15A-1021 (Cum. Supp. 1977).

406. *Id.* § 15A-1021(c).

407. *Id.* § 15A-1021(d).

408. Law of June 20, 1977, ch. 614, 1977 N.C. Sess. Laws 721 (formerly codified at N.C. GEN. STAT. § 15-199(10)) (repealed 1977); *see notes 399, 401-04 and text accompanying notes 399-404 supra*. Many of the restitution amendments require imposition in compliance with former § 15-199(10).

409. N.C. GEN. STAT. § 15A-1021(d) (Cum. Supp. 1977).

410. *Id.* § 143B-266(d).

411. The new § 148-33.1(f) (3a) authorizes the Department of Correction to disperse money earned by a prisoner on work release to make such restitution as is imposed as a condition of work release. *Id.* § 148-33.1(f)(3a).

412. *Id.* § 148-33.2.

413. *See note 416 infra*.

414. N.C. GEN. STAT. § 15A-1021 (Cum. Supp. 1977).

415. *Id.* § 148-33.2(a). If the order for work release cannot reasonably be implemented, the Parole Commission must give the court a written explanation that is to be considered by the court in issuing further orders regarding the prisoner. *Id.*

416. *Id.* § 148-33.2(b). The Secretary and Commission are not bound by the court's recommendation, but if they do not follow it, they must send a written explanation to the sentencing court. *Id.* Subsection (c) directs a sentencing court to consider whether reparation

directed to make appropriate rules and regulations, including provisions for adequate notice to the prisoner that restitution or reparation is being considered as a work release condition and for an opportunity to be heard.<sup>417</sup>

At least one commentator<sup>418</sup> has suggested that the provisions authorizing judicial involvement in ordering restitution and recommending it as a condition of work release and parole are a violation of the North Carolina Constitution's requirement of separation of powers.<sup>419</sup> The restitution remedy is expressly declared to be a rehabilitative remedy rather than a constitutional fine or punishment;<sup>420</sup> North Carolina courts are limited by the state constitution to imposing as criminal sentences death, removal from office, fines and imprisonment.<sup>421</sup> Furthermore, G.S. 143B-266<sup>422</sup> gives the Parole Commission and Department of Correction control of work release—indeed, a 1977 amendment authorizes the Parole Commission to make restitution or reparation a condition of probation or work release.<sup>423</sup> The provision giving the courts the power to make or recommend restitution or reparation as a work release condition may be an unconstitutional judicial intrusion into this executive sphere.

### Q. Probation

Article 82 of the 1977 Session Laws consolidates North Carolina's probation provisions.<sup>424</sup> The new legislation recategorizes types of probation,<sup>425</sup> defines and lists permissible conditions of probation<sup>426</sup> and sets out

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should be ordered or recommended whenever an active sentence is imposed and to make its order part of the commitment order. *Id.* § 148-33.2(c).

417. *Id.* § 148-33.2(d). The authority granted jointly to the Secretary of the Department of Correction and the Parole Commission by § 148-33.2(a), (b), (d), *see* notes 415 & 416 and text accompanying notes 412-16 *supra*, are conferred on the Parole Commission regarding restitution or reparation as a parole condition by N.C. GEN. STAT. § 148-57.1 (Cum. Supp. 1977).

418. INSTITUTE OF GOVERNMENT, *supra* note 351, at 36-37.

419. N.C. CONST. art. I, § 6.

420. *See* note 404 *supra*.

421. N.C. CONST. art. II, § 1. *See also* *Shore v. Edmisten*, 290 N.C. 628, 227 S.E.2d 553 (1976); INSTITUTE OF GOVERNMENT, *supra* note 351, at 35-37.

422. N.C. GEN. STAT. § 143B-266 (1975).

423. *See* note 411 and accompanying text *supra*.

424. N.C. GEN. STAT. §§ 15A-1341 to -1347 (Cum. Supp. 1977).

425. *Id.* § 15A-1341(b) recategorizes probation and a suspended sentence as supervised and unsupervised probation, respectively. The pre-1978 authorization for probation was Law of Mar. 13, 1937, ch. 132, § 1, 1936-1937 N.C. Pub. Laws 351 (formerly codified as amended at N.C. GEN. STAT. § 15-197 (1975)) (repealed 1977). The suspended sentence was seen as an inherent power of a court, which former § 15-197 did not withdraw. *State v. Simmington*, 235 N.C. 612, 614, 70 S.E.2d 842, 844 (1952). The sole difference between supervised and unsupervised probation is that the unsupervised probationer is, as the name implies, not supervised by a probation officer. Subsection 15A-1341(c) allows a probationer to elect to serve his suspended sentence of imprisonment at any time during the probationary period.

426. Permissible conditions of probation are defined in N.C. GEN. STAT. § 15A-1343(a) (Cum. Supp. 1977) as those "reasonably necessary to insure that the defendant will lead a law-

the procedural framework for altering, amending and revoking probation.<sup>427</sup> The two most significant aspects of the new probation statute are the warrantless search probation condition<sup>428</sup> and the codification of the procedural framework for violation hearings.<sup>429</sup>

Included in the new legislation's list of appropriate probation conditions is a subsection which, if imposed by the court, requires a probationer to submit at reasonable times to warrantless searches by his probation officer.<sup>430</sup> Before the enactment of this section, North Carolina courts had held that conditions requiring that probationers submit to searches by any law enforcement officers at reasonable times were valid.<sup>431</sup> The drafting commission, possibly influenced by the United States Court of Appeals for the Ninth Circuit's decision in *United States v. Consuelo-Gonzalez*,<sup>432</sup> decided to limit warrantless searches to those by the probation officer that are reasonably related to his probation supervision.<sup>433</sup> In *Consuelo-Gonzalez*, the court held that the purposes of the Federal Probation Act,<sup>434</sup> coupled with the fourth amendment prohibition, made the condition of warrantless searches by any law enforcement officers unacceptable.<sup>435</sup>

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abiding life or to assist him to do so." Subsection (b) provides a list of appropriate conditions, most of which were found in Law of Mar. 13, 1937, ch. 132, § 3, 1936-1937 N.C. Pub. Laws 351 (formerly codified as amended at N.C. GEN. STAT. § 15-199 (1975)) (repealed 1977).

427. N.C. GEN. STAT. § 15A-1345. *Id.* § 15A-1344 controls the power of courts to alter or revoke probation in response to violations of the conditions imposed. Subsection (a) provides that this power rests in any judge entitled to sit in the court that imposed probation, and who is a resident or is presiding in the district where probation was imposed, where the probation violation occurred or where the probationer resides. *Id.* § 15A-1344(a). Subsection (b) contains an exception to this general rule. A sentencing judge may limit jurisdiction to alter or revoke a sentence of unsupervised probation to the sentencing judge, or if he is no longer serving, to a presiding judge in the court where the defendant was sentenced. *Id.* § 15A-1344(b).

This framework represents a compromise among the drafting commission members. Power to alter suspended sentences has traditionally been limited because, with no supervision or report from a probation officer, the sentencing judge was generally considered the only authority qualified to alter the sentence. Section 15A-1344(b) modifies this rule by applying it only when the sentencing judge expressly limits jurisdiction. *See id.* § 15A-1342, Official Commentary.

428. *Id.* § 15A-1343(b)(15).

429. *Id.* § 15A-1345.

430. *Id.* § 15A-1343(b)(15).

431. *State v. Craft*, 32 N.C. App. 357, 232 S.E.2d 282, *cert. denied*, 292 N.C. 642, 235 S.E.2d 63 (1977) (condition of warrantless search by probationer's probation officer or any other law enforcement officer in presence of probation officer held valid); *State v. Mitchell*, 22 N.C. App. 663, 665, 207 S.E.2d 263, 264-65 (1974) (waiver and consent to warrantless search by lawful officer as condition of probation held valid).

432. 521 F.2d 259 (9th Cir. 1975).

433. N.C. GEN. STAT. § 15A-1343(b)(15) (Cum. Supp. 1977).

434. 18 U.S.C. § 3651 (1976).

435. The court explained that all probation conditions must "serve the dual objectives of rehabilitation and public safety." 521 F.2d at 265. The court held that some forms of search by probation officers are permissible, but blanket authorization for warrantless searches by any law enforcement officers gives rise to searches that could not possibly serve the ends of probation. *Id.* The court confined its holding by expressly reserving any opinion on how far the states can go in imposing the warrantless search condition. *Id.* at 266.

The North Carolina Court of Appeals ignored *Conseulo-Gonzalez* in its 1977 decision in *State v. Craft*<sup>436</sup> and upheld a condition of warrantless searches by any law enforcement officer in the presence of the probation officer as not unreasonable, partially because consent to the condition was voluntarily given at sentencing.<sup>437</sup> In support of its holding, the court cited a 1971 California case, *People v. Mason*,<sup>438</sup> which held a warrantless search condition reasonable in effecting the probation purposes of fostering rehabilitation and protecting public safety.<sup>439</sup> The California court, however, emphasized that the peculiar nature of defendant's conviction, a narcotics charge, and its high recidivism rate<sup>440</sup> made the search condition reasonable in deterring and discovering subsequent criminal offenses of the same nature.<sup>441</sup>

The *Craft* court did not engage in analysis linking the search condition to the particular offense for which defendant was put on probation; indeed, the opinion failed to indicate the exact offense for which defendant was convicted.<sup>442</sup> Despite legislative disapproval of this probation condition, however,<sup>443</sup> *Craft* has continuing vitality as long as the warrantless search condition can be found "reasonably necessary to insure that the defendant will lead a law-abiding life."<sup>444</sup>

North Carolina's new provision for probation violation hearings<sup>445</sup> codifies the procedural requirements announced by the United States Supreme Court in *Gagnon v. Scarpelli*.<sup>446</sup> G.S. 15A-1345(c) requires a preliminary hearing within five working days of arrest to determine if there is probable cause to believe the probationer violated one of his probation conditions,<sup>447</sup> unless the final revocation hearing is held before that time. The procedural framework of the preliminary hearing is set out in subsection

436. 32 N.C. App. 357, 232 S.E.2d 282, *cert. denied*, 292 N.C. 642, 235 S.E.2d 63 (1977).

437. *Id.* at 360-61, 232 S.E.2d at 285. It is questionable whether "consent" for such a condition can be termed voluntary, when the alternative is a prison sentence.

438. 5 Cal. 3d 759, 488 P.2d 630, 97 Cal. Rptr. 302 (1971), *cert. denied*, 405 U.S. 1016 (1972).

439. These are the same criteria articulated in *Consuelo-Gonzalez*. See note 435 *supra*.

440. 5 Cal. 3d at 764 n.2, 488 P.2d at 632 n.2, 97 Cal. Rptr. at 304 n.2.

441. *Id.* at 764-65, 488 P.2d at 632-33, 97 Cal. Rptr. at 304-05.

442. The search was made for stolen groceries and cigarettes. 32 N.C. App. at 358, 232 S.E.2d at 283-84.

443. See text accompanying notes 430-33 *supra*. The list of appropriate probation conditions is not exclusive. See N.C. GEN. STAT. § 15A-1343, Official Commentary (Cum. Supp. 1977).

444. N.C. GEN. STAT. § 15A-1343(a) (Cum. Supp. 1977).

445. *Id.* § 15A-1345.

446. 411 U.S. 778 (1973). The *Gagnon* Court held that while probation revocation is not a part of a criminal prosecution, the loss of liberty involved is serious enough to require the probationer to be accorded due process safeguards—"a probationer . . . is entitled to a preliminary and a final revocation hearing." *Id.* at 782. The court further decided that appointed counsel is not always required at either the preliminary or final hearing. *Id.* at 790.

447. N.C. GEN. STAT. § 15A-1345(c) (Cum. Supp. 1977).



(d). This provision requires that the probationer have notice, including a statement of violations alleged. He may speak in his own behalf, present relevant information and personally question adverse informants.<sup>448</sup> Moreover, the legislature went beyond *Gagnon* by requiring that all defendants be allowed counsel, or, if indigent, be represented by appointed counsel for the final revocation hearing.<sup>449</sup> The new section<sup>450</sup> also resolves a conflict in present North Carolina law<sup>451</sup> concerning the setting of bail following arrest for probation violation. Subsection (b) now provides that the arrested probationer be taken "without unnecessary delay before a judicial official" to have his bail set.<sup>452</sup>

### R. Contempt

Under previous North Carolina statutes, criminal contempt was designated "for contempt" while civil contempt was called "as for contempt."<sup>453</sup> The similarity in the wording of these statutes led to confusion over the procedures to be followed in determining contempt and the type of punishment to be imposed. The 1977 General Assembly, attempting to eliminate this confusion, drew a sharp distinction between criminal and civil contempt in the new contempt statute.<sup>454</sup> The legislature also made several changes in the grounds for criminal contempt and codified the procedures for finding contempt with regard to defendants' due process rights.

Regardless of what may have been considered contempt at common law,<sup>455</sup> G.S. 5A-11<sup>456</sup> now contains the exclusive grounds for criminal

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448. *Id.* § 15A-1345(d). These are the required elements detailed in *Gagnon*, 411 U.S. at 786; however, the statute does not specify that a written report of the hearing must be made, as specified in *Gagnon*, *id.*

The procedure for the formal revocation hearing is specified in N.C. GEN. STAT. § 15A-1345(e) (Cum. Supp. 1977), which also conforms to the *Gagnon* mandate, 411 U.S. at 786, and generally follows Law of Apr. 14, 1951, ch. 1038, § 1, 1951 N.C. Sess. Laws 1036 (formerly codified as amended at N.C. GEN. STAT. § 15-200.1 (Cum. Supp. 1977)) (repealed 1977).

449. N.C. GEN. STAT. § 15A-1345(e) (Cum. Supp. 1977); see note 446 *supra*.

450. N.C. GEN. STAT. § 15A-1345(b) (Cum. Supp. 1977).

451. Law of Apr. 14, 1951, ch. 1038, § 1, 1951 N.C. Sess. Laws 1036 (formerly codified as amended at N.C. GEN. STAT. § 15-200 (1975)) (repealed 1977), provided that a probation officer having charge of a defendant may take justified bail for the defendant's appearance at the hearing. N.C. GEN. STAT. § 7A-274 (1969) provides that in any district in which a district court has been established, only officers of the General Court of Justice may set bail.

452. N.C. GEN. STAT. § 15A-1345(b) (Cum. Supp. 1977).

453. *Galyon v. Stutts*, 241 N.C. 120, 124, 84 S.E.2d 822, 825 (1954). See *Luther v. Luther*, 234 N.C. 429, 67 S.E.2d 345 (1951), for an example of the confusion created by the prior wording of North Carolina's contempt statutes.

454. N.C. GEN. STAT. ch. 5A, art. 1, Official Commentary (Cum. Supp. 1977). Criminal contempt covers matters for which the sanction is purely punishment while civil contempt is used to induce compliance with a court order. *Id.* § 5A-21, Official Commentary.

455. See Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 186-220 (1971).

456. N.C. GEN. STAT. § 5A-11 (Cum. Supp. 1977).

contempt. All of the grounds "for contempt" previously listed in the statutes<sup>457</sup> were preserved and several new grounds were added to ensure that courts will have full power to protect their proceedings. Before the change, a person could be found in contempt for the willful publication of a grossly inaccurate report of court proceedings that presented a clear and present danger of imminent and serious threat to the administration of justice.<sup>458</sup> This ground now appears in G.S. 5A-11(a)(5) with the additional requirement that the publisher must have knowledge of the report's falsity.<sup>459</sup>

In order to protect trial proceedings, the new law includes two new grounds for the trial judge to find criminal contempt. First, under the new statute "willful or grossly negligent failure to comply with the schedules and practices of the court" are grounds for criminal contempt.<sup>460</sup> Thus, if someone fails to appear in court at the proper time, thereby interfering with the court's schedule, such an omission might be treated as criminal contempt.<sup>461</sup> Second, G.S. 5A-11(a)(9), providing a new ground for contempt that has no counterpart in present law, makes the willful attempt to influence a jury's deliberations punishable as criminal contempt.<sup>462</sup> Although such conduct may also be punishable under other criminal laws,<sup>463</sup> classifying it as contempt gives the trial judge the power to act quickly to protect the proceedings before him.<sup>464</sup>

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457. Law of Apr. 10, 1869, ch. 177, § 1, 1868-69 N.C. Pub. Laws 426 (formerly codified as amended at N.C. GEN. STAT. § 5-1 (Cum. Supp. 1977)) (repealed 1977).

Instead of listing specific conduct punishable as civil contempt, N.C. GEN. STAT. § 5A-21 (Cum. Supp. 1977) requires only that there be a failure to comply with an order of the court. According to case law, the person to whom the order is directed must be capable of compliance. See *Cox v. Cox*, 10 N.C. App. 476, 179 S.E.2d 194 (1971). Under N.C. GEN. STAT. § 5A-21(b) (Cum. Supp. 1977), a person refusing to comply with a court order can be imprisoned as long as the civil contempt continues. A person who is only suspected of a crime and fails to comply with a nontestimonial identification order, however, may only be imprisoned for 90 days. *Id.*

458. Law of Apr. 10, 1869, ch. 177, § 1, 1868-69 N.C. Pub. Laws 426 (formerly codified as amended at N.C. GEN. STAT. § 5-1(7) (Cum. Supp. 1977)) (repealed 1977).

459. N.C. GEN. STAT. § 5A-11(a)(5) (Cum. Supp. 1977). This addition is based on the standard enunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). See N.C. GEN. STAT. § 5A-11, Official Commentary (Cum. Supp. 1977).

460. N.C. GEN. STAT. § 5A-11(a)(7) (Cum. Supp. 1977).

461. *Id.*, Official Commentary.

462. *Id.* § 5A-11(a)(9).

463. See *id.* § 14-226 (1969).

464. Except for the publication of inaccurate reports and attempts to influence the jury, *id.* § 5A-12 (Cum. Supp. 1977) prohibits the imposition of punishment for contempt unless the act or omission is "willfully contemptuous" or "preceded by a clear warning by the court that the conduct is improper." *Id.* This section codifies case law interpreting "willful" behavior under the criminal laws as the "doing of [an] act purposely and deliberately in violation of law." *Id.*; see *In re Hege*, 205 N.C. 625, 630, 172 S.E.345, 347 (1934). Therefore, those who have no power to act or to refrain from acting and those who are unaware that their behavior violates a rule of the court cannot be found in criminal contempt.

According to North Carolina case law, "[a] direct contempt consists of words spoken or acts committed in the actual or constructive presence of the court . . . which tend to subvert or prevent justice."<sup>465</sup> Under the new law, a direct contempt can be punished summarily if the punishment is imposed "substantially contemporaneously" with the contempt and the person charged is given summary notice and a summary chance to respond.<sup>466</sup> These minimum requirements balance the due process rights of the contemnor and the interest of the court in maintaining its authority. The United States Supreme Court has approved such procedures when contempt proceedings occur immediately after the contemptuous conduct.<sup>467</sup>

If the judicial official chooses not to proceed summarily against a person charged with direct contempt or the person is charged with indirect contempt,<sup>468</sup> due process requires that the person have reasonable notice of the specific charges and an opportunity to be heard in his own behalf before an unbiased judge.<sup>469</sup> In addition to meeting these due process requirements, plenary proceedings for contempt under G.S. 5A-15 must be held before a judge who is the trier of fact.<sup>470</sup> There is no constitutional right to a jury trial in a criminal contempt case unless the maximum punishment exceeds six months imprisonment and a \$500 fine.<sup>471</sup> The punishment imposed by the new statute is within this limit, so an alleged contemnor has no right to a jury trial in the plenary proceedings under G.S. 5A-15.<sup>472</sup>

Previously, no appeals were allowed from orders of direct contempt although a defendant could seek relief through a petition for writ of habeas corpus.<sup>473</sup> The new law, however, permits an appeal from a finding of

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465. *Galyon v. Stutts*, 241 N.C. 120, 123, 84 S.E.2d 822, 824-25 (1954) (citations omitted).

466. N.C. GEN. STAT. § 5A-14 (Cum. Supp. 1977).

467. *Groppi v. Leslie*, 404 U.S. 496, 504 (1972).

468. "Any criminal contempt other than direct criminal contempt is indirect criminal contempt . . . ." N.C. GEN. STAT. § 5A-13(b) (Cum. Supp. 1977).

469. *Taylor v. Hayes*, 418 U.S. 488 (1974). A judge might be considered biased "[i]f the criminal contempt is based upon acts before a judge which so involve him that his objectivity may reasonably be questioned." N.C. GEN. STAT. § 5A-15(a) (Cum. Supp. 1977); see *In re Paul*, 28 N.C. App. 610, 222 S.E.2d 479 (1976).

As in the plenary proceedings for criminal contempt, an alleged civil contemnor must be given notice of the hearing at which the judge is the trier of fact. N.C. GEN. STAT. § 5A-23 (Cum. Supp. 1977). In addition to the issuance of an order to show cause allowed under the prior law, Law of Apr. 10, 1869, ch. 177, § 8, 1868-69 N.C. Pub. Laws 426 (formerly codified as amended at N.C. GEN. STAT. § 5-9 (1969)) (repealed 1977), N.C. GEN. STAT. § 5A-23 (Cum. Supp. 1977) also permits the judge to issue a notice to the defendant that he will be held in contempt unless he appears at a specified time to show cause.

470. N.C. GEN. STAT. § 5A-15(d) (Cum. Supp. 1977).

471. *Bloom v. Illinois*, 391 U.S. 194 (1968), held that there was a constitutional right to a jury trial only in relation to serious offenses. A serious offense is one for which the authorized punishment exceeds six months imprisonment and a \$500 fine. See *Blue Jeans Corp. v. Amalgamated Clothing Workers*, 275 N.C. 503, 169 S.E.2d 867 (1969).

472. N.C. GEN. STAT. § 5A-15 (Cum. Supp. 1977).

473. *In re Palmer*, 265 N.C. 485, 144 S.E.2d 413 (1965).

criminal contempt in the same manner as provided in other criminal actions.<sup>474</sup>

### S. Juvenile Rights

In *In re Arthur*,<sup>475</sup> the North Carolina Supreme Court limited the scope of an evidentiary statute that threatened to operate to deny confrontation rights in juvenile proceedings. G.S. 90-95(g) provides that whenever matter is submitted to certain specified laboratories for chemical analysis to determine if the matter is a controlled substance, the report of that analysis "[s]hall be admissible without further authentication in all proceedings in the district court . . . as evidence of the identity, nature, and quantity of the matter analyzed."<sup>476</sup>

Petitioner in *Arthur* was adjudged a delinquent juvenile in district court. The district court, relying on G.S. 90-95(g), admitted into evidence an SBI laboratory analysis concluding that material found in petitioner's possession was marijuana. The chemist who performed the analysis was not present and did not testify.<sup>477</sup> On appeal, the juvenile contended that the statute as applied to his adjudication denied him the right to confront and cross-examine the chemist. The court of appeals ruled adversely to the juvenile.<sup>478</sup> The state supreme court reversed but declined to reach the constitutional issue, holding only that the statute was not intended to apply to juvenile delinquency proceedings in the district court.<sup>479</sup> The court first examined the legislative intent underlying the statute and decided that the legislature had contemplated only the great majority of district court criminal proceedings. These proceedings involve only a determination of probable cause in felony cases, and in misdemeanor cases there is a right to a trial de novo in superior court. In both instances the opportunity ultimately to confront and cross-examine the chemist is assured in superior court.<sup>480</sup> Second, the court observed that G.S. 90-95<sup>481</sup> creates and defines *criminal*

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474. N.C. GEN. STAT. § 5A-17 (Cum. Supp. 1977).

A person found in civil contempt can appeal in the manner provided for appeals in civil actions. See *id.* § 5A-24.

475. 291 N.C. 640, 231 S.E.2d 614 (1977).

476. N.C. GEN. STAT. § 90-95(g) (1975).

477. 291 N.C. at 641, 231 S.E.2d at 615.

478. 27 N.C. App. 227, 218 S.E.2d 869 (1975), *rev'd*, 291 N.C. 648, 231 S.E.2d 614 (1977). The court of appeals had two bases for its holding. First, the court found no prejudice to the juvenile since he had a right to compulsory process and was afforded access to the report in time to prepare for the hearing. Second, the court felt that the report possessed sufficient regularity, trustworthiness, reliability and freedom from selfish or pecuniary interests to render it an acceptable exception to the hearsay rule. *Id.* at 231, 218 S.E.2d at 872.

479. 291 N.C. at 641, 231 S.E.2d at 615.

480. *Id.* at 643, 231 S.E.2d at 616. Appeal from juvenile adjudications is to the court of appeals. N.C. GEN. STAT. § 7A-289 (Cum. Supp. 1977).

481. N.C. GEN. STAT. § 90-95 (1975 & Cum. Supp. 1977).

violations under the Controlled Substances Act,<sup>482</sup> and that juvenile proceedings should not be grouped with the proceedings for criminal violations of the Act. Finally, the court noted that G.S. 7A-285<sup>483</sup> preserves the rights of confrontation and cross-examination in juvenile adjudications, thus making it doubtful that the legislature intended to risk depriving juveniles of confrontation rights by the operation of G.S. 90-95(g).<sup>484</sup>

The opinion in *Arthur* recognized that if the statute did apply to adjudication of delinquency a serious question about its constitutionality would arise.<sup>485</sup> The supreme court, while not specifically overruling the court of appeals' conclusions on the constitutionality of the statute, seemed to express doubts as to the correctness of those conclusions. The court was especially doubtful that "any applicable provision [of the Bill of Rights] might . . . be given less force or vigor in juvenile proceedings than in adult criminal prosecutions."<sup>486</sup>

The issue in *In re Drakeford*<sup>487</sup> was whether jeopardy attaches in a juvenile adjudication and thus bars a subsequent juvenile proceeding as a violation of the double jeopardy clause. In *Drakeford* a petition was filed alleging that respondent was a delinquent child because she assaulted a fellow student with a razor blade on a school bus. At a hearing the petition was dismissed for lack of sufficient evidence. Another petition was filed alleging that respondent had committed an affray by assaulting a fellow student on the bus (the same incident).<sup>488</sup> The affray charge, on which respondent was convicted, had as an essential element the assault charge that had been dropped for lack of evidence.<sup>489</sup> Therefore, if jeopardy attached at the first hearing, the second hearing caused respondent to be twice put in jeopardy for the same offense.

Juvenile proceedings are not traditionally thought of as criminal proceedings: a finding of delinquency is not considered to be the same as

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482. *Id.* §§ 90-86 to -113.8.

483. *Id.* § 7A-285 (Cum. Supp. 1977).

484. 291 N.C. at 643, 231 S.E.2d at 616-17.

485. *Id.* In juvenile adjudications the district court is the ultimate fact-finding forum. *Id.* Thus, the statute, largely a rule of convenience for the State, would operate to deprive the juvenile of a chance to confront and cross-examine the chemist. *Id.* The court of appeals had concluded that there was no denial of those rights since the juvenile retained his right to compulsory process and could subpoena the chemist if he wanted to do so. 27 N.C. App. 227, 231, 218 S.E.2d 869, 872 (1975), *rev'd*, 291 N.C. 640, 231 S.E.2d 614 (1977); *see note 478 supra*.

486. 291 N.C. at 644, 234 S.E.2d at 617.

487. 32 N.C. App. 113, 230 S.E.2d 779 (1977).

488. *Id.* at 114, 230 S.E.2d at 780. An assault or participation in an affray is a violation of N.C. GEN. STAT. § 14-33 (Cum. Supp. 1977). An affray is a fight between two or more persons in a public place that causes terror to surrounding people. 32 N.C. App. at 118, 230 S.E.2d at 782.

489. 32 N.C. App. at 119, 230 S.E.2d at 782.

conviction of a crime.<sup>490</sup> Thus, the full gamut of constitutional guarantees is not required in juvenile proceedings.<sup>491</sup> The court of appeals, however, said:

Although we do not obliterate all distinctions between juvenile proceedings and criminal prosecutions, we believe, and so hold, that they are sufficiently similar in nature that the double jeopardy provisions of the United States and North Carolina Constitutions are applicable to them. Accordingly, jeopardy attached to the initial petition once an adjudicatory hearing on the merits was held.<sup>492</sup>

The court relied on the ruling of the United States Supreme Court in *Breed v. Jones*,<sup>493</sup> in which petitioner was tried first in a juvenile proceeding and then in an adult criminal proceeding. In *Breed* the Supreme Court recognized, as did the North Carolina Court of Appeals in *Drakeford*, that the stigma and potential loss of liberty that accompany a finding of delinquency are serious consequences—so serious that there is little to distinguish such an adjudicatory hearing from a traditional criminal prosecution.<sup>494</sup> The *Drakeford* court thus concluded that jeopardy attached to the first juvenile proceeding and that the second one was barred.

The court of appeals' decision in *In re Byers*<sup>495</sup> offers an interesting contrast to the attitude expressed toward juvenile proceedings in *Drakeford*. Defendant in *Byers* was charged with delinquency on the basis of assault and theft. The district court ordered defendant placed in the custody of the Department of Human Resources for an indefinite period not to exceed his eighteenth birthday.<sup>496</sup> Defendant contended that the hearing in the district court did not meet the requirements of due process under the fourteenth amendment because it was held before a lay judge and without a right to a trial de novo before a legally trained judge.<sup>497</sup> Defendant argued that the United States Supreme Court's decision in *North v. Russell*<sup>498</sup> requires this right in a trial or hearing presenting the possibility of confinement.<sup>499</sup>

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490. *In re Burrus*, 275 N.C. 517, 529, 169 S.E.2d 879, 886-87 (1969), *aff'd sub nom. McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

491. A juvenile does not, for example, have a right to a jury trial. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971).

492. 32 N.C. App. at 117, 230 S.E.2d at 781.

493. 421 U.S. 519 (1975).

494. *Id.* at 530-31; *see* 32 N.C. App. at 117, 230 S.E.2d at 781.

495. 34 N.C. App. 710, 239 S.E.2d 618 (1977).

496. *Id.* at 710-11, 239 S.E.2d at 618.

497. *Id.* at 712, 239 S.E.2d at 619.

498. 427 U.S. 328 (1976). In *North*, defendant was tried for a traffic offense and sentenced to 30 days by a city police court in Kentucky. The judge was a nonlawyer. Defendant argued that when confinement is a possible penalty, it is a due process violation not to be tried by a legally trained judge. The Court, noting that any Kentucky defendant facing a criminal sentence had a right to a trial de novo before a lawyer-judge, found no due process violation. *Id.* at 333-38.

499. 34 N.C. App. at 712, 239 S.E.2d at 619. In North Carolina, district courts have criminal jurisdiction only over misdemeanor cases. N.C. GEN. STAT. § 7A-272 (1969). In these

The court of appeals rejected defendant's contention on two grounds. First, the court observed that *North* did not actually reach the question whether a person could be convicted and imprisoned in a proceeding in which the only trial afforded is before a lay judge; moreover, there was nothing in the Constitution to require that conclusion.<sup>500</sup> This aspect of *Byers* may reflect an unduly narrow interpretation of the Supreme Court's analysis of the validity of the Kentucky procedures involved in *North*.<sup>501</sup> In an earlier case challenging Kentucky's two-tier system, the Supreme Court said: "We are not persuaded, however, that the Kentucky arrangement for dealing with the less serious offenses disadvantages defendants any more or any less than trials conducted in a court of general jurisdiction in the first instance, *as long as the latter are always available*."<sup>502</sup> Although *North* did not hold that trials before a lay judge were impermissible, the main impetus for so holding was arguably the fact that every defendant had the right to a trial de novo before a legally trained judge.<sup>503</sup>

In addition, the court of appeals held that even if *North* were construed as defendant suggested it should be, it would be inapplicable to North Carolina juvenile proceedings.<sup>504</sup> *North* dealt with criminal proceedings while *Byers* concerned a juvenile petition. The court of appeals concluded that when the institution to which a juvenile is committed is not of a penal character, full constitutional guarantees need not extend to the proceeding.<sup>505</sup> Indeed, the court asserted that delinquent children are not treated as criminals, but rather as wards to be given the control and environment required for their reformation.<sup>506</sup> Moreover, the court observed that the "noncriminal nature of juvenile hearings and the nonpenal nature of the confinement at risk has been noted by the North Carolina Appellate Courts in several cases."<sup>507</sup> The court did not mention, however, that less than one year earlier in *Drakeford* the same court of appeals found the nature of

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cases, the defendant has the right to a trial de novo in superior court. *Id.* § 7A-271(b) (Cum. Supp. 1977).

500. 34 N.C. App. at 712, 239 S.E.2d at 619.

501. *North* did not reach that issue because the procedure involved there guaranteed a defendant facing a criminal sentence a right to a trial de novo before a legally trained judge. 427 U.S. at 334.

502. *Colten v. Kentucky*, 407 U.S. 104, 118 (1972) (emphasis added).

503. *See* 427 U.S. at 334-38.

504. 34 N.C. App. at 712-13, 239 S.E.2d at 619-20.

505. *Id.*; *see In re Wichard*, 8 N.C. App. 154, 161, 174 S.E.2d 281, 285, *appeal dismissed*, 276 N.C. 727 (1970), *cert. denied*, 403 U.S. 940 (1971).

506. 34 N.C. App. at 713, 239 S.E.2d at 620; *see In re Walker*, 282 N.C. 28, 39, 191 S.E.2d 702, 709 (1972).

507. 34 N.C. App. at 713, 239 S.E.2d at 620; *see In re Burrus*, 275 N.C. 517, 169 S.E.2d 879 (1969), *aff'd sub nom. McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

juvenile proceedings so serious that jeopardy attached to a juvenile adjudication.<sup>508</sup>

The *Byers* court concluded that "our Juvenile Court Act, pursuant to its benevolent guidelines, and with the right of appeal directly to this Court, passes the most strict requirements of fairness and due process. The possibility of confinement resulting from a hearing before a lay judge does not alter this conclusion."<sup>509</sup>

JAMES HARRY CLARKE

MARY BROOKE LAMSON

MARTHA JOHNSTON McDONALD

THOMAS C. POLLARD

## VII. DOMESTIC RELATIONS

### A. Adoptions

In pursuing the policy of encouraging adoptions, the court of appeals, in two recent decisions, carefully protected the rights of the natural and adoptive parents<sup>1</sup> involved, but in so doing gave insufficient consideration to the interests of the children concerned. With its decision in *In re Spinks*<sup>2</sup> the court for the first time interpreted the North Carolina statute concerning the procedure for opening court records<sup>3</sup> and vacated the trial court's order that granted the eighteen-year-old petitioner's motion that the identity of her natural parents be revealed to her.<sup>4</sup> While taking note of recent commentary

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508. See text accompanying notes 487-94 *supra*. In *Drakeford* the court of appeals said "[j]uvenile proceedings in North Carolina do more than merely determine the delinquency of the minor; they may result in severe curtailment of his freedom and, in some cases, in institutional commitment." 32 N.C. App. at 117, 230 S.E.2d at 781. Judge Morris authored both the *Drakeford* and the *Byers* opinions.

509. 34 N.C. App. at 713, 239 S.E.2d at 620.

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1. The General Assembly also protected the rights of parents in passing N.C. GEN. STAT. §§ 7A-289.20 to .32 (Cum. Supp. 1977) which carefully sets forth the procedure to be followed in the judicial termination of parental rights. The General Assembly, however, focused its primary attention on the best interests of the child, stating that it was the purpose of the Act "to recognize the necessity for any child to have a permanent plan of care . . . while at the same time recognizing the need to protect all children from the unnecessary severance of a relationship with biological or legal parents." *Id.* § 7A-289.20(2). In keeping with its concern for the welfare of the child, the General Assembly established an additional ground for ending parental rights. If the court finds that a "parent has without cause failed to establish or maintain concern or responsibility as to the child's welfare," parental rights may be terminated. *Id.* § 7A-289.30(1).

2. 32 N.C. App. 422, 232 S.E.2d 479 (1977).

3. N.C. GEN. STAT. § 48-26 (1976).

4. In reviewing the refusal of the county clerk's office to open the records, the lower



critical of sealed adoption records statutes,<sup>5</sup> the court nevertheless narrowly interpreted the North Carolina statute's requirement that opening the record "be to the best interest of the child *or* of the public to have such information disclosed,"<sup>6</sup> by requiring that opening the record be in the best interest of the child *and* the public.<sup>7</sup> In remanding the case, the court directed the lower court to consider the interests of the natural and adoptive parents as well as those of the child, although the court was to resolve any conflict in favor of the child.<sup>8</sup>

With this holding, the *Spinks* court recognized that an adoptee does have a right to know his or her natural heritage, but its narrow interpretation of the statute requires that the lower court specifically find that access to such information be not just to the benefit of the adoptee but in his or her best interests.<sup>9</sup> The decision indicates that the desires of the adoptee alone do not determine his or her best interests, for courts are now obliged to consider carefully the interests of the natural and adoptive parents in determining the adoptee's best interests.<sup>10</sup>

In *Acker v. Barnes*,<sup>11</sup> the court of appeals upheld a lower court's refusal to recognize that a paternal grandmother and aunt had any cause of action in seeking visitation rights with the children of divorced parents who had been adopted by their stepfather.<sup>12</sup> The ruling foreclosed any attempted communication between the children and their paternal relatives. The court strictly followed the statutory requirement that, after an adoption, the natural parents are divested of all rights with respect to the adopted child,<sup>13</sup> but chose to ignore any right the child itself might have to receive visits from

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court found that petitioner's adopted parents supported and encouraged her quest and that petitioner had suffered mental disturbance from not knowing the identity of her true parents. 32 N.C. App. at 423, 232 S.E.2d at 483.

5. *Id.* at 426, 232 S.E.2d at 482 (citing Note, *Sealed Records in Adoptions: The Need for Legislative Reform*, 21 CATH. LAW. 211 (1975); Note, *The Adoptee's Right to Know His Natural Heritage*, 19 N.Y.L.F. 137 (1973); Note, *The Adult Adoptee's Constitutional Right to Know His Origins*, 48 S. CAL. L. REV. 1196 (1975)). These Notes recognize the adoptee's right to examine records concerning his origins. Although considering counterbalancing effects, the writers generally conclude that the psychological problems caused by loss of identity in not knowing one's biological parents as well as constitutional principles of equal protection and the right to receive information constitute compelling grounds for providing an adult adoptee access to sealed records containing information about his or her parentage.

6. N.C. GEN. STAT. § 48-26 (1976) (emphasis added).

7. 32 N.C. App. at 427, 232 S.E.2d at 482.

8. *Id.* at 427-28, 232 S.E.2d at 483.

9. *Id.* at 429, 232 S.E.2d at 482.

10. *Id.* at 427, 232 S.E.2d at 482.

11. 33 N.C. App. 750, 236 S.E.2d 715, *cert. denied*, 293 N.C. 360, 238 S.E.2d 149 (1977).

12. *Id.* at 752, 236 S.E.2d at 716. Earlier North Carolina decisions have recognized that a parent has a natural and legal right to visitation with his or her minor children when custody of the child is awarded to another, provided that the parent has not forfeited the right. *See, e.g., In re Custody of Stancil*, 10 N.C. App. 545, 551, 179 S.E.2d 844, 849 (1971).

13. N.C. GEN. STAT. § 48-23 (1976).

a grandparent.<sup>14</sup> A minority of states are taking into consideration the best interests and rights of the child in this situation so that, while recognizing that the grandparent has no legal visitation right, courts are given considerable discretion to determine the child's best interests,<sup>15</sup> and to allow communication between the child and his or her relatives.

### B. Child Custody<sup>16</sup>

A 1977 amendment to G.S. 50-13.2(a),<sup>17</sup> which determines who is

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14. See Note, *Visitation Rights of a Grandparent Over the Objections of a Parent: The Best Interests of the Child*, 15 J. FAM. L. 51 (1976-77).

15. See, e.g., *Mimkon v. Ford*, 66 N.J. 426, 332 A.2d 199 (1975). But see *Lee v. Kepler*, 197 So. 2d 570 (Fla. Dist. Ct. App. 1976).

16. In reviewing child custody decisions, the North Carolina appellate courts have traditionally relied on two principles that largely determine the outcome of such cases. Basing the decision on the best interests of the child is a statutorily required consideration, N.C. GEN. STAT. § 50-13.2(a) (Supp. 1977), that is stressed by the courts. See, e.g., *Tyner v. Tyner*, 206 N.C. 776, 175 S.E. 144 (1934); *In re Lewis*, 88 N.C. 31 (1883). Many appellate decisions also reflect the principle that the trial court should enjoy wide discretion in determining child custody. See, e.g., *Griffin v. Griffin*, 237 N.C. 404, 411, 75 S.E.2d 133, 138 (1953); *In re Custody of Cox*, 17 N.C. App. 687, 689, 195 S.E.2d 132, 133 (1973). In each of the 1977 cases, fathers sought to show changed circumstances in order to justify modification of a child custody decree, and in each case the court of appeals deferred to the great discretion granted the trial judge.

In *Goodson v. Goodson*, 32 N.C. App. 76, 231 S.E.2d 178 (1977), plaintiff-father claimed that his child had been physically abused by defendant's current husband, but the lower court found no substantial change in circumstances. The court of appeals affirmed this finding, holding that although the lower court did err in ruling that defendant's current husband was not a hostile witness, the error was not prejudicial, thereby foreclosing the use of leading questions concerning allegations of child beating. *Id.* at 79, 231 S.E.2d at 181.

Affirming the lower court's holding in *Dean v. Dean*, 32 N.C. App. 482, 232 S.E.2d 470 (1977), the court found that the fact that defendant had given birth to two illegitimate children since the divorce and was rearing them in her home was a sufficient change in circumstances to justify a change in custody. *Id.* at 484, 232 S.E.2d at 472. While recognizing the continued validity of the North Carolina rule that evidence of adulterous conduct by itself is not sufficient to determine that a parent is unfit to retain custody of a child, see, e.g., *In re McCraw Children*, 3 N.C. App. 390, 395, 165 S.E.2d 1, 5 (1969), the court felt that the rule was not applicable in this case since the birth of illegitimate children and their residence with their mother was much more than evidence of an act of adultery.

The affirmation of the lower court's custody determination of *In re Williamson*, 32 N.C. App. 616, 233 S.E.2d 677 (1977), exemplified the utilization of another factor that courts often consider in determining child custody—the preference of the children involved. In granting the mother continued custody of her daughters, the court noted the desire of the girls to remain with their mother. In custody cases North Carolina courts take into consideration the wishes of a child who has reached the age of discretion. See *Brooks v. Brooks*, 12 N.C. App. 626, 631, 184 S.E.2d 417, 420 (1971). It has recently been suggested that not only should children be represented by independent counsel in custody disputes, but that their custodial preference should be presumptively controlling. Bersoff, *Representation for Children in Custody Decisions: All That Glitters Is Not Gault*, 15 J. FAM. L. 27 (1976-77). See also Comment, *A Child's Due Process Right to Counsel in Divorce Custody Proceedings*, 27 HASTINGS L.J. 917 (1976); Note, *Seen and Not Heard: The Child's Need for His Own Lawyer in Child Abuse and Neglect Cases*, 29 OKLA. L. REV. 439 (1976).

17. N.C. GEN. STAT. § 50-13.2(a) (Supp. 1977) provides in part: "[A]n order for custody of a minor child entered pursuant to this section shall award custody of such child to such person,

entitled to the custody of a minor, voids the judicially created presumption favoring the mother in custody controversies between parents.<sup>18</sup> This statutory amendment reflects the current trend recognizing the ability of the father to provide proper care and comfort for the child.<sup>19</sup> Prior to this amendment, the North Carolina Supreme Court had recently and strongly reaffirmed the traditional view giving added weight to the mother's child-caring abilities.<sup>20</sup> In a similar vein, an amendment changing the first two sentences of G.S. 33-2,<sup>21</sup> relating to the parents' rights to dispose of the custody and tuition of minor children by will, eliminates the distinctions previously maintained between the rights of the father and the mother<sup>22</sup> and states that the parents are allowed to "recommend" disposition of custody rather than simply "dispose" of custody.<sup>23</sup>

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agency, organization or institution as will, in the opinion of the judge, best promote the interest and welfare of the child."

18. The amendment reads, "Provided, between the mother and father, whether natural or adoptive, there is no presumption as to who will better promote the interest and welfare of the child." *Id.*

Other states have also adopted statutes expressly forbidding courts to discriminate against fathers in custody proceedings. See, e.g., FLA. STAT. ANN. § 61.13(2)(b) (Harrison 1976); WIS. STAT. ANN. § 247.24(3) (West Supp. 1977).

19. See Comment, *The Father's Right to Child Custody in Interparental Disputes*, 49 TUL. L. REV. 189, 200 (1974).

20. The court in *Spence v. Durham*, 283 N.C. 671, 687, 198 S.E.2d 537, 547 (1973), *cert. denied*, 415 U.S. 918 (1974) (quoting 2 NELSON, DIVORCE AND ANNULMENT § 15.09, at 226 (2d ed. 1961)) stated:

It is universally recognized that the mother is the natural custodian of her young. . . . If she is a fit and proper person to have custody of the children, other things being equal, the mother should be given their custody, in order that the children may not only receive her attention, care, supervision, and kindly advice, but also may have the advantage and benefit of a mother's love and devotion for which there is no substitute.

21. N.C. GEN. STAT. § 33-2 (Supp. 1977).

22. Law of Apr. 12, 1869, ch. 201, § 1, 1868 N.C. Pub. Laws 534 (formerly codified as amended at N.C. GEN. STAT. § 33-2 (1976)) (father generally had right to make disposition if mother were dead, but mother could make disposition only if father were dead and had made no disposition in his will).

The amendment to § 33-2 is one of several amendments and modifications to incorporate gender neutral statutory language in the domestic relations laws. Other amendments to remove unneeded references to gender were N.C. GEN. STAT. § 1-223 (Cum. Supp. 1977) (now relates to judgments against a married person, not just married women); *id.* § 6-21 (respecting costs in civil actions; "widow" changed to "surviving spouse," "wife" to "either spouse"); *id.* § 23-18 (recognizing an imprisoned debtor can be a woman); *id.* § 33-67 (Supp. 1977) (recognizing that person in military service can be male or female for purpose of disbursements of allotments to minor children); *id.* § 35-13 (*spouse* of incompetent husband or wife entitled to special proceeding for sale of property); *id.* § 35-19 (now refers to income of incompetent surviving *spouse*); *id.* § 48-6 (consent of parent in adoption proceedings); *id.* § 50-5(6) (divorce on grounds of insanity); *id.* §§ 5-1, -6 (marriage); and *id.* §§ 94-7, -8 (Cum. Supp. 1977) (regulating apprenticeship). See also Law of Feb. 16, 1859, ch. 52, § 1, 1858 N.C. Pub. Laws 91 (repealed 1977) (allowance to abandoned, insane wife).

The new amendments in N.C. GEN. STAT. § 51-3 (Supp. 1977) and the addition of *id.* § 51-3.1 have removed prior bars to interracial marriage. Section 51-3.1 validates any interracial marriage declared void by statute or court prior to its enactment and the new version of § 51-3 does away with the statutory prohibition against marriage between whites and blacks.

23. N.C. GEN. STAT. § 32-2 (Supp. 1977). The amendment accords great emphasis to the

### C. Child Neglect

Several statutory changes related to child neglect were made to G.S. Chapter 7A, Jurisdiction and Procedure Applicable to Children. In general, the statutory changes reflect an increased sensitivity for the rights and well-being of victims of child neglect.<sup>24</sup> Perhaps the most significant of these amendments is that to G.S. 7A-283 which, as amended, requires that a court appoint an attorney as guardian *ad litem* to represent the child in cases involving alleged child neglect "unless the court shall find as a fact that the child is not in need of and cannot benefit from such representation."<sup>25</sup> The statute expressly states that the guardian *ad litem* is to serve the child and protect the child's best interests and gives the guardian *ad litem* wide-ranging authority to obtain reports and information relevant to the proceeding.<sup>26</sup>

An amendment to G.S. 7A-451(a), which is a compilation of the proceedings in which an indigent person is entitled to the services of counsel, provides that such assistance will now be provided "[i]n the case of a juvenile alleged to be neglected."<sup>27</sup> This marks an extension of a juvenile's right to counsel in certain judicial proceedings, previously limited to delinquency hearings,<sup>28</sup> and may presage a future provision finally recognizing, as has often been suggested, that children should be represented by counsel in custody proceedings.<sup>29</sup>

G.S. 7A-284 provides that the court may give a concerned party an immediate order of physical custody, with a hearing to follow within five days, if it appears that a child is subject to serious neglect.<sup>30</sup> An amendment

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parental recommendation by stating that "parents are presumed to know the best interest of their children" and that the recommendation will be a "strong guide" if there is a dispute. *Id.*

24. *E.g.*, *id.* § 7A-286(2) (Cum. Supp. 1977) now provides for periodic review of child placement when the custody of the child has been removed from a parent "to determine if the needs of the child are being met and if the placement is in the child's best interests." A separate amendment to the same statute provides that a child removed from custody of a parent or one standing *in loco parentis* cannot be returned to that person "unless the court finds sufficient facts to show that the child will receive proper care and supervision." *Id.* These amendments allow the court to have control and supervision that was not previously possible over child placement.

25. *Id.* § 7A-283.

26. Neither the physician-patient privilege nor the husband-wife privilege may be invoked to prevent the guardian from obtaining such information. *Id.*

27. *Id.* § 7A-451(a)(12).

28. *See In re Gault*, 387 U.S. 1 (1967); *In re Burrus*, 275 N.C. 517, 169 S.E.2d 879 (1969), *aff'd sub nom.* *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); *State v. Rush*, 13 N.C. App. 539, 186 S.E.2d 595 (1972).

29. *See* J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973); Inker, *Expanding the Rights of Children in Custody and Adoption Cases*, 11 J. FAM. L. 129 (1971-72).

30. N.C. GEN. STAT. § 7A-284(a) (Cum. Supp. 1977). In *Newton v. Burgin*, 363 F. Supp. 782 (W.D.N.C. 1973), *aff'd*, 414 U.S. 1139 (1974), a federal district court held that this provision did not violate the due process rights of the parent of the child. *Id.* at 788.

to this procedure provides that an order for immediate, seventy-two hour custody may be issued by the magistrate on the oral direction of the judge,<sup>31</sup> ensuring that a child seriously endangered may swiftly be brought under the protective custody of the court for a short time.

In the only 1977 decision related to child neglect, *In re Kowalzek*,<sup>32</sup> the North Carolina Court of Appeals granted standing to a person with physical (though not legal) custody of a child to appeal the modification of a court order that had been issued without the provision of required notice or any finding of changed circumstances. The modification, which had been sought by the county social services department as legal custodian, gave custody of the child to the mother, who had abandoned the child in 1974. The child's father had died in February 1975, and appellants had had custody of the child since that time (approximately eighteen months when custody modification was ordered).<sup>33</sup> The court found that appellants as custodians stood *in loco parentis* to the child and therefore had standing.<sup>34</sup> By giving the custodian standing to appeal, the court increased the possibility that in the subsequent course of the litigation the child's need for a continued relationship with its actual custodians would be appropriately considered in the final determination of its custody.<sup>35</sup>

#### D. Child Support<sup>36</sup>

The court of appeals articulated a new principle in the child support

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31. N.C. GEN. STAT. § 7A-284(b) (Cum. Supp. 1977).

32. 32 N.C. App. 718, 233 S.E.2d 655 (1977).

33. At a full custody hearing in 1975 the mother did appear, but the court found that she had abandoned the child and could not provide support. *Id.* at 719, 233 S.E.2d at 656.

34. *Id.* at 721, 233 S.E.2d at 657.

35. The court itself made no reference to this need. See generally J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 29, at 31-35.

36. In two child support cases, the state courts followed the general decisional trend in this and other jurisdictions. In *Brondum v. Cox*, 292 N.C. 192, 232 S.E.2d 687 (1977), the supreme court considered the effect of a foreign order for child support that plaintiff sought to enforce under the Uniform Reciprocal Enforcement of Support Act, N.C. GEN. STAT. §§ 52A-1 to -32 (1976). Defendant, who had made no appearance in the foreign action, denied being the father of the child for whom support was sought. The North Carolina trial court had held that the Hawaiian (issuing) court could decide the paternity issue by virtue of the *in rem* jurisdiction it possessed over defendant. Both the court of appeals and the supreme court, however, held that the Hawaiian court, lacking personal jurisdiction over defendant, had no power to determine the paternity question, which could be relitigated in the North Carolina action. This decision is in accordance with rulings by other courts on this issue. See, e.g., *Hartford v. Superior Court*, 47 Cal. 2d 447, 304 P.2d 1 (1956); *State v. Murphy*, 354 S.W.2d 42 (Mo. Ct. App. 1962); *Watkins v. Watkins*, 194 Tenn. 621, 254 S.W.2d 735 (1953). For further discussion of *Brondum*, see this Survey, *Civil Procedure: Jurisdiction*.

Upholding its supervision of child support payments in separation agreements, the court of appeals in *Perry v. Perry*, 33 N.C. App. 139, 234 S.E.2d 449, *cert. denied*, 292 N.C. 730, 235 S.E.2d 784 (1977), held that the substantial evidence of changed circumstances presented by plaintiff (serious illness and permanent disability of the parent with custody) amply justified the

area in *Goodson v. Goodson*<sup>37</sup> by recognizing that the parent paying child support should, in some cases, receive credit for voluntary expenditures that he or she has made on behalf of the child.<sup>38</sup> This question had never before been presented to a North Carolina court, and other jurisdictions are divided in their determinations of the question.<sup>39</sup> The majority of courts hold that the parent paying support should not be allowed credit for voluntary expenditures, and are reluctant to allow a party the discretion to alter so freely the court's order for child support.<sup>40</sup> Aligning itself with a sizable minority of jurisdictions, however, the court of appeals held that credit should be allowed "when equitable considerations exist which would create an injustice if credit were not allowed."<sup>41</sup>

The lower court in *Goodson* had determined that the father owed the full \$1320 arrearage claimed by the mother for the children.<sup>42</sup> On appeal, the father contended that he was entitled to credit for clothing, food, recreation and medical treatment expenses he had incurred on behalf of the children amounting to \$1768.25. The court approved of the principle of allowing credit for some voluntary expenditures and remanded the question of the amount of credit due for determination by the lower court, providing in addition some specific guidelines to be followed.<sup>43</sup> The court emphasized, however, that the guidelines were not "hard and fast rules, and that the controlling principle is that credit is appropriate only when an injustice would exist if credit were not given."<sup>44</sup> The court thus prudently recognized the need for flexibility in this area where emergencies often arise, while acknowledging and accommodating the need for detailed directions to assist lower courts in their determination of whether or not to allow credit.

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court's order increasing the amount of child support provided for in the separation agreement. Plaintiff, in meeting her burden to show changed circumstances, did not need to show the needs of the child at the time the separation agreement was signed since the terms were in no way binding upon the court in connection with the children. *Id.* at 142, 234 S.E.2d at 452; see *Williams v. Williams*, 261 N.C. 48, 56, 134 S.E.2d 227, 233 (1964). The court did, however, continue to recognize the presumption that the provisions mutually agreed upon in a separation agreement concerning child support are just and reasonable and that the court is not warranted in changing such provisions in the absence of changed circumstances. 33 N.C. App. at 143, 234 S.E.2d at 452; see *Fuchs v. Fuchs*, 260 N.C. 635, 639, 133 S.E.2d 487, 491 (1963).

37. 32 N.C. App. 76, 231 S.E.2d 178 (1977).

38. *Id.* at 81, 231 S.E.2d at 182.

39. See Annot., 47 A.L.R.3d 1031 (1973 & Supp. 1977).

40. See *Baures v. Baures*, 13 Ariz. App. 515, 519, 478 P.2d 130, 134 (1970).

41. 32 N.C. App. at 81, 231 S.E.2d at 182.

42. *Id.*

43. The specific guidelines included the following: The delinquent parent is not entitled to credit for all voluntary expenditures as a matter of law or for obligations incurred prior to the time of the entry of the support order; the parent is not entitled as a matter of law to a deduction proportional to the amount of time spent with the child; credit is not ordinarily appropriate for frivolous expenses or those incurred in entertaining and feeding children during visitation periods, but would usually be appropriate for expenses incurred with the consent of the parent with custody or for payments made under compulsion of circumstances. *Id.*

44. *Id.*

In *Hicks v. Hicks*,<sup>45</sup> the court of appeals clarified the statutory command making the father primarily liable for the support of his minor child.<sup>46</sup> One year after a final divorce, the mother, with whom the children resided, sought child support and custody. Defendant father did not answer the complaint, but appealed the portion of the judgment awarding plaintiff \$8000 for past due child support. The lower court reached this sum by concluding that defendant should have paid the same amount in the past that he was being required to pay in the future. Finding no evidence of the amount that plaintiff had actually spent for support of the children, the court held that defendant's past liability could not be measured by the child support that had just been awarded.<sup>47</sup> Instead, defendant was liable for "the amount actually expended by plaintiff for the support of the children which represented . . . defendant's share of the support,"<sup>48</sup> a sum to be arrived at by considering the needs of the children and the ability of defendant to pay during the time for which past due support was being sought.<sup>49</sup>

### E. Separation Agreements

In *Riddle v. Riddle*,<sup>50</sup> a North Carolina court for the first time confronted the question whether injunctive relief is available to a former wife to compel her husband to make payments provided for only in the private separation agreement. Relying on earlier cases that emphasized the contractual nature of consent judgments and separation agreements,<sup>51</sup> the court reversed the lower court's grant of injunctive relief, holding that plaintiff possessed an adequate remedy at law in seeking damages for breach of

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45. 34 N.C. App. 128, 237 S.E.2d 307 (1977).

46. N.C. GEN. STAT. § 50-13.4(b) (1976).

47. 34 N.C. App. at 130, 237 S.E.2d at 309.

48. *Id.*

49. In two cases the court of appeals considered the question of a father's ability to pay child support. In *State v. Buff*, 32 N.C. App. 395, 232 S.E.2d 303, *cert. denied*, 292 N.C. 468, 233 S.E.2d 397 (1977), the court of appeals found that evidence of the fact that defendant was employed and had increased support payments at approximately the same time that a warrant was issued under N.C. GEN. STAT. § 14-322 (1969) (willful failure to provide adequate support a misdemeanor) was sufficient evidence to show that defendant was able to pay. In *Brumfield v. Brumfield*, 34 N.C. App. 322, 237 S.E.2d 868 (1977), the court found that defendant-father did have the ability to pay \$50 per week child support for two children of his first marriage from his \$125 per week salary. Defendant had contended that he was unable to pay because of the \$700 per month living expenses he incurred by virtue of his custody of two other children of the first marriage and a child of his present marriage, and his second wife's custody of her four children, all of whom resided with him. The court found no abuse of discretion in the trial judge's finding respecting defendant's ability to pay. *Id.* at 323, 237 S.E.2d at 869.

50. 32 N.C. App. 83, 230 S.E.2d 809 (1977).

51. *Id.* at 86-87, 230 S.E.2d at 811-12 (citing *Mitchell v. Mitchell*, 270 N.C. 253, 154 S.E.2d 71 (1967) (consent judgment part of court order can be upheld by means of contempt proceedings); *Bunn v. Bunn*, 262 N.C. 67, 136 S.E.2d 240 (1964) (consent judgment that court merely approves enforceable only as contract); *Stanley v. Stanley*, 226 N.C. 129, 37 S.E.2d 118 (1946) (separation agreement was extrajudicial transaction enforceable only as contract)).

contract<sup>52</sup> and that a separation agreement not ordered, but merely approved by the court, could not be enforced by means of an injunction.<sup>53</sup> Although the alimony provisions of consent judgments reached without benefit of any court order may be modified by the court,<sup>54</sup> the court in *Riddle* continues in this instance to recognize the distinction between private agreements between parties the provisions of which are incorporated into the order of the court and those agreements that the court merely approves.<sup>55</sup>

In several other court decisions resolving separation agreement controversies, the court of appeals stressed the contractual nature of the agreement in reaching its rulings. In *Whitt v. Whitt*,<sup>56</sup> the court held that a wife's agreement to convey property to her husband was binding upon her, notwithstanding a later reconciliation.<sup>57</sup> The wife argued that the agreement to convey was executory and therefore void because of the reconciliation.<sup>58</sup> Following principles of contract law, the court stated that "[o]ne spouse may not transform a provision in a separation agreement which is otherwise fully executed into an executory provision merely by fraudulently avoiding compliance with the executed covenant."<sup>59</sup> Similarly, the court looked to the intent of the parties in interpreting the terms of a separation agreement in *Krickhan v. Krickhan*.<sup>60</sup> After selling the family home, plaintiff claimed that the \$100 that had been designated as alimony in the separation agreement but was paid directly to the mortgagee by defendant should continue to be paid to plaintiff as alimony after the house was sold and the mortgage

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52. *Id.* at 87, 230 S.E.2d at 812. See also 2 R. LEE, NORTH CAROLINA FAMILY LAW § 201, at 423-24 (3d ed. 1963).

53. 32 N.C. App. at 87, 230 S.E.2d at 811.

54. N.C. GEN. STAT. § 50-16.9(a) (1976), discussed in note 72 *infra*.

55. This distinction also was of pivotal concern in *Levitch v. Levitch*, 34 N.C. App. 56, 237 S.E.2d 281 (1977), *rev'd*, 294 N.C. 437 (1978), in which the court held that plaintiff could not use a contempt proceeding to compel defendant to pay alimony as provided in the separation agreement when the court did not order the payment of alimony but merely incorporated the separation agreement into the divorce judgment. This seems somewhat inconsistent with the policy of N.C. GEN. STAT. § 50-16.9(a) (1976), which establishes the courts' power to modify alimony payments under contractual agreements. Section 50-16.9(a), however, does apply only to modification of alimony provisions in private agreements and not to the enforcement of provisions. In 1978 the North Carolina Supreme Court reversed *Levitch*, 294 N.C. 437 (1978) ("incorporation language . . . appears sufficiently compelling to indicate an intent on the part of the court to order payment of alimony"). The court, in blocking contempt proceedings, is not denying any relief available under a contract theory of recovery.

56. 32 N.C. App. 125, 230 S.E.2d 793 (1977).

57. *Id.* at 130, 230 S.E.2d at 796.

58. *Id.* at 129, 230 S.E.2d at 795. The reconciliation took place two years after the agreement was signed. During the two-year period, the husband continually tried to persuade the wife to sign the deeds of conveyance as she had promised. *Id.* at 127-28, 230 S.E.2d at 794-95.

59. *Id.* at 130, 230 S.E.2d at 796. See *Mather v. Mather*, 25 Cal. 2d 582, 586, 154 P.2d 684, 686 (1944). There is no prior North Carolina case on this point.

60. 34 N.C. App. 363, 238 S.E.2d 184 (1977).



paid.<sup>61</sup> The court agreed, basing its decision in its entirety on interpretive principles of contract law.<sup>62</sup>

### F. Divorce

In *Freeman v. Freeman*,<sup>63</sup> a case of first impression, the court of appeals held that the general guardian of an incompetent person cannot maintain an action for divorce based on one year's separation.<sup>64</sup> In two earlier North Carolina cases, guardians had represented incompetent persons in divorce actions.<sup>65</sup> The court, however, distinguished these cases. In *Smith v. Smith*, a guardian *ad litem* was permitted to *defend* the divorce action, since defendant's only election was to defend or abstain from answering and suffer a default judgment.<sup>66</sup> The court stated that *Sims v. Sims*,<sup>67</sup> in which the guardian of a lunatic was allowed to annul a marriage of his ward, applied only to divorces based upon the incompetency of a person at the time of his or her marriage.<sup>68</sup> With the *Freeman* decision, the court followed the rule recognized by the majority of states that a suit for

61. *Id.* at 366, 238 S.E.2d at 186.

62. A separation agreement's status as a contract brought it, in past years, within the mandate of Law of Feb. 12, 1872, ch. 193, § 27, 1871 N.C. Pub. Laws 336 (formerly codified at N.C. GEN. STAT. § 52-6(a) (1976)), which required that the officer certifying certain contracts between husband and wife privately examine the wife to determine that the agreement was not unreasonable or injurious to her. One important action of the 1977 General Assembly was to repeal § 52-6 and to incorporate some of its requirements into a rewritten N.C. GEN. STAT. § 52-10 (Supp. 1977). The requirement for a private examination of the wife was among those omitted from the new statute.

Before its repeal § 52-6 was challenged on constitutional grounds in *Spencer v. Spencer*, 430 F. Supp. 683 (M.D.N.C.), *appeal dismissed for want of jurisdiction*, 98 S. Ct. 39 (1977). Plaintiff-husband claimed the provisions of § 52-6(a) were a denial of his equal protection rights in not allowing him the same private examination determining the reasonableness of the separation agreement that his wife enjoyed. The court, concluding that it lacked jurisdiction to decide the question, did not reach the equal protection issue.

In *Cooke v. Cooke*, 34 N.C. App. 124, 237 S.E.2d 323, *cert. denied*, 293 N.C. 740, 241 S.E.2d 513 (1977), another case concerning a separation agreement, plaintiff-husband raised the issue of reconciliation in attempting to avoid the executory terms of the agreement. The court held that plaintiff's evidence of two isolated acts of sexual intercourse demonstrated at most "only a temporary resumption of marital relations on a trial basis without the intent to resume a full marital relationship, or to repudiate the separation agreement." *Id.* at 127, 237 S.E.2d at 325. *Cooke* follows other North Carolina decisions holding that isolated acts of sexual intercourse are not conclusive evidence of reconciliation, *see Newton v. Williams*, 25 N.C. App. 527, 214 S.E.2d 285 (1975), and continues the policy of encouraging the possibility of reconciliation by allowing separated couples to attempt reconciliation without forfeiting the terms of an earlier separation agreement should the attempted reconciliation fail. *See* 1 R. LEE, *supra* note 52, § 74, at 288.

63. 34 N.C. App. 301, 237 S.E.2d 857 (1977).

64. *Id.*

65. *Smith v. Smith*, 226 N.C. 544, 39 S.E.2d 458 (1946); *Sims v. Sims*, 121 N.C. 297, 28 S.E. 407 (1897).

66. 226 N.C. 544, 39 S.E.2d 458 (1946).

67. 121 N.C. 297, 28 S.E. 407 (1897).

68. 34 N.C. App. at 304, 237 S.E.2d at 859.

divorce is so strictly personal that it cannot be maintained by another on behalf of an incompetent.<sup>69</sup>

### G. Alimony

In *Seaborn v. Seaborn*,<sup>70</sup> the court of appeals confronted the question of modification of consent judgments, a question that had often arisen in North Carolina decisions<sup>71</sup> prior to the enactment of G.S. 50-16.9(a)<sup>72</sup> which specifically allows an alimony order by consent to be modified. Reversing the lower court's holding that the consent judgment could not be modified, the court held that the property settlement (which could not be modified<sup>73</sup>) was separable from the alimony provisions and that the alimony provisions were modifiable according to the statute.<sup>74</sup> In considering the two provisions of the consent judgment separately, the court upheld the intent of the statute that the court should retain supervision of alimony provisions.<sup>75</sup>

The court in *Bugher v. Bugher*<sup>76</sup> also upheld its control over alimony agreements not otherwise under court order. Defendant-husband had signed

69. See Annot., 6 A.L.R.3d 681 (1966).

The only other case decided in this area was *Ponder v. Ponder*, 32 N.C. App. 150, 230 S.E.2d 786 (1977), a suit for divorce on the basis of a one-year separation that dealt with the effects of cohabitation upon the required one-year separation period. Defendant-wife moved for a dismissal of plaintiff-husband's divorce action on the ground that the parties had not lived separate and apart for one year. The court of appeals affirmed the lower court's grant of dismissal. The evidence showed that, although the parties occupied separate bedrooms and had discontinued sexual relations, their association was still one of cohabitation, a term that includes not just sexual relations, but other marital responsibilities. *Id.* at 154, 230 S.E.2d at 788. In *Ponder*, the undisputed evidence showed that the parties occupied the same house, that plaintiff paid for defendant's automobile expenses, that defendant prepared plaintiff's meals, and that plaintiff operated his business from the house. *Ponder* follows other North Carolina cases that clearly state that separation as used in the context of divorce statutes means living apart in such a way that those who come into contact with the separated couple will realize that they are not living together. See, e.g., *Young v. Young*, 225 N.C. 340, 34 S.E.2d 154 (1945); *Dudley v. Dudley*, 225 N.C. 83, 33 S.E.2d 489 (1945).

70. 32 N.C. App. 556, 233 S.E.2d 67 (1977).

71. See, e.g., *Bunn v. Bunn*, 262 N.C. 67, 136 S.E.2d 240 (1964).

72. N.C. GEN. STAT. § 50-16.9(a) (1976) provides that an order for alimony may be modified, even though the order was by consent, upon a showing of changed circumstances. See also *Brooks v. Brooks*, 12 N.C. App. 626, 184 S.E.2d 417 (1971).

73. [A]n agreement for the division of property rights [between the parties] and an order for payment of alimony may be included as separable provisions in a consent judgment. In such event the division of property would be beyond the power of the court to change, but the order for future installments of alimony would be subject to modification in a proper case.

R. LEE, *supra* note 52, § 152, at 89 (Cum. Supp. 1976).

74. 32 N.C. App. at 558-59, 233 S.E.2d at 69.

75. Prior to the passage of the statute, the supreme court in *Holsomback v. Holsomback*, 273 N.C. 728, 732-33, 161 S.E.2d 99, 102-03 (1968), held that, although provisions in a consent judgment relating to the division of property could be modified or set aside only for fraud or mistake, the terms for the payment of future alimony could be modified in the event of changed circumstances when the consent judgment was a part of the court's decree.

76. 34 N.C. App. 601, 239 S.E.2d 303 (1977).

an agreement lessening the amount of alimony he was to pay after his former wife began receiving social security benefits. The court held that the unilateral agreement<sup>77</sup> could not reduce defendant's obligation under the court order, particularly since the social security payments were not amounts paid on behalf of defendant.<sup>78</sup>

Several of the alimony decisions the court of appeals delivered concerned jurisdictional questions. In allowing the issue of changed circumstances concerning future payments to be considered in an action for alimony past due<sup>79</sup> and in allowing the trial court to retain jurisdiction to hear a motion concerning alimony when the appellate court was hearing another question involving the same divorce action,<sup>80</sup> the court avoided the need for separate proceedings regarding different issues arising out of one case.

In *Webber v. Webber*,<sup>81</sup> the court of appeals ruled that it had jurisdiction to determine alimony and child support when plaintiff's hearing in a North Carolina divorce action followed defendant's prior Georgia divorce determination in which plaintiff had made no personal appearance. The court found that plaintiff did not make a general in personam appearance in the Georgia action when she authorized her attorney to negotiate through the mails to acquire title to a house and an automobile in exchange for her agreement not to contest the Georgia divorce.<sup>82</sup>

With this ruling, the court affirmed the protection afforded the dependent spouse under G.S. 50-11(d),<sup>83</sup> which provides that a foreign divorce obtained without in personam jurisdiction over the dependent spouse does not affect his or her right to obtain alimony in North Carolina. The telephone negotiations, although so limited as to lack the characteristics of a general appearance, did gain plaintiff valuable property. Even so, the court held that plaintiff was not estopped in her action by having received any benefit which the Georgia divorce decree had conferred.<sup>84</sup> In addition, by narrowly

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77. Plaintiff signed a separate statement agreeing to pay back to defendant any amount of social security benefits she received for those months during which defendant had paid the full amount of alimony. *Id.* at 602, 239 S.E.2d at 304.

78. 42 U.S.C. §§ 402(b), 416(d) (1970 & Supp. V 1975) create a category of eligible social security beneficiaries—divorced wives without their own adequate contribution records.

79. *Thompson v. Thompson*, 34 N.C. App. 51, 237 S.E.2d 283 (1977). In allowing defendant to offer evidence of changed circumstances in relation to future payments, the court suggested that the better procedure would be for defendant to allege changed circumstances in a counterclaim seeking relief as to future payments only. *Id.* at 52, 237 S.E.2d at 285.

80. *Cox v. Cox*, 33 N.C. App. 73, 234 S.E.2d 189 (1977).

81. 32 N.C. App. 572, 232 S.E.2d 865 (1977).

82. *Id.* at 575, 232 S.E.2d at 866.

83. N.C. GEN. STAT. § 50-11(d) (1976).

84. 32 N.C. App. at 575, 232 S.E.2d at 867. This ruling greatly liberalizes the rule that a person cannot attack a divorce decree after enjoying a benefit it has conferred. *See* 1 R. LEE,

interpreting plaintiff's agreement not to contest the Georgia divorce, which had resulted in a judgment including an award of alimony and child support, the court found that the doctrine of equitable estoppel did not operate to bar plaintiff's claims.<sup>85</sup> In denying either ground for estoppel of plaintiff's suit, the court in general expanded the dependent spouse's right to bring a suit for alimony in North Carolina.<sup>86</sup>

#### H. Uniform Reciprocal Enforcement of Support Act<sup>87</sup>

In *Pinner v. Pinner*<sup>88</sup> the court of appeals for the first time interpreted a portion of the 1975 amendments to the Uniform Reciprocal Enforcement of Support Act (URESA), holding that neither in personam nor in rem jurisdiction over the obligor was necessary for a foreign support order to be registered under G.S. 52A-29.<sup>89</sup> The court also ruled, however, that the registration and enforcement of foreign support orders were two separate procedures and declined to decide whether jurisdiction over the obligor was necessary in an enforcement proceeding.<sup>90</sup> In refusing to decide the latter

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*supra* note 52, § 98, at 388. Plaintiff did bring her North Carolina action on the day defendant's Georgia proceeding started, so the telephone transactions were not, in fact, part of the decree. The court, however, did not consider whether these prior property transfers realistically should have been considered a benefit, even though peripheral, conferred by the Georgia divorce.

85. "Plaintiff has not contested the Georgia divorce. In the present action she is simply asserting her right to alimony and child support." 32 N.C. App. at 576, 232 S.E.2d at 867.

86. In *Streeter v. Streeter*, 33 N.C. App. 679, 236 S.E.2d 185 (1977), the court also protected the dependent spouse's right to alimony. In *Streeter*, nine years had passed between the time of the couple's separation and the dependent spouse's claim for support. The court reaffirmed the longstanding North Carolina rule "that the mere delay by the dependent spouse in seeking maintenance from the supporting spouse, absent any showing of prejudice to the supporting spouse resulting from the delay, does not bar the dependent spouse's action to enforce the right to support." *Id.* at 682, 236 S.E.2d at 187; see *Nall v. Nall*, 229 N.C. 598, 599, 50 S.E.2d 737, 737 (1948).

87. N.C. GEN. STAT. §§ 52A-1 to -32 (1976).

88. 33 N.C. App. 204, 234 S.E.2d 633 (1977). The court found that cases arising in the 24 states that had adopted the registration provisions in question provided no guidance to the court in its ruling. *Id.* at 205, 234 S.E.2d at 635.

89. N.C. GEN. STAT. § 52A-29 (1976). Ordinarily the question of the court's jurisdiction over the obligor would not arise since the obligee would register the foreign judgment in the state of the obligor's residence. In this case, the obligee resided in North Carolina and the obligor in Pennsylvania. 33 N.C. App. at 204, 234 S.E.2d at 635.

The effect of registration of a foreign support order is stipulated in N.C. GEN. STAT. § 52A-30(a) (1976), which provides:

Upon registration, the registered foreign support order shall be treated in the same manner as a support order issued by a court of this State. It has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating or staying as a support order of this State and may be enforced and satisfied in a like manner.

90. N.C. GEN. STAT. § 52A-22 (1976) provides that participation in any proceeding under URESA does not confer jurisdiction over any of the parties in any other proceeding. Therefore, the court stressed, the jurisdictional question remained open in an enforcement proceeding, despite the obligor's unsuccessful challenge to the registration procedure. 33 N.C. App. at 207-08, 234 S.E.2d at 636.

jurisdictional question, the court unnecessarily postponed consideration of an unavoidable issue. Registration of a foreign support order accomplishes little when, as the court in *Pinner* held, enforcement must be separately pursued.<sup>91</sup> The court did explain that the registration "changes the status of the foreign support order by allowing it to be treated the same as a support order issued by a court of North Carolina,"<sup>92</sup> but then paradoxically left the actual question of enforcement unresolved.<sup>93</sup>

In *Blake v. Blake*,<sup>94</sup> the court of appeals held that a prior decision under URESA that defendant-wife was not entitled to alimony made the issue res judicata in the husband's subsequent action for divorce.<sup>95</sup> Rejecting defendant's interpretation that G.S. 52A-4, which provides that the remedies of URESA are "in addition to and not in substitution for any other remedies,"<sup>96</sup> precluded the operation of res judicata, the court held that the statute merely provides additional means of enforcing support obligations and does not establish an additional duty to support since under the Act the duty to support is governed by North Carolina law.<sup>97</sup>

### I. *Alimony Pendente Lite and Attorneys' Fees*

Although the general rule in North Carolina is that the award of attorneys' fees is within the sound discretion of the trial judge and is binding on the appellate court unless there is an abuse of discretion,<sup>98</sup> the court of appeals has been very careful in its review of lower court awards in this area and heedful of the necessity for specific findings of fact to support any such awards. In *Wyatt v. Wyatt*<sup>99</sup> the court found the lower court's award of attorneys' fees in a divorce proceeding in error because of insufficient findings of fact.<sup>100</sup> Following earlier cases that interpreted the requirement

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91. See note 89 *supra*.

92. 33 N.C. App. at 207, 234 S.E.2d at 636.

93. Leading authorities interpreting the Act seem to go further than the North Carolina court in recognizing that the purpose of registration is enforcement. See W. BROCKELBANK & F. INFAUSTO, INTERSTATE ENFORCEMENT OF FAMILY SUPPORT (THE RUNAWAY PAPPY ACT) 83 (2d ed. 1971). In light of their observations, the *Pinner* court's failure to decide the jurisdictional question in enforcement appears to be unnecessarily timid.

94. 34 N.C. App. 160, 237 S.E.2d 310 (1977).

95. *Id.* at 160-61, 237 S.E.2d at 311.

96. N.C. GEN. STAT. § 52A-4 (1976).

97. *Id.* § 52A-5.

98. See *Stadiem v. Stadiem*, 230 N.C. 318, 52 S.E.2d 899 (1949); *Wyche v. Wyche*, 29 N.C. App. 685, 225 S.E.2d 626 (1976).

99. 32 N.C. App. 162, 231 S.E.2d 42 (1977).

100. *Id.* at 165, 231 S.E.2d at 43. In *Lindsey v. Lindsey*, 34 N.C. App. 201, 204, 237 S.E.2d 561, 564 (1977), the court also found that there were insufficient findings of fact to determine the reasonableness of attorney's fees.

of G.S. 50-13.6<sup>101</sup> that there be findings of fact that the fee is reasonable,<sup>102</sup> the court held that a partial listing of legal expenses is an insufficient finding of fact concerning the reasonable worth of attorneys' services.<sup>103</sup> *Wyatt* clarifies the limitations put upon the trial judge's discretion in this area.

In *Ross v. Ross*,<sup>104</sup> the court of appeals reversed the lower court's award of alimony pendente lite for plaintiff after carefully interpreting G.S. 50-16.3,<sup>105</sup> which provides for the granting of alimony pendente lite if the party seeking the alimony is a dependent spouse, is entitled to the relief demanded in the action, and is without the means upon which to subsist during the suit. Maintaining its earlier cautious attitude in awarding alimony pendente lite,<sup>106</sup> the court held that plaintiff did not establish that she was a dependent spouse merely by partially accounting for her expenses and that the partial showing did not establish need.<sup>107</sup>

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101. N.C. GEN. STAT. § 50-13.6 (1976) requires that before the court may order payment of attorneys' fees there be findings that the legal fee is reasonable, that the moving party is acting in good faith without adequate means to defray legal expenses and that the party ordered to furnish support has refused to provide adequate support. The *Wyatt* court held there were adequate findings of "good faith without sufficient financial means and that plaintiff had refused to provide adequate support." 32 N.C. App. at 165, 231 S.E.2d at 43-44.

102. See, e.g., *Rickenbaker v. Rickenbaker*, 21 N.C. App. 276, 280, 204 S.E.2d 198, 201 (1974), *aff'd on other grounds*, 290 N.C. 373, 226 S.E.2d 347 (1976) (award of attorneys' fees not upheld in absence of evidence on scope and nature of services or time involved).

103. 32 N.C. App. at 165, 231 S.E.2d at 44.

104. 33 N.C. App. 447, 235 S.E.2d 405 (1977).

105. N.C. GEN. STAT. § 50-16.3 (1976).

106. Although recognizing that the award of alimony pendente lite "is intended to enable [the dependent spouse] to maintain herself according to her station in life," the court of appeals in *Newsome v. Newsome*, 22 N.C. App. 651, 654, 207 S.E.2d 355, 357 (1974), held that the lower court erred in awarding alimony pendente lite when there were no findings of fact other than "findings that plaintiff was no longer working and that she had no other source of income" to support the lower court's conclusion that plaintiff was a dependent spouse substantially in need of maintenance. *Id.* See also *Hogue v. Hogue*, 20 N.C. App. 583, 588, 202 S.E.2d 327, 330 (1974).

107. 33 N.C. App. at 457, 235 S.E.2d at 411.

## VIII. EVIDENCE

A. *Opinion*<sup>1</sup>

In *State v. Periman*,<sup>2</sup> the court of appeals held that a qualified medical expert could testify as to his diagnosis and understanding of the "battered child syndrome."<sup>3</sup> Although the use of the term had been tacitly approved in *State v. Fredell*,<sup>4</sup> *Periman* appears to be the first case in which a North Carolina appellate court directly faced the issue whether such a subject is a proper one for expert testimony. In *Periman*, defendant was convicted of voluntary manslaughter of the three-year-old daughter of the woman with whom he was living.<sup>5</sup> The prosecution sought to introduce expert testimony that the child was a victim of the "battered child syndrome." This testimony was admitted over defendant's objection. On review, the court of appeals rejected the argument that the experts were attempting to say that defendant inflicted the wounds. According to the court, the evidence merely precluded the possibility of accidental or self-inflicted wounds and consisted of conclusions properly based on medical science.<sup>6</sup>

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1. In *State v. Van Cross*, 293 N.C. 296, 237 S.E.2d 734 (1977), the supreme court held that a witness who was not present at the scene of the crime could not give her opinion that defendant resembled eyewitness sketches of the alleged perpetrator. Such testimony is "past opinion as to the identity of the individual depicted in the sketch" and invades the province of the jury. *Id.* at 302, 237 S.E.2d at 738. The North Carolina courts continued, however, to admit lay opinions based on contemporaneous perceptions of the physical and mental state of persons, animals and things. See *State v. Jones*, 291 N.C. 681, 231 S.E.2d 252 (1977) (allowing layman's testimony that he saw blood on defendant's shirt); *State v. Lloyd*, 33 N.C. App. 370, 235 S.E.2d 281 (1977) (upholding lay testimony that individual was intoxicated); *Waters v. Humphrey*, 33 N.C. App. 185, 234 S.E.2d 462, *appeal dismissed, cert. denied*, 293 N.C. 163, 236 S.E.2d 707 (1977) (allowing lay witness to testify that certain chop marks on tree were old).

2. 32 N.C. App. 33, 230 S.E.2d 802 (1977).

3. *Id.* at 40, 230 S.E.2d at 806.

The battered child syndrome is a term used . . . to characterize a clinical condition in young children who have received serious physical abuse, generally from a parent or foster parent. The condition has also been described as "unrecognized trauma" by radiologists, orthopedists, pediatricians and social service workers. It is a significant cause of childhood disability and death.

Kempe, Silverman, Steele, Droegemueller & Silver, *The Battered Child Syndrome*, 181 J.A.M.A. 17, 17 (1962).

4. 17 N.C. App. 205, 193 S.E.2d 587 (1972), *aff'd*, 283 N.C. 242, 193 S.E.2d 587 (1973). In *Fredell*, medical experts were allowed on redirect to define "battered child syndrome." Defendant, who was charged with child abuse, objected on the grounds that the testimony was new evidence that should have been excluded. The court of appeals did not question whether expert testimony on this subject was proper, but upheld admission of the testimony because the testimony clarified certain direct and cross-examination. *Id.* at 209, 193 S.E.2d at 590-91. On appeal, the supreme court, although not faced with the question of admissibility, stated that "[t]he condition of the child was diagnosed as that of a 'battered child,' a term meaning the most extreme form of child abuse." 283 N.C. 242, 243, 193 S.E.2d 587, 588 (1973).

5. 32 N.C. App. at 37, 230 S.E.2d at 804.

6. *Id.* at 40-41, 230 S.E.2d at 806.

There are two possible objections to admitting testimony on the "battered child syndrome." First, it arguably is not a proper subject for expert testimony because the "battered child syndrome" diagnosis is scientific evidence that is not sufficiently accepted by the medical community to be admissible. The second objection is that the use of the term "battered child syndrome," with its implication that a parent or guardian of the child is responsible for the abuse, invades the province of the jury. Neither of these objections can withstand scrutiny. The general test in North Carolina for admitting expert testimony is whether "*this witness* [is] better qualified than *this jury* to form an opinion from *these facts*."<sup>7</sup> The "battered child syndrome" is a medical diagnosis of the existence of a particular physical condition. Expert testimony should aid any jury in determining whether the condition is present in a particular case and what significance its presence might have. Moreover, testimony on the "battered child syndrome" can legitimately be classified as scientific evidence. Such testimony, to be admitted, must satisfy one of two tests. Some courts have required that when expert testimony is deduced from a scientific principle, that principle must be generally accepted within the particular field in which it lies.<sup>8</sup> A less strict standard, suggested by some commentators, accepts into evidence "[a]ny relevant conclusions which are supported by a qualified expert witness."<sup>9</sup> The diagnosis of the "battered child syndrome" is admissible under either test. It is founded on medical science as well as being generally accepted within the medical field.<sup>10</sup> In addition, in a case involving injury to or the death of a child, expert testimony concerning the "battered child syndrome" will provide relevant conclusions that the jury might not otherwise reach: specifically, the conclusion that the injuries were not self-inflicted, but instead were caused by someone in constant contact with the child.

The second possible objection to the testimony in *Periman*, that it invades the province of the jury, also appears unfounded. "The battered-child syndrome is a term used . . . to characterize a clinical condition in young children who have received serious physical abuse, generally from a parent or a foster parent."<sup>11</sup> The fact that a jury might legitimately conclude from such testimony that a parent or a guardian inflicted the injuries does not mean that the expert is stating that a particular defendant did in fact cause

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7. 1 D. STANSBURY, NORTH CAROLINA EVIDENCE § 132, at 425-26 (H. Brandis rev. 1973).

8. See generally C. McCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 203, at 488-89 (2d ed. E. Cleary 1972).

9. *Id.* at 491.

10. See McCoid, *The Battered Child and Other Assaults Upon the Family*, 50 MINN. L. REV. 1 (1965).

11. Kempe, Silverman, Steele, Droegemueller & Silver, *supra* note 3, at 17.



the injuries in question. Instead, this diagnosis merely recognizes that the injuries involved developed over time and were not accidental. That someone close to the child probably caused the injuries is merely a conclusion that logically follows from the diagnosis.<sup>12</sup> The diagnosis itself cannot be said to invade the province of the jury to determine whether a particular defendant did in fact cause the injuries in question.

The North Carolina rule with regard to expert causation testimony is that "[i]f the opinion asked for is one relating to cause and effect, the witness should be asked whether in his opinion a particular event or condition *could* or *might* have produced the result in question, not whether it *did* produce such result."<sup>13</sup> The court of appeals held in the 1977 case of *Lawrence v. Reliance Insurance Co.*<sup>14</sup> that this rule addresses itself to the question asked and not necessarily to the answer given.<sup>15</sup> This holding is not particularly surprising in light of the supreme court's 1973 holding in *Mann v. Virginia Dare Transportation Co.*<sup>16</sup> that an expert witness may answer a causation question with the degree of certainty he feels appropriate.<sup>17</sup> It does, however, have certain implications as to the remaining viability of the supreme court's much criticized, earlier holding in *Lockwood v. McCaskill*.<sup>18</sup>

*Lockwood* involved a personal injury suit in which plaintiff claimed that he suffered amnesia one month after a motor vehicle accident with defendant. A medical expert for plaintiff was asked if the accident was a contributing factor to the amnesia attack. He answered that it "may" have influenced the condition. Defendant appealed a verdict against him on the grounds that the medical testimony was not a sufficient basis for awarding damages.<sup>19</sup> Although the supreme court affirmed the verdict, it did state:

The "could" or "might" as used by Stansbury refers to probability and not mere possibility. . . . If it is not reasonably probable, as a scientific fact, that a particular effect is capable of production by a given cause, and the witness so indicates, the evidence is not

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12. See *People v. Jackson*, 18 Cal. App. 3d 504, 507, 95 Cal. Rptr. 919, 921 (1971).

13. D. STANSBURY, *supra* note 7, § 137, at 453.

14. 32 N.C. App. 414, 232 S.E.2d 462 (1977).

15. *Id.* at 420, 232 S.E.2d at 466.

16. 283 N.C. 734, 198 S.E.2d 558 (1973).

17. *Id.* at 748, 198 S.E.2d at 568.

18. 262 N.C. 663, 138 S.E.2d 541 (1964). "The most charitable thing to be said about the *Lockwood* opinion is that it confused admissibility with sufficiency. . . . It is clear that the *Lockwood* decision should not be—and, in fact, has apparently not been—followed in passing upon admissibility." D. STANSBURY, *supra* note 7, § 137, at 455-56, 456 n.97. The supreme court's decision in *Mann* did not mention *Lockwood*. See 283 N.C. 734, 198 S.E.2d 558 (1973).

19. 262 N.C. at 665-666, 138 S.E.2d at 544. It appears that defendant in *Lockwood* contended only that the medical testimony was so uncertain that the jury could not determine what part of the injuries had been caused by defendant and thus could not properly apportion damages. There was no contention that the testimony itself was inadmissible. *Id.*

sufficient to establish *prima facie* the causal relation, and if the testimony is offered by the party having the burden of showing the causal relation, the testimony, upon objection, should not be admitted . . . .<sup>20</sup>

The *Lockwood* court went on to say that the use of the term "it may have had an influence" by itself would be insufficient to allow admission of the evidence. The court did, however, sustain the admission of the evidence because the expert's further testimony showed a probability of causation.<sup>21</sup>

*Lawrence* involved a suit for property damage under an insurance contract. Plaintiff introduced the testimony of an expert who was asked "whether fire could cause damage to the tractor."<sup>22</sup> The expert replied that such an effect was possible. On appeal from an adverse verdict, defendant contended that the admission of this evidence violated the rule in *Lockwood* that causation testimony must be given in terms of probability.<sup>23</sup> The court of appeals, however, stated that *Lockwood* was not controlling in this case, reasoning that although the court in *Lockwood* restated the *could* or *might* rule, it still admitted the evidence.<sup>24</sup> In reality, the court's statement that *Lockwood* was not controlling was not based on any significant distinction between *Lockwood* and *Lawrence*,<sup>25</sup> but was a recognition that the *Lockwood* decision was an aberration that confused admissibility with sufficiency and that has not been followed. The *Lockwood* rule, although not yet overruled by the supreme court, appears to be no longer viable.<sup>26</sup> Instead, a witness may answer a causation question with the degree of certainty he deems appropriate,<sup>27</sup> and the trier of fact will be allowed to continue its proper role of considering the particular degree of certainty in weighing the evidence.

## B. Hearsay

### 1. Nonassertive Conduct

Conduct of a person that is intended as an assertion of fact is hearsay

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20. *Id.* at 668-69, 138 S.E.2d at 545-46. Although the court discussed the evidence in terms of sufficiency, it laid down a rule of exclusion when no showing of scientific probability of causation is made. *Id.*

21. *Id.* at 669, 138 S.E.2d at 546.

22. 32 N.C. App. at 419, 232 S.E.2d at 466.

23. *Id.*

24. *Id.* at 420, 232 S.E.2d at 466.

25. There is no real distinction between the two cases. In *Lockwood* the expert answered in terms of "may have had an influence." 262 N.C. at 666, 138 S.E.2d at 543. In *Lawrence* the expert stated that "it's possible" that the condition caused the effect in question. 32 N.C. App. at 419, 232 S.E.2d at 466. Any distinction between "may have" and "possibly" is artificial. Moreover, the *Lockwood* court stated that the use of the word "possibly" by itself was an insufficient basis for admissibility. See note 20 and accompanying text *supra*.

26. It has, to say the least, been distinguished to death. See note 25 *supra*.

27. See *Mann v. Virginia Dare Transp. Co.*, 283 N.C. 734, 198 S.E.2d 558 (1973).

when offered to prove that fact.<sup>28</sup> Sometimes, however, conduct that is not intended as an assertion of a fact will tend "to show that the actor believed that the fact existed."<sup>29</sup> One of the more difficult questions of evidence law is whether such conduct is hearsay. The trend in other jurisdictions has been away from allowing hearsay objections in these implied assertion situations.<sup>30</sup> Although past North Carolina cases have vacillated,<sup>31</sup> the trend in 1977 appeared to favor admission of such evidence as nonhearsay.<sup>32</sup>

In *State v. Garner*,<sup>33</sup> defendant was charged with willful refusal to support his illegitimate child. The trial court admitted over objection testimony of the prosecutrix that defendant's mother came to her house and wrote her a check. The jury found that defendant was the child's father but that he had not willfully refused to support the child. On appeal, defendant alleged error in the admission of the testimony concerning his mother's conduct.<sup>34</sup> The court of appeals found no error on the grounds that testimony about the mother's conduct was not hearsay, reasoning that the inherent vice of hearsay is that its value depends upon the credibility of someone other than the witness, whereas here the credibility of defendant's mother was not at issue.<sup>35</sup>

McCormick has suggested that classification of evidence as an implied assertion is only a start. The problem whether an implied assertion is hearsay can only be resolved by evaluating the evidence "in terms of the dangers which the hearsay rule is designed to guard against, i.e., imperfections of perception, memory, and narration."<sup>36</sup> Under such an analysis, the court's decision in *Garner* appears correct.<sup>37</sup> The actions of defendant's

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28. See D. STANSBURY, *supra* note 7, § 142, at 472.

29. *Id.* at 472-73.

30. C. MCCORMICK, *supra* note 8, § 250, at 598. Under FED. R. EVID. 801 conduct that is not intended by the actor as an assertion is not hearsay.

31. See D. STANSBURY, *supra* note 7, § 142, at 473-74.

32. See *State v. Tilley*, 292 N.C. 132, 232 S.E.2d 433 (1977) (testimony in murder trial that coconspirator of defendant carried pistol was not declaration and not hearsay); *State v. Locklear*, 291 N.C. 598, 231 S.E.2d 256 (1977); *State v. Garner*, 34 N.C. App. 498, 238 S.E.2d 653 (1977), *cert. denied*, 294 N.C. 184, 241 S.E.2d 519 (1978).

33. 34 N.C. App. 498, 238 S.E.2d 653 (1977), *cert. denied*, 294 N.C. 184, 241 S.E.2d 519 (1978).

34. *Id.* at 499, 238 S.E.2d at 654. Because the jury found for defendant on all issues except that of paternity, his hearsay objection must have been that the purpose of the prosecutrix' testimony was to prove that he was the father. Even if defendant's mother intended to assert that defendant was the father, it is possible that the purpose of the testimony was to prove that defendant had failed to support the child fully and not that he was the father. Under such circumstances, the evidence could not be hearsay because the purpose of the testimony would not be to prove the truth of the matter impliedly asserted. See C. MCCORMICK, *supra* note 8, § 246, at 584.

35. 34 N.C. App. at 500, 238 S.E.2d at 654.

36. C. MCCORMICK, *supra* note 8, § 250, at 598-99.

37. McCormick states that under such an analysis implied assertions should be classified as nonhearsay. *Id.* at 599.

mother in writing and delivering the check were arguably not intended as an assertion that defendant was the child's father. It is possible, however, to infer that because she wrote the check she believed that defendant was the father and that her actions were an implied assertion that defendant was the father. When viewed as an implied assertion, the dangers underlying the hearsay rule are not so great in *Garner* that the testimony should have been excluded. The major objection to admitting hearsay evidence is "that the actor's perception and memory are untested by cross-examination for the possibility of honest mistake."<sup>38</sup> There was little danger that the disputed testimony in *Garner* would be flawed by poor perception or memory.<sup>39</sup> The prosecutrix was merely testifying to what she observed firsthand.<sup>40</sup> Thus, there should be no more concern about flawed perception than there is in any situation in which a witness testifies to firsthand knowledge.<sup>41</sup> Moreover, "in contrast to the risks arising from insincerity, those arising from the chance of honest mistake seem more sensibly to be factors useful in evaluating weight and credibility rather than grounds for exclusion."<sup>42</sup> The approach taken in *Garner* appears to be the proper one. "Evidence, oral or written, is called hearsay when its probative force depends, in whole or in part, upon the competency and credibility of some person other than the witness by whom it is sought to produce it."<sup>43</sup> In *Garner* the witness was testifying about what she saw. It was the credibility of the in-court witness and not the out-of-court actor that was important. It is true that the out-of-court actions, as they did in *Garner*, may result in certain implications. The testimony itself, however, is best viewed as circumstantial evidence, with inferences from it best left to be drawn by the jury.<sup>44</sup>

In *State v. Locklear*,<sup>45</sup> the supreme court reached a result similar to that of the court of appeals in *Garner*. Defendant in *Locklear* was tried and convicted of murder. His alleged partner was convicted in a separate trial. At defendant's trial, evidence that the perpetrators had driven to the scene of the crime in a yellow station wagon was offered. The trial court admitted

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38. *Id.*

39. In addition, the type of situation ordinarily involved in implied assertions is such as to reduce the probability of poor memory or perception. *Id.*

40. 34 N.C. App. at 500, 238 S.E.2d at 654.

41. In any case, the relevant perception is that of the witness and not of the out-of-court actor. There can be no hearsay objection to the perception of an in-court witness since hearsay by its very definition deals with out-of-court assertions. See C. McCORMICK, *supra* note 8, § 246, at 584.

42. *Id.* § 250, at 599.

43. D. STANSBURY, *supra* note 7, § 138, at 458.

44. McCormick further supports his conclusion that nonassertive conduct should be classified as nonhearsay by pointing out that a rule of exclusion in these situations creates undue complication and operates unevenly because the hearsay objection is usually overlooked. C. McCORMICK, *supra* note 8, § 250, at 599.

45. 291 N.C. 598, 231 S.E.2d 256 (1977).

testimony of a locksmith that he made a key for a 1973 yellow station wagon, that he gave the key to a girl and that the girl paid him and signed the appropriate authorization in the name of defendant's partner. Defendant objected to this testimony on hearsay grounds.<sup>46</sup> The supreme court rejected his argument, stating that the locksmith only testified to what he did and to what he saw the girl do and that such testimony was not hearsay.<sup>47</sup>

In *Locklear*, the initial question whether the girl's conduct should be classified as an intended assertion or an implied assertion of fact is difficult.<sup>48</sup> It is certainly arguable that by signing the authorization card in the name of defendant's partner, the girl intended to assert that he was the owner of the station wagon. Had the court made such a finding, the evidence would have been hearsay.<sup>49</sup> Assuming the correctness of a contrary finding as to intent, however, the court's holding appears proper. The only real objection to the admission of this testimony is the lack of an opportunity to cross-examine the girl about what she meant in signing the authorization.<sup>50</sup> If, however, the girl intended no assertion of fact by her actions there should be less need to cross-examine her as to what she intended. Instead, as in *Garner*, the testimony should be viewed as circumstantial evidence that the jury can weigh as it sees fit.

## 2. Former Testimony

The admission of the former testimony of a witness is generally viewed as an exception to the hearsay rule.<sup>51</sup> Former testimony is admitted, however, only if certain requirements are met. The first prerequisite in North

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46. *Id.* at 600-01, 231 S.E.2d at 258.

47. *Id.* at 601, 231 S.E.2d at 258.

48. Although this initial question may be difficult, the probability against intent is so great that the objector should have the burden of proving intent. See C. MCCORMICK, *supra* note 8, § 250, at 599.

49. "If a person intends by his conduct to make an assertion of fact, and evidence of that conduct is offered to prove the existence of that fact, this is hearsay . . ." D. STANSBURY, *supra* note 7, § 142, at 472.

50. In addition to a lack of opportunity for cross-examination, hearsay is also excluded because of the absence of oath as well as personal presence of the declarant. See C. MCCORMICK, *supra* note 8, § 245, at 582-83. These latter two objections are less pertinent in implied assertion situations such as *Locklear*. The declarant's personal presence at trial is desired so that the jury may examine demeanor to determine the credibility of the declarant, while the oath helps ensure that the declarant speaks sincerely. See *id.* As for the alleged necessity of an oath, "it was recognized long ago that purposeful deception is less likely in the absence of intent to communicate." *Id.* § 250, at 599. The need for personal presence is also lessened when verbal conduct is involved because the in-court witness who is testifying about these actions is present for demeanor observation. Also, there is less need for exact recitation of actions than there is for verbal declarations.

51. See *id.*, § 254, at 614. Wigmore, however, views former testimony as a class of evidence in which the requirements of the hearsay rule are met. See 5 J. WIGMORE, EVIDENCE § 1370 (Chadbourn rev. 1974).

Carolina is that the witness be unavailable.<sup>52</sup> Moreover, "[t]he proceeding at which the currently unavailable witness testified must have been a former trial of the same cause, or a preliminary stage of the same cause, or the trial of another cause involving the issue and subject matter to which his testimony is directed at the current trial."<sup>53</sup> Finally, the party against whom the evidence was originally offered must have had the same motive and opportunity for cross-examination as the party against whom it is presently offered.<sup>54</sup>

Former testimony is admitted because of its relatively high trustworthiness, the oath under which it was given and the solemnity of the occasion at which it was given.<sup>55</sup> When former testimony meets the requirements of the hearsay rule, it may be proved in several ways. Although the transcript of the testimony is probably the most accurate method of proof, there is no best evidence requirement.<sup>56</sup> Oral proof may be used, therefore, but the second witness "must be able to give at least the substance, and not merely the effect, of the former testimony."<sup>57</sup> North Carolina generally allows any person who heard the prior testimony to prove it.<sup>58</sup> In *In re Williamson*,<sup>59</sup> the court of appeals went beyond the usual limits of this rule by allowing former testimony to be proved by a person who was not present when one original testimony was given. Although the court's decision is a liberal one, it properly recognizes that traditional application of the hearsay rule to former testimony may be overly stringent.

Petitioner and respondent in *Williamson* were divorced on June 4, 1974. Respondent, the wife, was awarded custody of the three children. On June 11, 1975, petitioner filed an application for a writ of habeas corpus asking that custody of the children be awarded to him. The grounds for his petition were that circumstances had changed and respondent was no longer fit to care for the children.<sup>60</sup> A hearing was held on June 20, 1975, in which one Dr. Sanders, a qualified expert in the field of child psychology, testified both on direct and cross-examination as to her opinion based on her examination of the children.<sup>61</sup> The court subsequently awarded temporary custody of the two girls to respondent and temporary custody of the boy to peti-

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52. See D. STANSBURY, *supra* note 7, § 145, at 480.

53. *Id.* at 482-83.

54. *Id.* at 484.

55. See C. McCORMICK, *supra* note 8, § 254, at 615.

56. See D. STANSBURY, *supra* note 7, § 145, at 485.

57. *Id.* at 486. McCormick states that the witness must be able to give the substance of all the testimony, both direct and cross-examination. C. McCORMICK, *supra* note 8, § 260, at 624.

58. See D. STANSBURY, *supra* note 7, § 145, at 485.

59. 32 N.C. App. 616, 233 S.E.2d 677 (1977).

60. *Id.* at 617, 233 S.E.2d at 678.

61. *Id.* at 618-19, 233 S.E.2d at 679.

tioner. The court also ordered the local Department of Social Services to make an investigation of the living arrangements of the children. On December 3, 1975, petitioner filed a motion that he be awarded permanent custody of all three children. A hearing was held in January 1976, and the court awarded permanent custody of the two girls to respondent and permanent custody of the boy to petitioner.<sup>62</sup> At this hearing, an employee of the local Department of Social Services was allowed to testify over objection that it was the opinion of Dr. Sanders that the children should remain with their mother. The Social Services employee was not present at the former hearing at which Dr. Sanders testified. Her testimony was based on a private opinion expressed to her by Dr. Sanders.<sup>63</sup> The court of appeals sustained the admission of this testimony because "[t]he opinion which [Dr. Sanders] expressed from the witness stand at that hearing was substantially the same as that attributed to her by the witness."<sup>64</sup>

At first glance it appears incongruous to allow a witness who was not present at the former hearing to give the testimony of a witness at that hearing. Such proof is certainly an extension of the four common methods of introducing admissible evidence of former testimony, all of which are based either on firsthand observation or the transcript of the testimony.<sup>65</sup> If viewed pragmatically, however, the result appears proper. The restrictions on the admission of former testimony have been criticized as "fantastically strict."<sup>66</sup> Commentators have advocated that the courts use liberality in admitting former testimony as the reliability of such testimony is far greater than that of many other exceptions to the hearsay rule.<sup>67</sup> Although this desire was addressed to the restrictions on former testimony and not to the manner of its proof, the logic behind the desire for liberality is also applicable to modes of proof. The crucial requirement in proving former testimony is that the witness "satisfy the court that he is able to give the substance of all that the witness has said, both on direct and cross-examination, about the subject matter relevant to the present suit."<sup>68</sup> Once this requirement has been determined affirmatively, as was done to the satisfaction of the court in

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62. *Id.* at 617, 233 S.E.2d at 679.

63. *Id.* at 618, 233 S.E.2d at 679.

64. *Id.* at 619, 233 S.E.2d at 679.

65. McCormick sets out four possible methods of acceptable introduction: (1) eliciting testimony of any firsthand observer of the former testimony who is testifying from unaided memory; (2) eliciting testimony of any firsthand observer testifying from present recollection refreshed; (3) the use of the transcript of the former testimony when properly authenticated; and (4) eliciting testimony of any firsthand observer who made notes and is testifying from past recollection recorded. C. MCCORMICK, *supra* note 8, § 260.

66. *Id.* § 261, at 626.

67. *Id.*

68. *Id.* § 260, at 624.

*Williamson*, the witness should be allowed to testify. The primary argument against allowing the witness to give the out-of-court opinion of the declarant when it is substantially the same as the declarant's former testimony is that the opinion being related was not made under oath or at a formal proceeding. This fact appears inconsequential, however, when the opinion being related is equivalent to the witness' former testimony which was given under oath. The court in *Williamson* thus properly recognized that the hearsay rule should not be applied in a mechanical fashion in the context of former testimony.

### C. Character—The Rape Shield Statute

The 1975 General Assembly directed the Legislative Research Commission to study the problem of sexual assaults.<sup>69</sup> In a response to this charge, a committee established by the Commission proposed legislation that would have revamped North Carolina sexual assault law.<sup>70</sup> Although a subsequent legislative committee substitute<sup>71</sup> diminished the scope of the bill significantly,<sup>72</sup> the provisions in the resulting law relating to the admission of evidence will substantially modify rape trials in North Carolina.<sup>73</sup>

The resulting rape shield statute redefines the law of relevancy in rape trials, drastically limiting what evidence may come in as to prior sexual activities of the complainant.<sup>74</sup> It declares all sexual behavior of the complainant irrelevant unless such behavior specifically falls within one of four

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69. The General Assembly directed the Legislative Research Commission to undertake, in part: "[a]n examination of the reasons rape cases are not reported or not prosecuted, [and] . . . [a] follow-up study of the long-term impact of the crime upon rape victims." Law of June 25, 1975, ch. 851, § 11.7, 1975 N.C. Sess. Laws 1209.

70. Professor Thomas Andrews of the University of North Carolina School of Law drafted the initial version and subsequently revised it in view of public comments and committee hearings. See generally LEGISLATIVE RESEARCH COMMISSION, REPORT TO THE 1977 GENERAL ASSEMBLY OF NORTH CAROLINA: SEXUAL ASSAULTS 3-30 (1977) [hereinafter cited as REPORT].

71. The legislative committee proffered S.B. 84, 1977 N.C. General Assembly, 1st Sess. (1977) (codified at N.C. GEN. STAT. § 8-58.6 (Cum. Supp. 1977)).

72. The committee substitute contained only a revised form of the sexual behavior evidence section, omitting the proposed sexual assault revision. This version is the basis of the present law.

73. The significant impact that this law will have on evidence in rape trials may very well have been the controlling consideration in delaying its effective date to encompass only offenses committed on or after January 1, 1978. See Law of June 30, 1977, ch. 851, § 2, 1977 N.C. Sess. Laws 1172.

74. This limitation of the evidence stemmed from a finding of the Legislative Research Commission that in many cases the victim was "assaulted" twice: the physical sexual assault and the indignity of public suspicion:

Several victims suggested that in a very real sense the second "assault" was more painful and more difficult to overcome. In the final analysis, it is because so many victims who reported the assault have subsequently expressed resentment and anger at the public's insensitivity to them that such a large percentage of sexual assaults still are not reported.

REPORT, *supra* note 70, at 37-38.



exceptions.<sup>75</sup> The statute also provides for a special in camera hearing in which all evidence bearing upon the complainant's sexual behavior is to be examined by the trial court to determine its relevance prior to the offer of proof at trial.<sup>76</sup> Last, the statute contains privacy provisions to prevent the unnecessary publication of irrelevant evidence, limiting access to the evidence to the court, its agents, the complainant, the defendant and the attorneys.<sup>77</sup>

### 1. Pre-1978 Rape Evidence Law

Prior to the effective date of the new rape shield statute, when the complainant testified, the defendant could cross-examine her for the purpose of impeachment to show her bad character through specific acts.<sup>78</sup> Because such evidence was collateral, the defendant was bound by her answer.<sup>79</sup> Thus the defendant could not present direct evidence of prior sexual acts; such testimony had no substantive value.<sup>80</sup> In addition to proof of bad character by specific acts, the general character of the complainant could be shown to attack her credibility and to establish the likelihood of consent.<sup>81</sup> The defendant could thus introduce character evidence through witnesses,

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75. N.C. GEN. STAT. § 8-58.6(b) (Cum. Supp. 1977). The commentary to the draft law observes that the "law completely rejects the notion that all sexual behavior, however proved, has some intrinsic relevance in a sexual assault proceeding, and requires a more specific showing of relevance before such behavior can be proved." REPORT, *supra* note 70, at 92. In this framework, the exceptions to the general irrelevancy rule reflect a decision by the General Assembly that the rational probative value of these exceptions outweighs their potential prejudicial effect; conversely, all other evidence of sexual behavior is considered not logically relevant or, if relevant, so prejudicial in effect as to outweigh its probative value.

76. N.C. GEN. STAT. § 8-58.6(c) (Cum. Supp. 1977); see notes 106-08 and accompanying text *infra*.

77. N.C. GEN. STAT. § 8-58.6(d); see notes 108-09 and accompanying text *infra*.

78. Prior acts could and usually did include prior sexual acts with third persons. See, e.g., *State v. Murray*, 63 N.C. 31 (1868); *State v. Satchell*, 17 N.C. App. 312, 194 S.E.2d 51, *cert. denied*, 283 N.C. 260, 195 S.E.2d 692 (1973) (error to exclude cross-examination of prosecuting witness in rape trial to bring out that she had had intercourse "over several dozen times," but harmless error). See also *Seventh Annual Survey of North Carolina Case Law*, 38 N.C.L. REV. 506, 562-64 (1960).

79. See *State v. Grundler*, 251 N.C. 177, 111 S.E.2d 1 (1959), *cert. denied*, 362 U.S. 917 (1960); *State v. Jefferson*, 28 N.C. 222, 1 Ired. 305 (1846). The defendant was not, however, bound by her answer when questioning her about prior sexual acts with him. See, e.g., *State v. Parish*, 104 N.C. 679, 10 S.E. 457 (1889) (dictum).

80. See *State v. Grundler*, 251 N.C. 177, 111 S.E.2d 1 (1959), *cert. denied*, 362 U.S. 917 (1960); *State v. Arnold*, 146 N.C. 602, 60 S.E. 504 (1908); *State v. Murray*, 63 N.C. 31 (1868).

81. See *State v. Goss*, 293 N.C. 147, 235 S.E.2d 844 (1977); *State v. Daniel*, 87 N.C. 507 (1882); *State v. Cole*, 20 N.C. App. 137, 201 S.E.2d 100 (1973).

In addition, there is dictum in North Carolina cases suggesting that evidence of the prosecutrix' reputation for virtue, a specific character trait, could be elicited on direct examination of the defendant's witnesses in order to show consent. *State v. Daniel*, 87 N.C. 507 (1882); see *State v. Jefferson*, 28 N.C. 222, 1 Ired. 305 (1846) (suggesting that evidence that prosecutrix is strumpet would be admissible to show consent). But see *State v. Hairston*, 121 N.C. 579, 28 S.E. 492 (1897), discussed in note 82 *infra*.

although their testimony was limited to statements about the complainant's reputation. A character witness could, however, on his own, volunteer testimony as to specific character traits.<sup>82</sup> Moreover, on cross-examination the character witness could be asked about specific relevant traits of character, although not about specific acts nor about reputation for having done a specific act.<sup>83</sup>

Prior case law regarding evidence in rape trials has not been completely rejected. As the original draft provision declaring that relevant sexual behavior "shall be proved only by otherwise admissible evidence of specific acts and not by opinion or by evidence of reputation or character"<sup>84</sup> was deleted from the committee substitute,<sup>85</sup> the North Carolina rape shield statute is silent as to method of proof. Ordinarily, such silence would indicate a preference for the common law method of proof in effect at the time of enactment.<sup>86</sup> However, because the statute has effected a significant modification in the common law scheme of relevant proof, the courts should also examine the policy underlying the statute in determining the method for proving relevant evidence. An analysis of these factors follows in the discussion of specific exceptions.

## 2. The Exceptions Under the Rape Shield Statute

The first exception in G.S. 8-58.6(b)(1)<sup>87</sup> applies to all sexual behavior between the defendant and the victim.<sup>88</sup> This exception essentially continues the common law rule; consequently, the defendant is not bound by the

82. *State v. Hairston*, 121 N.C. 579, 28 S.E. 492 (1897). The *Hairston* court stated the rule as follows: "A party introducing a witness as to character can only prove the general character of the person asked about. The witness, of his own motion, may say in what respect it is good or bad." *Id.* at 582, 28 S.E. at 493. See D. STANSBURY, *supra* note 7, § 114, at 348 n.48, which notes: "It is remarkable that more than seventy years have since elapsed without an effort to re-examine this curiously illogical rule. . . . No other rule of evidence known to the present author can compete with this one in encouraging the coaching of witnesses."

83. See *State v. Lefevers*, 216 N.C. 494, 5 S.E.2d 552 (1939); *State v. Cathey*, 170 N.C. 794, 87 S.E. 532 (1916).

84. REPORT, *supra* note 70, at 58.

85. Had the deleted provision remained in the law, character evidence showing the complainant's sexual behavior with third parties could only be elicited by cross-examining her as the provision added the condition "by otherwise admissible evidence." *Id.* Prior law had indicated that specific acts could only be brought out upon cross-examination.

86. *Kearney v. Vann*, 154 N.C. 311, 70 S.E. 747 (1911); cf. *Winslow v. Morton*, 118 N.C. 486, 24 S.E. 417 (1896) (law does not favor repeal of older statute by enactment of later one by mere implication). Moreover, the deletion of the provision from the Act may demonstrate the intent of the General Assembly to continue the common law rules of proof in these situations.

87. N.C. GEN. STAT. § 8-58.6(b)(1) (Cum. Supp. 1977).

88. The common law rules as developed in North Carolina did not place any limitation regarding sexual activity about which the complainant could be questioned. However, it is generally thought that the relevancy of an incident will fade over time particularly when the evidence is to go to bias or consent. See, e.g., Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 58 (1977).

complainant's answer, but may introduce direct evidence of such acts.<sup>89</sup> This blanket coverage of sexual activity between the complainant and the defendant may include some evidence that otherwise would be legally irrelevant.<sup>90</sup> This problem should, however, be ameliorated by the requirement that the relevancy of all such evidence be examined by the trial judge in an in camera hearing.<sup>91</sup>

Section 8-58.6(b)(2) provides an exception for "evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant."<sup>92</sup> This exception will most often operate in situations in which the defendant attacks the prosecution's attempts to corroborate the crime by proof of such sex-related conditions as the presence of semen, pregnancy, venereal disease or damage to sexual organs.<sup>93</sup> Evidence admitted under this exception is clearly relevant because it "at least calls into question this particular corroboration of the victim's testimony,"<sup>94</sup> and is limited to specific instances within a short time span. The defendant in this situation should not be bound by the complainant's answers on cross-examination. Instead, he should be able to introduce direct evidence, as the matter is not collateral and does not bear solely on the complainant's character but goes directly to the question whether the corroborating evidence has validity.<sup>95</sup> Moreover, permitting evidence to be introduced by direct evidence also comports with the policy of the statute because this evidence consists of specific, relevant instances

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89. See note 79 and accompanying text *supra*.

90. The commentary to the draft law (§ 8-58.6(b)(1) remains unchanged from draft form) noted:

The draft law opts for blanket treatment of this type of behavior despite the possibility that in some cases even it may be irrelevant. The fact that the defendant and the victim have previously engaged in sexual relations is likely enough to demonstrate some particular bias of the victim against the defendant, or some particular motive to falsify an accusation or alter or misinterpret the facts of an encounter between them, that evidence of this type of activity ought to be admissible. This behavior is also less likely to create the kind of prejudice which sexual behavior of a more general nature might create.

REPORT, *supra* note 70, at 92.

91. See text accompanying notes 106-09 *infra*.

92. N.C. GEN. STAT. § 8-58.6(b)(2) (Cum. Supp. 1977); cf. REPORT, *supra* note 70, at 57 (draft bill allowed exception for evidence of specific instances of sexual behavior to "show an origin of semen other than in the alleged sexual assault").

93. Obviously, this defense can arise only when the defendant denies intercourse took place; it is not available when he claims consent.

94. REPORT, *supra* note 70, at 93; see Berger, *supra* note 88, at 58.

95. For example, if the prosecution offers a doctor's testimony that he found semen in the complainant shortly after the alleged rape, the defendant may in good faith ask her whether she had sexual intercourse with her boyfriend shortly before the [alleged] rape. The defendant is not bound by her answer and may present evidence (such as the boyfriend) to show that the prior sexual act may have caused the presence of the semen.

Farb, *The New Rape Evidence Law*, AD. JUST. MEMORANDA, December 1977, at 4 (Institute of Government, University of North Carolina at Chapel Hill).

rather than the broad character attack that the statute was designed to prevent.

The third of the exceptions, G.S. 8-58.6(b)(3), allows the introduction of

evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented.<sup>96</sup>

Quite evidently, the first prerequisite for the application of this provision is that the defense be one of consent. The introduction of such highly specialized pattern evidence is permitted, under the rationale that pattern evidence avoids the evils often associated with permitting evidence of general sexual behavior of the complainant with third parties,<sup>97</sup> as long as the pattern is sufficiently distinctive to indicate that consent would have been forthcoming.<sup>98</sup> Alternatively, this provision permits the defendant who claims consent as a defense to introduce evidence of facts and sexual behavior leading to the honest but mistaken assumption by the defendant that the victim consented.<sup>99</sup> The language of this subdivision implies that evidence is to be elicited in the form of specific acts; therefore, because the only manner of introducing evidence of specific acts of the complainant into evidence has been upon cross-examination<sup>100</sup> and because these specific acts

96. N.C. GEN. STAT. § 8-58.6(b)(3) (Cum. Supp. 1977). This provision, along with *id.* § 8-58.6(b)(4) replaced the original draft provision which precluded evidence of the sexual behavior of the victim unless such behavior

occurred in specific instances under circumstances or as part of a pattern of behavior so similar to the alleged assault that its relevance to a material issue in such prosecution clearly outweighs any prejudice, confusion of issues, or invasion of privacy which would result from introduction of evidence or reference to it during the proceeding.

REPORT, *supra* note 70, at 57-58.

97. "The fact that a woman may have been guilty of illicit intercourse with one man is too slight and uncertain an indicator to warrant the conclusion that she would probably be guilty with another man who sought such favors with her." *Rice v. State*, 35 Fla. 236, 237, 17 So. 286, 287 (1895). Although a single encounter may not have probative value, habitual sexual conduct with strangers may be relevant to the issue of consent with the defendant. *See generally* Note, *Indiana's Rape Shield Law: Conflict with the Confrontation Clause*, 9 IND. L. REV. 418 (1976).

98. In light of the specific language of the statute and the policy against admitting evidence of complainant's behavior with third persons, one or even a few sexual encounters is not enough. What is necessary is habitual, *indiscriminate* sexual conduct, for only indiscriminate behavior would tend to show that the complainant was likely to have consented. Extreme caution should be observed by the trial judge in reference to this section during his *in camera* review of pattern evidence bearing on consent. *See* Note, *supra* note 97, at 430.

99. *See, e.g.*, *State v. Powell*, 141 N.C. 780, 53 S.E. 515 (1906). *Powell* involved the selling of liquor; there is, however, no reason why the defense of a reasonable mistake of fact would not apply in a rape case in which consent is in issue. *See also* *State v. Dizon*, 47 Haw. 444, 390 P.2d 759 (1964) (defense to a crime considered *malum in se* because of mistake of fact is subject to qualification that mistake must not be due to negligence or carelessness of defendant).

100. *See* notes 78-80 and accompanying text *supra*.

are collateral,<sup>101</sup> it should follow that the defendant is bound by the complainant's answer.<sup>102</sup>

The final exception permits introduction of "evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged."<sup>103</sup> It has been suggested that this provision will be rarely used because a prosecutor will seldom proceed to trial knowing that the defense will present expert testimony that the victim fantasized the sexual act charged.<sup>104</sup> It is also arguable that the provision is unnecessary, as the evidence at issue would not ordinarily involve "evidence of sexual behavior." For example, the fact that the complainant had made false accusations of sexual assault in the past does not come within the definition of sexual behavior and, therefore, is not declared irrelevant by the statute.<sup>105</sup>

### 3. In Camera and Probable Cause Hearings

Subsection (c) provides that no evidence of the complainant's sexual behavior may be introduced unless the court in camera has determined that such sexual behavior is relevant.<sup>106</sup> The purpose of this provision is to set up an informal procedure for ensuring that unnecessarily prejudicial evidence never comes before the jury.<sup>107</sup> After the hearing, the judge must enter an

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101. An offer of evidence tending to show that the complainant consented would generally be direct evidence. It is direct evidence, however, only because it pertains to the specific act that is the basis of the prosecution. By contrast, pattern evidence deals with other acts involving third parties and is therefore collateral. *See generally* Berger, *supra* note 88.

102. *Cf. Washington v. Texas*, 388 U.S. 14 (1967) (suggesting that it may be constitutionally impermissible to prohibit necessary cross-examination about specific acts to establish defense). *But see* *People v. Thompson*, 76 Mich. App. 705, 257 N.W.2d 268 (1977) (in most cases probative value of such evidence does not outweigh prejudice to victim and society). The policy of exclusion of third party sexual behavior inherent in the rape shield statute further supports the proposition that the defendant should be bound by the complainant's answer, as does the fact that prior sexual behavior (even in a pattern situation) has such slight probative value.

103. N.C. GEN. STAT. § 8-58.6(b)(4) (Cum. Supp. 1977).

104. *See* Farb, *supra* note 95, at 6.

105. *See* REPORT, *supra* note 70, at 94. Although the draft law contained no explicit subdivision (4), the substance of this subdivision was envisioned to be included within the catch-all subsection (3). As the commentary points out, that subsection dealt only with sexual behavior; other behavior is outside the scope of the statute altogether and thus was not declared irrelevant by the statute. *Id.*

106. N.C. GEN. STAT. § 8-58.6(c) (Cum. Supp. 1977). While all the rape shield statutes differ in some respect, most provide for some form of in camera hearing. *See, e.g.,* FLA. STAT. ANN. § 794.022 (Harrison Cum. Supp. 1977); GA. CODE ANN. § 38-202.1 (Harrison Cum. Supp. 1977); TEX. PENAL CODE ANN. tit. 5, § 21.13 (Vernon Cum. Supp. 1978). The North Carolina statutory formula of making even excepted proof subject to judicial screening has been commended by one commentator: "This resolution has the advantage of curbing freedom to admit—but not to exclude evidence, and this ensures as much as possible effectuation of the statute's purpose of changing past abusive practices in order to promote the state's and the victim's legitimate interests." Berger, *supra* note 88, at 72.

107. The provision reflects a commonly recognized theme—"that a judge's instruction to

order stating what evidence is relevant and the nature of the questions that will be admitted. The proponent of the evidence may move for such a hearing either prior to or at the time of trial.<sup>108</sup>

Subsection (d) provides a further protection for the complainant, declaring that the record of the in camera hearing is available for inspection only by the parties, the complainant, the attorneys, the court and its agents, and that it is to be used only as necessary for appellate review.<sup>109</sup> Subsection (d) further provides for the secrecy of evidence received at a probable cause hearing. At a probable cause hearing, the judge must take cognizance of the admissible evidence in determining probable cause, without the questions or evidence being resubmitted in open court.<sup>110</sup> This subdivision seems to refer only to the evidence at the probable cause hearing and should not prevent the same evidence, if found relevant at the in camera hearing at the trial stage, from being introduced. In essence, the statute is attempting to prevent disclosure of prejudicial and embarrassing facts of the complainant's sexual behavior until absolutely necessary in the court proceedings.

#### 4. Conclusion

The rape shield statute will effect its greatest impact in the proof of the complainant's sexual activity with third parties. No evidence of the complainant's reputation for unchastity may come in, and evidence relating to the complainant's sexual behavior with third parties is excluded, unless it falls within three narrowly circumscribed exceptions: it is probative that someone else committed the rape charged to the defendant; the complainant's sexual behavior is so nondiscriminatory as to suggest either consent or that the defendant could reasonably believe that she consented; or the prior sexual behavior suggests that the complainant fabricated the story. Thus, North Carolina has enacted a broad protection device for the rape victim in the hopes of both ensuring the reporting of the crime and increasing the conviction rate of defendants. Ultimately, however, the Act merely defines relevance as it should always have been read and maintains a fair balance between the complainant and the defendant.

#### D. Impeachment

##### 1. Silent Admissions as Prior Inconsistent Statements

In 1977 the North Carolina courts confronted the complex issue of

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disregard inadmissible evidence can never entirely cure the impact of its original introduction or even of a question referring to it." REPORT, *supra* note 70, at 98.

108. N.C. GEN. STAT. § 8-58.6(c) (Cum. Supp. 1977).

109. *Id.* § 8-58.6(d).

110. *Id.*

silent admissions<sup>111</sup> as prior inconsistent statements for purposes of impeaching a defendant's testimony. In separate cases both the court of appeals and the supreme court approved the use of silence as impeachment,<sup>112</sup> despite strong arguments that the law of evidence precluded such use.<sup>113</sup>

In *State v. Foddrell*,<sup>114</sup> the state supreme court appears to have held that a cross-examination of defendant that brought out the fact that he had not denied the commission of a rape when identified by the victim was not error.<sup>115</sup> This silence, the court observed, "was entirely inconsistent with the story he told on the witness stand."<sup>116</sup> The court rested its decision on constitutional grounds, declaring that in the absence of *Miranda* warnings, the silence of defendant was admissible as impeachment to show its inconsistency with defendant's testimony at trial.<sup>117</sup> In deciding this issue, the court distinguished United States Supreme Court decisions that had held that

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111. If a former statement fails to mention a material circumstance of the present testimony, which it would have been natural to mention in the prior statement, the prior statement is inconsistent. See *State v. Mack*, 282 N.C. 334, 340, 193 S.E.2d 71, 75 (1972) (citing *Esderts v. Chicago Rock Island & Pac. Ry.*, 76 Ill. App. 210, 222 N.E.2d 117 (1966); C. McCORMICK, *supra* note 8, § 34).

112. *State v. Foddrell*, 291 N.C. 546, 231 S.E.2d 618 (1977); *State v. Fisher*, 32 N.C. App. 722, 233 S.E.2d 634 (1977).

113. This issue raises constitutional questions when it arises in the criminal law context; however, inquiry in this situation, if it passes the constitutional threshold, must relate to the materiality of the silent admission, a question for the law of evidence.

114. 291 N.C. 546, 231 S.E.2d 618 (1977).

115. To ascertain a single holding in the case is difficult, as the court discussed several alternative holdings. In the course of its opinion, it indicated that there was no objection, *id.* at 557, 231 S.E.2d at 625-26; that there was no police interrogation of defendant, *id.* at 557, 231 S.E.2d at 626; and that the introduction of defendant's admissions by silence was harmless error, *id.* at 559-60, 231 S.E.2d at 627. The court's brief discussion of the absence of a timely objection suggests that the question of impeachment by silent admissions is of such importance that a timely objection is not necessary to raise it on appeal and that thus no waiver of objection occurs. See note 163 *infra*. The court's second ground is clearly correct, because *Miranda* warnings are not required in the absence of a custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 477-78 (1966). The court's third ground, harmless error, could have been controlling, however, because there was ample evidence of the crime, including the victim's account and sufficient corroborating evidence in the absence of the disputed evidence. As the court correctly concluded, "there is no reasonable possibility that defendant's admission of silence contributed to his conviction." 291 N.C. at 559-60, 231 S.E.2d at 627. Despite the alternative holding of harmless error, the court's discussion of admissions by silence represents a very important development in North Carolina evidence law.

116. 291 N.C. at 558, 231 S.E.2d at 626.

117. As the court conceded, these admissions by silence are not admissible as substantive evidence: "Had defendant exercised his right not to testify, evidence of his silence at the time of the confrontation and accusation would not have been competent for it would then have been offered as affirmative or substantive evidence tending to establish guilt of the crime charged." *Id.* at 559, 231 S.E.2d at 627; see *State v. Guffey*, 261 N.C. 322, 134 S.E.2d 619 (1964) (undenied statements made by another in presence and hearing of defendants after arrest and custody are not admissible); 2 D. STANSBURY, *supra* note 7, § 179, at 54-55. See also *State v. Temple*, 240 N.C. 738, 83 S.E.2d 792 (1954).

silence could not be used as impeachment,<sup>118</sup> noting the significance placed by that Court upon the presence of *Miranda* warnings in those cases.<sup>119</sup>

Although the court's distinction was undoubtedly correct in terms of constitutional law, it failed to take account of the complementary rationale from evidence law for excluding the "admission"—that the fact of silence possesses no significant probative value in certain situations.<sup>120</sup> Therefore, despite an initial inquiry into constitutional issues, the analysis inevitably devolves into an evidential one. The constitutional questions are important in themselves, but they also constitute circumstances that aid in determining whether defendant's silence was materially inconsistent with his later explanation.

Two recent North Carolina cases, *State v. Williams*<sup>121</sup> and *State v. Whitney*,<sup>122</sup> are representative of this view. Defendant in *Williams*, in a conversation with a police officer after defendant's arrest, failed to give the story he later related at trial.<sup>123</sup> The court contrasted this situation

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118. 291 N.C. at 557-59, 231 S.E.2d at 625-27 (discussing *United States v. Hale*, 422 U.S. 171 (1975)). Not discussed but also relevant was *Doyle v. Ohio*, 426 U.S. 610 (1976). In both *Hale* and *Doyle* the Court held that a prosecutor may not impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving *Miranda* warnings at the time of his arrest.

119. In line with this distinction, the court noted the difference between a defendant's silence in the face of a victim's accusations at the scene of the crime and his silence when he was served with a warrant for his arrest. In the latter situation, when he had been given *Miranda* warnings, the fact of his silence would have been inadmissible had an objection been made to the question that elicited it. 291 N.C. at 559, 231 S.E.2d at 627. The court's treatment of this point may suggest that it was giving greater weight to its alternative holding that defendant had waived his claim of error by his failure to object. See note 115 *supra*.

120. The *Foddrell* court's holding centered upon the *Miranda* warnings. However, the Court in *United States v. Hale*, 422 U.S. 171 (1975), also considered evidence law in respect to silence as a prior inconsistent statement:

Failure to contest an assertion, however, is considered evidence of acquiescence only if it would have been natural under the circumstances to object to the assertion in question. . . . But the situation of an arrestee is very different, for he is under no duty to speak and . . . has *ordinarily* been advised by government authorities only moments earlier that he has a right to remain silent . . . .

. . . [I]nnocent and guilty alike—perhaps particularly the innocent—may find the situation so intimidating that they may choose to stand mute. A variety of reasons may influence that decision. In these often emotional and confusing circumstances, a suspect might not have heard or fully understood the question, or may have felt there was no need to reply. He may have maintained silence out of fear or unwillingness to incriminate another. Or the arrestee may simply react with silence in response to the hostile and perhaps unfamiliar atmosphere surrounding his detention.

*Id.* at 176-77 (citations omitted) (emphasis added).

121. 288 N.C. 680, 220 S.E.2d 558 (1975).

122. 26 N.C. App. 460, 216 S.E.2d 439 (1975).

123. Defendant had been arrested on May 5, 1974. On May 8, a police officer talked with him. The officer testified that, during his conversation with defendant, defendant failed to make a statement as to the events of May 4-5. 288 N.C. at 692, 220 S.E.2d at 567-68.

Defendant testified at trial that he heard shots, ran into the house, and at the same time observed someone going out the back door with a gun in his hand. Defendant pulled his pistol, ran to the back door and shot several times. He was then apprehended by the police. *Id.* at 684, 220 S.E.2d at 563.



with prior cases<sup>124</sup> in which it had been held that an illegally obtained statement taken from a defendant could be used to impeach him after he became a witness in his own behalf.<sup>125</sup> The *Williams* court noted that a prior inconsistent statement "obviously had a material bearing" on credibility, but concluded that no such inference could be drawn solely from defendant's silence.<sup>126</sup> Similarly, in *Whitney*, the court of appeals held that it was error to allow testimony concerning a statement, made in defendant's presence, that he had been caught as a "Peeping Tom."<sup>127</sup> The *Whitney* court used a refreshingly simple analysis, determining that the statement in question was made not to defendant but to a police officer as defendant was being placed into custody and that thus no reply was required.<sup>128</sup>

In holding that when there is an accusation at the time of arrest and the defendant does not come forward with a denial, his silence may be used to impeach him, the supreme court in *Foddrell* ignored *Williams* and *Whitney*.<sup>129</sup> By ignoring this prior law, the court refuted a sound and logical evidence rule, that custodial silence lacks not only significant probative value as substantive evidence but also fails to produce the material inconsistency necessary for a prior inconsistent statement.

Unlike *Foddrell*, which presented the easier case of custodial accusations and fit more readily into established constitutional and evidentiary guidelines, *State v. Fisher*<sup>130</sup> involved the more difficult issue of noncustodial, investigatory questioning of a defendant prior to arrest. Defendant in *Fisher* testified and offered as a defense to a charge of rape that he and the prosecuting witness had been having an affair, that the assault was committed by two others, and that afterwards she came to his apartment and they had had sex before going to the hospital. In response the State offered testimony by a police officer who testified that he had interviewed defendant

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124. *Harris v. New York*, 401 U.S. 222 (1971); *State v. Bryant*, 280 N.C. 551, 187 S.E.2d 111 (1972).

125. *State v. Bryant*, 280 N.C. 551, 556, 187 S.E.2d 111, 114 (1972).

126. 288 N.C. at 693, 220 S.E.2d at 568.

127. 26 N.C. App. at 462-63, 216 S.E.2d at 441.

128. *Id.* The supreme court evidently repudiated this holding and this logic by its decision in *Foddrell*.

129. Before *Miranda*, the North Carolina courts endeavored to determine whether the circumstances were such that a denial was called for. While *Miranda*, and particularly its progeny, *United States v. Hale*, 422 U.S. 171 (1975), and *Doyle v. Ohio*, 426 U.S. 610 (1976), prohibit the use of silence as impeachment in custodial circumstances after *Miranda* warnings have been given, see note 118 *supra*, there is no reason to restrict inquiry to this point. There are other circumstances in which a denial should not be required, particularly custody—to require a defendant to deny a statement while in custody before he has even been informed of his rights conflicts with the spirit, if not the letter, of *Miranda v. Arizona*, 384 U.S. 436, 468 n.37 (1966). See also *State v. Bates*, 140 Conn. 326, 99 A.2d 133 (1953) (fact of arrest or custody alone sufficient to render confession inadmissible).

130. 32 N.C. App. 722, 233 S.E.2d 634 (1977).

before his arrest and that defendant never claimed to have been having an affair with the prosecuting witness.<sup>131</sup>

The court of appeals, as the supreme court had done in *Foddrell*, distinguished prior constitutional precedent<sup>132</sup> by noting that *Fisher* did "not present a situation in which a defendant's exercise of his right to remain silent is used against him."<sup>133</sup> The court followed *State v. Mack*,<sup>134</sup> which held that a witness may be impeached by a prior inconsistent statement consisting of a failure to state a material fact to which he later testified at trial.<sup>135</sup> *Fisher*, however, does not represent an analogous situation, for *Fisher* involved a criminal defendant rather than a nonparty witness. This distinction might not ordinarily affect the analysis; however, in *Fisher* defendant had reason not to relate his full story to the police during an ordinary investigation—a statement declaring these additional facts would be an admission to a criminal act.<sup>136</sup> The facts not related in defendant's story thus were not facts that he would naturally relate to the police. Therefore, his prior statement, on both evidentiary and constitutional grounds, was not properly held admissible as inconsistent with his testimony at trial.

*Foddrell* and *Fisher* represent intrusions into basic principles of evidence law. The courts' analyses focused on the constitutional rights of defendants; finding no violation, the courts affirmed the use of silence as impeachment. A preferred approach would begin by analyzing the effect of any constitutional mandates upon the defendants' rights. If there is found to be no danger of constitutional infringement, the next step would be to consider the question whether the circumstances of the conversation required a denial by the defendant. Constitutional considerations may bear on the latter question as well, but resolution of the constitutional issues does not excuse the courts from completing the inquiry into materiality required by the law of evidence.

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131. *Id.* at 723, 233 S.E.2d at 635.

132. *Id.* at 725, 233 S.E.2d at 635-36 (discussing *Doyle v. Ohio*, 426 U.S. 610 (1976)); see note 118 *supra*.

133. 32 N.C. App. at 725, 233 S.E.2d at 636.

134. 282 N.C. 334, 193 S.E.2d 71 (1972).

135. *Id.* at 340, 193 S.E.2d at 75.

136. Defendant's alleged acts would have been a violation of N.C. GEN. STAT. § 14-184 (1969) (prohibiting habitual cohabitation).

## 2. Attacking Witness Credibility With Conviction<sup>137</sup> and Sentence

In *State v. Finch*,<sup>138</sup> the North Carolina Supreme Court held for the first time that when, for purposes of impeachment, a witness has admitted a prior conviction, the time and place of the conviction and the punishment imposed may be inquired into upon examination.<sup>139</sup> Prior to *Finch*, the court of appeals had approved the introduction of sentencing information for impeachment purposes, declaring that the sentence imposed bore a relation to the gravity of the offense and thus had relevance to the credibility of the witness.<sup>140</sup> This approach was adopted by the court of appeals despite a prior intimation by the supreme court that "[o]rdinarily the *quantum* of punishment imposed upon conviction or a plea of guilty of another criminal offense is not admissible for purposes of impeachment."<sup>141</sup>

The policy adopted in *Finch* accords with that of the federal courts<sup>142</sup> and other states.<sup>143</sup> This rule allowing sentences to be elicited along with convictions satisfies the traditional arguments against inquiry into the details of conviction.<sup>144</sup> There is little distraction from the issues since the sentence

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137. In *State v. Guinn*, 32 N.C. App. 595, 233 S.E.2d 73 (1977), the court of appeals continued established impeachment practices by holding that the habitual offender statute, N.C. GEN. STAT. § 15A-928 (1975), which prohibits the introduction in support of an element of the offense charged evidence of prior convictions to which the defendant has admitted, does not prohibit the introduction of the same prior offenses as impeachment when the defendant takes the stand. This interpretation comports with the purpose of the statute that, in allowing the defendant to admit judicially his prior convictions and thereby precluding the State from introducing evidence of them, the habitual felon be set upon equal footing with the first offender. Section 15A-928 was modeled after N.Y. CRIM. PROC. LAW § 200.60 (McKinney 1971). N.C. GEN. STAT. § 15A-928, Official Commentary (1975). See generally *People v. Giuliano*, 52 App. Div. 2d 240, 383 N.Y.S.2d 878 (1976) (construing the New York statute from which § 15A-928 was drawn). That equal footing necessarily allows the use of the prior conviction as impeachment when the defendant takes the stand. See, e.g., *D. STANSBURY*, *supra* note 7, § 112, at 104-05 n.18 (Supp. 1976) (predicting that § 15A-928 would not be construed to prohibit use of such prior convictions as impeachment).

138. 293 N.C. 132, 235 S.E.2d 819 (1977).

139. *Id.* at 141-42, 235 S.E.2d at 825. Previous North Carolina cases had allowed examination of the accused as to former convictions and the imposition of sentences of imprisonment. The supreme court had simply applied the general rule permitting impeachment by showing former convictions without discussion of the fact that a sentence was incidentally mentioned. See, e.g., *State v. Sheffield*, 251 N.C. 309, 111 S.E.2d 195 (1959); *State v. Holder*, 153 N.C. 606, 69 S.E. 66 (1910).

140. *Ormond v. Crampton*, 16 N.C. App. 88, 92, 191 S.E.2d 405, 409, *cert. denied*, 282 N.C. 304, 192 S.E.2d 194 (1972). See also *State v. Turner*, 21 N.C. App. 608, 205 S.E.2d 628, *appeal dismissed*, 285 N.C. 668, 207 S.E.2d 751 (1974).

141. *State v. McNair*, 272 N.C. 130, 134, 157 S.E.2d 660, 664 (1967).

142. E.g., *Beaudine v. United States*, 368 F.2d 417 (5th Cir. 1966); *United States v. Ramsey*, 315 F.2d 199 (2d Cir.), *cert. denied*, 375 U.S. 883 (1963).

143. See *Gafford v. State*, 440 P.2d 405 (Alas. 1968), *cert. denied*, 393 U.S. 1120 (1969), *overruled on other grounds*, *Fields v. State*, 487 P.2d 831 (Alas. 1971); *State v. Washington*, 383 S.W.2d 518 (Mo. 1964) (extending not only to inquiry into punishment but also to nature of crime); *State v. Sinclair*, 57 N.J. 56, 269 A.2d 161 (1970).

144. Minimizing prejudice and distraction from the issues are the arguments most often

is relevant to the gravity of the crime and any prejudice produced is minimal once the conviction has been admitted.

### *E. Evidence of Prior Crimes As Substantive Evidence*

In *State v. May*<sup>145</sup> the North Carolina Supreme Court expanded an exception to the general rule that “ ‘in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense.’ ”<sup>146</sup> The exception to this rule relied on by the court in *May* allows the introduction of evidence tending to establish intent even though such evidence discloses the commission of a separate offense.<sup>147</sup>

Defendant in *May* was prosecuted for a murder committed during the commission of a robbery of a confectionery store proprietor.<sup>148</sup> The State offered testimony that defendant had participated in a robbery of another retailer five days earlier. A State's witness identified the sawed-off shotgun used in the prior robbery as the same gun recovered from defendant.<sup>149</sup> Defendant argued that the admission of evidence relating to his participation in the prior crime constituted reversible error on the grounds that “the evidence was not probative of any issue in the case and was introduced solely to inflame the jury, to the prejudice of defendant.”<sup>150</sup>

The supreme court affirmed defendant's conviction on the premises that “the State was required to show that defendant possessed a specific intent to rob [the confectionery store's proprietor]”<sup>151</sup> and that evidence of

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posed against allowing use of details other than convictions. Neither of these concerns is present here, as sentences are integral components of a conviction. *See, e.g.*, C. McCORMICK, *supra* note 8, § 43, at 88-89. Although it is true that the sentence lies wholly in the discretion of the judge, today's trial judge has the benefit of reviewing the record of the defendant more closely and tailoring each sentence to that individual.

145. 292 N.C. 644, 235 S.E.2d 178, *cert. denied*, 98 S. Ct. 414 (1977).

146. *Id.* at 648, 235 S.E.2d at 181 (quoting *State v. McClain*, 340 N.C. 171, 173, 81 S.E.2d 364, 365 (1954)).

147. “Where a specific mental intent or state is an essential element of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite mental intent or state, even though the evidence discloses the commission of another offense by the accused.”

*Id.* (quoting *State v. McClain*, 240 N.C. 171, 175, 81 S.E.2d 364, 366 (1954)). A vigorous dissent by Justice Exum protested this extension of the intent exception to the facts in *May*. *Id.* at 662-68, 235 S.E.2d at 189-93 (Exum, J., dissenting).

148. *Id.* at 646, 235 S.E.2d at 180. The State's evidence tended to show that defendant was seen entering the store, that a loud noise was heard and that defendant was seen limping away from the store. Shortly thereafter, the proprietor was found dead in the store, killed by a shotgun wound. Defendant was found that afternoon semi-conscious from a gunshot wound in the chest, with a sawed-off shotgun in his possession that had been fired once. *Id.* at 646, 235 S.E.2d at 180-81.

149. *Id.* at 647, 235 S.E.2d at 181.

150. *Id.*

151. *Id.* at 649, 235 S.E.2d at 182. The court stated on this point:

the prior offense was admissible to show the requisite intent.<sup>152</sup> The court relied upon *State v. Long*,<sup>153</sup> in which the State had proven an overt but ambiguous act as an essential element of the crime charged. *Long* presented the classic case in which evidence of a prior crime was relevant to show intent because the ambiguous act, coupled with intent, constituted a crime.<sup>154</sup> In *May*, however, there was no evidence of what happened inside the store tending to show an overt act.<sup>155</sup> Without the evidence of an overt act, evidence of intent was therefore irrelevant.

This use of the intent exception goes far beyond prior precedent.<sup>156</sup> The

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[T]he State had the burden of proving beyond a reasonable doubt that defendant murdered [the proprietor] during the perpetration or attempted perpetration of an armed robbery. . . .

Under G.S. 14-87, an armed robbery is defined as the taking of the personal property of another in his presence or from his person without his consent by endangering or threatening his life with a firearm, with the taker knowing that he is not entitled to the property and the taker intending to permanently deprive the owner of the property. An attempted armed robbery occurs when a defendant "with the requisite intent to rob, does some overt act calculated and designed to bring about the robbery, thereby endangering or threatening the life of a person."

*Id.* (quoting *State v. Price*, 280 N.C. 154, 157-58, 184 S.E.2d 866, 869 (1971)).

152. *Id.* at 650, 235 S.E.2d at 182.

153. 280 N.C. 633, 187 S.E.2d 47 (1972).

154. In *Long*, the State introduced evidence that defendants, who were on trial for the attempted armed robbery of a service station, endeavored to rob the station's attendant with a pearl-handled pistol. The attempt failed after the attendant "tussled" over the gun with one of the defendants. *Id.* at 635, 187 S.E.2d at 48. Defendant testified that the "tussle" was not caused by an attempted robbery, but instead by a dispute over a refund alleged to be due from a vending machine. In rebuttal, the State introduced testimony concerning defendant's participation in a robbery that had occurred about three weeks prior to the service station robbery in which defendant had acquired the pearl-handled pistol. *Id.* at 636, 187 S.E.2d at 49-50. The *Long* court held that the earlier robbery was competent as evidence of defendant's intent at the time he entered the service station. It further held that this intent was a critical disputed element of the State's attempted robbery case and that the evidence of the prior robbery clearly tended to prove intent. *Id.* at 641, 187 S.E.2d at 52.

155. The only evidence of what happened inside the store came from defendant's statement to police:

[D]efendant stated that he had entered [the store] to purchase a package of cigarettes. After purchasing the cigarettes and receiving his change, defendant turned and began walking toward the door. As he looked over his shoulder, defendant saw that [the proprietor] was about to shoot him with a pistol. He turned his body, and [the proprietor] shot defendant on his left side. Defendant then took the sawed-off shotgun from his right hip pocket and shot [the proprietor]. . . . Defendant then put the gun back in his pants and staggered to Main Street.

292 N.C. at 647, 235 S.E.2d at 181. This testimony was clearly not sufficient to show an act equivalent to the ambiguous act of *State v. Long*. Moreover, the State attempted to discredit the statement, thereby leaving no evidence from which to find an overt act.

156. Justice Exum's dissent emphasized this point:

The effect of the majority's ruling is far-reaching. It amounts to this: The state, lacking evidence of what actually happened, may bootstrap itself around this deficiency by offering evidence of what defendant did on some other occasion. This, according to the majority, proves defendant's intent to do on the occasion in question what the state contends he did. This, in turn, somehow proves that he did it. Under the majority's holding the rule against admitting such evidence is totally abrogated. The state may use it in any case, but particularly in those cases where there is no other evidence as to what happened.

*Id.* at 665, 235 S.E.2d at 191 (Exum, J., dissenting).

court permitted the State to use the evidence of the prior crime not only to show intent, but also to show what happened inside the store. This use violates the general rule itself by allowing the commission of a prior offense to be proof of the commission of another crime.<sup>157</sup> Under the majority's holding, then, the rule against admitting such evidence is totally abrogated, for the State may use proof that a defendant committed an earlier, similar crime not only as evidence of intent but as its only proof that a defendant committed the overt act required for the crime charged.

#### F. *Privileged Communication*

In *State v. Lewis*<sup>158</sup> the North Carolina Court of Appeals declared that plea bargain negotiations with an arresting officer are admissible into evidence. To do so, the court had to find that such negotiations do not fall within the scope of G.S. 15A-1025, which provides: "The fact that the defendant or his counsel *and the solicitor* engaged in plea discussions or made a plea arrangement may not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings."<sup>159</sup> The court's limiting construction of the statute is based on a very literal interpretation that does not take into account the policy underlying the statute, a policy that supports the argument that evidence of plea bargaining should be inadmissible in court either for or against the defendant.

Defendant in *Lewis* was on trial for possession with intent to deliver a controlled substance and delivery of a controlled substance.<sup>160</sup> During the cross-examination of defendant, the district attorney was permitted over objection to make inquiries that led to an admission by defendant that he had engaged in plea bargaining with the arresting officer.<sup>161</sup> Defendant argued in the court of appeals that G.S. 15A-1025 prohibited the introduction of any evidence of plea bargaining, whether or not the solicitor was involved.<sup>162</sup> The court dismissed this argument by restricting the statute's application to the specific instance of plea discussions between a defendant or his counsel and the solicitor.<sup>163</sup>

157. See *State v. McClain*, 240 N.C. 171, 81 S.E.2d 364 (1954); *People v. Molineux*, 168 N.Y. 264, 61 N.E. 286 (1901), quoted in *State v. McClain*, 240 N.C. 171, 174, 81 S.E.2d 364, 365 (1954); *Shaffner v. Commonwealth*, 72 Pa. 60 (1872).

158. 32 N.C. App. 298, 231 S.E.2d 693 (1977).

159. N.C. GEN. STAT. § 15A-1025 (1975) (emphasis added).

160. 32 N.C. App. at 298, 231 S.E.2d at 693.

161. *Id.* at 300, 231 S.E.2d at 694.

162. *Id.*

163. *Id.* The court noted that defendant failed to make an objection or a motion to strike this allegedly inadmissible evidence. *Id.* Ordinarily such a failure to make an objection waives it. *State v. Hunt*, 223 N.C. 173, 25 S.E.2d 598 (1943). The fact that the court proceeded to deal with the question would indicate that this was a situation in which admission of the evidence could be reversible error even in the absence of objection. See *State v. Everett*, 284 N.C. 81, 199 S.E.2d 462 (1973); D. STANSBURY, *supra* note 7, § 27, at 67 n.16.

While the court's holding follows from a literal reading of the statute, it ignores the policy underlying it. The plea bargaining rule exists to encourage judicial compromises, to reduce clogged court dockets and to ensure frank and open discussions of plea alternatives.<sup>164</sup> These rationales apply whether the state's representative is a police officer or a prosecutor. If compromise is to be encouraged by G.S. 15A-1025 when discussions occur between a solicitor and a defendant, there is no reason not to extend the protection of the statute to plea discussions between a defendant and the police.<sup>165</sup>

The *Lewis* holding means that a defendant whose good faith negotiations with the police fail will be severely penalized by the introduction into evidence of the fact of the plea bargaining and any contemporaneous admissions; a similarly situated defendant who enters into the same discussion with the solicitor will, however, have that evidence excluded. To read the statute so narrowly severely erodes the protection it is intended to provide. Moreover, it is not unreasonable that the solicitor be required to oversee police practices in this area. It follows that if he does not prohibit these plea bargaining practices, the solicitor should not then be permitted to introduced evidence of unsuccessful negotiations that he has countenanced.<sup>166</sup>

E. WILLIAM BATES, II  
CHARLES PREYER ROBERTS, III

## IX. INSURANCE

### A. *Ratemaking Legislation*

In an action certain to produce a significant impact on the insurance industry in North Carolina, the General Assembly passed comprehensive

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164. The basic rationale for plea bargaining exists in reducing case loads. Viewed in this light, the criminal rule is not unlike the civil rule forbidding evidence of negotiations. *See* C. MCCORMICK, *supra* note 8, § 274, at 663-65.

165. It may well be argued that police should not engage in plea negotiations, and that by refusing to prohibit introduction of the fact of negotiation, the court is intending to limit such discussions. This approach, however, will not protect the unwary defendant. To penalize the defendant who made a good faith effort at compromise with the figure of authority with whom he has been most closely associated (the arresting officer) smacks of unfairness.

166. Otherwise, there is nothing short of legislative enactment to prohibit the solicitor from using the police as his plea bargaining agents, and from subsequently introducing into evidence whatever statements or admissions a defendant makes if the negotiations fall through.

legislation<sup>1</sup> pertaining to ratemaking and effecting major changes in three general areas of insurance regulation. As a result, ratemaking has been changed from a prior approval system to a file and use system.<sup>2</sup> Also, methods of promulgating rates and procedures by which rates may be disapproved by the Commissioner of Insurance have been outlined in detail for the first time. Finally, the operation of the reinsurance pool for high-risk insureds in the area of motor vehicle insurance has been revised to make that pool self-sustaining.

Under the new law, for purposes of ratemaking, insurance is divided into two categories<sup>3</sup>—so-called essential and nonessential lines<sup>4</sup>—for which two patterns of rate regulation are established based upon mandatory or voluntary rating bureau membership, respectively. The change from a prior approval to a file and use system of ratemaking applies to both categories, and all rates now take effect automatically after filing, subject to subsequent disapproval by the Commissioner of Insurance.<sup>5</sup>

Article 13C<sup>6</sup> of the new statute establishes a system of voluntary rating bureau membership for the nonessential lines of insurance, which include certain fire and property insurance, casualty insurance and inland marine

1. Law of June 30, 1977, ch. 828, 1977 N.C. Sess. Laws 1119 (codified in scattered sections of N.C. GEN. STAT. chs. 58, 97 (Cum. Supp. 1977)). The new law is based generally on the recommendations of John W. Hall, Georgia State University, who was hired as a consultant to the two insurance committees of the 1977 General Assembly. Several significant provisions, however, were introduced and adopted during the floor debates. INSTITUTE OF GOVERNMENT, LEGISLATIVE BULL. SERVICES, WEEKLY SUMMARY, June 24, 1977; *id.* June 17, 1977. See generally INSTITUTE OF GOVERNMENT, NORTH CAROLINA LEGISLATION 1977, at 17-19 (J. Brannon ed. 1977).

2. There are six basic systems for ratemaking: (1) mandatory rating bureau; (2) state-made rates; (3) prior approval; (4) modified prior approval; (5) file and use; and (6) open competition. GOVERNOR'S STUDY COMMISSION ON AUTOMOBILE LIABILITY INSURANCE AND RATES, REPORT TO THE GOVERNOR OF NORTH CAROLINA 8-9 (1971) [hereinafter cited as GOVERNOR'S STUDY COMMISSION]; see notes 17, 18, 20 & 36 and text accompanying notes 17-21 & 36 *infra*.

3. Under the previous system, the types of insurance subject to rate regulation had been divided into five categories, each of which was regulated in a slightly different manner—fire, casualty, miscellaneous lines, automobile liability and workers' compensation. See Law of Mar. 6, 1945, ch. 380, 1945 N.C. Sess. Laws 443 (formerly codified as amended at N.C. GEN. STAT. §§ 58-125 to -131.9 (1975) (fire insurance); *id.* §§ 58-131.10 to .25 (casualty insurance); *id.* §§ 58-131.26 to .33 (miscellaneous insurance)) (repealed 1977); Law of Apr. 4, 1939, ch. 394, 1935 N.C. Pub. Laws 861 (formerly codified as amended at N.C. GEN. STAT. §§ 58-246 to -248.10 (1975) (automobile liability insurance)) (repealed 1977); Law of Apr. 15, 1931, ch. 279, 1931 N.C. Pub. Laws 355 (formerly codified as amended at N.C. GEN. STAT. §§ 97-102 to -104.6 (1972) (workers' compensation insurance)) (repealed 1977).

4. See INSTITUTE OF GOVERNMENT, NORTH CAROLINA LEGISLATION 1977, *supra* note 1, at 17-19.

5. See notes 17, 18 & 20 and text accompanying notes 17-21 *infra* (nonessential lines); note 36 and accompanying text *infra* (essential lines).

6. N.C. GEN. STAT. §§ 58-131.34 to .60 (Cum. Supp. 1977).



insurance.<sup>7</sup> Article 13C begins with a statement of purpose<sup>8</sup> expressing the legislature's determination that insurance rates should not be "excessive, inadequate or unfairly discriminatory"<sup>9</sup> and that the most effective way to achieve proper rates is through "reasonable price competition among insurers."<sup>10</sup> The article contains detailed provisions further explaining the meaning of these terms<sup>11</sup> and also provides a detailed list of the criteria to be considered in determining whether rates comply with the specified standards.<sup>12</sup> Article 13C specifies in addition the factors that may be taken into

7. *Id.* § 58-131.36 defines the scope of application of Article 13C in the negative by listing the types of insurance to which the article does *not* apply. This Article does not apply to the essential lines regulated by new Article 12B, *id.* §§ 58-124.17 to .28; *see* note 23 and accompanying text *infra*. It also does not apply to reinsurance insurance in connection with property located outside the state, marine insurance, accident, health or life insurance, annuities, title insurance, mortgage guaranty insurance, hospital service or medical service corporations, investment companies, mutual benefit associations or fraternal beneficiary associations. *Id.* § 58-131.36. Article 13C does not apply to certain types of insurers operating on the assessment plan. *Id.* § 58-131.60. The exclusion of assessment plan insurance, however, is inconsequential, for even fraternal insurance, the field in which assessment plans were most commonly used, are now generally conducted on the legal reserve plan. W. VANCE, HANDBOOK ON THE LAW OF INSURANCE 30, 108-10, 343-47 (3d ed. B. Anderson 1951). Although the terms of § 58-131.36 do not list credit insurance as one of the categories of insurance excluded from coverage under Article 13C, credit insurance is regulated exclusively by Article 32 of Chapter 58, N.C. GEN. STAT. §§ 58-341 to -358 (Cum. Supp. 1977). Article 13C, however, would apply to insurance issued in connection with loans for a period of more than ten years, since such loans are not subject to the exclusive regulation of Article 32. *See id.* § 58-341.

The definition section of Article 13C contains detailed definitions of "private passenger motor vehicle" and "nonfleet motor vehicle" which are important in determining the scope of the Article's application, since liability, theft and physical damage insurance on "private passenger (nonfleet) motor vehicles" is excluded from coverage of the article. *See id.* §§ 58-131.35(8)(a)-(c), (9), .36(9), (10). The inclusion of pickup trucks in the definition of "private passenger motor vehicle," *id.* § 58-131.35(8)(b), is probably a legislative response to the supreme court's decision in *Security Ins. Group v. Parker*, 289 N.C. 391, 222 S.E.2d 437 (1976), in which the court had held that the truck involved in the accident in question was not a private passenger automobile. The definition also includes motorcycles, N.C. GEN. STAT. § 58-131.35(8)(c) (Cum. Supp. 1977), thus codifying a recent decision to that effect reached by the court of appeals in *State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Administrative Office*, 30 N.C. App. 477, 227 S.E.2d 621 (1976). It appears, however, that insurance rates for private passenger motor vehicles that are eligible for a fleet classification as well as rates for all commercial vehicles will be regulated in accordance with Article 13C. Motor vehicles that are regulated by the Utilities Commission or the Interstate Commerce Commission are explicitly excluded from the ratemaking authority of the new North Carolina Rate Bureau. N.C. GEN. STAT. § 58-124.17(3) (Cum. Supp. 1977).

8. N.C. GEN. STAT. § 58-131.34.

9. *Id.* § 58-131.34(1).

10. *Id.* § 58-131.34(3). Professor Keeton has pointed out that, while competition traditionally has been a factor in insurance rating, the complexity of insurance transactions reduces the significance of price competition for the ordinary consumer. R. KEETON, BASIC TEXT ON INSURANCE LAW § 8.4(a), at 557-58 (1971).

11. N.C. GEN. STAT. § 58-131.37(b)-(e) (Cum. Supp. 1977).

12. *See* text accompanying notes 29-35 *infra*. The former provisions regulating nonessential lines of insurance contained no comparable guidelines. Law of Mar. 6, 1945, ch. 380, § 1, 1945 N.C. Sess. Laws 443 (formerly codified as amended at N.C. GEN. STAT. §§ 58-131.10 to .25 (1975) (casualty insurance); *id.* §§ 131.26 to .33 (miscellaneous lines of insurance)) (repealed 1977).

consideration for purposes of classifying risks in order to establish rates.<sup>13</sup> Finally, this article authorizes the operation of rating organizations, whose services must be made available to all insurers operating in the state.<sup>14</sup> Insurers are not required to join a rating organization and therefore may choose whether to make their own rates or join a rating organization and use its rates.<sup>15</sup> Simultaneously, however, the statute recognizes that, while cooperation among insurers is desirable, it must be regulated to prevent restraint of competition.<sup>16</sup>

A major portion of the new law relates to the exact procedures to be followed in promulgating and reviewing rates. To promulgate new or revised rates for nonessential lines, the insurer or rating organization<sup>17</sup> is required only to file the rates and accompanying supportive data with the Commissioner prior to the effective date of the rates.<sup>18</sup> The rates then take effect automatically<sup>19</sup> and remain in effect until revised rates are filed. No prior approval by the Commissioner is required for the rates to take effect.

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13. See N.C. GEN. STAT. § 58-131.38(2) (Cum. Supp. 1977).

14. *Id.* § 58-131.34(2).

15. *Id.* § 58-131.41.

16. *Id.* § 58-131.34(4). While each insurer is required to use the rates of the rating organization to which it belongs or the rates which it files itself, *id.* § 58-131.39, additional competitive variation can be achieved through the payment of dividends to policyholders. As a plan for payment of dividends is not considered to be a "rating plan," it is not subject to regulation by the Commissioner of Insurance and therefore can be used freely by the insurance companies as a competitive device. *Id.* § 58-131.58. See generally C. KULP & J. HALL, CASUALTY INSURANCE 993-94 (1968).

The rating organizations must obtain a license from the Commissioner of Insurance and must disclose specified information about their organization and personnel. N.C. GEN. STAT. §§ 58-131.35(5), .43(a), (c), (d) (Cum. Supp. 1977). Advisory organizations and joint underwriting and joint reinsurance organizations are required to submit the same type of information to the Commissioner, but no license is required. *Id.* §§ 58-131.35(1), .44(a), .45(a). But see *id.* § 58-131.51 (referring to "each advisory organization licensed pursuant to G.S. 58-131.44" (emphasis added)).

Only in the context of a rating organization or a joint underwriting or joint reinsurance organization may unrelated insurers agree to adhere to the same rates, rules and the like. *Id.* §§ 58-131.46 to .48. Insurers who enter into agreements to adhere in violation of the prohibitions will be deemed to be a rating organization, subject to licensing and disclosure requirements. *Id.* §§ 58-131.35(5), .43. See also *id.* §§ 58-131.49 to .52, .55(a)-(c) (regulation of rating organizations).

17. N.C. GEN. STAT. § 58-131.41 (Cum. Supp. 1977) also permits each insurer to give notice to the Commissioner that it uses the rates of a designated rating organization. The giving of such notice fulfills the insurer's obligation to file under § 58-131.39. See *id.* § 58-131.41(b).

18. *Id.* § 58-131.39. This filing requirement does not apply to inland marine risks. *Id.* Policy forms must also be filed with the Commissioner. *Id.* § 58-131.56. One commentator, in discussing the Pennsylvania insurance rate statutes, has raised the question whether the due process clause of the fourteenth amendment requires that the public be given prior notice and an opportunity to be heard before revised rates take effect. See Comment, *Insurance Rate Regulation in Pennsylvania: Does the Consumer Have a Voice?*, 81 DICK. L. REV. 297 (1976-1977). Although rates under the new North Carolina statute take effect before a hearing is held, the administrative and judicial review provisions of the statute clearly appear to satisfy due process requirements. See note 41 and accompanying text *infra*.

19. See N.C. GEN. STAT. § 58-131.39 (Cum. Supp. 1977).

In thus abandoning the prior approval system in favor of a file and use system, North Carolina reflects the recent general trend of state regulatory programs,<sup>20</sup> some of which have also gone so far as to eliminate the filing requirement.<sup>21</sup>

New Article 12B<sup>22</sup> establishes a system of mandatory rating bureau membership for the essential lines of insurance, which include certain residential fire and property insurance, automobile theft and physical damage insurance, automobile liability insurance and allied lines, and workers' compensation and employers' liability insurance.<sup>23</sup> The article establishes the North Carolina Rate Bureau<sup>24</sup> and requires all insurance companies writing any of the essential lines of insurance in North Carolina to be members of the Bureau.<sup>25</sup> Mandatory bureau membership and mandatory adherence to the rates established by the Bureau<sup>26</sup> are the primary features that distinguish the regulation of the essential lines from the regulation of the nonessential lines of insurance. No price competition is permitted among

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20. The general trend of state regulatory programs since the late 1960's has been to move from reliance on prior approval laws toward use of either file and use laws or no-filing ("open competition") laws. R. KEETON, *supra* note 10, § 8.4(b), at 564. The adoption of a file and use system for automobile insurance was formally recommended for use in North Carolina as early as 1971. GOVERNOR'S STUDY COMMISSION, *supra* note 2, at 49.

21. See GOVERNOR'S STUDY COMMISSION, *supra* note 2, at 9.

22. N.C. GEN. STAT. §§ 58-124.17 to .28 (Cum. Supp. 1977).

23. *Id.* § 58-124.17(1). Although Article 12B does not include a list of definitions, it adopts by reference the definition of "private passenger (nonfleet) motor vehicle" established in Article 13C. *Id.* The ratemaking procedures of Article 12B do not apply to certain commercial vehicles because § 58-124.17(3) exempts certain commercial vehicles from "[t]he provisions of this subdivision." Insurance rates for these commercial vehicles are apparently regulated by Article 13C. Insurance operating on the assessment plan is also not regulated under Article 12B. *Id.* § 58-124.28; see note 7 *supra*.

24. The Bureau is to assume the functions previously performed by the North Carolina Fire Insurance Rating Bureau, the North Carolina Automobile Rate Administrative Office and the Compensation Rating and Inspection Bureau of North Carolina. N.C. GEN. STAT. § 58-124.17(1) (Cum. Supp. 1977).

25. *Id.* § 58-124.18. Each member is represented in the Bureau and participates in its administration. The expenses of the Bureau are shared among its members. *Id.*

26. See *id.* § 58-124.23. Deviations from Bureau rates are allowed only if the insurer files the deviation with the Bureau and the Commissioner and only if the Commissioner approves the deviation. Deviations must be renewed annually. *Id.* Under the former statute, no deviations were allowed. See Law of Mar. 6, 1945, ch. 381, § 2, 1945 N.C. Sess. Laws 457 (formerly codified as amended at N.C. GEN. STAT. § 58-248.2 (1975)) (repealed 1977).

The Governor's Study Commission, however, recommended in 1971 that the prohibition of rate deviation be repealed, citing the view that the adoption of this prohibition had represented a complete rejection of competition in insurance ratemaking. See GOVERNOR'S STUDY COMMISSION, *supra* note 2, at 38, 49.

Members of the Bureau may also modify rates, subject to the approval of the Commissioner, in connection with agreements to apportion among themselves high-risk insureds. N.C. GEN. STAT. § 58-124.17(4) (Cum. Supp. 1977). For "difficult to place" workers' compensation insurance, the Bureau designates an insurance company to write coverage and sets the initial premium for such coverage. *Id.* § 58-124.17(5).

insurance companies in the essential lines,<sup>27</sup> whereas in the nonessential lines bureau membership is voluntary, and companies who choose not to join a rating organization are free to set their own rates.<sup>28</sup>

The factors to be considered in establishing rates for essential lines are specified in the statute.<sup>29</sup> The basic requirement—that the rates “not be excessive, inadequate or unfairly discriminatory”<sup>30</sup>—coincides with the standards set forth for the nonessential lines of insurance in Article 13C.<sup>31</sup> The statutory definitions of these standards,<sup>32</sup> however, may not be comprehensive enough to eliminate all disputes regarding what factors may properly be considered in evaluating rates. For example, investment income of the insurer is not mentioned as a factor to be considered in determining whether rates are excessive;<sup>33</sup> neither is it included in the list of criteria to be applied in determining whether the rates comply with the specified standards.<sup>34</sup> Investment income, however, is not *excluded* from such consideration, and thus the propriety of considering investment income in determining whether proposed or existing rates provide a reasonable profit for an insurance company remains an unsettled issue.<sup>35</sup>

27. As with the nonessential lines, however, insurers in the essential lines are free to return dividends to policyholders without interference by the Bureau. *Id.* § 58-124.18(c); see note 16 *supra*.

28. See note 17 *supra*.

29. N.C. GEN. STAT. § 58-124.19 (Cum. Supp. 1977). In 1971, the Governor's Study Commission had recommended that the rating statutes should be revised “by spelling out the consideration to be given to all reasonable and related factors.” GOVERNOR'S STUDY COMMISSION, *supra* note 2, at 50.

30. N.C. GEN. STAT. § 58-124.19(1) (Cum. Supp. 1977). As with the nonessential lines, *id.* § 58-131.38(2), risks may be classified for ratemaking purposes, but the classification plan for automobile insurance may not be based upon the age or sex of the persons insured. *Id.* § 58-124.19(4). In other action relating to discrimination in insurance, the General Assembly passed *id.* § 168-10 (prohibiting insurers from denying individual accident and health insurance coverage to any handicapped person solely on the basis of the person's handicap).

31. See *id.* § 58-131.37(a). The rates for workers' compensation insurance are required to be “fair, reasonable, and adequate.” *Id.* § 97-100(a).

32. *Id.* § 58-131.37(b)-(e). There are no definitions of these terms in Article 12B, as there are in Article 13C, but it is unlikely that the courts would interpret the terms any differently in the absence of any ground for doing so.

33. The subsections defining the term “excessive” refer (1) to “a reasonable degree of price competition” as an indication that the rates are *not* excessive and (2) in the absence of such competition, to a “long-run underwriting profit that is unreasonably high” as an indication that the rates *are* excessive. *Id.* § 58-131.37(b), (c).

34. See *id.* § 58-131.38(1).

35. In a case decided under the former statute, the North Carolina Supreme Court found that investment profit could be taken into consideration in ratemaking. See *State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Administrative Office*, 292 N.C. 1, 12-16, 231 S.E.2d 867, 874-75 (1977). That finding, however, does not necessarily apply to the new statute, and it is likely that the issue will have to be resolved in the courts once more.

The role of investment income in ratemaking was the subject of testimony at hearings on the rates filed under the new law, and under its view of that law the North Carolina Rate Bureau contends that investment income may not be considered. See Adams, *Insurers Debate Rates, Profits*, Raleigh, N.C., News & Observer, Feb. 17, 1978, at 10, col. 1. See generally R. COOPER,

Although rates for both essential and nonessential lines become effective without the Commissioner's approval,<sup>36</sup> the statute for the first time adequately outlines procedures under which the Commissioner may contest such rates after they are filed.<sup>37</sup> To do so he must hold a hearing<sup>38</sup> and, if he

INVESTMENT RETURN AND PROPERTY-LIABILITY INSURANCE RATEMAKING 10-17 (1974); R. KEETON, *supra* note 10, § 8.4(b), at 565.

The statute, however, does deal effectively with another question that had arisen in previous litigation. The statute specifies when the factors to be considered in ratemaking are to be based solely on North Carolina data and when countrywide data may be considered. N.C. GEN. STAT. § 58-124.19(2) (Cum. Supp. 1977) (essential lines); *id.* § 58-131.38(1) (nonessential lines). In an earlier case involving the sufficiency of evidence to support the Commissioner's disapproval of proposed homeowners insurance rates, the North Carolina Supreme Court had pointed out that the former statute permitted the Commissioner to consider "conflagration and catastrophe hazards, both within and without the State." *State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau*, 292 N.C. 471, 492, 234 S.E.2d 720, 731-32 (1977). The court implied, however, that the statute did not permit the use of countrywide data for the "experience" factor. *Id.* The court found that the Bureau had presented no substantial evidence that countrywide loss and expense data reflected North Carolina experience and that the Commissioner therefore was not required to accept the Bureau's use of countrywide data. The specificity of the new statute in addressing this point will eliminate future disputes on this issue.

One other provision relating to the factors to be considered in ratemaking appears to represent a direct legislative response to recent litigation. The new statute provides that, in connection with fire insurance, "consideration may be given to the experience of such fire insurance business during the most recent five-year period." N.C. GEN. STAT. § 58-124.19(3) (Cum. Supp. 1977) (emphasis added). The former statute had provided that "the Commissioner shall give consideration to . . . the experience of the fire insurance business during a period of not less than five years next preceding the year in which the review is made." Law of Mar. 6, 1945, ch. 380, § 1, 1945 N.C. Sess. Laws 443 (formerly codified at N.C. GEN. STAT. § 58-131.2 (1975)) (repealed 1977). On two occasions the North Carolina Supreme Court was faced with the question whether this provision set forth an absolute prerequisite to proper rate review, but on both occasions the court found it unnecessary to reach that issue. *See State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau*, 292 N.C. at 485, 234 S.E.2d at 727-28 (1977); *In re North Carolina Fire Ins. Rating Bureau*, 245 N.C. 444, 452, 96 S.E.2d 344, 350 (1956). The new statute, which clearly makes the consideration of such data optional, deals effectively with a requirement that had otherwise promised to be a continuing source of controversy.

36. The rates for nonessential lines take effect on the date specified in the filing. *See* notes 17, 18 & 20 and text accompanying notes 17-21 *supra*. Rates for essential lines take effect automatically on the date specified by the North Carolina Rate Bureau, following a 90-day waiting period. N.C. GEN. STAT. § 58-124.20(a) (Cum. Supp. 1977). Until July 1, 1979, the "total combined general rate level" for certain automobile coverages may not be increased more than six percent per year. *Id.* § 58-124.26. This was a compromise measure added to the legislation as a floor amendment in the house. INSTITUTE OF GOVERNMENT, NORTH CAROLINA LEGISLATION 1977, *supra* note 1, at 18. Fifteen days' notice of any changes in rates or coverage must be given to the insured and the agent. N.C. GEN. STAT. § 58-124.27 (Cum. Supp. 1977) (essential lines); *id.* § 58-131.59 (nonessential lines).

37. The North Carolina Supreme Court had pointed out that the former statute failed to "clearly state the exact procedure to be followed by the Commissioner" in approving or disapproving rates. *State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Administrative Office*, 292 N.C. 1, 9, 231 S.E.2d 867, 871 (1977). The new statute is obviously intended to deal with the former statute's procedural shortcomings, reflected in a series of recent insurance rate cases involving the Commissioner of Insurance. *See, e.g., State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Administrative Office*, 293 N.C. 365, 239 S.E.2d 48 (1977); *State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau*, 292 N.C. 471, 234 S.E.2d 720 (1977); *Foremost Ins. Co. v. Ingram*, 292 N.C. 244, 232 S.E.2d 414 (1977);

finds that the rates are not in compliance with the statutory standards,<sup>39</sup> he may disapprove the rates and declare them ineffective.<sup>40</sup> Any such decision is subject to judicial review,<sup>41</sup> but the insurers may continue using the rates pending such review, if the purportedly excessive premiums are placed in an escrow account.<sup>42</sup> If a member of the North Carolina Rate Bureau disagrees with a Bureau decision, the member may appeal to the Commissioner, who is required to hold a hearing on the matter.<sup>43</sup> In connection with the nonessential lines, parties other than the Commissioner or an insurer may also initiate administrative and judicial review of rates, rating plans, rating systems or underwriting rules promulgated by insurers or rating organizations.<sup>44</sup>

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State *ex rel.* Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 292 N.C. 70, 231 S.E.2d 882 (1977); State *ex rel.* Commissioner of Ins. v. North Carolina Auto. Rate Administrative Office, 292 N.C. 1, 231 S.E.2d 867 (1977). Of the five rate cases to reach the appellate courts in 1977, in only one was the Commissioner upheld. *See* Foremost Ins. Co. v. Ingram, 292 N.C. 244, 232 S.E.2d 414 (1977) (Commissioner properly allowed 10% reduction in mobile home insurance premiums as credit for proper tie-downs because such reduction was mandated by statute).

38. N.C. GEN. STAT. § 58-124.21 (Cum. Supp. 1977) (essential lines); *id.* § 58-131.42 (nonessential lines).

39. *Id.* § 58-124.19 (standards for essential lines); *id.* § 58-131.37 (standards for nonessential lines).

40. *Id.* § 58-124.21 (essential lines; providing that Commissioner "may issue his order" declaring rates ineffective (emphasis added)); *id.* § 58-131.42 (nonessential lines; providing that Commissioner "shall issue an order" declaring rates ineffective (emphasis added)).

41. *Id.* § 58-124.22(a) (essential lines); *id.* § 58-131.54(b) (nonessential lines). On its face the new law permits appeal to the courts from "any order or decision of the Commissioner" and does not require exhaustion of administrative remedies before seeking judicial review. *Id.* §§ 58-124.22(a), -131.54(b) (emphasis added). The courts nevertheless may require that a party exhaust his administrative remedies before seeking judicial review. *See generally* Daye, *North Carolina's New Administrative Procedure Act: An Interpretive Analysis*, 53 N.C.L. REV. 833, 904-08 (1975). Professor Daye, citing the judicial review provisions of the insurance statute as illustrative of the "needless variety" of the state's judicial review statutes, has "strongly recommended" that the legislature repeal the judicial review provisions contained in individual statutes. *Id.* at 899 & n.296, 900 n.301. Uniformity of procedures would be assured if judicial review of administrative decisions were available only under the Administrative Procedure Act, N.C. GEN. STAT. §§ 150A-1 to -64 (1974 & Cum. Supp. 1977). The new insurance statute takes no step in that direction, however, even though the Administrative Procedure Act is apparently broad enough to apply to review of insurance ratemaking. *See* Daye, *supra* at 872 n.187; *Survey of Developments in North Carolina Law*, 1976, 55 N.C.L. REV. 895, 1058 n.38 (1977).

42. N.C. GEN. STAT. § 58-124.22(b) (Cum. Supp. 1977) (essential lines); *id.* § 58-131.42(b) (nonessential lines).

43. *Id.* § 58-124.24. The statute does not specify a time period within which the Commissioner must hold the hearing. The Commissioner, therefore, could refuse to hold such a hearing until the member had sought review from the Bureau itself, in accordance with the procedures to be established under § 58-124.17(2).

44. The procedural steps required in order to obtain such review in connection with nonessential lines are outlined in great detail in the statute. "Any person aggrieved" may request in writing that the insurer or rating organization involved review its action and may subsequently request a hearing before the Commissioner. *Id.* § 58-131.53. Whenever the Commissioner issues an order or a decision without holding a hearing, the affected party may request a hearing, and again the exact procedures to be followed are set forth in the statute. *Id.* § 58-131.54(a).

The remaining substantive portions of the new law deal with the North Carolina Reinsurance Facility, a statutory reinsurance pool for high-risk insureds in the area of motor vehicle insurance.<sup>45</sup> The most significant change made by the new law in the operation of the Facility is the establishment of procedures designed to make the Facility self-sustaining. In the past, a high-risk insured whose coverage was ceded<sup>46</sup> to the Facility paid the same amount for insurance as the insured whose coverage was not ceded.<sup>47</sup> Under the new law, losses sustained by the Facility are to be recouped "either through surcharging persons reinsured by the Facility or by equitable pro rata assessment of member companies."<sup>48</sup> The member companies, in turn, are to recoup any such assessment by surcharging policyholders.<sup>49</sup> On the other hand, if the Facility should realize any gain, any balance remaining after losses of the Facility are defrayed is to be distributed to persons reinsured by the Facility.<sup>50</sup> The decision to surcharge insureds in order to recoup losses of the Facility represents an apparent

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45. See *id.* § 58-248.26 to .40 (1975 & Cum. Supp. 1977). All insurance companies licensed to write motor vehicle insurance in North Carolina are required to participate in the Facility. *Id.* § 58-248.34(e) (Cum. Supp. 1977). For a discussion of the Canadian Facility after which reinsurance facilities in the United States have been modeled, see D. REINMUTH & G. STONE, A STUDY OF ASSIGNED RISK PLANS 71-78 (1970) (report of Division of Industry Analysis, Bureau of Economics, Federal Trade Commission, to Department of Transportation). For a comparison of the reinsurance systems in force in 1975 in Massachusetts, North Carolina and South Carolina, see Lee & Formisano, *Automobile Insurance Markets: Developments in the Reinsurance Facility Technique*, 1975 INS. L.J. 9, 15-25. See also Lee & Formisano, *The North Carolina Plan: Blueprint for an Automobile Reinsurance Facility*, 1973 INS. L.J. 559.

The rates for motor vehicle insurance reinsured by the Facility are to be made by the Facility itself or by a rating organization acting on its behalf. N.C. GEN. STAT. § 58-248.33(1) (Cum. Supp. 1977). The rates must be filed with the Commissioner, and the procedures for administrative and judicial review are essentially the same as those prescribed for the essential lines in *id.* §§ 58-124.20 to .22. The rates must conform to the familiar standard—"neither excessive, inadequate nor unfairly discriminatory"—with the additional requirement that they be "calculated, insofar as is possible, to produce neither a profit nor a loss." *Id.* § 58-248.33(1).

The new law also details the role of the agent in determining whether particular coverage is to be rated at the Facility rate or the ordinary rate and establishes a detailed procedure for authorizing licensed agents to write insurance for the Facility. See *id.* §§ 58-248.32(b), 33(g)(6). See generally Lee & Formisano, *The North Carolina Plan*, *supra* at 569.

46. "'Cede' or 'cession' means the act of transferring the risk of loss from the individual insurer to all insurers through the operation of the facility." N.C. GEN. STAT. § 58-248.26(a) (Cum. Supp. 1977). The new law eliminates the previous 50% limit on risks which a company could cede to the Facility. See *id.* § 58-248.35.

47. See Law of Mar. 6, 1945, ch. 381, § 2, 1945 N.C. Sess. Laws 461 (formerly codified as amended at N.C. GEN. STAT. § 58-248.2 (1975)) (repealed 1977).

48. N.C. GEN. STAT. § 58-248.34(e) (Cum. Supp. 1977).

49. *Id.* § 58-248.34(f). This surcharge is to be assessed "on motor vehicle insurance policies issued by the member or through the Facility." *Id.* The implication is that the surcharge will not apply exclusively to policyholders whose coverage is ceded to the Facility.

50. *Id.* § 58-248.34(e). In accordance with the new provision requiring that gains be distributed to insureds, several sections of the statute were amended to delete references to gains being shared by the member companies. See, e.g., *id.* §§ 58-248.26(1), .29, .33(a), (g)(8).

rejection of the principle that the industry should "subsidize the substandard market."<sup>51</sup>

Despite its complexity, the new law is internally consistent and well-integrated with the retained portions of the old law. However, the most important aspect of the law—the new ratemaking procedures—is quite difficult to evaluate in the abstract; accordingly, how effective these procedures will be in eliminating the ratemaking problems of the recent past<sup>52</sup> remains to be seen.

### B. Construction of Policy Terms

In *Gaddy v. State Farm Mutual Automobile Insurance Co.*<sup>53</sup> the court of appeals found that the automobile for which coverage was sought was neither an "owned" nor a "non-owned" automobile under the terms of the policy.<sup>54</sup> This result was compelled by an earlier decision of the North Carolina Supreme Court, *Nationwide Mutual Insurance Co. v. Hayes*,<sup>55</sup> which had held that a properly executed certificate of title was the exclusive method of establishing ownership of an automobile.<sup>56</sup> In *Gaddy*, the named insured under the policy had purchased a used car from an automobile salesman who was the owner of the car, but who did not possess the certificate of title at the time of sale. When the insured's son was involved in an accident with plaintiff, the insurance company denied coverage.<sup>57</sup> The

51. D. REINMUTH & G. STONE, *supra* note 45, at 77.

52. In recent years, [the] Commissioner . . . has consistently refused to approve rate increases asked for by the bureaus. Just as consistently, the insurance industry has appealed and received court approval for the increases, but it has always been delayed in implementing the rate by the amount of time necessary to complete the court action.

INSTITUTE OF GOVERNMENT, NORTH CAROLINA LEGISLATION 1977, *supra* note 1, at 18.

The procedures under the new law designed to ensure prompt effectiveness of new rates and plans are already being put to the test. On February 27, 1978, the Commissioner of Insurance announced his disapproval of the new automobile insurance rates that had been filed by the North Carolina Rate Bureau, *see Adams, Auto Insurance Rate Hike Nixed*, Raleigh, N.C., News & Observer, Feb. 28, 1978, at 1, col. 1, and on March 12, 1978, the North Carolina Rate Bureau announced that it would appeal the Commissioner's ruling to the court of appeals and would put the new rates into effect pending the court's decision, *see Powell, Insurer Appeal Leads to Auto Rate Hikes*, Raleigh, N.C., News & Observer, Mar. 13, 1978, at 1, col. 1.

The 1977 General Assembly, recognizing the need for continued reevaluation of North Carolina insurance law, adopted Law of July 1, 1977, ch. 1028, 1977 N.C. Sess. Laws 1336, which instructs the Legislative Research Commission to study the state's insurance laws, "examining the effects of the 1977 General Assembly changes in the laws and anticipating other insurance law issues to come before the 1979 General Assembly." The Commission is to report to the 1979 General Assembly. As another means of ensuring reconsideration of North Carolina insurance law, the final section of the new law provides that the law shall expire September 1, 1980. Law of June 30, 1977, ch. 828, § 25, 1977 N.C. Sess. Laws 1119.

53. 32 N.C. App. 714, 233 S.E.2d 613 (1977).

54. *Id.* at 718, 233 S.E.2d at 615.

55. 276 N.C. 620, 174 S.E.2d 511 (1970).

56. *Id.* at 640, 174 S.E.2d at 524.

57. 32 N.C. App. at 715, 233 S.E.2d at 614.



superior court granted plaintiff's motion for summary judgment,<sup>58</sup> but the court of appeals reversed, citing *Hayes*.<sup>59</sup> The *Gaddy* court found that, within the terms of the policy, the vehicle was not "owned" because the insured had no properly executed certificate of title,<sup>60</sup> but the car was also *not* "non-owned" because it had been "furnished for the regular use of the insured."<sup>61</sup>

A standard automobile liability insurance policy<sup>62</sup> limits coverage to the named insured and to various other individuals who are defined in terms of their relationship with the named insured. Such a policy also limits coverage to automobiles that are either "owned" or "non-owned" as defined in the policy. An automobile that has been "furnished for regular use" of the insured is excluded from the definition of "non-owned" automobile, and, therefore, although the insured does not own it, it is not "non-owned" under the terms of the policy. The purpose of excluding such cars from coverage is to preclude a person, who has paid a premium to insure only one car, from borrowing or leasing a car for regular use and obtaining coverage for that car without paying an additional premium.<sup>63</sup> For the same reason, policies place certain limitations on coverage for a newly acquired car. Such a car is covered by an existing policy only if it replaces a previously owned car or if the insured notifies the insurance company of the acquisition during the policy period or within thirty days of the acquisition.<sup>64</sup>

In *Gaddy*, however, the court did not give sufficient consideration to the purpose such limitations are intended to serve. On the facts of *Gaddy*, it would have been appropriate for the court to ignore the technical question of ownership and to treat the car like any other newly acquired car, relying on the terms of the policy that establish certain limitations on coverage of newly acquired cars. This would have exposed the insurance company to no risk beyond that which it would have faced under its coverage of any newly acquired car. The court, however, relied on the certificate of title requirement established in *Hayes*. Although the denial of recovery to innocent accident victims on such technical grounds is particularly unfortunate, the court in *Gaddy* was bound to follow the precedent of *Hayes*. Consequently,

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58. *Id.*

59. 32 N.C. App. at 716, 233 S.E.2d at 614.

60. *Id.*

61. *Id.* at 716-17, 233 S.E.2d at 614-15.

62. See, e.g., R. KEETON, *supra* note 10, app. H, at 662 (Family Combination Automobile Policy Form).

63. *Id.* § 4.9(b), at 240.

64. See, e.g., *id.* app. H, at 662.

legislative action will be necessary before the courts can take a more flexible approach in such cases.<sup>65</sup>

In *DeBerry v. American Motorists Insurance Co.*,<sup>66</sup> the court of appeals considered whether direct physical impact between an automobile and the insured is necessary in order for the insured to be able to recover under a medical payments provision that covers injuries caused by accident "through being struck by an automobile."<sup>67</sup> The *DeBerry* court cited as controlling the decision reached in *Wachovia Bank & Trust Co. v. Westchester Fire Insurance Co.*,<sup>68</sup> in which the supreme court held that direct contact with the automobile is not required when the victim is a passenger in one car that is struck by another car. In *Gant v. Provident Life & Accident Insurance Co.*,<sup>69</sup> a much earlier case that involved an injury caused when a plank was thrown by the wheels of a car, the supreme court had denied recovery, holding that direct contact was required. Although the insurance company in *DeBerry* cited *Gant* and argued that there is a distinction between "collision" and "thrown object" cases, the court of appeals refused to recognize that distinction and held that *Wachovia* had overruled *Gant* by implication.<sup>70</sup> Thus, the court of appeals, in not requiring direct contact in *DeBerry*, aligned itself with the position of most jurisdictions on this issue.<sup>71</sup> The supreme court, however, has not spoken on the issue, since the decision in *Wachovia* did not directly overrule *Gant*. Whether thrown object cases are covered by the "struck by an automobile" clause therefore remains an open question in North Carolina, and its resolution must await a decision by the supreme court directly addressed to the problem.

65. For purposes of the joy-riding statute, the legislature has defined "owner" as "any person with a property interest in the motor-propelled conveyance." N.C. GEN. STAT. § 14-72.2(d) (Cum. Supp. 1977); see notes 87, 88 & 90 and text accompanying notes 87-90 *infra*. Although the concept of "property interest" embodied in that statute is not fully clarified, it probably does not require a "properly executed certificate of title"; use of a comparable definition of ownership for purposes of automobile liability insurance could eliminate the problem faced by the court in *Gaddy*.

66. 33 N.C. App. 639, 236 S.E.2d 380 (1977).

67. *Id.* at 640, 236 S.E.2d at 382. Plaintiff was injured when a third party drove a car into a rope barrier, causing it to break and strike plaintiff.

68. 276 N.C. 348, 172 S.E.2d 518 (1970).

69. 197 N.C. 122, 147 S.E. 740 (1929).

70. 33 N.C. App. at 643, 645, 236 S.E.2d at 383-84.

71. See *id.* at 644, 236 S.E.2d at 384 and cases cited therein. See also Annot., 33 A.L.R.3d 962 (1970). The *DeBerry* court noted that since 1945 South Carolina has been the only state to deny recovery on the ground that direct physical contact is required under the "struck by an automobile" clause. 33 N.C. App. at 644, 236 S.E.2d at 384.

On another issue in *DeBerry*, however, the court followed a minority rule. Again relying on *Wachovia*, the court rejected plaintiff's claim that recovery should be based on the combined medical payments coverage for both of plaintiff's cars rather than on just the coverage for any one car. See *id.* at 645-46, 236 S.E.2d at 385. A Florida court recently reached the same result. See *Chappelear v. Allstate Ins. Co.*, 347 So. 2d 477 (Fla. Dist. Ct. App. 1977).

Two cases decided by the court of appeals involved construction of the phrase "arising out of the ownership, maintenance or use of the . . . automobile." Although the cases shared some factual elements in that each involved gunshot wounds, opposite results were reached. In *Reliance Insurance Co. v. Walker*<sup>72</sup> the court of appeals found that when a truck is equipped with a permanently mounted gun rack, transportation of guns constitutes a "use" of the truck.<sup>73</sup> The court considered this finding sufficient to establish the causal relationship between the use and the related injury<sup>74</sup> necessary to bring the incident within the coverage of the policy.

Recovery was denied in *Nationwide Mutual Insurance Co. v. Knight*,<sup>75</sup> a case that also involved a gun, but under quite different circumstances. The insured and three others, in an apparent attempt to kidnap a child, pursued and deliberately rammed a car in which the child was riding with his father. Someone in the insured's car fired a gun into the other car, and the child was struck by a bullet.<sup>76</sup> After finding that the insurance company was liable for the property damage to the rammed car that arose from the insured's deliberate ramming,<sup>77</sup> the court rejected the claim that the gunshots constituted an accident "arising out of the ownership, maintenance or use" of the automobile.<sup>78</sup> The court found no causal relationship between the use of the car and the child's injury, rejecting defendant's attempt to establish "but for" causation.<sup>79</sup>

If "use" is construed to refer to "use as a vehicle,"<sup>80</sup> denial of recovery in *Knight* might be justified on that ground, since a deliberately inflicted gunshot wound is clearly not a "motoring risk."<sup>81</sup> Such a construction, however, would also compel a denial of recovery in *Walker*, as the spontaneous firing of a gun in a rack in a parked truck is also not a "motoring risk." Exactly what constitutes "use" of an automobile is a much-litigated issue, and, as these decisions indicate, the results depend so

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72. 33 N.C. App. 15, 234 S.E.2d 206, *cert. denied*, 293 N.C. 159, 236 S.E.2d 702 (1977).

73. *Id.* at 22, 234 S.E.2d at 211.

74. In *Walker*, a passenger was injured as he stood beside the truck when a rifle in the gun rack discharged spontaneously. *Id.* at 17, 234 S.E.2d at 208.

75. 34 N.C. App. 96, 237 S.E.2d 341, *cert. denied*, 293 N.C. 589, 239 S.E.2d 263 (1977).

76. *Id.* at 97, 237 S.E.2d at 343.

77. *Id.* at 98, 237 S.E.2d at 343-44 (citing *Nationwide Mut. Ins. Co. v. Roberts*, 261 N.C. 285, 134 S.E.2d 654 (1964) (even deliberate assault with automobile is accidental from victim's point of view)).

78. *Id.* at 100, 237 S.E.2d at 344.

79. *Id.* at 100, 237 S.E.2d at 344-45. The court distinguished *Walker* on the ground that *Walker* did not involve an intentional shooting and that there was no evidence in *Knight* that the insured's car was used to transport guns. *Id.* at 99, 237 S.E.2d at 344.

80. Professor Keeton has suggested this as a "fair construction." R. KEETON, *supra* note 10, § 5.2(b), at 275.

81. Professor Keeton refers to the "basic idea that the automobile policy is designed to cover *motoring risks*." *Id.* (emphasis added).

peculiarly on the facts of each case that it is difficult to formulate a unifying principle for resolution of the issue.<sup>82</sup>

### C. Construction of Statutory Provisions

In *Ford Marketing Corp. v. National Grange Mutual Insurance Co.*,<sup>83</sup> the court of appeals considered the issue of what constitutes "lawful possession" of a vehicle for purposes of automobile liability coverage under the omnibus clause.<sup>84</sup> Despite the definite inclination of the North Carolina courts, as evidenced in previous cases, to expand the coverage of the omnibus clause,<sup>85</sup> the court in *Ford Marketing* adopted a very restrictive view of "lawful possession." In *Ford Marketing*, the owner of a truck permitted his employee unrestricted, full-time use of the truck. The employee's son-in-law, who on a previous occasion had used the truck with the employee's express permission, used the truck without express permission and was involved in an accident. Although neither the owner nor his employee objected to the son-in-law's use of the truck, the court found that the son-in-law was not in lawful possession of the truck and, therefore, under the terms of the omnibus clause, he was not an insured.<sup>86</sup> The court determined that the son-in-law's use of the truck had been unlawful because

82. The interpretation of "use" is one of the insurance issues that, as Professor Keeton declares, "illustrates the case-by-case difficulties of applying standards that involve an element of evaluation as well as fact finding." *Id.* § 1.6, at 24. See generally 7 J. APPLEMAN, *INSURANCE LAW* § 4317 (rev. ed. 1962 & Supp. 1977); R. KEETON, *supra* note 10, §§ 5.2(b) (especially nn.2-4, discussing cases involving guns), 4.7(b) n.11 & 4.9(b) n.6.

83. 33 N.C. App. 297, 235 S.E.2d 82, *cert. denied*, 293 N.C. 253, 237 S.E.2d 535 (1977).

84. Automobile liability insurance policies are required to "insure the person named therein and any other person, as insured, using any such motor vehicle . . . with the express or implied permission of such named insured, or any other persons in lawful possession." N.C. GEN. STAT. § 20-279.21(b)(2) (Cum. Supp. 1977) (emphasis added).

85. The issues of lawful possession and coverage under the omnibus clause have been confronted in a series of recent cases in which the courts have interpreted omnibus clause coverage in a progressively broader manner: *Jernigan v. State Farm Mut. Auto. Ins. Co.*, 16 N.C. App. 46, 190 S.E.2d 866 (1972) (permission, express or implied, is essential element of lawful possession); *Iowa Nat'l Mut. Ins. Co. v. Broughton*, 283 N.C. 309, 196 S.E.2d 243 (1973) (permission is only one way to establish lawful possession, but second permittee is not within coverage of omnibus clause when first permittee had been forbidden to lend car); *Nationwide Mut. Ins. Co. v. Chantos*, 25 N.C. App. 482, 214 S.E.2d 438 (1975) (permission from first permittee, who was not prohibited from lending car, is sufficient to establish coverage under the omnibus clause); and *Packer v. Travelers Ins. Co.*, 28 N.C. App. 365, 221 S.E.2d 707 (1976) (plaintiff was in "lawful possession," although he did not have permission to use vehicle on personal business). See generally R. KEETON, *supra* note 10, § 4.7(b)(2); *Survey of Developments in North Carolina Law, 1976*, *supra* note 41, at 1060-61.

86. 33 N.C. App. at 303, 235 S.E.2d at 85. The owner's liability policy extended coverage to the owner and "any other person while using the pickup truck with [the owner's] permission." *Id.* at 299-300, 235 S.E.2d at 83-84. Recovery under this provision was not claimed on appeal, however, as plaintiff did not appeal the trial court's determination that the son-in-law had not had the owner's express or implied permission at the time of the accident. *Id.* at 300, 235 S.E.2d at 84.

it was in violation of the joy-riding statute<sup>87</sup> in effect at the time of the incident,<sup>88</sup> which had provided that consent to use the vehicle could not be implied from the owner's consent on a previous occasion.<sup>89</sup> Since the son-in-law's use of the truck under the circumstances was a misdemeanor, the court was unwilling to find that he was in lawful possession for purposes of liability insurance coverage; yet, in apparent recognition of the incongruity of the result it was compelled to reach, the court invited the legislature to review and remedy the situation.<sup>90</sup>

Omnibus clauses constitute a major source of insurance litigation, in part because they typically incorporate subjective standards such as "permission."<sup>91</sup> It has been suggested that in order to avoid the ambiguities created by the "permission" concept the omnibus clause should be rewritten to "cover all persons using the designated automobile unless under circumstances amounting to conversion."<sup>92</sup> In *Ford Marketing*, however, the court rejected plaintiff's argument that, by providing coverage for "any other person in lawful possession," the legislature intended to extend coverage to any driver of the insured automobile except a thief.<sup>93</sup> The court offered no support for its rejection of that argument, except to point to the

87. Any person who drives or otherwise takes and carries away a vehicle, not his own, without the consent of the owner thereof, and with intent to temporarily deprive said owner of his possession of such vehicle, without intent to steal the same, is guilty of a misdemeanor. The consent of the owner of a vehicle to its taking or driving shall not in any case be presumed or implied because of such owner's consent on a previous occasion to the taking or driving of such vehicle by the same or different person.

Law of Mar. 23, 1937, ch. 407, § 69, 1937 N.C. Pub. Laws 819 (formerly codified at N.C. GEN. STAT. § 20-105 (1965)) (repealed 1973), quoted in *Ford Marketing*, 33 N.C. App at 302, 235 S.E.2d at 85.

88. 33 N.C. App. at 302, 235 S.E.2d at 85. That law was later repealed and replaced by a similar statute:

(a) A person is guilty of an offense under this section if, without the consent of the owner, he takes, operates, or exercises control over . . . a motor vehicle . . . of another.

(b) Consent may not be presumed or implied because of the consent of the owner on a previous occasion . . . given to the person charged or to another person.

Law of Apr. 12, 1974, ch. 1330, § 38, 1973 N.C. Sess. Laws 2d Sess. 1974 690 (formerly codified at N.C. GEN. STAT. § 14-72.2(a), (b) (Cum. Supp. 1975)) (repealed 1977). Prior to *Ford Marketing*, this version was declared void for vagueness. See *State v. Graham*, 32 N.C. App. 601, 233 S.E.2d 615 (1977). Another version has since gone into effect. See note 90 *infra*.

89. See note 87 *supra*:

90. "If the legislature wishes to extend the owner's automobile liability insurance coverage of 'any other person in lawful possession' to encompass the facts of this case, it will have to adapt its criminal statutes to that intent." 33 N.C. App. at 303, 235 S.E.2d at 86. Before the *Ford Marketing* opinion was filed, however, the legislature had already rewritten the statute in an apparent response to *State v. Graham*, 32 N.C. App. 601, 233 S.E.2d 615 (1977). See note 88 *supra*. The current version reads in pertinent part: "A person is guilty of an offense under this section if, without the express or implied consent of the owner or person in lawful possession, he takes or operates an aircraft, motorboat, motor vehicle, or other motor-propelled conveyance of another." N.C. GEN. STAT. § 14-72.2(a) (Cum. Supp. 1977).

91. See R. KEETON, *supra* note 10, § 4.7(c), at 231.

92. *Id.* § 4.7(c), at 232.

93. 33 N.C. App. at 302, 235 S.E.2d at 85.

language of the then applicable joy-riding statute.<sup>94</sup> In view of the fact that the joy-riding statute has recently been amended,<sup>95</sup> it is apparent that the North Carolina omnibus clause could now be interpreted to exclude only "thieves" from its coverage. The North Carolina Supreme Court, however, has refused to entertain an appeal of *Ford Marketing*,<sup>96</sup> so a different construction of the omnibus clause must await another case.

In *Nationwide Mutual Insurance Co. v. Chantos*,<sup>97</sup> the supreme court considered the scope of the statutorily authorized reimbursement clause<sup>98</sup> in an automobile liability insurance policy. This clause provides that the insurer is entitled to reimbursement from the insured whenever the financial responsibility laws obligate the insurer to make any payments not otherwise required by the policy. Defendant, a second permittee who was in lawful possession of the car, negligently caused a collision that seriously injured a third party. The insurance company settled the victim's claim and obtained a release discharging defendant from any further liability to the victim.<sup>99</sup> The insurance company then claimed reimbursement from defendant on the ground that coverage was extended to defendant solely by reason of the omnibus clause<sup>100</sup> and that the company was therefore entitled to reimbursement under the terms of the statute and policy.<sup>101</sup> The court denied recovery under the reimbursement clause on the ground that the insurance policy was a contract between "the parties to the policy," not binding on a third party such as defendant in *Chantos* who had not consented to be bound.<sup>102</sup> Although such an agreement is authorized by statute, it is still "merely a contractual agreement" and therefore subject to the general principles of contract law.<sup>103</sup> The court finally noted that, while reimbursement could not be had under the policy, it might be available on a theory of a contract of indemnity implied in law.<sup>104</sup> Accordingly, the case was remanded for its fourth trial.<sup>105</sup>

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94. *Id.*

95. See notes 88 & 90 *supra*.

96. Certiorari was denied. 293 N.C. 253, 237 S.E.2d 535 (1977).

97. 293 N.C. 431, 238 S.E.2d 597 (1977). This case has reached the appellate courts on two previous occasions, 21 N.C. App. 129, 203 S.E.2d 421 (1974) (reversing trial court's grant of summary judgment in favor of defendant), and 25 N.C. App. 482, 214 S.E.2d 438, *cert. denied*, 287 N.C. 465, 215 S.E.2d 624 (1975) (again reversing trial court's grant of summary judgment in favor of defendant). See note 85 *supra*.

98. N.C. GEN. STAT. § 20-279.21(h) (1975).

99. 293 N.C. at 433, 238 S.E.2d at 600.

100. N.C. GEN. STAT. § 20-279.21(b)(2) (Cum. Supp. 1977), *quoted in* note 84 *supra*.

101. The insurance company later amended its complaint to allege that defendant had sought coverage under the owner's policy. 293 N.C. at 434, 238 S.E.2d at 600.

102. *Id.* at 438, 238 S.E.2d at 602-03. The court rejected the company's contention that defendant had sought the protection of the policy. *Id.* at 439, 238 S.E.2d at 603.

103. *Id.* at 438, 238 S.E.2d at 602.

104. *Id.* at 441-42, 238 S.E.2d at 605.

105. *Id.* at 446, 238 S.E.2d at 607; see note 97 *supra*.

The court formulated the issue in *Chantos* as "whether an insurer may have reimbursement from a stranger to the insurance contract whose negligence caused the injuries and damages for which the insurer had paid as a result of liability imposed by statute."<sup>106</sup> Although the question did not arise in *Chantos*, it is possible that a future case may present the question whether, for purposes of the reimbursement clause, there is any distinction between the "stranger" who is an additional insured under the policy and the "stranger" who is a statutory insured under the omnibus clause, as in *Chantos*.<sup>107</sup> The validity of such a distinction is questionable, for it would appear that even an additional insured has not consented to the contract and would therefore not be bound by the reimbursement clause. Under the principles applied in *Chantos*, therefore, the additional insured could be required to reimburse the insurance company only on a theory of indemnity. If the courts, however, are in fact willing to find liability on the indemnity theory, the inapplicability of the reimbursement clause would have little practical consequence.

SUSAN WRIGHT MASON

## X. PRISONERS' RIGHTS

### A. *Prisoners' Constitutional Rights*

In 1977 the United States Supreme Court decided two cases significantly affecting the scope of prisoners' constitutional rights that arose from North Carolina prisons. The issues presented by the cases, the degree to which the constitution affords inmates the right of free speech and assembly and the extent of a state's duty to provide legal assistance to prisoners, required the Court to strike a balance between the competing interests of the states in managing their correctional facilities and the prisoners in securing new rights. The Court's resolution of these issues reaffirms that states have a

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106. *Id.* at 439, 238 S.E.2d at 603.

107. The court of appeals has considered a case in which such a question might have been raised. In *Allstate Ins. Co. v. Webb*, 10 N.C. App. 672, 179 S.E.2d 803 (1971), defendant, an additional insured under his wife's insurance policy, had intentionally injured a man while driving his wife's car. After compensating the victim, the insurance company sought reimbursement from the husband for damages paid and expenses. Although defendant was an additional insured within the terms of the policy, the damages had been caused intentionally and thus were not covered by the terms of the policy. However, since statutory provisions take precedence over exceptions in the policy, the insurance company was required to pay. *Id.* at 673-74, 179 S.E.2d at 804-05. As defendant admitted that he was liable to the insurance company for the damages and challenged only the claim for expenses, the court did not discuss the propriety of claiming reimbursement from defendant and thus was not required to resolve the issue faced by the supreme court in *Chantos*. *Id.* at 674, 179 S.E.2d at 805.

constitutional obligation to provide certain basic services to prisoners while recognizing the existence of important state interests that substantially limit prisoners' first amendment rights.

In *Jones v. North Carolina Prisoners' Labor Union, Inc.*,<sup>1</sup> an organization of prison inmates<sup>2</sup> brought a civil rights action under 42 U.S.C. § 1983,<sup>3</sup> section one of the Civil Rights Act of 1871,<sup>4</sup> challenging regulations promulgated by the North Carolina Department of Correction that prevented inmates from forming or operating a union<sup>5</sup> as violations of the first and fourteenth amendments.<sup>6</sup> The inmates alleged that no-solicitation and no-meeting rules infringed their rights to engage in protected free speech, association and assembly.<sup>7</sup> The correction officials countered that they were willing to allow the prisoners' union to exist but that restrictions on solicitation and assembly were necessary considering the state's substantial interests in maintaining security and order within the penal system.<sup>8</sup> The United States Supreme Court held that the bans on inmate solicitation and group meetings were rationally related to the reasonable objectives of prison

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1. 433 U.S. 119 (1977).

2. The inmates' organization, self-denominated as the "Prisoners' Labor Union," was formed for the purpose of working "legally and peacefully to alter or eliminate practices of the Department of Correction which are thought to be in conflict with the just, constitutional and social interests of all persons." *North Carolina Prisoners' Labor Union, Inc. v. Jones*, 409 F. Supp. 937, 940 (E.D.N.C. 1976), *rev'd*, 433 U.S. 119 (1977). Despite its name, this organization of prisoners could not operate as a true labor union pursuant to the National Labor Relations Act, 29 U.S.C. § 152(2) (Supp. V 1975), 409 F. Supp. at 940 n.1, because governmental agencies, which the inmates would have to claim as employers, are exempted from coverage of the Act. See Clark & Parker, *The Labor Law Problems of the Prisoner*, 28 RUTGERS L. REV. 840, 857-58 (1975); Comeau, *Labor Unions for Prison Inmates: An Analysis of a Recent Proposal for the Organization of Inmate Labor*, 21 BUFFALO L. REV. 963, 963 (1972). Furthermore, collective bargaining for inmates with respect to pay, hours of employment and other terms and conditions of incarceration is illegal under N.C. GEN. STAT. § 95-98 (1975). 433 U.S. at 122 n.1. Collective bargaining by prison unions has been opposed primarily because correctional officials fear that it would present a serious threat to prison authority. Note, *Bargaining in Correctional Institutions: Restructuring the Relation Between the Inmate and the Prison Authority*, 81 YALE L.J. 726, 738-45 (1972).

3. 42 U.S.C. § 1983 (1970).

4. Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871).

5. The regulations prohibited inmates from soliciting other inmates to join the union, barred all meetings of the union and prevented delivery of packets of union publications that were mailed in bulk to prisoners for distribution. 433 U.S. at 121. The no-solicitation rule was somewhat curious in light of the fact that prison officials did not attempt to ban membership but only solicitation for membership; furthermore, there were no formal procedures for becoming a member since "a prisoner apparently [could] become a member simply by considering himself a member." *Id.* at 128-29.

6. *Id.* at 121.

7. *Id.*

8. *North Carolina Prisoners' Labor Union, Inc. v. Jones*, 409 F. Supp. 937, 941 (E.D.N.C. 1976), *rev'd*, 433 U.S. 119 (1977). See also *Procunier v. Martinez*, 416 U.S. 396, 412-13 (1974); *Nolan v. Fitzpatrick*, 451 F.2d 545, 549 (1st Cir. 1971); *Sostre v. McGinnis*, 442 F.2d 178, 199 (2d Cir. 1971), *cert. denied*, 405 U.S. 978 (1972); *Brown v. Peyton*, 437 F.2d 1228, 1231 (4th Cir. 1971); *Jackson v. Godwin*, 400 F.2d 529, 533 (5th Cir. 1968); *Carothers v. Follette*, 314 F. Supp. 1014, 1024 (S.D.N.Y. 1970).



administration and therefore did not violate the prisoners' first amendment rights.<sup>9</sup>

Traditionally, federal courts have displayed a broad "hands-off" attitude toward problems of prison administration;<sup>10</sup> nevertheless, when a prison regulation or practice offends fundamental constitutional guarantees, federal courts have consistently discharged their duty to protect constitutional rights.<sup>11</sup> In *Procunier v. Martinez*,<sup>12</sup> the Court enunciated a two prong test for determining whether a particular prison restriction constituted an impermissible restraint on first amendment liberties: "First [prison officials] must show that a regulation . . . furthers one or more of the substantial governmental interests of security, order, and rehabilitation. Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved."<sup>13</sup> Justice Rehnquist, while paying lip service to the *Procunier* standards, nevertheless announced substantial new restrictions on inmates' rights of free expression in *Jones* that signal a significant retreat from earlier positions taken by the Court in the area of prisoners' rights. The first prong of the *Procunier* test, the "justifiable purposes" standard, has been significantly diluted. Under the majority opinion in *Jones*, presumably any restriction will be upheld so long as it is "consistent with the inmates' status as prisoners"<sup>14</sup> and with the "legitimate operational considerations

9. 433 U.S. at 121, 129.

10. Fox, *The First Amendment Rights of Prisoners*, 63 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 162, 162-64 (1972). Courts have justified their refusal to review prisoners' complaints on the grounds that the judiciary is "ill equipped to deal with the increasingly urgent problem of prison administration and reform." *Procunier v. Martinez*, 416 U.S. 396, 405 (1974). See also *Banning v. Looney*, 213 F.2d 771 (10th Cir.), cert. denied, 348 U.S. 859 (1954). Courts have also justified the hands-off doctrine procedurally by citing the separation of powers of the executive and judicial branches. See, e.g., *United States v. Marchese*, 341 F.2d 782, 789 (9th Cir. 1965). See generally Millemann, *Protected Inmate Liberties: A Case for Judicial Responsibility*, 53 ORE. L. REV. 29 (1973); Kaufman, *Prison: The Judge's Dilemma*, 41 FORDHAM L. REV. 495 (1973); Singer, *Bringing the Constitution to Prison: Substantive Due Process and the Eighth Amendment*, 39 U. CIN. L. REV. 650 (1970); Spaeth, *The Courts' Responsibility for Prison Reform*, 16 VILL. L. REV. 1031 (1971); Note, *Decency and Fairness: An Emerging Judicial Role in Prison Reform*, 57 VA. L. REV. 841 (1971).

11. *Procunier v. Martinez*, 416 U.S. 396, 405 (1974). See also ABA Joint Committee on the Legal Status of Prisoners, *Standards Relating to the Legal Status of Prisoners* (Tent. Draft 1977), 14 AM. CRIM. L. REV. 377, 417-20 (1977).

12. 416 U.S. 396 (1973).

13. *Id.* at 413.

14. 433 U.S. at 129. While the Court has noted that first amendment guarantees must be "applied in light of the special characteristics of the . . . environment," *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 506 (1969), Justice Rehnquist emphasized the factor of the "inmates' status as prisoners" in analyzing the permissible scope of prison regulation of first amendment rights: "[T]his Court has long recognized that '[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.'" 433 U.S. at 125 (quoting *Price v. Johnston*, 334 U.S. 266, 285 (1948)). The *Procunier* Court, dealing with the first amendment rights of

of the institution."<sup>15</sup> While in *Procunier* prison officials had the burden of justifying the challenged regulation, *Jones* shifted the burden to the prisoners to show that the restricted activity was not inconsistent with legitimate penological objectives.<sup>16</sup> Furthermore, the Court in *Jones* gave broad discretion to corrections officials to determine what restrictions are necessary, revitalizing the old "hands-off" doctrine and holding that courts should defer to the expertise of prison officials so long as their judgment is "rational."<sup>17</sup> The Court also found that the second prong of the *Procunier* test, the "least drastic means" requirement, was satisfied in that the regulations were "drafted no more broadly than they need be to meet the perceived threat."<sup>18</sup> The Court's opinion has made this requirement more illusory than real: although the permissible breadth of the restrictions is based on the perceived threat, an evaluation of the validity of any threat to prison discipline is now largely entrusted to the discretion of the prison administrators.<sup>19</sup> In the *Jones* case, it is difficult to conceive of a broader restriction that would not ban inmate speech altogether; nevertheless, the Court found the restrictions sufficiently narrow.

The *Jones* decision will probably have repercussions in several areas. The Court's holding will undoubtedly have a severe chilling effect on prisoners' efforts to organize groups that serve several beneficial purposes.<sup>20</sup>

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prisoners for the first time, however, rejected the notion that the prison context should have an overriding significance: "[W]e reject any attempt to justify censorship of inmate correspondence merely by reference to certain assumptions about the legal status of prisoners." 416 U.S. at 409.

15. 433 U.S. at 130 (emphasis added). This language in the Court's opinion indicates a shift away from the strict requirement that "the regulation or practice in question must further an important or substantial governmental interest," *Procunier v. Martinez*, 416 U.S. at 413, to the more lenient standard that the restriction must be consistent with purposes of prison administration, e.g., the security of prisoners and guards and the minimization of prison administration expenses. See Fox, *supra* note 10, at 165; *Nolan v. Fitzpatrick*, 451 F.2d 545, 548-50 (1st Cir. 1971).

16. The district court in *Jones* found: "There is not one scintilla of evidence to suggest that the Union has been utilized to disrupt the operation of the penal institutions." 409 F. Supp. 937, 944 (E.D.N.C. 1976). The Supreme Court held: "[T]he burden was not on [prison administrators] to show affirmatively that the Union would be 'detrimental to proper penological objectives'" unless the inmates could produce "substantial evidence" that these beliefs were unreasonable. 433 U.S. at 128 (quoting 409 F. Supp. at 944).

17. 433 U.S. at 132.

18. *Id.* at 133.

19. Justice Marshall in his dissent noted that the problems of running a school or a city were also complex and difficult and that school principals and mayors possessed professional expertise, yet in first amendment cases the Court did not defer to the judgment of such officials simply because their judgment was rational. He further explained: "Because the prison administrator's business is to maintain order, 'there inheres the danger that he may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression.'" 433 U.S. at 141 (Marshall, J., dissenting) (quoting *Freedman v. Maryland*, 380 U.S. 51, 57-58 (1965)).

20. Inmate unions provide opportunities for prisoners to interact with each other and with

The Court's emphasis on judicial deference to penological expertise will discourage lower courts from finding violations of prisoners' constitutional rights and will permit prison administrators to limit significantly the free speech and assembly rights of inmates under the guise of preserving prison discipline.<sup>21</sup>

In *Bounds v. Smith*,<sup>22</sup> three inmates of North Carolina prisons filed suit under 42 U.S.C. § 1983<sup>23</sup> alleging that they had been denied access to the courts in violation of the fourteenth amendment by the state's failure to provide legal research facilities. The United States District Court for the Eastern District of North Carolina found that the sole prison library in the state was "severely inadequate" and ordered state authorities to devise a plan to correct the deficiency.<sup>24</sup> In response, the North Carolina Department of Correction proposed creation of seven libraries in prisons located throughout the state as well as a plan to train inmates as research assistants and typists to aid fellow prisoners.<sup>25</sup> The district court found the state's plan adequate and the United States Court of Appeals for the Fourth Circuit affirmed.<sup>26</sup> The United States Supreme Court affirmed in an opinion for the Court by Justice Marshall, who stated: "[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."<sup>27</sup>

The Supreme Court recognized as early as 1941 that prisoners have a constitutional right of access to the courts.<sup>28</sup> Although this basic right of access is now well established and prisoners are seeking post-conviction relief in ever increasing numbers,<sup>29</sup> the extent of a state's obligation in

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the prison administration, thus providing an important step towards rehabilitation. Many existing prison organizations are devoted to educational advancement, religious interests, recreational activities and even the sale of inmate craft items. P. KEVE, *PRISON LIFE AND HUMAN WORTH* 67-71 (1974); Fox, *supra* note 10, at 181.

21. See 433 U.S. at 141-42 (Marshall, J., dissenting); Fox, *supra* note 10, at 164.

22. 430 U.S. 817 (1977), *aff'g* 538 F.2d 541 (4th Cir. 1976).

23. 42 U.S.C. § 1983 (1970).

24. 430 U.S. at 818.

25. *Id.* at 819.

26. 538 F.2d 541 (4th Cir. 1976) (affirming district court's approval of state's plan with two minor modifications pertaining to equality of access to legal research facilities between male and female prisoners).

27. 430 U.S. at 828 (footnote omitted).

28. *Ex parte Hull*, 312 U.S. 546 (1941). The Court in *Ex parte Hull* invalidated a regulation prohibiting state prisoners from filing habeas corpus petitions unless the petitions had been drawn by a legal investigator for the parole board. *Id.* at 549.

29. In the decade between 1963 and 1973, prisoner petitions, including habeas corpus actions, in the federal courts soared from 4,337 to 17,218. This represents a 400% increase compared with a slightly more than 50% increase during the same period in all civil cases filed. ABA Joint Committee on the Legal Status of Prisoners, *supra* note 11, at 421.

assuring that prisoners have "meaningful access" to the courts is still a subject of much litigation.<sup>30</sup> Supreme Court decisions in recent years have gradually expanded the list of rights necessary for prisoners to have effective access to courts for adjudication of their claims.<sup>31</sup> In *Bounds* the Court has signalled a halt to this expansive trend by reaffirming its earlier position<sup>32</sup> and refusing to find that the right of meaningful access requires a state to provide independent legal advisors for inmates.<sup>33</sup>

State correctional officials opposed the establishment of prison law libraries primarily on the ground that the right of a prisoner to bring a federal habeas corpus or civil rights action is a federal statutory right rather than a constitutional right; consequently, the duty of the state is merely negative: it must not act in ways that interfere with the exercise of such federal rights.<sup>34</sup> Justice Marshall announced a "fundamental constitutional right of access to the courts"<sup>35</sup> that not only proscribes overly restrictive prison regulations

30. *Id.*

31. *See, e.g.,* Griffin v. Illinois, 351 U.S. 12 (1956) (states must provide trial records to inmates unable to buy them); Burns v. Ohio, 360 U.S. 252 (1959) (indigent prisoners must be allowed to file appeals and habeas corpus petitions without payment of docket fees); Long v. District Ct., 385 U.S. 192 (1966) (states must provide transcript of post conviction hearing); Gardner v. California, 393 U.S. 367 (1969) (states must provide habeas corpus transcript); Johnson v. Avery, 393 U.S. 483 (1969) (regulation prohibiting prisoners from assisting each other with habeas corpus applications and other legal matters unconstitutional); Procunier v. Martinez, 416 U.S. 396 (1974) (regulations barring law students and paralegals from seeing inmate clients unconstitutional); Wolff v. McDonnell, 418 U.S. 539 (1974) (regulation prohibiting jailhouse lawyers from assisting prisoners in civil rights actions unconstitutional). *See generally* Alpert, *Prisoners' Right of Access to the Courts: Planning for Legal Aid*, 51 WASH. L. REV. 653 (1976); Wedlock, *The Emerging Rights of the Confined: Access to the Courts and Counsel*, 25 S.C.L. REV. 605 (1973); Note, *The Expansion of a Prisoner's Right of Access to the Courts*, 1 CAPITAL U.L. REV. 192 (1972).

32. In *Younger v. Gilmore*, 404 U.S. 15 (1971), *aff'g per curiam* *Gilmore v. Lynch*, 319 F. Supp. 105 (N.D. Cal. 1970), the Supreme Court affirmed the decision of a three judge court that a state has an affirmative constitutional duty to furnish law libraries to prisoners or to provide them with professional or quasi-professional legal assistance. The test to be used was whether "indigent prisoners are given adequate means of obtaining the legal expertise necessary to obtain judicial consideration of alleged grievances cognizable by the Courts." 319 F. Supp. at 112.

33. The inmates sought to require the state to set up an independent attorney's office to provide prisoners with additional assistance. The Fourth Circuit, relying on *Ross v. Moffitt*, 417 U.S. 600 (1974) (right of meaningful access to the courts does not require appointment of counsel to file petitions for discretionary review in state courts), found that an independent attorney's office was an alternative to providing adequate legal research facilities. 538 F.2d at 544. *See also* Kirby v. Ciccone, 491 F.2d 1310, 1312 (8th Cir. 1974).

34. 430 U.S. at 823. The State, relying on *Johnson v. Avery*, 393 U.S. 483 (1969), which struck down a regulation prohibiting prisoners from assisting each other with habeas corpus applications and other legal matters, argued that as long as it permitted writ writers to function and did not restrict inmate communication on legal matters, it had satisfied its constitutional obligation and had no further obligation to spend state funds to implement affirmatively the right of access. *See also id.* at 833-36. (Burger, C.J., dissenting).

35. 430 U.S. at 828. Justice Marshall's majority opinion, however, did not make the source of this fundamental constitutional right clear. It stated that "habeas corpus and civil rights actions are of 'fundamental importance . . . in our constitutional scheme' because they

but also places affirmative obligations on the states to assure prisoners meaningful access to the courts.<sup>36</sup> The affirmative obligation placed on the states requires only that correctional officials offer some form of basic assistance to prisoners with legal problems; providing independent legal advisors is an alternative method of meeting this obligation rather than an additional requirement.<sup>37</sup>

While the Court's decision is an important step toward facilitating judicial review of prisoners' claims, full implementation of the right of a prisoner to seek judicial relief would require the states to provide independent legal advisors for inmates.<sup>38</sup> The Supreme Court has recognized the need of prisoners for legal services in a number of contexts<sup>39</sup> but has refrained from requiring states to provide counsel in prison matters largely because of the concern that it would create an unreasonable financial burden on the states and because alternative methods have been considered adequate to satisfy the needs of prisoners for legal services.<sup>40</sup> There are, however, many justifications for an expansive right to counsel for prison-

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directly protect our most valued rights." *Id.* at 827 (quoting *Johnson v. Avery*, 393 U.S. 483, 485 (1969)). The Court in *Wolff v. McDonnell*, 418 U.S. 539 (1974), held: "The right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Id.* at 579.

36. Justice Marshall asserted that Supreme Court decisions had "consistently required States to shoulder affirmative obligations,"<sup>41</sup> but cited only cases requiring state expenditures for indigent defendants at trial and in appeals as of right, not for prisoners making collateral attacks on their convictions. 430 U.S. at 824-25 (citing *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Douglas v. California*, 372 U.S. 353 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

37. *Id.* at 830-32.

38. In *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932), the Supreme Court stated: "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." The ABA Joint Committee on the Legal Status of Prisoners took the position that any scheme for providing legal services to inmates should reflect the structure established for making legal services available to free citizens. The Joint Committee concluded in standard 2.2(b): "Prisoners should be entitled to retain counsel or an advisor of their own choosing when able to do so and, when indigent, to have legal assistance provided for them." ABA Joint Committee on the Legal Status of Prisoners, *supra* note 11, at 426-29.

39. See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Douglas v. California*, 372 U.S. 353 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

40. ABA Joint Committee on the Legal Status of Prisoners, *supra* note 11, at 427-28. See also *Baxter v. Palmigiano*, 425 U.S. 308 (1976); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (no right to counsel in prison disciplinary proceedings); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (states are not constitutionally obliged to provide counsel in all probation and parole revocation proceedings but should do so when indigent probationer or parolee may have difficulty in presenting his version of disputed facts).

North Carolina authorizes the expenditure of state funds for appointment of counsel in some post-conviction proceedings for prisoners whose claims survive initial review by the courts. N.C. GEN. STAT. § 7A-451 (Cum. Supp. 1977). This statute, however, does not cover appointment of counsel in federal habeas corpus proceedings or state or federal civil rights actions. 430 U.S. at 828 n.17. See also *Ross v. Moffitt*, 417 U.S. 600 (1974) (prisoner seeking discretionary review is not denied meaningful access by failure of state to appoint counsel).

ers.<sup>41</sup> A frequently cited justification is that the assurance of fairness and the protection against arbitrary and erroneous decisions is essential to uphold the integrity of the correctional system.<sup>42</sup> The protection of constitutional rights should not be unnecessarily restricted by the cost of implementation.<sup>43</sup> Furthermore, prisoners have a unique need for legal assistance that cannot be adequately met merely by providing access to legal materials.<sup>44</sup> The presence of counsel would also further legitimate state interests: lawyers would be able to mediate many prisoner complaints or to convince an inmate that a particular cause of action will be unsuccessful, thus saving valuable court time; in addition, positive contact with the judicial process would further rehabilitation goals.<sup>45</sup>

### B. Parole

In adopting the parole procedure changes recommended by the Criminal Code Commission, the 1977 General Assembly assured prison inmates of periodic parole review while giving trial judges and prosecuting attorneys more influence in the parole process.<sup>46</sup> The most significant changes from present procedure are the time-served eligibility requirements<sup>47</sup> and the

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41. See ABA Resource Center on Correctional Law and Legal Services, *Providing Legal Services to Prisoners*, 8 GA. L. REV. 363 (1974); Jacob & Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process*, 18 KAN. L. REV. 493 (1970).

42. ABA Joint Committee on the Legal Status of Prisoners, *supra* note 11, at 427. See also *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *In re Gault*, 387 U.S. 1 (1967); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

43. The ABA Joint Committee on the Legal Status of Prisoners estimates that between 460 and 900 lawyers would be required to provide legal services to all inmates in the United States. The ABA Correctional Economics Center estimates that the annual per prisoner cost of providing this level of legal services would be \$75. Such a program, if implemented, would raise the total annual cost per inmate by less than 1.1%. ABA Joint Committee on the Legal Status of Prisoners, *supra* note 11, at 428-29.

44. Confinement often precludes a prisoner from gathering the information necessary for a successful lawsuit. Prison libraries rarely contain the facilities for adequate research of legal issues. In addition, many prisoners are either illiterate or incapable of handling even simple legal matters. *Id.* at 427.

45. 430 U.S. at 831. In a national survey, nearly 95% of state corrections officials responding supported creation and expansion of prison legal services. Over 80% believed that the furnishing of legal services would provide a safety valve for inmate grievances, reduce inmate power structures, reduce tensions from unresolved legal problems and contribute to rehabilitation by providing a positive experience with the legal system. Cardarelli & Finkelstein, *Correctional Administrators Assess the Adequacy and Impact of Prison Legal Services Programs in the United States*, 65 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 91, 95-99 (1974). See also Champagne & Haas, *The Impact of Johnson v. Avery on Prison Administration*, 43 TENN. L. REV. 275, 295-99 (1976); Wexler, *Counseling Convicts: The Lawyer's Role in Uncovering Legitimate Claims*, 11 ARIZ. L. REV. 629 (1969).

46. The new parole provisions appear in N.C. GEN. STAT. §§ 1371 to -1377 (Cum. Supp. 1977). These laws do not apply to persons sentenced before July 1, 1978. Law of June 23, 1977, ch. 711, § 39, 1977 N.C. Sess. Laws 900. See NORTH CAROLINA CRIMINAL CODE COMMISSION, LEGISLATIVE PROGRAM AND REPORT TO THE GENERAL ASSEMBLY OF NORTH CAROLINA 137-39 (1977).

47. N.C. GEN. STAT. § 15A-1371(a) (Cum. Supp. 1977).

permitting of appeal from a parole revocation.<sup>48</sup> The due process requirements for parole revocation hearings, as set forth in the United States Supreme Court's decision in *Morrissey v. Brewer*,<sup>49</sup> have also been codified with statutory time limits for holding such hearings.<sup>50</sup> On the whole the new procedures attempt to prevent those paroles that impair the criminal sentencing process while recognizing the prisoner's interest in an early parole.

Until July 1978, when the legislature's changes went into effect, North Carolina prisoners were eligible for parole after serving one-fourth of a determinate sentence or one-fourth of the minimum of an indeterminate sentence.<sup>51</sup> Now, G.S. 15A-1371(a) makes a prisoner eligible for parole consideration at any time unless his sentence includes a minimum term or he is serving a term of life imprisonment.<sup>52</sup> In an effort to increase the importance of a judge's minimum sentence,<sup>53</sup> a prisoner with a sentence that includes a minimum term is eligible for parole only after serving that minimum term or one-fifth of the maximum allowed by law, whichever is less.<sup>54</sup> This provision perhaps will ease the frustration that some trial judges feel toward the parole process<sup>55</sup> by giving the trial judge some control over when a prisoner might be released on parole. Previously, North Carolina courts held this decision to be the sole responsibility of the Parole Commission.<sup>56</sup>

Whereas the former North Carolina provision concerning parole did not specifically require that prisoners be considered for parole once they became eligible,<sup>57</sup> newly enacted G.S. 15A-1371(b) mandates that once a prisoner is eligible for parole he must be considered at least once a year until parole is

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48. *Id.* § 15A-1377.

49. 408 U.S. 471 (1972).

50. N.C. GEN. STAT. § 15A-1376 (Cum. Supp. 1977).

51. Law of May 10, 1935, ch. 414, § 8, 1935 N.C. Sess. Laws 628 (formerly codified as amended at N.C. GEN. STAT. § 148-58 (1974)) (repealed 1977).

52. N.C. GEN. STAT. § 15A-1371(a) (Cum. Supp. 1977).

Under the former law a person serving a life sentence was eligible for parole after serving 20 years. Law of May 10, 1935, ch. 414, § 58, 1935 N.C. Sess. Laws 628 (formerly codified as amended at N.C. GEN. STAT. § 148-58 (1974)) (repealed 1977). Section 15A-1371, however, has no provision for parole from a determinate life sentence although a person serving an indeterminate sentence with life as the maximum would be eligible for parole after 20 years or the length of the minimum sentence, whichever is less.

53. See N.C. GEN. STAT. § 15A-1371(a), Official Commentary (Cum. Supp. 1977).

54. *Id.* § 15A-1371(a).

55. See *State v. Snowden*, 26 N.C. App. 45, 215 S.E.2d 157 (1975) (trial judge imposes unusually long sentences because of dissatisfaction with length of time offenders remain in prison).

56. *Id.* at 48, 215 S.E.2d at 159.

57. Law of May 10, 1935, ch. 414, § 8, 1935 N.C. Sess. Laws 628 (formerly codified as amended at N.C. GEN. STAT. § 148-58 (1974)) (repealed 1977).

granted.<sup>58</sup> Moreover, to assure that all the facts will be considered when reviewing the eligibility of a prisoner who has served less than one-half of his maximum sentence, the Parole Commission must now notify the district attorney for the district where the prisoner was convicted.<sup>59</sup> Upon notification, the district attorney can ask the parole commission to conduct its considerations publicly.<sup>60</sup> Although there is no indication that G.S. 15A-1371(b) empowers the district attorney to present evidence against the granting of parole, placing the process in the public view should serve to intensify the Commission's scrutiny.<sup>61</sup>

The new parole law affects not only the eligibility of the prisoner seeking parole; the parolee facing the possibility of a parole revocation will also find that his rights have changed significantly. Prior to 1975, North Carolina courts held that upon revocation a parolee was not entitled to credit the time spent on parole against his active sentence.<sup>62</sup> In 1975, the legislature passed an amendment to the general statutes that essentially overruled these decisions and permitted parole time to be credited against an active sentence.<sup>63</sup> Now, G.S. 15A-1373(d)(2) reflects a further change in the legislature's position. Although the new parole law gives the parolee credit against his active sentence for all time spent in custody as a result of any revocation proceedings,<sup>64</sup> no credit is given for time spent on parole prior to revocation.<sup>65</sup> Prior to 1977, when a parole revocation was based on the commission of a new crime, the Parole Commission could in its discretion direct that the unserved portion of the parolee's sentence be served at the end of the new sentence.<sup>66</sup> Since this provision was not expressly carried over to the new parole law, it is questionable whether the Commission still possesses this power. If the Commission does not have this power and the unserved portion of the old sentence is served concurrently with any newly imposed sentence, the provision preventing credit against an active sentence

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58. N.C. GEN. STAT. § 15A-1371(b)(2) (Cum. Supp. 1977).

59. *Id.*

60. *Id.* Section 15A-1371(d) codifies the only legitimate reasons for denying parole. *See id.* § 1371(d), Official Commentary.

61. Under *id.* § 15A-1371(f), the prisoner who has been unable to qualify for parole must be paroled 6 months prior to the end of his sentence. The former statute, Law of June 16, 1975, ch. 618, § 1, 1975 N.C. Sess. Laws 736 (formerly codified at N.C. GEN. STAT. § 148-60.2 (Cum. Supp. 1975)) (repealed 1977), mandated parole 90 days prior to the expiration of a prisoner's sentence.

62. *State v. Davis*, 19 N.C. App. 459, 199 S.E.2d 37 (1973).

63. Law of June 23, 1975, ch. 720, § 3, 1975 N.C. Sess. Laws 973 (formerly codified at N.C. GEN. STAT. § 148-58.1 (Cum. Supp. 1975)) (amending Law of Feb. 3, 1953, ch. 17, § 7, 1953 N.C. Sess. Laws 12) (repealed 1977).

64. N.C. GEN. STAT. § 15A-1373(d)(2) (Cum. Supp. 1977).

65. *Id.* § 15A-1373, Official Commentary.

66. Law of May 10, 1935, ch. 414, § 12, 1935 N.C. Sess. Laws 628 (formerly codified as amended at N.C. GEN. STAT. § 148-62 (1974)) (repealed 1977).



for time spent on parole would only be crucial when no new crime has been committed.<sup>67</sup>

Under a provision carried over from the former statute,<sup>68</sup> a parolee is subject to arrest for a violation of a condition of parole<sup>69</sup> only upon an order of revocation from the Parole Commission.<sup>70</sup> In what appears to be a change from present practice,<sup>71</sup> however, the new law permits the revocation hearing to be held without first arresting the parolee.<sup>72</sup> Although the parolee's due process rights are protected under the Parole Commission's administrative regulations,<sup>73</sup> G.S. 15A-1376 is a codification of the due process requirements of a parole revocation hearing as set forth in *Morrissey v. Brewer*.<sup>74</sup> As suggested by *Morrissey*,<sup>75</sup> the new statute requires a preliminary hearing to determine whether there is probable cause to believe that a condition of parole has been violated.<sup>76</sup> The Parole Commission is not required to order the arrest of a parolee before holding a revocation hearing,<sup>77</sup> but when a parolee is arrested for violating a condition of parole, the new statute directs that the preliminary hearing be held within four working days of the arrest.<sup>78</sup> If the hearing is not held within this time limit, the parolee must be released on parole pending a hearing.<sup>79</sup> The final revocation hearing must be held within forty-five days of the parolee's reconfine-ment,<sup>80</sup> thereby placing a definite time limit on *Morrissey*'s requirement that the hearing be held within a reasonable time.<sup>81</sup>

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67. Under N.C. GEN. STAT. § 15A-1373(d)(1) (Cum. Supp. 1977), when a term of parole has been revoked, the parolee must be recommitted for the unserved portion of the maximum term or six months, whichever is greater.

68. Law of May 10, 1955, ch. 867, § 6, 1955 N.C. Sess. Laws 815 (formerly codified at N.C. GEN. STAT. § 148-61.1 (1964)) (repealed 1977).

69. N.C. GEN. STAT. § 15A-1374 (Cum. Supp. 1977).

70. *Id.* § 15A-1376(a).

71. See Clarke, *Probation and Parole in North Carolina: Revocation Procedure and Related Issues*, 13 WAKE FOREST L. REV. 5, 60 (1977).

72. N.C. GEN. STAT. § 15A-1376(a) (Cum. Supp. 1977).

73. N.C. ADMIN. CODE tit. 5, ch. 4F.0400 (1976).

74. 408 U.S. 471 (1972); see N.C. GEN. STAT. § 15A-1376, Official Commentary (Cum. Supp. 1977). In *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), the Supreme Court said that counsel should be provided if requested by the parolee facing the possibility of parole revocation if the parolee has a timely and colorable claim that he is innocent of violating the conditions of parole or that, even if he did violate parole, there are complex reasons why revocation is inappropriate. *Id.* at 790. N.C. GEN. STAT. § 148-62.1 (Cum. Supp. 1977) permits the appointment of counsel for indigents at parole revocation hearings.

75. 408 U.S. at 485-87.

76. N.C. GEN. STAT. § 15A-1376(b) (Cum. Supp. 1977).

77. See discussion in text accompanying notes 69-76 *supra*.

78. N.C. GEN. STAT. § 15A-1376(b) (Cum. Supp. 1977). *Morrissey* requires the preliminary hearing to be held "as promptly as convenient after arrest." 408 U.S. at 485.

79. N.C. GEN. STAT. § 15A-1376(b) (Cum. Supp. 1977).

80. *Id.* § 15A-1376(e).

81. 408 U.S. at 488.

Under former North Carolina law, review of a parole revocation was limited because there was no statutory provision for appeal<sup>82</sup> and the Department of Correction is exempt from review under the Administrative Procedures Act.<sup>83</sup> Although one federal court has allowed review of a Parole Commission determination by means of habeas corpus,<sup>84</sup> and North Carolina courts have reviewed laws affecting the power of the Parole Commission under the Declaratory Judgment Act,<sup>85</sup> the concept of separation of powers and the discretionary nature of parole revocation have for the most part discouraged review of parole revocations.<sup>86</sup> Therefore, G.S. 15A-1377 is perhaps one of the most important changes in the parole procedures from the parolee's standpoint because it permits a parolee to appeal a parole revocation under North Carolina's Administrative Procedures Act.<sup>87</sup> The standard of review of a discretionary act of the Parole Commission may not be very demanding, but at least there is now the possibility of some review.

EUGENE F. DAUCHERT, JR.

THOMAS C. POLLARD

## XI. PROPERTY

### A. Deeds

In *Rauchfuss v. Rauchfuss*<sup>1</sup> the North Carolina Court of Appeals confronted the issue whether a husband, by causing a mortgagee to reconvey property to him individually that had previously been held in a tenancy by the entirety, could terminate any interest of the wife in the property. The subject property in *Rauchfuss* (land) had been conveyed to a corporation as security for a loan, and the corporation agreed to reconvey the property to the husband and wife upon payment of the loan.<sup>2</sup> The husband paid off the loan and the corporation reconveyed the property to him alone.<sup>3</sup> The North Carolina Court of Appeals held that the actions of the husband did not cut

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82. See Clarke, *supra* note 71, at 69.

83. N.C. GEN. STAT. § 150A-1 (Cum. Supp. 1977) specifically exempts the Department of Correction from review under the Act.

84. *Howie v. Byrd*, 396 F. Supp. 117 (W.D.N.C. 1975), *rev'd mem.*, 532 F.2d 750 (4th Cir. 1976).

85. N.C. GEN. STAT. §§ 1-253 to -267 (1969); see *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971).

86. See *Jernigan v. State*, 279 N.C. 556, 563-65, 184 S.E.2d 259, 265-66 (1971).

87. N.C. GEN. STAT. § 15A-1377 (Cum. Supp. 1977).

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1. 33 N.C. App. 108, 234 S.E.2d 423 (1977).

2. *Id.* at 110-11, 234 S.E.2d at 425.

3. *Id.* at 111, 234 S.E.2d at 425.

off the interests of the wife and, using the resulting trust and constructive trust devices, held that the wife was entitled to an undivided one-half interest in the property.<sup>4</sup>

In North Carolina a deed to a man and wife vests title in them as tenants by the entirety, even though the man furnishes the entire consideration.<sup>5</sup> The law presumes that the husband intended a gift to the wife of her interest in the property.<sup>6</sup> The land in question in *Rauchfuss* was purchased with funds derived from the sale of entirety property; consequently, the wife was deemed to have furnished some consideration for the property to support a resulting trust in her favor.<sup>7</sup>

The court of appeals also found the principles of a constructive trust applicable.<sup>8</sup> The court noted that it was not necessary to prove fraud to imply such a trust; all that need be shown is that legal title had been "obtained in violation, express or implied, of some duty owed to the one who is equitably entitled [to the property]." "In order to find the existence

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4. *Id.* at 113-16, 234 S.E.2d at 426-28.

5. *See, e.g.,* *Freeze v. Congleton*, 276 N.C. 178, 171 S.E.2d 424 (1970); *Combs v. Combs*, 273 N.C. 462, 160 S.E.2d 308 (1968); *Bowling v. Bowling*, 252 N.C. 527, 114 S.E.2d 228 (1960). An estate by the entirety in personal property is not recognized in North Carolina. When land held as a tenancy by the entirety is sold, the proceeds derived from the sale are personalty and belong to the husband and wife as tenants in common. The wife's share remains her sole and separate estate. N.C. CONST. art. X, § 4; N.C. GEN. STAT. § 52-1 (1976); *Bowling v. Bowling*, 252 N.C. at 531, 114 S.E.2d at 231.

6. *Waddell v. Carson*, 245 N.C. 669, 97 S.E.2d 222 (1957); *Honeycutt v. Citizens Nat'l Bank*, 242 N.C. 734, 89 S.E.2d 598 (1955); *Strange v. Sink*, 27 N.C. App. 113, 218 S.E.2d 196 (1975). To rebut this presumption of a gift to the wife and to establish a resulting trust in favor of the husband, the evidence must be clear, strong, cogent and convincing. *Honeycutt v. Citizens Nat'l Bank*, 242 N.C. at 741, 89 S.E.2d at 604. Conversely, when a husband acquires possession of the separate property of his wife, even if done with her consent, the transaction does not raise the presumption of a gift from the wife to the husband; instead, he is deemed to hold it in trust for her benefit. *Bowling v. Bowling*, 252 N.C. 527, 114 S.E.2d 228 (1960); *Dunn v. Dunn*, 242 N.C. 234, 87 S.E.2d 308 (1955); *Kelly Springfield Tire Co. v. Lester*, 190 N.C. 411, 130 S.E. 45 (1925).

7. 33 N.C. App. at 113, 234 S.E.2d at 426. A resulting trust arises by operation of law when a person conveys property under circumstances that raise the inference that he does not intend the taker to have both the legal and equitable title to the property. *Strange v. Sink*, 27 N.C. App. 113, 116, 218 S.E.2d 196, 198 (1975). A resulting trust differs from a constructive trust in that it is primarily a means of effectuating the inferred intents of the parties rather than a remedial device for frustrating an evil intent or the making of a restitution. 4A R. POWELL, *THE LAW OF REAL PROPERTY* ¶ 590 (1977).

8. A constructive trust arises when a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. *Tractor & Auto Supply Co. v. Fayetteville Tractor & Equip. Co.*, 2 N.C. App. 531, 542-44, 163 S.E.2d 510, 517-18 (1968). A common, indispensable element of those cases in which a constructive trust is deemed to arise is the presence of fraud, the breach of a duty or some other wrongdoing by the holder of the property. *Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 212, 171 S.E.2d 873, 882 (1970). *See generally* Lauerma, *Constructive Trusts and Restitutionary Liens in North Carolina*, 45 N.C.L. REV. 424 (1967); *see also* R. POWELL, *supra* note 7, ¶ 593.

9. 33 N.C. App. at 113, 234 S.E.2d at 426 (quoting *Colwell Elec. Co. v. Kale-Barnwell Realty & Constr. Co.*, 267 N.C. 714, 719, 148 S.E.2d 856, 860 (1966)).

of some duty, the court relied on several cases finding that the marital relationship is one of utmost confidence and that any transaction between the parties is held to a high standard of fairness.<sup>10</sup> From these cases the court inferred a strict fiduciary duty on the part of the husband and found that his actions had violated this duty, thus justifying the imposition of a constructive trust on the property for the benefit of the wife.<sup>11</sup>

The court's decision is significant for two reasons. First, the court has substantially increased the importance of the "confidential relationship" pertaining between a husband and wife as it affects legal acts between parties. Previously, the concept had been invoked only in cases concerning transactions *between* the husband and wife; usually some element of fraud or overreaching was present.<sup>12</sup> The court's opinion in *Rauchfuss* expands this concept to encompass transactions between the husband and a third party. Second, the court has substantially lessened the burden of proof that the wife must meet in order to obtain relief. Whereas the husband must produce "clear, strong, cogent and convincing" proof,<sup>13</sup> the wife need only show "the slightest trace of undue influence or unfair advantage."<sup>14</sup> Although the court reached an equitable result in *Rauchfuss*, it did not need to apply different burdens of proof in order to protect the wife's interest in the property.<sup>15</sup> The idea that a wife is under the complete dominance of her

10. *Id.* at 114, 234 S.E.2d at 427 (citing, *e.g.*, *Link v. Link*, 278 N.C. 181, 179 S.E.2d 697 (1971); *Eubanks v. Eubanks*, 273 N.C. 189, 159 S.E.2d 562 (1968)).

11. *Id.* at 115, 234 S.E.2d at 427.

12. *E.g.*, *Link v. Link*, 278 N.C. 181, 179 S.E.2d 697 (1971) (husband who induced estranged wife to transfer corporate securities to him by threats and abuse violated his duty to exercise utmost good faith in transaction and to disclose all material facts relating thereto); *Eubanks v. Eubanks*, 273 N.C. 189, 159 S.E.2d 562 (1968) (to be valid, separation agreement between husband and wife must be untainted by fraud and entered into without coercion or undue influence and with full knowledge of all material circumstances); *Fulp v. Fulp*, 264 N.C. 20, 140 S.E.2d 708 (1965) (husband who obtained money from his wife by orally promising to convey her a one-half interest in his real property violated fiduciary relationship existing between the parties).

13. See note 6 *supra*. See also *Waddell v. Carson*, 245 N.C. 669, 97 S.E.2d 222 (1957); *Shue v. Shue*, 241 N.C. 65, 84 S.E.2d 302 (1954); *Bowden v. Darden*, 241 N.C. 11, 84 S.E.2d 289 (1954); *Williams v. Williams*, 231 N.C. 33, 56 S.E.2d 20 (1949).

14. 33 N.C. App. at 114, 234 S.E.2d at 427 (quoting *Link v. Link*, 278 N.C. 181, 192, 179 S.E.2d 687, 704 (1971)).

15. The different standards of proof required by the *Rauchfuss* court are largely a result of the unique nature of the marital relationship. Ordinarily in an action to establish a constructive trust the fraud or inequitable conduct must be established by clear, strong and convincing proof. *Winner v. Winner*, 222 N.C. 414, 23 S.E.2d 251 (1942) (holding that fraud, duress or undue influence must be shown by clear, strong and convincing evidence to engraft constructive trust on gift of money by parent to one of his children). See also *Katz v. Katz*, 121 N.Y.S.2d 562 (Sup. Ct. 1953); *Colwell Elec. Co. v. Kale-Barnwell Realty & Constr. Co.*, 267 N.C. 714, 148 S.E.2d 856 (1966); *Carmichael v. Huggins*, 221 S.C. 278, 70 S.E.2d 223 (1952); *R. POWELL*, *supra* note 7, ¶ 594, at 570. Nevertheless, the court of appeals in *Rauchfuss* justified the imposition of a constructive trust in favor of the wife on the grounds that because of their marriage a "confidential relationship existed between the parties, and the law presumes fraud

husband is no longer valid; both the husband and wife should be held to the same standard of proof.<sup>16</sup>

### B. Zoning<sup>17</sup>

In *Kritzer v. Town of Southern Pines*,<sup>18</sup> the court of appeals interpreted the statutory requirements for annexation of new territory by a municipality.<sup>19</sup> The Town Council of Southern Pines adopted an oral resolution of its intent to consider annexing "these areas," referring to certain lands described in an annexation study<sup>20</sup> and displayed on an accompanying map.<sup>21</sup> After a public hearing on the subject, the Council voted to annex

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in transactions when confidential relationships exist between the parties." 33 N.C. App. at 114, 234 S.E.2d at 427 (emphasis added).

16. The relation of husband and wife is usually treated as highly confidential and any abuse of this relationship is recognized as adequate to support the imposition of a constructive trust. The notion that the husband is the dominant party prevails in the vast majority of jurisdictions, thus placing the burden on him to show that any transactions concerning the parties are free from coercion, undue influence or overreaching and done with full knowledge of all material circumstances. See, e.g., *In re Marriage of Walter*, 57 Cal. App. 3d 802, 129 Cal. Rptr. 351 (1976); *Bonarrigo v. Bonarrigo*, 47 App. Div. 2d 642, 363 N.Y.S.2d 839 (1975); C. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 482, at 133-38 (1960).

In other activity in 1977 relating to husband-wife transactions, the North Carolina General Assembly implicitly recognized that the notion of a husband's dominance in the marital relationship is no longer valid. The General Assembly passed Law of May 13, 1977, ch. 375, §§ 1, 2, 1977 N.C. Sess. Laws 375 (repealing Law of Feb. 12, 1872, ch. 193, § 27, 1871 N.C. Pub. Laws 336 (formerly codified as amended at N.C. GEN. STAT. § 52-6 (1976)) and amending Law of Feb. 12, 1872, ch. 193, § 28, 1871 N.C. Pub. Laws 337 (codified as amended at N.C. GEN. STAT. § 52-10 (Supp. 1977))). Former § 52-6 required any contract of a wife with her husband affecting the wife's real estate to be written and to be acknowledged by a certifying officer who had made a private examination of the wife. This section was applicable to the wife's interest in an estate by the entirety; an instrument purporting to convey the wife's interest without the certificate required by statute was void. *Honeycutt v. Citizens Nat'l Bank*, 242 N.C. 734, 89 S.E.2d 598 (1955); *Davis v. Bass*, 188 N.C. 200, 124 S.E. 566 (1924). The amendments to § 52-10 reverse this rule and provide that contracts between a husband and wife, including separation agreements, are valid without consideration and even though no private examination of the wife is conducted.

17. In 1977, the North Carolina General Assembly enacted N.C. GEN. STAT. § 14-202.11 (Cum. Supp. 1977), which prohibits the operation of more than one adult establishment in any one building. This statute was recently declared unconstitutional by the United States District Court for the Western District of North Carolina in *U.T., Inc. v. Edmisten*, No. CC-77-0365 (W.D.N.C. Feb. 14, 1978) and by the United States District Court for the Eastern District of North Carolina in *Hart Book Store, Inc. v. Edmisten*, No. 77-387-CIV-5 (E.D.N.C. Apr. 12, 1978). For a further discussion of these decisions and the constitutional status of this statute, see this Survey, *Constitutional Law: First Amendment*.

18. 33 N.C. App. 152, 234 S.E.2d 648 (1977).

19. See N.C. GEN. STAT. §§ 160A-47, -49 (1976 & Supp. 1977). In *Sellers v. City of Asheville*, 33 N.C. App. 544, 236 S.E.2d 283 (1977), the court of appeals declared that a city must bear the cost of ascertaining with certainty the extent of its extraterritorial zoning jurisdiction under N.C. GEN. STAT. § 160A-360 (Supp. 1977), by defining with specificity the boundaries of the allowed one mile extraterritorial zone in terms of geographical features identifiable on the ground.

20. The study also included statements that sewer lines would be constructed within one year of the effective date of annexation. 33 N.C. App. at 157, 234 S.E.2d at 651.

21. *Id.* at 153, 234 S.E.2d at 649. Both the study and the map indicating the proposed areas for annexation were before the Town Council when the resolution was adopted. *Id.*

these areas,<sup>22</sup> and plaintiffs, owners or residents of property within the annexed areas, appealed for review of the annexation ordinances, alleging violations of G.S. 160A-49(a).<sup>23</sup> The court of appeals, in interpreting the statute, held that the resolution of notice of intent to consider annexation is not required to be written.<sup>24</sup> In addition, it determined that the requisite description of the boundaries of the proposed annexation areas in the resolution was adequate in this instance,<sup>25</sup> because of testimony before the trial court that maps clearly outlining the specific boundaries were before the Town Council when the resolution concerning "these areas" was offered and adopted.<sup>26</sup>

This broad construction of G.S. 160A-49(a) facilitates the ability of a municipality to commence the annexation process. Not only is the amount of requisite paperwork reduced, but under this ruling a municipality's governing board need only describe the proposed areas in its resolution of intent to annex in the most general terms, provided it can prove it possessed a clear understanding of the exact lands to which this description referred when the resolution was adopted. Because this entire procedure is in reality merely an internal board affair simply designed as a prelude to subsequent stages of the annexation process, minimal formalities should suffice. As the *Kritzer* court noted, the rights of affected landowners within the proposed areas continue to be adequately protected by the specificity of description required by G.S. 160A-49(b)<sup>27</sup> in the notice of public hearing on the proposed annexation,<sup>28</sup> and by the prohibition upon the governing board's

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22. *Id.* at 154, 234 S.E.2d at 650. Notice of the hearing was placed in a local newspaper and contained a map of the areas and a metes and bounds description of the land proposed for annexation. *Id.* at 153, 234 S.E.2d at 649.

23. *Id.* at 155, 234 S.E.2d at 650. N.C. GEN. STAT. § 160A-49(a) (1976) provides in part: "Any municipal governing board desiring to annex territory . . . shall first pass a resolution stating the intent of the municipality to consider annexation. Such resolution shall describe the boundaries of the area under consideration . . . ." Plaintiffs claimed that the resolution of notice of intent to consider annexation must be written, and that the Town Council's resolution did not provide an adequate description of the proposed areas for annexation. 33 N.C. App. at 155, 234 S.E.2d at 650-51. Plaintiffs also alleged violations of N.C. GEN. STAT. § 160A-47(3)c (1976) which requires the inclusion of a proposed timetable for construction of sewer lines in the annexation plans. They maintained that the town's annexation study, which provided for construction to begin within 12 months of the effective date of annexation, did not set forth a sufficient timetable under the statute. The court of appeals rejected this argument, however, based upon the rejection by the supreme court of a similar argument presented in *Dunn v. City of Charlotte*, 284 N.C. 542, 201 S.E.2d 873 (1974). 33 N.C. App. at 156-57, 234 S.E.2d at 651.

24. 33 N.C. App. at 155, 234 S.E.2d at 650. The court relied solely upon the statutory language in question.

25. The court reached this ruling even though the resolution did not expressly describe the territories or incorporate a description by explicit reference. *Id.* at 156, 234 S.E.2d at 651.

26. *Id.*

27. N.C. GEN. STAT. § 160A-49(b) (1976).

28. 33 N.C. App. at 155, 234 S.E.2d at 651.

annexation of anything not described in that notice, contained in G.S. 160A-49(e).<sup>29</sup>

### C. Eminent Domain<sup>30</sup>

The North Carolina Court of Appeals in *Board of Transportation v. Brown*<sup>31</sup> considered the admissibility of evidence of traffic noise in determining damages when land is taken for highway purposes. Eight of 52.2 acres owned by defendants were condemned and appropriated for the construction of a controlled access highway.<sup>32</sup> In assessing damages,<sup>33</sup> the trial court refused to hear evidence relating to the diminution in value of defendants' remaining land allegedly resulting from the traffic noise of the highway to be built on their taken land.<sup>34</sup> Relying upon two North Carolina Supreme Court railroad eminent domain cases<sup>35</sup> in which noise was considered in determining damage done to the remainder land, the court of appeals held that noise may be considered as a contributing element of damages to the remaining lands "only if it is demonstrably resultant from the use of the particular lands taken."<sup>36</sup> It further held, consistent with the railroad cases, that defendants need not prove what damages were attributable to the use of their taken land as opposed to the similar use of surrounding condemned land, when such damages were common to the entire neighborhood.<sup>37</sup>

While this decision reaffirms the principle that noise is to be considered as an element of damages in condemnation cases, it is important in extending such consideration to the exercise of eminent domain for purposes of highway construction. The appropriation of land for railroad usage is rare in

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29. *Id.* at 156, 234 S.E.2d at 651; see N.C. GEN. STAT. § 160A-49(e) (1976).

30. The North Carolina General Assembly enacted amendments to N.C. GEN. STAT. § 136-18 (Cum. Supp. 1977), that allow the Department of Transportation to condemn land to improve state maintained secondary roads upon request by a county board of commissioners. The power to condemn is triggered when owners of land abutting the property to be condemned, whose frontage totals at least 75% of the footage sought to be improved, petition the appropriate board of commissioners to request the Department to exercise the power. *Id.* § 136-18(26).

31. 34 N.C. App. 266, 237 S.E.2d 854, *cert. granted, appeal dismissed*, 293 N.C. 740, 241 S.E.2d 515 (1977) (No. 88 pc).

32. *Id.* at 267, 237 S.E.2d at 854.

33. The measure of damages when a portion of land is appropriated for highway purposes is "the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking." N.C. GEN. STAT. § 136-112(1) (1974).

34. 34 N.C. App. at 267, 237 S.E.2d at 855.

35. *Id.* at 269, 237 S.E.2d at 856 (citing *Raleigh, C. & S. Ry. v. Mecklenburg Mfg. Co.*, 169 N.C. 156, 85 S.E. 390 (1915); *Carolina & Yadkin River R.R. v. Armfield*, 167 N.C. 464, 83 S.E. 809 (1914)).

36. *Id.*

37. *Id.* at 269-70, 237 S.E.2d at 856.

an age in which automobile transportation dominates. It is significant as well that the court did not restrict the admissibility of noise damage evidence to those cases in which it can be apportioned to the use made of taken land, since in many circumstances this places an impossible burden of proof upon the owner of the taken and remaining lands.<sup>38</sup>

In *Orange Water & Sewer Authority v. Estate of Armstrong*,<sup>39</sup> the court of appeals clarified the eminent domain rights of water and sewer authorities created pursuant to Article I, Chapter 162A of the North Carolina General Statutes.<sup>40</sup> Plaintiff, which provides water and sewer services to several communities, decided it was necessary to construct a new dam and reservoir on portions of defendants' property, but was prevented by defendants from surveying the land.<sup>41</sup> It was thus forced to obtain a temporary injunction in order to obtain entry onto defendants' lands for those purposes.<sup>42</sup> The court of appeals held that plaintiff, as a Chapter 162A authority, possessed the same eminent domain powers as cities and counties, but in addition was required to obtain a certificate of authorization before beginning an eminent domain action.<sup>43</sup> In this situation, however, no certificate was required since plaintiff was not involved in an eminent domain action,<sup>44</sup> but was merely protecting its right to enter and survey lands prior to instituting an eminent domain proceeding.<sup>45</sup>

The court's decision is of primary interest in defining the eminent domain rights and powers of Chapter 162A water and sewer authorities, particularly in light of the recent trend of decreased rainfall across the state which might require prompt action by such authorities to procure needed water supplies.<sup>46</sup> The result appears well founded as a pragmatic response to

38. *Id.*; see Annot., 59 A.L.R.3d 488, 501-03 (1974).

39. 34 N.C. App. 162, 237 S.E.2d 486, *cert. denied*, 293 N.C. 593, 239 S.E.2d 265 (1977).

40. N.C. GEN. STAT. §§ 162A-1 to -19 (1976); see note 43 *infra*.

41. 34 N.C. App. at 162, 237 S.E.2d at 487.

42. *Id.* at 162-63, 237 S.E.2d at 487.

43. *Id.* at 164, 237 S.E.2d at 488. N.C. GEN. STAT. § 162A-6(10) (1976) empowers Chapter 162A authorities

to acquire in the name of the authority by . . . exercise of the right of eminent domain in accordance with the General Statutes . . . which may be applicable to the exercise of such powers by municipalities or counties, any lands or rights in land or water rights in connection therewith . . . as it may deem necessary in connection with the acquisition, construction, reconstruction, improvement, extension, enlargement or operation of any water system or sewer system . . .

*Id.* The eminent domain powers and limitations of cities and towns are found in Article 11 of Chapter 160A, *id.* §§ 160A-240 to -263 (1976); those of counties are located in Article 8, Part 1 of Chapter 153A, *id.* §§ 153A-158 to -177 (1974 & Cum. Supp. 1977). *Id.* § 162A-7(a) (1976) sets out the requirement of a certificate of authorization.

44. 34 N.C. App. at 164, 237 S.E.2d at 488.

45. *Id.* This right is identical to the right granted to cities by N.C. GEN. STAT. § 160A-263 (1976).

46. For statistical data evidencing the existence of such a trend, compare the figures for rainfall for the years 1971-1977 presented in "Monthly Summarized Station and Divisional



the exigencies faced by these authorities, for they would encounter considerable difficulty in trying to precisely describe those lands they wish to acquire in petitions for certificates to exercise eminent domain if they are unable to inspect and survey the lands beforehand.<sup>47</sup>

#### D. Surface Water Drainage

In *Pendergrast v. Aiken*,<sup>48</sup> a downstream landowner placed a culvert in a drainage ditch running through his property and then filled the ditch and property with dirt. As a result, the stream that formerly coursed through the ditch backed up several times during rainfalls and flooded a building on plaintiff's land. Plaintiff sued for damages, alleging that under the "civil law rule"<sup>49</sup> any interference with the natural flow of surface waters<sup>50</sup> was a nuisance.<sup>51</sup> Defendant countered that under a "reasonable use rule"<sup>52</sup> he

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Data" in CLIMATOLOGICAL DATA—NORTH CAROLINA, published by the National Oceanic and Atmospheric Administration.

47. See 34 N.C. App. at 164, 237 S.E.2d at 488.

48. 293 N.C. 201, 236 S.E.2d 787 (1977).

49. The civil law rule forbids any interference, obstruction or diversion of the natural flow of surface waters and subjects a landowner to liability when he alters the natural course of the waters to the detriment of another. *Id.* at 208-09, 236 S.E.2d at 791-92; 5 R. CLARK, WATERS AND WATER RIGHTS § 452.1 (1972). See also Long & Long, *Surface Waters and the Civil Law Rule*, 23 EMORY L.J. 1015 (1974). The civil law rule previously followed in North Carolina was stated by the supreme court as follows:

The law confers on the owner of each upper estate an easement or servitude in the lower estates for the drainage of surface water flowing in its natural course and manner without obstruction or interruption by the owners of the lower estates to the detriment or injury of the upper estates.

*Midgett v. North Carolina State Hwy. Comm'n*, 260 N.C. 241, 246, 132 S.E.2d 599, 605 (1963). See also Note, *Disposition of Diffused Surface Waters in North Carolina*, 47 N.C.L. REV. 205 (1968). Various rationales have been advanced in support of the civil law rule. Some courts felt that since there had to be some rule, the rule of nature was reasonable and just. R. CLARK, *supra* § 452.1, at 502. Others adopted it due to a belief that the common enemy rule, in use previously in North Carolina and other jurisdictions, was inadequate and encouraged the use of force. *Id.* § 452.1, at 503. Under the "common enemy rule" surface water is considered a common enemy that each landowner may fight as he is able—no cause of action arises from any interference or diversion of the natural flow of the water, even if such interference results in damage to others. 293 N.C. at 207-208, 236 S.E.2d at 791; R. CLARK, *supra* § 451.1. See also Annot., 59 A.L.R.2d 421 (1958). The common enemy rule is based on two concepts: "(1) the necessity for improving lands with the recognition that some injury results from even minor improvements, and (2) philosophical preference for freedom of each landowner to deal with his land essentially as he sees fit." R. CLARK, *supra* § 451.1, at 488 (footnotes omitted). The rule has been criticized on the ground that in reality it does very little to promote improvement of the land. Hanks, *The Law of Water in New Jersey*, 22 RUTGERS L. REV. 621, 690 (1968), and that it encourages contests of "might" between adjoining landowners seeking to protect their land. Maloney & Plager, *Diffused Surface Water: Scourge or Bounty?*, 8 NAT. RESOURCES J. 72 (1968).

50. Technically, water derived from rain, melting snow or springs is "diffused surface water" and is distinguished from water travelling in a clearly defined channel or a "water-course." 1 R. CLARK, *supra* note 49, § 52.1(A), at 302 (1967). While some courts have applied different rules based on the classification of the water's origin, North Carolina has treated all water the same under the heading "surface water." 293 N.C. at 206-07, 236 S.E.2d at 790.

51. 293 N.C. at 206, 236 S.E.2d at 790.

52. The reasonable use rule allows the landowner to develop his land even if such

should not be subject to liability for making improvements on his property unless his conduct was unreasonable.<sup>53</sup> Although the civil law rule prevailed at the time suit was initiated,<sup>54</sup> the North Carolina Supreme Court in *Pendergrast* formally adopted the reasonable use rule with respect to surface water drainage, finding it a more flexible and less confusing principle for resolving disputes arising out of interferences with the natural flow of surface water.<sup>55</sup>

Virtually any use of land will affect the drainage and water flow of that tract; consequently, the strict application of the civil law rule was found to discourage the improvement and best utilization of land.<sup>56</sup> The North Carolina courts, while previously proclaiming adherence to the civil law rule, had recognized numerous exceptions to its application.<sup>57</sup> In doing so the courts sought to facilitate land development and to avoid hardship in individual cases.<sup>58</sup> This practice, however, also resulted in a series of inconsistent decisions on the rule creating much uncertainty in this area of the law.<sup>59</sup>

The *Pendergrast* court's adoption of the reasonable use rule should provide a flexible benchmark by which a landowner's conduct can be judged.<sup>60</sup> Shifting the focus of inquiry in a surface water drainage case from concepts of property law to principles of tort law permits a landowner's conduct to be judged according to a standard of reasonableness<sup>61</sup>—a more

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development alters the natural flow of surface waters and such alteration results in damage to other landowners; liability is incurred only if the damage to others is found to be unreasonable. *Id.* at 209-11, 236 S.E.2d at 792-93; R. CLARK, *supra* note 49, § 453.1. Including North Carolina, at least ten states have adopted the reasonable use rule: *Weinberg v. Northern Alas. Dev. Corp.*, 384 P.2d 450 (Alas. 1963); *Rodrigues v. State*, 52 Haw. 156, 472 P.2d 509 (1970); *Commonwealth, Dep't of Hwys. v. Baird*, 444 S.W.2d 541 (Ky. 1969); *Sachs v. Chiat*, 281 Minn. 540, 162 N.W.2d 243 (1968); *Armstrong v. Francis Corp.*, 20 N.J. 320, 120 A.2d 4 (1956); *Pendergrast v. Aiken*, 293 N.C. 201, 236 S.E.2d 787 (1977); *Jones v. Boeing Co.*, 153 N.W.2d 897 (N.D. 1967); *Butler v. Bruno*, 115 R.I. 264, 341 A.2d 735 (1975); *Sanford v. University of Utah*, 26 Utah 2d 285, 488 P.2d 741 (1971); *State v. Deetz*, 66 Wis. 2d 1, 224 N.W.2d 407 (1974). Some states have modified the civil law rule so that it is almost indistinguishable from the reasonable use rule. *See, e.g.*, *Keys v. Romley*, 64 Cal. 2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1966).

53. *See* 293 N.C. at 209-11, 236 S.E.2d at 792-93.

54. *Id.* at 214, 236 S.E.2d at 795.

55. *Id.* at 215-16, 236 S.E.2d at 796.

56. *Id.* at 208, 236 S.E.2d at 791.

57. *See, e.g.*, *Lease Properties, Inc. v. Shingleton*, 25 N.C. App. 287, 212 S.E.2d 683 (1975) (increased flow caused by paving portion of land does not give rise to liability); *Magnolia Apartments, Inc. v. Hanes*, 8 N.C. App. 394, 174 S.E.2d 828 (1970) (natural water flow may be increased but not diverted).

58. 293 N.C. at 212-15, 236 S.E.2d at 793-96; *see, e.g.*, *Yowman's v. City of Hendersonville*, 175 N.C. 574, 96 S.E. 45 (1918).

59. 293 N.C. at 215-16, 236 S.E.2d at 796.

60. *See* R. CLARK, *supra* note 49, § 450.3. In addition to the belief that the rule of reasonable use will not hamper land development, courts have listed other advantages, such as a more equitable allocation of the cost of land improvements, accruing from application of the rule. *See Butler v. Bruno*, 115 R.I. 264, 274, 341 A.2d 735, 741 (1975).

61. "These property concepts are rigid and absolute in nature and, while they are appro-

appropriate measure by which to resolve conflicts over the proper use of land in an increasingly industrialized and urbanized society.<sup>62</sup> Consequently, the determination of liability will require a careful comparison of the benefits created by the challenged conduct with the harms alleged to result from it. A claim for unreasonable interference with the flow of surface water will hereafter take the form of a private nuisance action in which liability will be established whenever the conduct of the landowner is intentional and unreasonable or negligent.<sup>63</sup>

### E. Homestead Exemption

In *The Seeman Printery, Inc. v. Schinhan*,<sup>64</sup> the court of appeals reviewed the validity of the homestead exemption<sup>65</sup> as it relates to sale under execution on a debt. After execution issued on plaintiff's money judgment against defendant,<sup>66</sup> defendant requested that his homestead be set aside in accordance with G.S. 1-372,<sup>67</sup> the homestead exemption provision, so that he might receive the \$1000 exemption from sale under execution of the judgment afforded him by the North Carolina Constitution.<sup>68</sup> When the sheriff and appraisers came to his house to lay off the homestead, defendant selected the hallway adjacent to the front door, an area approximately 5 feet by 15.4 feet, as his "homestead."<sup>69</sup> Defendant then filed objections to the

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private where the civil law doctrine is strictly applied, they serve as an impediment where it becomes necessary to modify the doctrine to accommodate changing social and economic needs." 293 N.C. at 215, 236 S.E.2d at 795-96. See also Kinyon & McClure (*Interferences with Surface Waters*, 24 MINN. L. REV. 891, 936-39 (1940); Comment, *The Application of Surface Water Rules in Urban Areas*, 42 MO. L. REV. 76 (1977).

62. 293 N.C. at 211, 236 S.E.2d at 793. But see Long & Long, *supra* note 49, at 1044-46.

63. 293 N.C. at 217, 236 S.E.2d at 797.

64. 34 N.C. App. 637, 239 S.E.2d 744 (1977).

65. N.C. CONST. art. X, § 2(1) provides in part: "Every homestead and the dwellings and buildings used therewith, to a value fixed by the General Assembly but not less than \$1,000, to be selected by the owner thereof . . . , shall be exempt from sale under execution or other final process obtained on any debt." *Id.* art. X, § 2(3), (4) was amended by vote of the people at the general election held on November 8, 1977, to eliminate references to females in the language of the sections, thereby making them applicable to either gender.

66. Plaintiff had obtained a \$5,900 judgment against defendant that was not appealed. 34 N.C. App. at 638, 239 S.E.2d at 745.

67. N.C. GEN. STAT. § 1-372 (1969) provides in part: "The appraisers shall value the homestead with its dwellings and buildings thereon, and lay off to the owner . . . such portion as he selects not exceeding in value one thousand dollars . . . ."

68. 34 N.C. App. at 638, 239 S.E.2d at 745; see note 65 *supra*. The \$1000 valuation limitation on the homestead exemption is set forth in N.C. GEN. STAT. §§ 1-372, -386 (1969 & Cum. Supp. 1977). This is the same amount that was established by the General Assembly in 1869. See Law of Apr. 7, 1869, ch. 137, §§ 3, 7, 1868 N.C. Pub. Laws 331.

69. 34 N.C. App. at 638, 239 S.E.2d at 745. The homestead allotment was valued at \$1000. It failed, however, to provide defendant with a means of ingress and egress from the public road adjoining defendant's lot to the front door where the homestead began. In addition, the area selected contained none of the facilities defendant would need to live comfortably and failed to provide any access to them. *Id.* at 638-39, 239 S.E.2d at 745. Initially, defendant had chosen his entire house with sufficient surrounding property to allow him to maintain it and to provide him

\$1000 limitation on his homestead, insisting that he should be allowed to claim his homestead exemption in his entire house, regardless of its value.<sup>70</sup> The limitation was obsolete, the defendant claimed, arguing that in 1869, when the figure was established, a \$1000 homestead would have comprised a 250 acre farm with a house and barn.<sup>71</sup>

The court of appeals, however, rejected this contention and upheld the lower court's determination that, under the North Carolina Constitution and statutes, only a \$1000 homestead could be set aside, whether or not this permitted the exemption of only a portion of a dwelling.<sup>72</sup> While the homestead exemption was changed in 1971 from language limiting it to \$1000 to language requiring it to be fixed by the General Assembly at not less than \$1000, the court noted that the legislature had not amended G.S. 1-372 to increase the value of the homestead;<sup>73</sup> it therefore refused to exercise that power which, it declared, was exclusively granted to the legislature by the North Carolina Constitution.<sup>74</sup> Though the court admitted its present resolution of the problem was absurd,<sup>75</sup> it maintained that its holding protected the creditor's interest in obtaining execution of judgment while preserving the debtor's constitutional right to a homestead.<sup>76</sup>

Although the *Schinhan* court was correct in attempting not to compromise the interests of either the judgment creditor or debtor, its response

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with a means of access, but the sheriff had refused to make that allotment because the value of the house and lot, \$72,000, greatly exceeded the \$1000 limitation. *Id.* at 638, 239 S.E.2d at 745.

70. *Id.* at 639, 642, 239 S.E.2d at 745, 747.

71. *Id.* at 639, 239 S.E.2d at 745-46. Other testimony submitted established that the value of a dollar in 1868 was 170 times its value in 1976. *Id.*

72. *Id.* at 642, 239 S.E.2d at 747. The court cited as controlling authority an 1886 North Carolina Supreme Court case, *Campbell v. White*, 95 N.C. 491 (1886), in which the court declined to apply the homestead exemption to an entire house, even though the parties agreed the house was indivisible. 34 N.C. App. at 642, 239 S.E.2d at 747. The *Schinhan* court did note, however, that under its holding based upon *Campbell* the purpose of the homestead exemption could not be attained. *Id.* at 641, 239 S.E.2d at 747. That purpose has been described as follows:

"The purpose of the homestead provision of the Constitution is to surround the family home with certain protection against the demands of urgent creditors. It carries the right of occupancy free from levy or sale under execution so long as the claimant may live unless alienated or abandoned. It is the place of residence which the homesteader may improve and make comfortable and where his family may be sheltered and live, beyond the reach of those financial misfortunes which even the most prudent and sagacious cannot always avoid."

*Id.* (citations omitted by the court) (quoting *Williams v. Johnson*, 230 N.C. 338, 343, 53 S.E.2d 277, 281 (1949)).

73. *Id.* at 641, 239 S.E.2d at 747. It appears, though, that the legislature's failure to amend § 1-372 may have been an oversight since the language of § 1-372, *see* note 67 *supra*, still incorporates the phrase "not exceeding in value one thousand dollars" that had been used in the prior, superseded constitutional provision, N.C. CONST. art. X, § 2 (1868, amended 1970), but was deleted in the amended version. *See* note 65 *supra*.

74. 34 N.C. App. at 641-42, 239 S.E.2d at 747.

75. The court explained: "The debtor has his homestead in an area which is utterly useless to him, while the value of his remaining property from which his creditor must seek to collect his judgment has been substantially impaired." *Id.* at 644, 239 S.E.2d at 748.

76. *Id.* at 643, 239 S.E.2d at 748.

nonetheless failed to protect either party<sup>77</sup>—plaintiff cannot in all likelihood recover his judgment from a house that has no front door or hallway; defendant cannot use his hallway homestead even if he has a means of ingress and egress to it. Perhaps it is true, as the court suggests, that the failure of the legislature to act “reflects a conscious determination that the exemption is no longer as economically or socially desirable as it was once thought to be.”<sup>78</sup> The powerlessness of the court to resolve the ludicrous situation with which it was presented, however, emphasizes the need for the appropriate entity to act in some manner. The failure of the legislature to evaluate the purposes of the homestead exemption during the last 110 years has resulted in this predicament—it should not remain unresponsive in the near future.

### F. Landlord-Tenant

The North Carolina General Assembly passed two major pieces of legislation in 1977 relating to landlord-tenant law.<sup>79</sup> The first Act amended Chapter 42 of the General Statutes by adding an Article 5 entitled “*Residential Rental Agreements*.”<sup>80</sup> This Article defines the rights and obligations of the landlord<sup>81</sup> and of the tenant<sup>82</sup> with respect to the maintenance of a rental unit in North Carolina. In addition, it sets out the remedies, and the limitations thereon, available to either party upon the violation of a right, or the failure to perform an obligation, under the article.<sup>83</sup>

The other major new Act regulates the handling of tenant security deposits in rental units.<sup>84</sup> Article 6 of Chapter 42 now requires the landlord

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77. The court was willing to concede this point. *Id.* at 644, 239 S.E.2d at 748.

78. *Id.* at 642, 239 S.E.2d at 747.

79. In addition the legislature made it illegal for a landlord or his agent to refuse to rent or sell premises to a visually handicapped person because he has a guide dog. N.C. GEN. STAT. § 168-7 (Supp. 1977).

80. See *id.* §§ 42-38 to -44. Article 5 is more fully discussed and analyzed in Fillette, *North Carolina's Residential Rental Agreements Act: New Developments For Contract and Tort Liability in Landlord-Tenant Relations*, 56 N.C.L. REV. 785 (1978).

81. N.C. GEN. STAT. § 42-42 (Supp. 1977).

82. *Id.* § 42-43.

83. *Id.* § 42-44.

84. *Id.* §§ 42-50 to -56. These sections comprise a new Article 6 entitled “*Tenant Security Deposit Act*.” This Act is somewhat similar to the California security deposit statute, CAL. CIV. CODE § 1950.5 (West Cum. Supp. 1978), except that the California statute does not specifically require a trust arrangement for the holding of deposits and makes no provision for attorneys’ fees when tenants successfully sue for return of deposit funds. The New York statute, N.Y. GEN. OBLIG. LAW § 7-103 (McKinney 1978), differs from North Carolina’s Act in that it makes some provision for accumulated interest and administration expenses of the trust. The North Carolina Act is more elaborate than its New York counterpart, though, in statutorily defining the maximum amounts and permitted uses of security deposits and the remedies available for breach of the Act. Colorado goes even further than North Carolina in deterring landlord violations by allowing recovery of treble damages in deposit withholding suits, but fails to establish the manner in which deposits are to be held by landlords. COLO. REV. STAT. § 38-12-103 (1973).

to place security deposits in a trust account with a licensed and insured bank or savings institution in North Carolina.<sup>85</sup> He must then notify the tenant within thirty days after the lease has begun of the name and address of the institution holding the deposit.<sup>86</sup> The permitted uses of security deposits are restricted to those set forth in the article,<sup>87</sup> which also establishes limits on the amounts that may be required for security deposits, computed in relation to the length of the tenancy.<sup>88</sup> Upon termination of the tenancy, the deposit may be applied to those uses allowed under the article and, if not so applied, must be refunded to the tenant.<sup>89</sup> Finally, the article outlines the remedies a tenant may pursue if the landlord fails to account for and refund the tenant's deposit as required.<sup>90</sup> If willful noncompliance with the article is found by the court, it may allow a reasonable attorney's fee to the attorney representing the prevailing party.<sup>91</sup>

The passage of this Act should be applauded by consumer interests across the state, for it represents the first attempt by the legislature to protect the tenant in an area in which he was previously left to the landlord's mercy.<sup>92</sup> However, the Act is imperfect in failing to make any provision for any interest that might accumulate while security deposits are held in trust accounts in the event that these accounts are interest bearing.<sup>93</sup> The legislature should correct this omission so that landlords and tenants will know to which party the accumulated interest should be credited or, if necessary, apportioned when the tenancy ends. The Act is further weakened in failing

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85. N.C. GEN. STAT. § 42-50 (Supp. 1977). The landlord has the option of furnishing a bond from an insurance company licensed to do business in North Carolina. If the landlord chooses, he may establish the trust account outside of North Carolina, but only if he provides the tenant with an adequate bond. *Id.*

86. *Id.*

87. *Id.* § 42-51. The deposits may be devoted to compensation for nonpayment of rent, damage to the rental unit (other than normal wear and tear), nonfulfillment of the lease term, liens due to unpaid bills by the tenant, rerenting costs following tenant breach or court costs related to terminating a tenancy. *Id.* The withholding of amounts for damages attributable to normal wear and tear or of amounts that exceed actual damages is prohibited by *id.* § 42-52.

88. *Id.* § 42-51.

89. *Id.* § 42-52. The landlord must compile an itemized list of any damage for which any of the deposit is retained and mail this to the tenant with the balance of the deposit within 30 days after the tenancy has terminated. *Id.*

90. The tenant can institute civil action to require an accounting and recovery of the deposit, and may recover damages resulting from noncompliance by the landlord. *Id.* § 42-55.

91. *Id.*

92. As there was no common or statutory law with respect to security deposits in North Carolina prior to this statute's enactment, the only protection afforded tenants in this area was what they could acquire in arms-length bargaining with landlords over rental lease agreements. Because most large apartment owners use a prewritten and typed lease form, many tenants were forced to accept provisions relating to security deposits in order to rent apartments.

93. It is unclear from the wording of the statute whether or not trust accounts will or may be interest bearing. See N.C. GEN. STAT. §§ 42-50, -52 (Supp. 1977). This should be clarified by amendment as well.

to provide for attorneys' fees in all events if the tenant prevails against the landlord—a tenant may gain nothing if he successfully sues for his deposit but willful noncompliance is not found, for in all likelihood he may then be forced to turn the regained deposit over to his attorney as payment for his services.<sup>94</sup>

In the major case in this area, *Usher v. Waters Insurance & Realty Co.*,<sup>95</sup> the United States District Court for the Western District of North Carolina materially advanced tenant rights by declaring North Carolina's summary ejectment statutes<sup>96</sup> unconstitutional.<sup>97</sup> Plaintiff, ordered to leave her apartment by a magistrate's judgment obtained by defendant under the state's summary ejectment proceedings,<sup>98</sup> was unable to stay the eviction pending appeal<sup>99</sup> because she could not raise the requisite three months' rent appeal bond.<sup>100</sup> The federal court ruled that this bond requirement, together with other North Carolina summary ejectment statutes,<sup>101</sup> denied tenants "access to jury trial and place[d] an unconstitutionally discriminatory burden upon less-than-affluent tenant-appellants . . . in violation of the equal protection clause of the United States Constitution."<sup>102</sup>

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94. For a comparison of the North Carolina legislation with the comparable statutes of other jurisdictions, see note 84 *supra*.

95. 438 F. Supp. 1215 (W.D.N.C. 1977). For discussion of the constitutional issues raised in this case, see this Survey, *Constitutional Law: Fourteenth Amendment: Equal Protection*.

96. N.C. GEN. STAT. § 42-32 (1976) (allows additional damages of double rent in summary ejectment suits); *id.* § 42-34(b) (requires posting of bond in amount equal to at least three months' rent in order to stay summary ejectment while on appeal); N.C.R. Civ. P. 62(a) (excepts summary ejectment cases from automatic ten day stay of execution of judgment).

97. 438 F. Supp. at 1220-21.

98. *Id.* at 1216. Plaintiff had lived in her apartment only a week before being sent a notice to vacate; her rent was not in arrears. Defendant allegedly sent the notice because plaintiff gave a loud party that disturbed the neighbors. Plaintiff maintained the eviction notice was motivated by her entertainment of black persons. *Id.*

99. Such an appeal is a matter of right under N.C. GEN. STAT. §§ 7A-228, -229 (1969).

100. 438 F. Supp. at 1216. Plaintiff did try to stay the eviction by tendering one month's rent, but the clerk of court found it insufficient. Plaintiff then filed suit in federal district court and obtained a preliminary injunction restraining her eviction until the court could address the constitutional issues. *Id.*

101. See note 96 *supra*.

102. 438 F. Supp. at 1218. The court concluded that since no jury trial is allowed in magistrate's court where the eviction order was obtained, tenant-appellants could not receive a jury trial unless they could put up the three months' rent bond. *Id.*

The court found discrimination because the statute requires a sizable bond of tenant-appellants that is not required of appellants in any other case. In addition, the court examined procedures in title dispute suits in which losers are not subject to the same strict bond arrangements pending appeal, even though the winning party's interests are identical to those of a landlord in summary ejectment cases—the regaining of possession of the property or premises in question. *Id.* at 1219. The court also reviewed other statutes that allow stays of execution upon the posting of appeal bonds, but considered the requisite amounts established therein to bear some rational relation to potential costs incurred by the appellee should he prevail. *Id.* at 1217; see, e.g., N.C. GEN. STAT. §§ 1-289, -292 (1969); *id.* § 7A-227 (Cum. Supp. 1977); N.C.R. Civ. P. 62(c). The court could find no rational basis for the rigid bond requirements imposed in summary ejectment cases. 438 F. Supp. at 1218-19.

Under this decision, tenant-appellants must be treated in the same manner as all other appellants with respect to the amount required to be posted as bond on appeal as well as with regard to all other requirements for maintaining appeal. Differentiation in the requirements for appeal will be permitted only if some legitimate state interest can be served thereby.<sup>103</sup> The impact of this decision, then, should be widespread. Tenants who hereafter become subject to summary ejectment proceedings and who wish to appeal will not be penalized as before if they are able to pay each month's rent only as it becomes due. In this way, they will not be foreclosed at the outset from raising valid defenses to an eviction at a jury trial.

### G. *Recovery of Historical Documents*

In *State v. West*,<sup>104</sup> a case of first impression, the North Carolina Supreme Court confronted the issue whether a state can recover historical documents that once belonged to the state without compensating those individuals who had since acquired them. In 1767 and 1768, William Hooper, who later signed the Declaration of Independence on behalf of North Carolina, signed two bills of indictment as attorney for King George III.<sup>105</sup> Defendant, a private collector of manuscripts of historical significance, acquired the documents at an auction sale in 1974,<sup>106</sup> but the next year the State instituted a civil suit to recover their possession. The supreme court declared the State to be the rightful owner of the bills,<sup>107</sup> thereby dealing a severe blow to private individuals and institutions engaged in the collection and preservation of historical documents.

The court began its discussion by declaring that the relative merits of private collectors as compared with public archivists was a policy question best left to the legislature; its sole concern in the case was with the property rights of the State in the documents.<sup>108</sup> The court then reasoned that the State was entitled to the documents based on the premise that once a private paper

103. The court made it clear that it could think of no reasonable state purpose that would justify statutes treating tenant-appellants more strictly than other appellants, particularly in light of the lesser requirements demanded of title dispute litigant-appellants. 438 F. Supp. at 1218-19.

104. 293 N.C. 18, 235 S.E.2d 150 (1977).

105. *Id.* at 20, 235 S.E.2d at 151.

106. *Id.* at 21, 235 S.E.2d at 151-52.

107. *Id.* at 32, 235 S.E.2d at 158.

108. *Id.* at 25, 235 S.E.2d at 154. The court, however, failed to note in its opinion that the legislature has already set forth a broader policy with respect to such documents. N.C. GEN. STAT. § 121-4(13) (1974) provides in part:

The Department of Cultural Resources shall have the following powers and duties:

(13) To promote and encourage throughout the State knowledge and appreciation of North Carolina history and heritage by encouraging the people of the State to engage in the preservation and care of archives, historical manuscripts, museum items, and other historical materials . . .



becomes a "court record," the title becomes vested in the sovereign.<sup>109</sup> The fact that a particular document is removed or stolen from the records does not divest the sovereign of title,<sup>110</sup> nor would the fact that a custodian had intentionally discarded it.<sup>111</sup> A change of sovereignty transfers but does not alter the right of the former sovereign to his official property.<sup>112</sup> A sovereign's right to recover possession of property is likewise not barred by the passage of time, however great.<sup>113</sup> Furthermore, the court held that the bona fides of the person taking possession of the documents is immaterial and does not confer good title upon the taker or any subsequent purchasers; in fact, such a purchaser, regardless of his good faith, is now to be considered a converter liable to the true owner.<sup>114</sup>

*State v. West* represents the first time a court has dealt with the issue of a state's right to recover public documents of historical import,<sup>115</sup> and the decision permits this State to recover such documents from private collectors merely by showing that the papers are "court records."<sup>116</sup> The majori-

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109. 293 N.C. at 26, 235 S.E.2d at 155.

110. *Id.* at 27, 235 S.E.2d at 155.

111. *Id.* at 30, 235 S.E.2d at 157. Defendant argued that in all likelihood these documents had been thrown away by the clerk of the superior court during the Revolutionary War and that this constituted an abandonment. The court rejected this contention, stating that an essential element of abandonment is intent of the owner to relinquish the article permanently. *Id.*; see, e.g., *Botkin v. Kickapoo, Inc.*, 211 Kan. 107, 505 P.2d 749 (1973); *Oxford Orphanage v. Kittrell*, 223 N.C. 427, 27 S.E.2d 133 (1943); *St. Peter's Church v. Bragaw*, 144 N.C. 126, 56 S.E. 688 (1907). The court reasoned that even if the clerk had intentionally discarded the documents, this would not constitute abandonment because he was only the custodian and not the owner. 293 N.C. at 30-31, 235 S.E.2d at 157. Under the court's formulation, it is unusually difficult to prove that a private party would be entitled to state documents, since such proof would require a showing that (in this case) either King George III or the State of North Carolina intended to abandon its court records.

112. 293 N.C. at 28, 235 S.E.2d at 156; see *United States v. Huckabee*, 83 U.S. (16 Wall.) 414, 435 (1873) ("[T]he conqueror, by the completion of his conquest, becomes the absolute owner of the property conquered from the enemy, nation or State.").

113. 293 N.C. at 27, 235 S.E.2d at 155. The court also found that no statute of limitations ran against the State in this type of action. *Id.* at 24-25, 235 S.E.2d at 154.

114. *Id.* at 31, 235 S.E.2d at 158.

115. See Brief of Amicus Curiae Duke University at 1, *State v. West*, 293 N.C. 18, 235 S.E.2d 150 (1977). There exist only a handful of reported cases dealing with recovery. See *First Trust Co. v. Minnesota Historical Soc'y*, 146 F. Supp. 652 (E.D. Minn. 1956), *aff'd*, 251 F.2d 686 (8th Cir. 1958); *Victor De La O v. Acoma*, 1 N.M. (Gild, C. ed.) 226 (1857); *People v. Peck*, 138 N.Y. 386, 34 N.E. 347, 22 N.Y.S. 576 (1893); *Mayor of New York v. Lent*, 51 Barb. 19 (App. Div. 1868); *Manning v. Anderson Galleries, Inc.*, 130 Misc. 131, 222 N.Y.S. 572 (Sup. Ct. 1927).

116. The North Carolina Court of Appeals had held the State to a much higher burden of proof, finding that "the state must (a) prove the indictments were required by law to be permanently retained; (b) overcome the presumption that public officials have properly performed their duty; and (c) prove that the indictments were in a public archive and were stolen or otherwise improperly removed." *State v. West*, 31 N.C. App. 431, 437, 229 S.E.2d 826, 829 (1976). The court of appeals nevertheless went on to find that the State had met this burden. *Id.* at 437-44, 229 S.E.2d 829-33. The supreme court gave no reason for its adoption of a much more lenient standard.

ty, however, fails to make clear whether its opinion covers any "public document"<sup>117</sup> or only "court records."<sup>118</sup>

An important consideration underlying the court's decision in *West* was its concern that, should the court decide the case any differently, the State would be able to recover stolen archives only by purchasing them.<sup>119</sup> The court's apprehension in this respect caused it to disregard those important policy considerations that would have dictated a more equitable result. The State should not be permitted to reassert a right of ownership to the prejudice of those who in the interim have come into the possession of historical papers in complete good faith and for value. The court's holding, so harmful to the interests of the antiquarian, appears particularly ironic in light of the fact that a large number of historical documents remain in existence solely because of the efforts of private collectors.<sup>120</sup> It is likely that, as a result of this case, many historically valuable documents that would otherwise be available to the public will now be secretly held by private collectors in order to avoid the obligation under *West* to surrender them to the state.

EUGENE F. DAUCHERT, JR.  
SUSIE SPRUILL SIMPSON

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117. See, e.g., *Rehling v. Carr*, 295 Ala. 336, 330 So. 2d 423 (1976) (reports of state toxicologist are state records); *City Council v. Superior Court*, 204 Cal. App. 2d 68, 21 Cal. Rptr. 896 (1962) (records not required by law to be kept can still be public records); *Nero v. Hyland*, 136 N.J. Super. 537, 347 A.2d 29 (Super. Ct. Law Div. 1975).

118. Technically, the court's opinion would apply only to court records: "[T]hese documents, being bills of indictment, bear upon their face notice to all the world that they were part of the court records of the Colony of North Carolina and, therefore, the property of the State." 293 N.C. at 31, 235 S.E.2d at 158.

119. The supreme court asserted its belief that the bills of indictment had been "intentionally removed from the clerk's office in more recent times, when discovered by one who was aware of their intrinsic value." *Id.* at 31, 235 S.E.2d at 157.

120. See *id.* at 33, 235 S.E.2d at 158-59 (Copeland, J., dissenting).

XII. TAXATION<sup>1</sup>A. *Property Tax—Tax Sales*<sup>2</sup>

The North Carolina Supreme Court examined significant local tax issues in *Henderson County v. Osteen*.<sup>3</sup> Execution on a judgment docketed in favor of Henderson County for nonpayment of real property taxes had been issued five days after the listed owner's death. The property was sold at a sheriff's sale one month after execution. The trial court found that the administrator and heirs of the deceased, defendants in *Osteen*, received no notice of the sale. Furthermore, no evidence was presented showing that notice had been mailed to the deceased. The trial court granted defendants' motion to set aside the sale, basing its decision on *Flynn v. Rumley*<sup>4</sup> which prohibits sale of land under an execution issued after the judgment debtor's death.<sup>5</sup> The court of appeals reversed the trial court's decision, distinguishing *Flynn v. Rumley* on the ground that the earlier case precluded execution of an in personam judgment and held that this prohibition had no applicability to the G.S. 105-375<sup>6</sup> in rem proceeding involved in *Osteen*.<sup>7</sup> The court of appeals also stated that, even assuming that notice of the execution sale had not been mailed to the listed owner, the sale would not have been invalid.<sup>8</sup> Likewise, the court held that the lack of notice to the heirs of the deceased owner did not invalidate the sale, stating that "the

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1. Minor tax cases recently decided include: *Broadwell Realty Corp. v. Coble*, 291 N.C. 608, 231 S.E.2d 656 (1977) (cash-basis taxpayer reporting income under installment method may not deduct deferred state and federal income tax liabilities from franchise tax base); and *Arnold v. Varnum*, 34 N.C. App. 22, 237 S.E.2d 272, cert. denied, appeal dismissed, 293 N.C. 740, 241 S.E.2d 513 (1977) (county board of commissioners may levy tax to support hospital in unincorporated township).

For a concise discussion of all 1977 legislative changes in North Carolina tax laws, see J. BRANNON, NORTH CAROLINA LEGISLATION 1977, at 245-61, 303-05 (1977). For additional discussion of property tax legislation, see Campbell & Ferrell, *1977 Legislation Affecting Property Tax and Privilege License Administration*, PROP. TAX BULL., July 14, 1977, at 1 (Institute of Government, University of North Carolina at Chapel Hill).

2. For a slightly dated discussion of tax-collection enforcement in North Carolina and in other states, see H. LEWIS & R. BYRD, IN REM TAX FORECLOSURES (1959). For a more recent general discussion of North Carolina property tax, see H. LEWIS, THE PROPERTY TAX IN NORTH CAROLINA: AN INTRODUCTION (rev. ed. 1975).

3. 292 N.C. 692, 235 S.E.2d 166 (1977), rev'g 28 N.C. App. 542, 221 S.E.2d 903 (1976). The North Carolina Court of Appeals decision in this case is discussed in *Survey of Developments in North Carolina Law, 1976*, 55 N.C.L. REV. 895, 1087 (1977).

4. 212 N.C. 25, 192 S.E. 868 (1937).

5. 28 N.C. App. 542, 545, 221 S.E.2d 903, 905 (1976).

6. N.C. GEN. STAT. § 105-375 (Cum. Supp. 1977) (in rem statutory procedure for foreclosure of a property tax lien).

7. 28 N.C. App. 542, 549, 221 S.E.2d 903, 907 (1976).

8. *Id.* at 549-52, 221 S.E.2d at 907-09. See generally N.C. GEN. STAT. § 105-348 (1972) (notice to taxpayer of legal tax enforcement proceedings conclusively presumed); *id.* § 105-394(9) (failure to serve taxpayer with notice of tax sale constitutes harmless irregularity with regard to validity of sale).

County is not required to shoulder the intolerable burden of directly notifying the heirs of a listing taxpayer who died prior to issuance of execution."<sup>9</sup>

The supreme court reversed. Speaking through Justice Lake, the court agreed that foreclosure of a tax lien and execution under G.S. 105-375 is an exception to the general rule that land may not be sold under an execution issued after the death of the judgment debtor.<sup>10</sup> The court also agreed that requiring the county "[to] determine, at its peril, that the listing taxpayer still lives and still owns the land, or if he does not, to give such notice to his administrator, heirs, or transferee" would be intolerably burdensome and would make the G.S. 105-375 procedure "completely impracticable."<sup>11</sup> The court held, however, that notice by registered or certified mail to the listed owner under G.S. 105-375 is necessary to satisfy the due process requirements of both the North Carolina Constitution<sup>12</sup> and the fourteenth amendment of the United States Constitution.<sup>13</sup> Accordingly, the court held that G.S. 105-394(9),<sup>14</sup> which validates tax sales when notice has not been given to the listed owner, was unconstitutional.<sup>15</sup> The court remanded the case to the trial court to determine whether notice of the sale had actually been mailed to the deceased.<sup>16</sup>

The supreme court's pragmatic holding on the notice issue in *Osteen* reasonably accommodates unavoidable administrative constraints yet requires notice calculated to apprise the taxpayer of the tax sale's pendency in most cases.<sup>17</sup> Even in an anomalous case like *Osteen*, notice by mail addressed to the deceased should be sufficient for an alert administrator or close relatives. Notice requirements for tax sale proceedings have not been stringent historically.<sup>18</sup> Indeed, the United States Supreme Court has often held notice by publication to be sufficient for in rem proceedings.<sup>19</sup> The Court has required notice by mail in more recent cases involving in rem proceedings,<sup>20</sup> however, and the North Carolina Supreme Court in *Osteen*

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9. 28 N.C. App. 542, 551, 221 S.E.2d 903, 908-09 (1976).

10. 292 N.C. at 706, 235 S.E.2d at 175.

11. *Id.* at 708, 235 S.E.2d at 176.

12. N.C. CONST. art. I, § 19.

13. 292 N.C. at 708, 235 S.E.2d at 176; see U.S. CONST. amend. XIV, § 1.

14. N.C. GEN. STAT. § 105-394(9) (1972); see note 8 *supra*.

15. 292 N.C. at 708, 235 S.E.2d at 176.

16. *Id.* at 711, 235 S.E.2d at 178.

17. See generally *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

18. See Note, *Notice by Publication in Tax Sale Cases*, 44 TENN. L. REV. 159, 161 (1976). Notice by publication in tax foreclosure cases has been justified on three grounds: (1) the in rem nature of the proceedings; (2) the landowner's imputed knowledge that the state will take action to collect the taxes by selling the land if necessary; and (3) the landowner's presumed care and vigilance with regard to matters concerning his or her real estate. *Id.* See also Note, *The Constitutionality of Notice by Publication in Tax Sale Proceedings*, 84 YALE L.J. 1505 (1975).

19. See, e.g., *Winona & Saint Peter Land Co. v. Minnesota*, 159 U.S. 526 (1895).

20. See, e.g., *Schroeder v. City of New York*, 371 U.S. 208 (1962).

demonstrated that it was more responsive to this trend than the high courts of some other states that have adjudicated similar tax sale cases.<sup>21</sup>

The supreme court's refusal to apply the *Flynn v. Rumley* rule in *Osteen* may seem less commendable but is consistent with the notion that the county should not be forced to follow procedures that would render the statutorily provided foreclosure method impracticable. The court discussed a sound policy reason for applying the rule to some judgments in rem—to protect the deceased's estate from wasteful sale of property worth far more than the amount of the debt.<sup>22</sup> Nevertheless, the court stated that an action to foreclose a tax lien pursuant to the G.S. 105-374<sup>23</sup> quasi-mortgage method of foreclosing a tax lien—the only method of tax lien foreclosure provided in the General Statutes besides G.S. 105-375—had been held valid despite the listed owner's death prior to foreclosure,<sup>24</sup> and found no basis for distinguishing between G.S. 105-374 and G.S. 105-375.<sup>25</sup> The court's reasoning with regard to this issue, at first glance, thus seems to elevate symmetry over sound policy. The prohibition of tax sales after the death of the listed owner, however, would force the county to determine whether the taxpayer still lives before it could proceed to foreclosure. The court sought to avoid this administrative burden in holding that notice did not have to be given to the listed owner's administrator and heirs. Furthermore, the harshness of the holding should be mitigated to a great extent by the court's ruling that notice by mail to the listed owner is required under G.S. 105-375. Wasteful tax sales may be prevented by timely payment of the delinquent taxes by the deceased's administrator or relatives.<sup>26</sup>

### B. Refunds

It is a well-established rule that taxes paid to release the taxpayer from duress may be recovered.<sup>27</sup> However, voluntary payment of a tax, even one that is imposed under an unconstitutional law, generally does not give the

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21. See, e.g., *Botens v. Aronauer*, 32 N.Y.2d 243, 298 N.E.2d 73, 344 N.Y.S.2d 892, appeal dismissed, 414 U.S. 1059 (1973); *Marlowe v. Kingdom Hall of Jehovah's Witnesses*, 541 S.W.2d 121 (Tenn. 1976).

22. 292 N.C. at 705, 235 S.E.2d at 174.

23. N.C. GEN. STAT. § 105-374 (1972 & Cum. Supp. 1977).

24. See *Guilford County v. Estates Administration, Inc.*, 213 N.C. 763, 197 S.E. 535 (1938).

25. 292 N.C. at 705, 235 S.E.2d at 175.

26. See N.C. GEN. STAT. § 105-375(g) (1972).

27. See *Ward v. Board of County Comm'rs*, 253 U.S. 17 (1920) (threats of advertisement and arrest); *Sneed v. Shaffer Oil & Ref. Co.*, 35 F.2d 21 (8th Cir. 1929) (threat of civil penalties for nonpayment); *Tyler v. Dane County*, 289 F. 843 (W.D. Wis. 1923) (transfer of property withheld); *Manufacturer's Cas. Ins. Co. v. Kansas City*, 330 S.W.2d 263 (Mo. 1959) (threat of criminal penalties for nonpayment).

taxpayer the right to a refund.<sup>28</sup> Legislation in some states permits the refund of taxes under certain circumstances whether payment was voluntary or not.<sup>29</sup> In *Coca-Cola Co. v. Coble*,<sup>30</sup> the North Carolina Supreme Court held that G.S. 105-266.1,<sup>31</sup> a statute providing a procedure by which a taxpayer may recover taxes that are "excessive or incorrect,"<sup>32</sup> does not permit the refund of taxes unconstitutionally levied, but voluntarily paid.

Prior to 1974, North Carolina excluded nonresident distributors and dealers from a cheaper soft drink tax available to residents.<sup>33</sup> This exclusion was held to be discriminatory and an undue burden on interstate commerce in *Richmond Food Stores v. Jones*.<sup>34</sup> Coca-Cola, a nonresident distributor, applied for a refund under section 105-266.1 of the portion of soft drink taxes it had paid in excess of the amount it would have paid under the tax available to residents. After the Secretary of Revenue's denial of this claim, the trial court found for Coca-Cola and entered judgment granting the refund.<sup>35</sup> The court of appeals reversed, and its decision was affirmed by the supreme court.

The supreme court held that "G.S. 105-266.1, by its express terms, confers no authority on the Secretary to refund taxes which, at the time they were collected, were unlawful but *not* erroneous or incorrect."<sup>36</sup> The court stated that the appropriate remedy lay under G.S. 105-267,<sup>37</sup> which permits suits for the refund of invalid taxes.<sup>38</sup> The court rejected Coca-Cola's argument that payment of the soft drink taxes was involuntary since nonpayment would have triggered civil and criminal sanctions.<sup>39</sup> Coca-Cola could

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28. See *C. & J. Michel Brewing Co. v. State*, 19 S.D. 302, 103 N.W. 40 (1905).

29. See, e.g., FLA. STAT. ANN. § 195.106(1) (Harrison Cum. Supp. 1977) (overpayment, payment when no tax due, adjudication of no liability, erroneous payment).

30. 293 N.C. 565, 238 S.E.2d 780, *aff'g* 33 N.C. App. 124, 234 S.E.2d 477 (1977).

31. N.C. GEN. STAT. § 105-266.1(1972). This statute provides in pertinent part:

(a) Any taxpayer may apply to the Secretary of Revenue for refund of tax or additional tax paid by him at any time within three years after the date set by the statute for filing of the return or . . . within six months from the date of payment of such tax or additional tax, whichever is later. The Secretary shall grant a hearing thereon, and if upon such hearing he shall determine that the tax is excessive or incorrect, he shall resettle the same according to the law and the facts, and adjust the computation accordingly.

*Id.*

32. *Id.*

33. 293 N.C. at 565-66, 238 S.E.2d at 781.

34. 22 N.C. App. 272, 206 S.E.2d 346 (1974). The Secretary of Revenue did not seek review of this decision. 293 N.C. at 566, 238 S.E.2d at 781.

35. 293 N.C. at 566-67, 238 S.E.2d at 782.

36. *Id.* at 568, 238 S.E.2d at 783 (emphasis by the court).

37. N.C. GEN. STAT. § 105-267 (Cum. Supp. 1977).

38. 293 N.C. at 569, 238 S.E.2d at 783. The court noted that the statute of limitations under § 105-267 is shorter than that applied under § 105-266.1 and that Coca-Cola had failed to demand a refund within the requisite time under the former. *Id.*

39. *Id.* at 569, 238 S.E.2d at 783. *But cf.* *State ex rel. S.S. Kresge Co. v. Howard*, 357 Mo. 302, 208 S.W.2d 247 (1947) (distinguishable due to absence of general statute allowing recovery of illegal tax).

have protected its rights, the court stated, by paying the taxes and pursuing the section 105-267 remedy.<sup>40</sup> The court also rejected Coca-Cola's argument that the payments were involuntary because of the necessity of commencing a civil lawsuit to recover them.<sup>41</sup> Apprehension of the difficulty and expense necessary to challenge a tax, the court held, does not constitute duress.<sup>42</sup>

The supreme court's interpretation of section 105-266.1 is a useful gloss on that statute but fails to provide a clear indication of whether it permits refund of "erroneous or incorrect" taxes—incorrect due to an error in calculation by the taxpayer, for example—remitted voluntarily. The language of the statute itself does not seem to make the refund contingent upon involuntary payment in the first instance, and there is some authority supporting the proposition that section 105-266.1 provides for unconditional refund of excessive taxes paid by mistake.<sup>43</sup> The court of appeals, however, seemed to hold in its review of *Coca-Cola* that the statute is not broad enough to permit recovery of taxes paid voluntarily and even stated that it is a "procedural statute": "It does not set out *when* a taxpayer is entitled to a refund but only the steps by which a refund may be received."<sup>44</sup> The supreme court's review of this seemingly incorrect interpretation of G.S. 105-266.1 would have been a valuable addition to its *Coca-Cola* opinion.

### C. Tax Measures To Encourage Energy Conservation<sup>45</sup>

Legislation is pending in Congress that would provide federal income tax credits for such energy conservation measures as the installation of storm windows, insulation and solar heating or cooling systems.<sup>46</sup> The North Carolina General Assembly enacted a diversified package of statutes in 1977 with the same purpose: to provide tax incentives for energy conservation.

The General Assembly passed one bill providing favorable property tax assessments for buildings with solar heating or cooling systems in accordance with schedules of value for buildings equipped with conventional systems, declaring that "no additional value shall be assigned for the difference in cost between a solar heating or cooling system and a conven-

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40. 293 N.C. at 569, 238 S.E.2d at 783.

41. *Id.* at 570, 238 S.E.2d at 784.

42. *Id.*

43. See *Southern Bell Tel. & Tel. Co. v. Clayton*, 266 N.C. 687, 147 S.E.2d 195 (1966) (refund of taxes paid due to bookkeeping error upheld).

44. 33 N.C. App. 124, 129, 234 S.E.2d 477, 481, *aff'd*, 293 N.C. 565, 238 S.E.2d 780 (1977).

45. For a discussion of several energy conservation tax measures, see Landis, *The Impact of the Income Tax Laws on the Energy Crisis: Oil and Congress Don't Mix*, 64 CALIF. L. REV. 1040 (1976).

46. See H.R. 8444, 95th Cong., 1st Sess. § 2011 (1977); H.R. 5263, 95th Cong., 1st Sess. § 1011 (1977).

tional system . . . .'<sup>47</sup> The General Assembly also passed the Energy Conservation Act of 1977 (ECA).<sup>48</sup> The ECA includes provisions for tax credits against state taxes on both personal and corporate income for the installation and equipment cost of solar hot water, heating or cooling equipment.<sup>49</sup> The credits are limited to 25% of the cost and may not in any case exceed \$1000 on any single building or family unit.<sup>50</sup> The ECA also includes provisions for credits against state income taxes for installation of insulation, storm windows and storm doors in buildings constructed and occupied prior to January 1, 1977.<sup>51</sup> These credits will be available for improvements made during the period from January 1, 1977, through December 31, 1978, will be limited to 25% of cost and may not exceed \$100 on any single building or family dwelling unit.<sup>52</sup>

The ECA's insulation credit will be the most significant facet of this tax incentive package for most taxpayers. The alert homeowner may gain valuable tax benefits not only from the ECA credit but also from any available federal tax credit if Congress enacts one of the proposed energy tax bills.<sup>53</sup> These boons to taxpayers and the insulation industry should result in substantial fuel savings.<sup>54</sup> There is also evidence, however, that such credits may not produce the desired results in the near future, "[f]or even though the consumer demand is there, the insulation clearly is not."<sup>55</sup> Shortages of insulating materials have been reported since the early months of 1977,<sup>56</sup> and due to increased demand and scarce supply, the advisability of the tax credits has been questioned: "[T]he shortages are unlikely to ease soon. . . . Tax incentives, desirable as they may be in theory, will only feed a demand that cannot immediately be supplied . . . ."<sup>57</sup> Other problems, by-products of overheated demand, such as price-gouging and shoddy installation, have also been identified.<sup>58</sup> In addition, there is the danger that some insulation materials now being marketed may be carcinogenic.<sup>59</sup> The

47. Law of July 1, 1977, ch. 965, § 1, 1977 N.C. Sess. Laws 1289 (codified at N.C. GEN. STAT. § 105-277(g) (Cum. Supp. 1977)).

48. Law of June 29, 1977, ch. 792, 1977 N.C. Sess. Laws 1038 (codified in scattered sections of N.C. GEN. STAT. chs. 105, 143, 143A, 143B (Cum. Supp. 1977)).

49. *Id.* §§ 3, 4.

50. *Id.*

51. *Id.* §§ 5, 6.

52. *Id.*

53. See text accompanying note 46 *supra*.

54. It has been estimated that proposed federal residential insulation and solar and wind tax credits should result in savings equivalent to 250,000 to 310,000 barrels of natural gas and oil per day in 1985. See H.R. REP. NO. 496, pt. III, 95th Cong., 1st Sess. 40 (1977).

55. *Insulation: A Boom Too Soon*, NEWSWEEK, Aug. 15, 1977, at 68, 68.

56. *Sales Heat Up for Home Insulation*, BUS. WEEK, Feb. 28, 1977, at 31, 31-32.

57. *Running Out of Insulation*, TIME, Nov. 14, 1977, at 81, 81.

58. See *Insulation: A Boom Too Soon*, *supra* note 55.

59. *Id.*



General Assembly, aware of the risk posed by low quality workmanship, enacted legislation requiring state and local cooperation in regulating the installation of insulating materials.<sup>60</sup> The tax credit, nevertheless, may cause more problems than it solves.

#### D. *Taxation of Property in Foreign Trade Zones*

A foreign trade zone is an enclosed and policed area operated as a public utility where foreign and domestic merchandise—without being subject to United States customs laws—may be stored, sold, exhibited, treated or repacked prior to being exported or sent into the customs territory of the United States.<sup>61</sup> The reason for establishing foreign trade zones has been explained as follows:

The purpose of a foreign trade zone is to encourage and expedite that part of . . . foreign trade which the government wishes to be free from restrictions necessitated by customs duties. More specifically, it aims to foster the dealing in foreign goods that are imported, not for domestic consumption, but for re-export to foreign markets and for conditioning and combining with domestic products previous to export. . . . Customs duties or tariffs hinder the free flow of goods in international commerce, and the function of a foreign trade zone is to eliminate these hindrances to commerce . . . .<sup>62</sup>

The General Assembly in 1976 passed enabling legislation for the establishment of foreign trade zones in North Carolina.<sup>63</sup> Under this foreign trade zone law as originally enacted, property located in North Carolina zones was subject to ad valorem taxes.<sup>64</sup> The constitutionality of this tax provision was questioned on import-export clause<sup>65</sup> and commerce clause<sup>66</sup> grounds,<sup>67</sup> however, it was eliminated by the General Assembly in 1977.<sup>68</sup>

60. Law of June 23, 1977, ch. 703, 1977 N.C. Sess. Laws 846.

61. See Singer, *Foreign-Trade Zones: A Means by Which the Businessman May Avoid the Impact of Duties*, 29 U. PITT. L. REV. 89, 97-98 (1967) and sources cited therein.

62. D. Morris, *Constitutional Limitations on the Power of North Carolina to Tax Goods Located in a Foreign Trade Zone 3* (1977) (unpublished paper) (copy on file in office of *North Carolina Law Review*) (footnote omitted).

63. Law of May 14, 1976, ch. 983, § 132, 1975 N.C. Sess. Laws, 2d Sess. 1976, at 56 (codified at N.C. GEN. STAT. §§ 55C-1 to -4 (Cum. Supp. 1977)). For a discussion of the federal foreign trade zone law and North Carolina law as originally enacted, see Ferrell, *1976 Legislation: Foreign Trade Zone*, PROP. TAX BULL., June 24, 1976, at 1 (Institute of Government, University of North Carolina at Chapel Hill); Fogel, *Foreign Trade Zones: An Opportunity for North Carolina*, 2 N.C.J. INT'L L. & COM. REG. 1 (1977).

64. See Law of May 14, 1976, ch. 983, § 132, 1975 N.C. Sess. Laws, 2d Sess. 1976, at 56 (codified at N.C. GEN. STAT. §§ 55C-1 to -4 (Cum. Supp. 1977)).

65. U.S. CONST. art. I, § 10, cl. 2.

66. *Id.* art. I, § 8, cl. 3.

67. See Fogel, *supra* note 63, at 12 (import-export clause); D. Morris, *supra* note 62, at 25-36 (import-export clause, commerce clause).

68. Law of June 28, 1977, ch. 782, § 1, 1977 N.C. Sess. Laws 1026 (codified at N.C. GEN. STAT. § 55C-4 (Cum. Supp. 1977)).

In addition, tangible personal property produced in the United States for exportation or imported from outside the United States and held in a North Carolina foreign trade zone has now been classified as property free from the ad valorem tax.<sup>69</sup>

The 1977 amendments should prove to be economically sound measures.<sup>70</sup> If a foreign trade zone were established in North Carolina, the no-tax classification would certainly provide additional incentive for international trade within that zone. No such zone has been established to date, however, and there are no immediate prospects for the establishment of any.<sup>71</sup> The main disincentive appears to be the monumental undertaking involved in completing the federal application for foreign trade zone status.<sup>72</sup>

### *E. Benefits Under Pension Plans*

Legislation was enacted by the General Assembly changing provisions in the state's tax laws to allow taxpayers the same advantages for retirement plan contributions and benefits that are currently available under federal tax laws.<sup>73</sup> The new law provides a state income tax deduction for contributions by an individual for the benefit of himself or of his spouse made to individual retirement accounts, annuities or bonds if these contributions are also deductible under the federal income tax.<sup>74</sup> It further provides that benefits paid under such plans are exempt from the state inheritance tax if they may be excluded from the decedent's gross estate under the federal estate tax.<sup>75</sup>

Such changes coordinating state tax provisions with their federal counterparts seem well-advised. Closer coordination could simplify tax calculations for North Carolina taxpayers and give them full advantage under state tax law of tax benefits now available under the federal tax code. There remains the potential for even further coordination of state and federal tax provisions, however. A deduction for unreimbursed medical expenses, for example, is provided under both the federal income tax<sup>76</sup> and the state income tax.<sup>77</sup> The state tax deduction, however, is subject to a 5% floor—

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69. *Id.* § 2 (codified at N.C. GEN. STAT. § 105-275(23) (Cum. Supp. 1977)).

70. See Fogel, *supra* note 63, at 12.

71. Telephone interview with Hunter A. Poole, Assistant Director, International Division, North Carolina Department of Commerce (Jan. 20, 1978).

72. *Id.*

73. Law of July 1, 1977, ch. 900, 1977 N.C. Sess. Laws 1225 (codified in scattered sections of N.C. GEN. STAT. ch. 105 (Cum. Supp. 1977)). For a discussion of the relevant federal tax provisions, see S. GOLDBERG, PENSION PLANS UNDER ERISA (1976).

74. N.C. GEN. STAT. § 105-141 (Cum. Supp. 1977); see J. BRANNON, *supra* note 1, at 304.

75. N.C. GEN. STAT. § 105-3 (Cum. Supp. 1977); see J. BRANNON, *supra* note 1, at 304.

76. I.R.C. § 213(a)(1).

77. N.C. GEN. STAT. § 105-147(11)(a) (Cum. Supp. 1977).

unreimbursed medical expenses exceeding 5% of the taxpayer's adjusted gross income are deductible—while the federal deduction is subject to a 3% floor. Thus, a taxpayer and his or her dependents would have to incur greater medical expenses to trigger the state tax deduction. In light of such continuing disparities, the General Assembly should consider further synchronizing the tax benefits available under the state and federal tax codes during the next legislative session.

WILLIAM JOSEPH AUSTIN, JR.

### XIII. TORTS

#### A. *False Arrest*

In a case of first impression, *Robinson v. City of Winston-Salem*,<sup>1</sup> the court of appeals considered the issue of the civil liability of a police officer for false arrest when the officer, acting under a valid arrest warrant, mistakenly arrested the wrong person. The court adopted the position of a majority of jurisdictions, holding that an officer arresting the wrong person is liable only if he failed to use reasonable care in determining the identity of the person named in the warrant.<sup>2</sup>

Defendant police officers in *Robinson* had an arrest warrant for one Bernard Jackson. An informant allegedly told the officers that Jackson lived at plaintiff Clarence Bernard Robinson's address. When the officers arrived at that address, however, they were informed that only Clarence Bernard Robinson lived there. Nevertheless, Clarence Robinson was arrested and held in jail overnight, even though it was learned prior to his incarceration that he was the wrong person.<sup>3</sup> Robinson subsequently brought suit alleging false arrest.<sup>4</sup>

The only North Carolina authority available to guide the court, the supreme court's decision in *Melton v. Rickman*,<sup>5</sup> suggests that strict liability should be imposed on an officer for false arrest. Under *Melton*, the only showing necessary to establish liability for false arrest or imprisonment is

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1. 34 N.C. App. 401, 238 S.E.2d 628 (1977).

2. *Id.* at 406-07, 238 S.E.2d at 631. See also Manos, *Police Liability for False Arrest or Imprisonment*, 16 CLEV.-MAR. L. REV. 415 (1967).

3. 34 N.C. App. at 403-04, 238 S.E.2d at 629-30. There was a dispute as to whether an SBI agent had identified a photograph of plaintiff and, later, plaintiff himself as the person from whom the drug purchase was made. *Id.*

4. *Id.* at 402-03, 238 S.E.2d at 629.

5. 225 N.C. 700, 36 S.E.2d 276 (1945).

"the deprivation of one's liberty without legal process."<sup>6</sup> The *Robinson* court did not consider this statement binding, however, since *Melton* involved a charge of abuse of criminal process rather than a charge of false arrest.<sup>7</sup> In rejecting the strict liability approach,<sup>8</sup> the *Robinson* court adopted the view that liability should result only from failure to use reasonable diligence properly to determine that the person arrested is the person described in the warrant.<sup>9</sup> The court's test thus allows for exculpation when the officer acts in good faith.<sup>10</sup> Good faith, however, is not to be construed as the absence of malice, but rather as affirmative due diligence.<sup>11</sup>

An approach to liability for false arrest not considered by the court is that proposed by the American Law Institute.<sup>12</sup> The *Restatement (Second) of Torts* suggests that an arrest with a warrant is privileged only when the person arrested is adequately described or named in the warrant *and* is in fact the person intended by the warrant or reasonably believed to be so.<sup>13</sup> The accompanying commentary explains that if one is arrested who is *not* named or described adequately in the warrant, the arrest is not privileged regardless of the reasonableness of the mistake of identity unless the person arrested is knowingly responsible for the mistake.<sup>14</sup> This test apparently allows for exculpation of the officer when the name or description in the warrant is close to that of the person arrested, but not when, as in *Robinson*, there is nothing in the warrant to prompt the officer's mistake. The *Restatement* position gives greater weight to the individual's interest in liberty as opposed to the conflicting interest of society in effective law enforcement than the position adopted by *Robinson*.<sup>15</sup> Perhaps the *Restatement's* test

6. *Id.* at 703, 36 S.E.2d at 277-78.

7. 34 N.C. App. at 406, 238 S.E.2d at 631. *Melton* tangentially alluded to the nature of a false arrest charge in discussing the elements of abuse of process. 225 N.C. at 703, 36 S.E.2d at 277-78. Thus the *Melton* discussion was *obiter dictum* rightly nonbinding on the *Robinson* court.

8. 34 N.C. App. at 406-07, 238 S.E.2d at 631.

9. *Id.*

10. *Id.* at 407, 238 S.E.2d at 631.

11. *Id.* (citing *Blocker v. Clark*, 126 Ga. 484, 490, 54 S.E. 1022, 1024 (1906)). *Blocker* articulates the good faith test as follows:

Good faith will protect the officer. Personal spite or a reckless disregard of the rights of others would amount to bad faith. But the officer may not be animated by spite; his conduct may not be reckless, and still bad faith may exist. Good faith implies due diligence. Good faith may be negated by evidence of negligence. The failure to exercise ordinary care in a transaction like the one under construction is inconsistent with good faith.

126 Ga. at 490, 54 S.E. at 1024.

12. RESTATEMENT (SECOND) OF TORTS § 125 (1965).

13. *Id.*

14. *Id.* § 128, Comment on Subsection 1(a).

15. See *Manos*, *supra* note 2, at 418. The court's expressed fear in *Robinson* is that if a strict liability standard were imposed, police officers would be extremely reluctant to serve warrants in cases of even minimal doubt. 34 N.C. App. at 406, 238 S.E.2d at 631.

would go further in promoting effective law enforcement than the good faith test because it would foster efforts to generate and follow closely adequate warrants. Provided that the due diligence standard established in *Robinson* is properly applied, however, the court's adopted position with respect to false arrest based on mistaken identity will provide an adequate safeguard for the individual's interest in liberty.

### B. False Returns

In *Rollins v. Gibson*<sup>16</sup> the state supreme court expanded the scope of a sheriff's liability for a false return, overruling prior case law holding that the G.S. 162-14<sup>17</sup> penalty for a false return applied to process issued in civil cases only.<sup>18</sup> The statute prescribes a \$500 penalty for such a return, one-half of which goes to the aggrieved party and one-half to the person who brings suit. This provision also allows for further action for damages by the party aggrieved.<sup>19</sup>

When assigned to deliver a subpoena to plaintiff in *Rollins* requiring his appearance in court for a traffic offense, defendant-sheriff in *Rollins* later returned the subpoena to the court marked, "after due and diligent search Raymond Rollins not to be found in Guilford County."<sup>20</sup> Plaintiff was never notified of the date of his trial and was taken into custody when he did not appear for trial.<sup>21</sup> Plaintiff brought suit against the sheriff pursuant to section 162-14<sup>22</sup> and showed at trial that he had been available during the period the sheriff held the subpoena.<sup>23</sup> Thus, the jury found a false return by the sheriff and awarded plaintiff \$500 in damages.<sup>24</sup>

Addressing the issue whether section 162-14 applies to returns in criminal as well as civil proceedings,<sup>25</sup> the *Rollins* court faulted *Martin v.*

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16. 293 N.C. 73, 235 S.E.2d 159 (1977).

17. N.C. GEN. STAT. § 162-14 (1976).

18. 293 N.C. at 82, 235 S.E.2d at 165.

19. N.C. GEN. STAT. § 162-14 (1976) provides:

Every sheriff . . . shall execute and make due return of all writs and other process to him legally issued . . . .

For every false return, the sheriff shall forfeit and pay five hundred dollars (\$500.00), one moiety thereof to the party aggrieved and the other to him that will sue for the same, and moreover be further liable to the action of the party aggrieved, for damages.

20. 293 N.C. at 74, 235 S.E.2d at 160. The sheriff testified that he had no personal knowledge of an attempt to deliver the subpoena, but that he believed his deputy followed procedures that involved attempting to deliver the subpoena two or three times. *Id.*

21. *Id.* at 75, 235 S.E.2d at 161.

22. See text of statute note 19 *supra*.

23. 293 N.C. at 75, 235 S.E.2d at 161.

24. *Id.* at 76, 235 S.E.2d at 161.

25. The court first considered whether the allegation in the return of "due and diligent search" could render the return false. Reviewing past decisions, the court determined that if the underlying facts from which a false inference is made in the return are omitted, the return is false for purposes of § 162-14. *Id.* at 79, 235 S.E.2d at 163. Compare *Lemit v. Freeman*, 29

*Martin*,<sup>26</sup> an 1858 supreme court case which limited the provision's sanctions to civil returns, as a misconstruction of statutory language.<sup>27</sup> *Martin*, in analyzing the statute's distribution of damages clause: "one moiety to the party aggrieved,"<sup>28</sup> concluded that "party" was intended to mean a person rather than the sovereign. Thus, only in a civil action would there be an opposing party commanding the subject of the return's presence in court. In a criminal process, the state would be the initiator; therefore, the court reasoned, there would be no "party aggrieved."<sup>29</sup> In overruling *Martin* and applying the statute to criminal proceeding returns as well, *Rollins* determined that the *Martin* court had overlooked the fact that the action for a false return can be brought by someone other than the party aggrieved.<sup>30</sup> Thus, the court in *Rollins* suggested that the statute's beginning, general reference to "all writs and other process" was not limited by the later language of the statute as *Martin* had stated.<sup>31</sup>

*Rollins*, however, did not confront other facets of *Martin*'s analysis of the statutory language. The *Martin* court noted that since a process to arrest one charged with an offense against the state was to be executed without

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N.C. (7 Ired.) 317 (1847) (a return marked "too late to hand to execute in time" held false), with *Lemit v. Mooring*, 30 N.C. (8 Ired.) 312 (1848) (return with same language where date upon which sheriff received writ was truthfully given held not false). See also *Tomlinson v. Long*, 53 N.C. (8 Jones) 469 (1862); *Hassell v. Lathem*, 52 N.C. (7 Jones) 465 (1860). If the underlying facts are given truthfully, the return is not false even though incorrect inferences are drawn. 293 N.C. at 79, 235 S.E.2d at 163. Thus, the *Rollins* court, in finding a bare allegation of "due and diligent search" unaccompanied by further facts to be a proper basis for a charge of false return, concluded that *Tomlinson v. Long*, 53 N.C. (8 Jones) 469 (1862) was controlling. 293 N.C. at 80, 235 S.E.2d at 164. In *Tomlinson*, the return was endorsed "not to be found in my county." 53 N.C. (8 Jones) at 470. The evidence showed that plaintiff had been at home during the time the subpoena was held by the sheriff. The court there noted that "if the sheriff desires to avoid the heavy penalty of the statute for a false return, he should, in all cases of doubt, return the facts, and not merely his conclusions." *Id.* at 471-72.

26. 50 N.C. (5 Jones) 349 (1858).

27. 293 N.C. at 82, 235 S.E.2d at 165.

28. N.C. GEN. STAT. § 162-14 (1976).

29. 50 N.C. (5 Jones) at 351. This interpretation of the statute's language is difficult to understand. Although typically an amercement (fine) against a sheriff is brought by a plaintiff "aggrieved" by a sheriff's failure to execute a judgment received in a prior action, see, e.g., *Brogden Produce Co. v. Stanley*, 267 N.C. 608, 148 S.E.2d 689 (1966), or by a sheriff's failure to properly serve a summons to the party being sued, see, e.g., *Bell v. Wycoff*, 131 N.C. 245, 42 S.E. 608 (1902), the party aggrieved may be the party sued in the prior action, see, e.g., *Harrell v. Warren*, 100 N.C. 216, 6 S.E. 777 (1888). Thus, it would seem that when a criminal process is involved, a defendant could just as easily be the "party aggrieved" as could the State. The *Rollins* court instead based its reading of the statute on the fact that the action can be brought by "anyone who will sue, whether or not that person is the party aggrieved," 293 N.C. at 82, 235 S.E.2d at 165, thereby avoiding the question whether a criminal defendant can be a "party aggrieved."

30. 293 N.C. at 82, 235 S.E.2d at 165. The \$500 penalty assessed against a sheriff for a false return is designated to be paid "one moiety thereof to the party aggrieved and the other to him that will sue for the same . . ." N.C. GEN. STAT. § 162-14 (1976) (emphasis added).

31. 293 N.C. at 82, 235 S.E.2d at 165.

reference to the time of its delivery, the language "where such process shall be delivered to him twenty days before the sitting of the court to which the same is returnable" could not apply to a criminal process.<sup>32</sup> Further, a statute enacted in 1850 that applied when *Martin* was decided provided penalties analogous to those in section 162-14 for returns in criminal proceedings.<sup>33</sup> Certainly such a statute would have been a superfluity had G.S. 162-14 been intended to apply to criminal proceeding returns as well.

The *Rollins* court, in addition to its reevaluation of the language of the provision, pointed out that the supreme court's decision in *State v. Berry*<sup>34</sup> actually initiated the abrogation of the dichotomy existing in the remedies available for defective returns of process in civil and criminal actions. *Berry* held that the language of G.S. 14-242,<sup>35</sup> traditionally held applicable only to returns of criminal process, also applied to returns of civil process.<sup>36</sup> Certainly the language of G.S. 14-242 is more susceptible to such a construction than is the language of G.S. 162-14. G.S. 14-242 contains no limiting language similar to that interpreted by the *Martin* court to restrict G.S. 162-14 to civil processes.<sup>37</sup>

Since G.S. 14-242 and G.S. 162-14 are the only two provisions dealing with false returns, one offering a civil and one a criminal remedy, the logical result, reached by the *Rollins* court, is that each should be applicable to both returns of civil and criminal process. It is doubtful, however, that an accurate historical appraisal of G.S. 162-14 would justify such a construction.

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32. 50 N.C. (5 Jones) at 351.

33. Law of Jan. 28, 1851, ch. 57, § 1, 1850-51 N.C. Laws 127 (formerly codified at N.C. REV. CODE ch. 35, § 10 (Moore & Biggs 1855)) (repealed). The statute read in pertinent part as follows:

§ 10. Every sheriff shall indorse on all process and subpoenas issuing in criminal cases, whether for the State or defendant, the day when such process and subpoenas come to hand, and also the day of their execution; and on failure of any sheriff to perform either of said duties, he shall forfeit and pay the sum of ten dollars for every case of neglect to be recovered for the use of the State in the same manner as forfeitures are recovered against sheriffs by parties in civil suits, for failure to make due return of process delivered to them.

34. 169 N.C. 371, 85 S.E. 387 (1915).

35. N.C. GEN. STAT. § 14-242 (1969). The statute reads:

If any sheriff, constable, or other officer, . . . refuse or neglect to return any precept, notice or process to him tendered or delivered, which it is his duty to execute or make a false return thereon, he shall forfeit and pay to anyone who will sue for the same one hundred dollars and shall moreover be guilty of a misdemeanor.

36. 169 N.C. at 372, 85 S.E. at 388. The original decision that the provision applied only to returns of criminal process was seemingly premised on the placement of the provision in the chapter of the statutes entitled "Crimes and Punishments." *Harrell v. Warren*, 100 N.C. 264 (1888). The *Berry* court observed that since the provision is a criminal statute and creates a criminal offense, it is properly included in the section regardless of its application to both civil and criminal returns. 169 N.C. at 372, 85 S.E. at 388.

37. The statute makes a sheriff liable for a false return of "any precept, notice, or process to him delivered." N.C. GEN. STAT. § 14-242 (1969). Nothing in the later language of the statute in any way limits this language as to indicate that it applies only to criminal process.

### C. Wrongful Death

In enacting the 1973<sup>38</sup> and 1969<sup>39</sup> amendments to North Carolina's wrongful death statute, the General Assembly created an unusually liberal vehicle for recovery of damages.<sup>40</sup> *Christenbury v. Hedrick*,<sup>41</sup> a 1977 court of appeals decision, presented one of the first interpretations of the scope of the damages recoverable under the statute in relation to other forms of recovery existing prior to the amendments. The court of appeals concluded that a parent is barred from any individual action for personal injury for the tortious death of her child since all possible elements of the parent's injury are included within the terms of the statute. Therefore the action must be brought under the wrongful death statute by the personal representative of the deceased.<sup>42</sup>

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38. Law of Apr. 12, 1973, ch. 1329, § 3, 1973 N.C. Sess. Laws 629 (codified at N.C. GEN. STAT. § 28A-18-2(a) (1976)). Section 28A-18-2(a) provides in part:

(a) When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages, therefor, the person or corporation that would have been so liable, and his or their personal representatives or collectors, shall be liable to an action for damages, to be brought by the personal representative or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amounts in law to a felony. The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, and reasonable hospital and medical expenses not exceeding five hundred dollars (\$500.00) incident to the injury resulting in death . . .

39. Law of Apr. 14, 1969, ch. 215, § 1, 1969 N.C. Sess. Laws 194 (codified at N.C. GEN. STAT. § 28A-18-2(b) (1976)). Section 28A-18-2(b) provides in part:

- (b) Damages recoverable for death by wrongful act include:
  - (1) Expenses for care, treatment and hospitalization incident to the injury resulting in death;
  - (2) Compensation for pain and suffering of the decedent;
  - (3) The reasonable funeral expenses of the decedent;
  - (4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected:
    - a. Net income of the decedent,
    - b. Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,
    - c. Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered;
  - (5) Such punitive damages as the decedent could have recovered had he survived, and punitive damages for wrongfully causing the death of the decedent through maliciousness, wilful or wanton injury, or gross negligence;
  - (6) Nominal damages when the jury so finds.

40. See Lauerma, *The 1969 Amendments to the North Carolina Wrongful Death Statute*, 6 WAKE FOREST INTRA. L. REV. 211, 234 (1970). The North Carolina statute places no limit on the damages recoverable. Moreover the statute is unusual in specifying numerous types of harm for which damages are recoverable. A comparison with other state statutes reveals the comparative liberality of the North Carolina law with respect to the inclusion of such elements. Finally the statute allows for nominal and punitive damages, a relatively atypical provision. *Id.* at 232-34.

41. 32 N.C. App. 708, 234 S.E.2d 3 (1977).

42. *Id.* at 712-13, 234 S.E.2d at 5.



In *Christenbury*, plaintiff-mother brought suit in her individual capacity against the administrator of her husband's estate for damages stemming from the death of her two minor children in an automobile collision caused by her husband's negligence.<sup>43</sup> The court of appeals, affirming the trial court's dismissal of plaintiff's claim, held that each of the elements of the recovery sought by plaintiff was included within the terms of the wrongful death provision and therefore the action for such damages must be brought by the personal representative of the decedent.<sup>44</sup>

Plaintiff's argument hinged largely on a 1969 case, *Crawford v. Hudson*,<sup>45</sup> in which the court of appeals had decided a similar question immediately prior to the effective date of the amendments to the statute. In *Crawford* the court allowed the father of a deceased son to bring an action in his individual capacity for funeral expenses and loss of services during minority despite the father's previous institution of an action for wrongful death as administrator of his son's estate.<sup>46</sup> Since funeral expenses were not an element to be considered in determining recovery in a wrongful death action under the old statute,<sup>47</sup> the *Crawford* court viewed the claim for those expenses as a separate personal injury action by the one responsible for the expenses.<sup>48</sup> *Crawford*, however, also allowed a claim in the independent

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43. *Id.* at 709, 234 S.E.2d at 3. Plaintiff specifically sought recovery of ambulance, medical, funeral and burial expenses, and the value of the children's lives to plaintiff including net income during minority, protection, care and assistance of the decedents, and their society, companionship, comfort, guidance, kindly offices and advice. *Id.* at 709, 234 S.E.2d at 4.

44. *Id.* at 712, 234 S.E.2d at 5. Plaintiff had earlier brought an action as administrator of the estates of her children. The action was dismissed, apparently on the basis of *Skinner v. Whitley*, 281 N.C. 476, 189 S.E.2d 230 (1972) (administrator of an unemancipated child has no action against administrator of child's father for wrongful death from father's ordinary negligence). The court of appeals in *Christenbury* noted that prior to that dismissal the legislature had enacted Law of June 19, 1975, ch. 685, § 1, 1975 N.C. Sess. Laws 911 (codified at N.C. GEN. STAT. § 1-539.21 (Cum. Supp. 1977)), abolishing parent-child immunity in motor vehicle cases. 32 N.C. App. at 713, 234 S.E.2d at 6. Plaintiff did not appeal the decision. *Id.* at 709, 234 S.E.2d at 4. Plaintiff's claim as administrator was barred by the two-year wrongful death statute at the time the present suit was brought.

45. 3 N.C. App. 555, 165 S.E.2d 557 (1969).

46. *Id.* at 557, 165 S.E.2d at 559.

47. See Lauerma, *supra* note 40, at 211. The forerunner of the present statute read: "The plaintiff in such action may recover such damages as are a fair and just compensation for the pecuniary injury resulting from such death." Law of Apr. 6, 1869, ch. 113, § 71, 1868-69 N.C. Pub. Laws 276 (formerly codified at N.C. GEN. STAT. § 28-174 (1966)) (repealed 1973). Coverage of the act excluded burial, hospital and medical expenses of the decedent and recovery for any harm other than pecuniary injury, for example, sentiment. Lauerma, *supra* note 40, at 216; *Bowen v. Constructors Equip. Rental Co.*, 283 N.C. 395, 415, 196 S.E.2d 789, 803 (1973). Funeral expenses were likewise nonrecoverable under the old survival statute, Law of Apr. 16, 1869, ch. 113, § 70, 1868-69 N.C. Pub. Laws 276 (formerly codified at N.C. GEN. STAT. § 28-172 (1966)) (repealed 1973), on the theory that the decedent had no right to them before his death. See McNeeley, *The New North Carolina Wrongful Death Statute*, 48 N.C.L. REV. 594, 603 (1970).

48. 3 N.C. App. at 557, 165 S.E.2d at 559.

action by the deceased's parent for recovery for the loss of the child's services during the remaining period of minority, even though a separate wrongful death action had already been brought.<sup>49</sup> The recovery for "pecuniary injury" allowed under the pre-amendments wrongful death statute<sup>50</sup> would certainly compensate the deceased's parent for loss of these services.<sup>51</sup> Thus *Crawford* assented to recovery for this injury under both the wrongful death statute and in an individual action by the injured parent.<sup>52</sup> The *Christenbury* court's summary dismissal of *Crawford* as a case decided before the amendments did not deal adequately with *Crawford*'s allowance of dual claims, one under the statute and one in an independent action by the parent.

In addressing plaintiff's claim, *Christenbury* considered each element of the damages alleged in the individual action against the recovery allowed by the new wrongful death act.<sup>53</sup> Each was held to be included within the terms of the statute.<sup>54</sup> The court questioned, however, whether the statute's language allowed for recovery of loss of services between the time of the injuries and the time of death.<sup>55</sup> Recovery had been allowed a deceased's

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49. *Id.* at 556, 165 S.E.2d at 558.

50. See note 47 *supra*. "Pecuniary injury" was defined as the present worth of the net pecuniary value of the life of the deceased "ascertained by deducting the probable cost of his own living and usual and ordinary expenses from his probable gross income which might be expected to be derived from his own exertions based upon his life expectancy." Lauerma, *supra* note 40, at 211 (citing *Purnell v. Rockingham R.R.*, 190 N.C. 573, 575, 130 S.E. 313, 314 (1925)).

51. This recovery is strictly statutory. The common law allows no cause of action for loss of services of a deceased child. Lauerma, *supra* note 40, at 220. The North Carolina statute, before it was amended to allow recovery for "pecuniary injury," used the measure of loss to the estate of the deceased rather than loss to beneficiaries. Comment, *Wrongful Death Damages in North Carolina*, 44 N.C.L. REV. 402, 429-33 (1966). Nevertheless, since distribution of the recovery is determined by the laws of intestate succession, the parents of a minor child should receive compensation for injury for loss of services at minimum. *Id.* at 436.

52. *Crawford*, in essence, created a nonstatutory wrongful death recovery in contravention of the generally accepted common law. See *Baker v. Bolton*, 170 Eng. Rep. 1033 (1808), in which Lord Ellenborough stated that "in a civil court the death of a human being could not be complained of as an injury"; W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 127, at 901-02 (4th ed. 1971).

53. The damages allowed under § 28A-18-2, *quoted in* note 38 *supra*, in a suit brought by the personal representative of the deceased include not only damages resulting from death, but also those formerly allowed only under the survival statute. Law of Apr. 6, 1869, ch. 113, § 70, 1868-69 N.C. Pub. Laws 276. These damages include expenses for care and hospitalization incident to the injury resulting in death and compensation for pain and suffering. See N.C. GEN. STAT. § 28A-18-2(a) (1976). See also Lauerma, *supra* note 40, at 227-28.

54. 32 N.C. App. at 712, 234 S.E.2d at 5. The court in conclusory terms stated that any claim now encompassed by the wrongful death statute must be asserted under that statute. *Id.* In so doing the court failed to recognize the nonstatutory right.

55. *Id.* The record was unclear as to whether the children died at the time of the accident. *Id.* The common law aspect of this element of damages is a murky area of the law. North Carolina has recognized a common law right in a parent to sue for damages for loss of services and earnings of the child during minority when the child is injured by the negligence of another. *Kleibor v. Rogers*, 265 N.C. 304, 144 S.E.2d 27 (1965); W. PROSSER, *supra* note 52, § 125 at 888-

parents for this injury at common law.<sup>56</sup> In addition, other jurisdictions have found that this action is available to the parent even though he has an additional action through a personal representative under a death statute.<sup>57</sup> The court correctly read the expanded coverage of the amendments as including such damages.<sup>58</sup> The statute explicitly allows recovery for expenses for care and hospitalization incident to the injury resulting in death and compensation for pain and suffering.<sup>59</sup> These injuries do not result from death, but cease at death.<sup>60</sup> Thus the statute should be read to include damages stemming from the injury resulting in death as well as from the death itself. Applying this rationale to the language of the statute,<sup>61</sup> recovery should be included for compensation for monetary loss for the decedent's injuries between time of injury and time of death.<sup>62</sup> This analysis, coupled with the fact that legislative action with respect to the common law takes precedence,<sup>63</sup> bolsters the court's conclusion that any recovery allowed a parent under the common law for loss of services between injury and death is included within the terms of the statute and therefore must be brought under the statute.<sup>64</sup>

In finding that substantially all claims for loss related to an injury caused by a tortfeasor's negligence must be brought under the wrongful death statute rather than in an independent action, the *Christenbury* court ignored the possibility of inequitable distribution that may occur under the statute. Any recovery in the wrongful death action is distributed according to the laws of intestate succession.<sup>65</sup> In *Bowen v. Constructor's Equipment Rental Co.*<sup>66</sup> the North Carolina Supreme Court hypothesized a situation in which those entitled to the wrongful death recovery under the intestate succession statutes were ten nephews and nieces of the deceased, one of whom was a close friend and companion who actually suffered the major loss of support and services. The rather undesirable result was that this loss

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89. The death of the child, however, seemingly cuts off recovery absent statutory authorization. *Id.* § 127, at 901-02. But see *Crawford v. Hudson*, 3 N.C. App. 555, 165 S.E.2d 557 (1969).

56. *Hinnant v. Tidewater Power Co.*, 189 N.C. 120, 126 S.E. 307 (1925).

57. See *Davis v. St. Louis, I.M. & S. Ry.*, 53 Ark. 117, 13 S.W. 801 (1890).

58. 32 N.C. App. at 712, 234 S.E.2d at 5.

59. N.C. GEN. STAT. § 28A-18-2(b)(1), (2) (1976); see *Lauerman*, *supra* note 40, at 227.

60. *Lauerman*, *supra* note 40, at 227. Recovery for these would be had from a personal injury action brought under the survival statute. *Id.*

61. N.C. GEN. STAT. § 28A-18-2(b)(4) (1976), *quoted in* note 39 *supra*.

62. *Accord*, *Forsyth County v. Barneycastle*, 18 N.C. App. 513, 516, 197 S.E.2d 576, 578, *cert. denied*, 283 N.C. 752, 198 S.E.2d 722 (1973).

63. *Allen v. Standard Crankshaft & Hydraulic Co.*, 210 F. Supp. 844 (W.D.N.C. 1962), *aff'd*, 323 F.2d 29 (4th Cir. 1963).

64. 32 N.C. App. at 712, 234 S.E.2d at 5.

65. N.C. GEN. STAT. § 28A-18-2(a) (1976), *quoted in* note 38 *supra*.

66. 283 N.C. 395, 196 S.E.2d 789 (1973).

of services was considered in the recovery, but distribution was made among the ten equally.<sup>67</sup> Implementation of the *Christenbury* holding allows for the same troublesome distribution problem. The court's interpretation of the language of the statute is, however, supported by the possibility of double recovery against the defendant tortfeasor should independent actions for loss of services to a parent be allowed as well as recovery under the wrongful death statute.

#### D. Family Purpose Doctrine

The "family purpose doctrine" is generally acknowledged as a misapplication of the principles of agency<sup>68</sup> and consequently has been rejected in at least thirty-two jurisdictions.<sup>69</sup> Nevertheless, the North Carolina Supreme Court recently broadened this doctrine of imputed negligence, holding in *Williams v. Wachovia Bank & Trust Co.*<sup>70</sup> that its ambit extends to the use of motorcycles on private property. As traditionally applied, the family purpose doctrine holds the owner of a vehicle who supplies that vehicle to his family for their use and enjoyment liable for the negligence of his family members in using the vehicle for family purposes.<sup>71</sup> In extending the doctrine<sup>72</sup> beyond its traditional application, the court failed to give adequate weight to the doctrine's faulty conceptual basis, focusing instead on the social policy underlying the doctrine.<sup>73</sup>

The *Williams* suit originated when a fourteen-year-old boy rode his father's motorcycle across a neighbor's yard, striking and seriously injuring the neighbor's three-year-old child. The father had furnished the motorcycle to the son for his use and enjoyment.<sup>74</sup> The injured child's father brought suit against the motorcyclist's father, alleging imputed negligence under the family purpose doctrine.<sup>75</sup> The court of appeals held the doctrine inapplicable in such a situation noting that the legislature was the proper forum for any extension of the doctrine.<sup>76</sup> The supreme court permitted plaintiff to

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67. *Id.* at 422, 196 S.E.2d at 807.

68. See W. PROSSER, *supra* note 52, § 73, at 485-86.

69. See Annot., 8 A.L.R.3d 1191 (1966).

70. 292 N.C. 416, 233 S.E.2d 589 (1977).

71. *Id.* at 419-20, 233 S.E.2d at 592.

72. North Carolina case law had limited the doctrine to the use of motor vehicles operating on public highways. *Grindstaff v. Watts*, 254 N.C. 568, 119 S.E.2d 784 (1961). See notes 78-82 and accompanying text *infra*.

73. 292 N.C. at 421-22, 233 S.E.2d at 593.

74. *Id.* at 417-18, 233 S.E.2d at 590.

75. *Id.* at 418, 233 S.E.2d at 590-91.

76. 30 N.C. App. 18, 226 S.E.2d 210 (1976). The court of appeals decision relied heavily on *Grindstaff v. Watts*, 254 N.C. 568, 119 S.E.2d 784 (1961), discussed in notes 78-81 and accompanying text *infra*. The court thus limited judicial application of the doctrine to its original purpose and scope and declared that any extension to include other than motor vehicles

recover, however, holding that the fact that the vehicle was a motorcycle rather than a car and was operated on private property rather than on a public street was insufficient to take the case outside of the doctrine.<sup>77</sup>

In so extending the family purpose doctrine, the court sidestepped the policy expressed in its earlier decision in *Grindstaff v. Watts*<sup>78</sup> of tightly confining the doctrine in the absence of legislative action to "motor vehicles operating on public highways."<sup>79</sup> The *Grindstaff* court characterized the doctrine as an "anomaly in the law"<sup>80</sup> that unduly stretched the principle of *respondeat superior*. Noting the reluctance of other jurisdictions to extend the doctrine's scope, the court then expressed a fear that any extension would precipitate a rush to extend the doctrine to other instrumentalities and factual situations, thus creating undue uncertainty in agency law.<sup>81</sup> The *Williams* court chose to deemphasize the analytical problems of the doctrine and the *Grindstaff* fear of unbridled extension. *Williams* avoided conflict with *Grindstaff* by construing the latter case's limitation of the doctrine to the use of motor vehicles operating on public highways as describing the nature of the vehicle to which the doctrine was applicable, rather than the particular use of the vehicle giving rise to the complaint.<sup>82</sup> This strained construction, however, clearly runs counter to the strong presumption expressed in *Grindstaff* against any judicial expansion of the doctrine.

The supreme court defended its narrow construction of *Grindstaff* by asserting the value of the social policy behind the doctrine.<sup>83</sup> Critics of the

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in public vehicular areas should come from the legislature. 30 N.C. App. at 24, 226 S.E.2d at 213.

77. 292 N.C. at 421, 233 S.E.2d at 593.

78. 254 N.C. 568, 119 S.E.2d 784 (1961).

79. The *Grindstaff* opinion stated:

[I]n the absence of legislative action, this Court is not disposed to extend the family purpose doctrine in North Carolina to instrumentalities other than motor vehicles operating on public highways. Should the principles of *respondeat superior* be further relaxed, great uncertainty will exist in the field of agency and there will be an immediate clamor to extend the doctrine to still other instrumentalities to meet the exigencies of particular cases.

*Id.* at 574, 119 S.E.2d at 789 (citations omitted). *Grindstaff* held that the family purpose doctrine did not apply to negligence cases arising out of the operation of motorboats. *Id.*

80. *Id.* at 571, 119 S.E.2d at 787.

81. *Id.* at 572-74, 119 S.E.2d at 788-89.

82. 292 N.C. at 421, 233 S.E.2d at 592.

83. The court drew attention to the following policy considerations articulated in *Grindstaff*:

The family purpose doctrine "came into being as an instrument of social policy to afford great protection for the rapidly growing number of motorists in the United States." Perhaps nothing has had so great an impact on the business and social life of the country during the past half century as the advent and ever increasing use of automobiles and trucks. It was probably inevitable that there should be an alarming number of collisions and accidents resulting in injuries, suffering and economic loss. This possibility justified the search of the courts for some device to impose a greater degree of financial responsibility . . . .

*Id.* at 420, 233 S.E.2d at 592 (quoting *Grindstaff v. Watts*, 254 N.C. at 572, 119 S.E.2d at 788) (citation omitted).

family purpose doctrine, on the other hand, have found the policy considerations outweighed by the faulty theoretical basis of the doctrine in the principles of agency. The doctrine presupposes a master-servant or principal-agent relationship between the head of the family and the family members—use for the pleasure and convenience of a family member serves the business of the “master.”<sup>84</sup> Those opposed to the doctrine suggest that consistency with the principles of agency would require, for example, that a father be liable for his son’s negligence only when the son is, in fact, in his father’s service and acting as his agent.<sup>85</sup>

The *Williams* court cited *Meinhardt v. Vaughan*<sup>86</sup> as an instance in which the Tennessee Supreme Court applied the reasoning of the family purpose doctrine to motorcycles. In *Meinhardt*, however, the Tennessee court conceded the tenuous basis of the doctrine and predicated its decision on the son’s use of the motorcycle to get to school, a mission that the father had a duty to perform.<sup>87</sup> Hence, in *Meinhardt* the principles of agency were substantially fulfilled.

The court’s narrow reading of *Grindstaff* was no doubt predicated in large part on the subsequent overruling of *Grindstaff* by legislative enactment declaring the family purpose doctrine applicable to motorboats.<sup>88</sup> The legislature, however, is the proper forum for extension of the purview of a doctrine that contorts established legal principles. The court should have followed the judgment made in *Grindstaff*,<sup>89</sup> allowing the legislature to respond should it determine that policy considerations of increased possibility of recovery warrant extension of the family purpose doctrine to motorcycles.

### E. Governmental Immunity

In 1977 both the General Assembly and the court of appeals considered the scope of the doctrine of governmental immunity in North Carolina in circumstances of substantial import. The legislature retrenched

84. *Smith v. Callahan*, 34 Del. 129, 133, 144 A. 46, 47 (1928).

85. *Id.* at 133-36, 144 A. at 47-48. The court in *Smith* explains the tenuousness of this application of agency law by posing a hypothetical question. Suppose a son of the family has a car that he allows members of the family to use. Is he to be liable for injuries resulting from his father’s negligent driving of the car? Logically this follows from the family purpose doctrine’s theory. *Id.* See also W. PROSSER, *supra* note 52, § 73, at 485-86.

86. 159 Tenn. 272, 17 S.W.2d 5 (1929).

87. *Id.* at 278-79, 17 S.W.2d at 7.

88. Law of May 27, 1971, ch. 450, § 1, 1971 N.C. Sess. Laws 382 (codified at N.C. GEN. STAT. § 75A-10.1 (1975)), states: “The family purpose doctrine, as applicable in this State to tort cases arising from the operation of motor vehicles, shall apply to tort cases arising from the operation of motor boats and vessels as these terms are defined in this Chapter.”

89. See note 79 *supra*.

on the bar to tort recovery against the government by allowing recovery for the negligent omissions of state employees.<sup>90</sup> Previously, only negligent acts were actionable.<sup>91</sup> The court of appeals, on the other hand, broadened the doctrine's effect in a case of first impression, upholding a claim of immunity in the area of foster care services by declaring such services to be governmental rather than proprietary in nature.<sup>92</sup>

In amending North Carolina's Tort Claims Act, G.S. 143-291,<sup>93</sup> to allow recovery for "negligence,"<sup>94</sup> the legislature followed a national trend toward narrowing the scope of governmental immunity.<sup>95</sup> The amendment to the statute resolves obvious inequities resulting from characterization of conduct by state agents as "negligent acts" or "negligent omissions." For example, in *Flynn v. Highway and Public Works Commission*,<sup>96</sup> plaintiff filed a claim against the North Carolina Industrial Commission for wrongful death.<sup>97</sup> The complaint alleged that the negligent acts of the Highway Commission's employees in failing to repair a break or hole in the road surface resulted in an automobile accident fatal to plaintiff's son.<sup>98</sup> In reviewing the claim the court noted that the Tort Claims Act required a negligent act by a state employee while acting in the scope of his employment.<sup>99</sup> Thus, although the Highway Commission was charged with the maintenance of the road in question, its failure to repair the hole was a negligent omission and plaintiff was unable to recover for his injury.<sup>100</sup>

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90. Law of June 10, 1977, ch. 529, §§ 1, 2, 1977 N.C. Sess. Laws 627 (to be codified at N.C. GEN. STAT. § 143-291) (effective July 1, 1979) substitutes "negligence" for "a negligent act" in defining the scope of waiver of sovereign immunity.

91. N.C. GEN. STAT. § 143-291 (Cum. Supp. 1977) reads in part as follows:

The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Department of Transportation, and all other departments, institutions and agencies of the State. The Industrial Commission shall determine whether or not each individual claim arose as a result of a *negligent act* of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.

*Id.* (emphasis added).

92. *Vaughn v. County of Durham*, 34 N.C. App. 416, 240 S.E.2d 456 (1977), *cert. denied*, 294 N.C. 188, 241 S.E.2d 522 (1978).

93. N.C. GEN. STAT. § 143-291 (Cum. Supp. 1977).

94. See notes 90 & 91 and accompanying text *supra*.

95. See W. PROSSER, *supra* note 52, § 131, at 984-87.

96. 244 N.C. 617, 94 S.E.2d 571 (1956).

97. The Industrial Commission is empowered to determine the validity of claims brought under the Tort Claims Act. See note 91 *supra*.

98. 244 N.C. at 618, 94 S.E.2d at 571.

99. *Id.* at 620, 94 S.E.2d at 573.

100. *Id.* See also *Ayscue v. Highway Comm'n*, 270 N.C. 100, 153 S.E.2d 823 (1967) (failure to remove gravel that had washed down into intersection resulted in decedent's death from tractor accident; held not negligent act for purposes of Tort Claims Act).

A similar situation arose in *Mackey v. Highway Commission*.<sup>101</sup> In *Mackey*, plaintiff was again injured as a result of holes left by state employees in the shoulder of a road after removal of some large posts.<sup>102</sup> The court characterized the state's conduct as a negligent act, noting, "we are not concerned with a failure by defendant to maintain the shoulders of the highway in a safe condition for pedestrian travel; we are concerned here with the act of an agent of the Commission in negligently creating a trap, or pitfall, upon a shoulder of the highway which is apparently safe for pedestrian travel."<sup>103</sup>

These two cases are clearly accurate applications of the act-omission distinction.<sup>104</sup> In *Mackey*, there was an undertaking by a state employee that was absent in *Flynn*.<sup>105</sup> Both cases, however, are characterized by a negligent failure to repair holes in the highway by a state agency charged with that responsibility, resulting in injury to the interests of the respective plaintiffs. The inequity of allowing recovery in the one instance and not in the other has now been resolved by the amendment to G.S. 143-291.<sup>106</sup>

The court of appeals reaffirmed the doctrine of governmental immunity in a case of first impression, *Vaughn v. County of Durham*,<sup>107</sup> holding that the placement of children in foster homes by the Durham County Department of Social Services was a governmental function shielded from tort liability by governmental immunity.<sup>108</sup> Plaintiff in *Vaughn* kept foster children for the Department of Social Services. Employees of the Department, knowing that plaintiff intended to become pregnant, placed a child in the home who was a known carrier of cytomegalic inclusion disease. When the disease infects pregnant mothers it often causes defects in their unborn fetuses.<sup>109</sup> Plaintiff became pregnant, contracted the disease and had an abortion.<sup>110</sup> She brought suit alleging negligence by the Department and its employees.<sup>111</sup>

Traditionally a municipal corporation is not protected by governmental immunity when it is performing a proprietary as opposed to a governmental

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101. 4 N.C. App. 630, 167 S.E.2d 524 (1969).

102. *Id.* at 631, 167 S.E.2d at 525.

103. *Id.* at 634, 167 S.E.2d at 526.

104. W. PROSSER, *supra* note 52, § 56, at 338-40.

105. An omission to repair a gas pipe has been regarded as a negligent distribution of gas. *Id.* Thus, the negligence in *Mackey* could have been characterized as negligent maintenance of the highway.

106. Law of June 10, 1977, ch. 529, §§ 1, 2, 1977 N.C. Sess. Laws 627 (to be codified at N.C. GEN. STAT. § 143-291); *see* note 90 *supra*.

107. 34 N.C. App. 416, 240 S.E.2d 456 (1977), *cert. denied*, 294 N.C. 185, 241 S.E.2d 522 (1978).

108. *Id.* at 418, 240 S.E.2d at 458.

109. *Id.* at 416, 240 S.E.2d at 457.

110. *Id.* at 416-17, 240 S.E.2d at 457.

111. *Id.*



function.<sup>112</sup> The supreme court outlined several tests to be applied in determining whether an activity is proprietary or governmental, including whether a monetary charge is made for the service,<sup>113</sup> whether the activity has historically been performed by the government or by private corporations,<sup>114</sup> whether there is statutory authorization for the activity,<sup>115</sup> and “whether the act is for the common good of all without the element of special corporate benefit, or pecuniary profit.”<sup>116</sup> In applying these tests to the facts of *Vaughn*, the court noted that there is no charge for foster placement;<sup>117</sup> the General Assembly appropriates funds for the service. Moreover, the court cited the North Carolina Constitution’s mandate of state care “for the poor, the unfortunate, and the orphan”<sup>118</sup> as refuting plaintiff’s argument that, historically, religious, charitable or other private institutions have provided foster care.<sup>119</sup> The court concluded that placement of children in foster homes by the county is a governmental function.<sup>120</sup>

The court properly characterized the foster care placement of children as a governmental function. Although the distinction between the public and corporate functions of a governmental entity is a difficult one to make,<sup>121</sup> North Carolina has viewed the presence or absence of pecuniary benefit derived from the service as a crucial inquiry.<sup>122</sup> On this basis, the court in *Sides v. Cabarrus Memorial Hospital, Inc.*<sup>123</sup> determined that the operation of a public hospital by a county for pecuniary benefit is a proprietary function for which there is no governmental immunity. As no charge is made for foster care services the presumption is strong that this is a governmental rather than a proprietary activity.

The court’s conclusion that the function of caring for homeless children is historically a government function is less sound. The *Sides* court noted

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112. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E.2d 897 (1972); *Metz v. City of Asheville*, 150 N.C. 748, 64 S.E. 881 (1909).

113. *Sides v. Cabarrus Memorial Hosp.*, 287 N.C. 14, 22-23, 213 S.E.2d 297, 302-03 (1975).

114. *Id.* at 23, 213 S.E.2d at 303.

115. *See Rhodes v. City of Asheville*, 230 N.C. 134, 52 S.E.2d 371, *rehearing denied*, 230 N.C. 759, 535 S.E.2d 313 (1949). The court in *Rhodes* noted that statutory authorization was not determinative of the question whether a particular activity is proprietary or governmental. *Id.* at 137-38, 52 S.E.2d 373-74. The *Vaughn* court, however, suggested that the statutory basis for the activity is a factor to be considered in the totality of circumstances. 34 N.C. App. at 420, 240 S.E.2d at 459.

116. *Vaughn v. County of Durham*, 34 N.C. App. at 420, 240 S.E.2d at 459 (quoting *McCombs v. City of Asheboro*, 6 N.C. App. 234, 241, 170 S.E.2d 169, 174 (1969)).

117. *Id.*

118. N.C. CONST. art. XI, § 4.

119. 34 N.C. App. at 419, 240 S.E.2d at 458-59.

120. *Id.* at 418, 240 S.E.2d at 458.

121. *See W. PROSSER, supra* note 52, § 131, at 979.

122. *See, e.g., Sides v. Cabarrus Memorial Hosp., Inc.*, 287 N.C. 14, 24, 213 S.E.2d 297, 303 (1975).

123. 287 N.C. 14, 213 S.E.2d 297 (1975).

examples of functions traditionally governmental<sup>124</sup> concluding that "it appears that all of the activities held to be governmental functions by this Court are those historically performed by the government, and which are not ordinarily engaged in by private corporations."<sup>125</sup> Arguably, providing for orphans or children needing homes has been the focus of activity of many private institutions such as churches to at least as great an extent as the government.

A different characterization of foster care activities might result from application of another test for determining whether a function is governmental—a test articulated in McQuillan's treatise, *Municipal Corporations*.<sup>126</sup> McQuillan suggests that governmental duties are those that are public with respect to the state in general and in which the municipal corporation serves as the agent of the state. Corporate duties, on the other hand, are private, providing the local necessities of local citizens.<sup>127</sup> Different results arise from this test depending on whether the county Department of Social Services is viewed as serving the local citizenry or the state at large. Despite the flexibility that this more general test would provide in finding a function proprietary, in North Carolina the *Sides* requirement of some monetary charge attached to proprietary functions is of preeminent importance.<sup>128</sup>

The *Vaughn* court acknowledged the policy considerations in favor of abolishing governmental immunity.<sup>129</sup> These factors had been outlined in *Smith v. State*,<sup>130</sup> a 1976 North Carolina Supreme Court decision that abolished governmental immunity in breach of contract actions. Grounds for abrogation in that case included the notions that the injury-causing activity of a public enterprise should be counted as an activity cost of the enterprise, that injuries caused by government activities should be paid for by those reaping the benefits of the government's activities rather than the victim, and that since taxpayers reap the rewards of the government, they should

124. *Id.* at 23, 213 S.E.2d at 303 (citing, e.g., *State ex rel. Hayes v. Billings*, 240 N.C. 78, 81 S.E.2d 150 (1954) (erection of jails); *Hamilton v. Town of Hamlet*, 238 N.C. 741, 78 S.E.2d 770 (1953) (installation and maintenance of traffic lights); *Howland v. City of Asheville*, 174 N.C. 749, 94 S.E. 524 (1917) (furnishing water for extinguishing fires)).

125. 287 N.C. at 23, 213 S.E.2d at 303.

126. E. MCQUILLAN, *THE LAW OF MUNICIPAL CORPORATIONS* (rev. 3d ed. 1977). The test is articulated as follows:

What are governmental powers and duties, and what are corporate duties, is not subject to precise definition further than to say this: The powers and duties of municipal corporations are of two-fold character; the one public as regards the state at large, insofar as they are its agents in government; the other private insofar as they provide the local necessities and conveniences for their own citizens.

18 *id.* § 53.29, at 227.

127. See note 126 *supra*.

128. 287 N.C. at 22-23, 213 S.E.2d at 302-03.

129. 34 N.C. App. at 420-21, 240 S.E.2d at 459.

130. 289 N.C. 303, 222 S.E.2d 412 (1976).

pay the costs.<sup>131</sup> Nonetheless, despite the concession that sovereign immunity has been decried in various quarters,<sup>132</sup> the court considered itself bound by the supreme court's refusal in *Steelman v. City of New Bern*<sup>133</sup> to abrogate the doctrine judicially.<sup>134</sup>

The difficulty with the position of the court of appeals in *Vaughan* and the supreme court in *Steelman* in leaving the solution to the immunity problem to the legislature is that the legislature has failed to act comprehensively. The 1977 amendment to the Tort Claims Act, abolishing the act-omission distinction, is a prime example of the piecemeal approach used by state legislatures to cut inroads into the doctrine.<sup>135</sup> Judicial inroads into the scope of the doctrine, on the other hand, might provide the proper catalyst for precipitating comprehensive scrutiny of the doctrine by the legislature.<sup>136</sup>

ELIZABETH L. MOORE

#### XIV. WILLS, TRUSTS AND ESTATES

##### A. Wills

North Carolina courts have often been required to decide whether a residuary clause in a will effectively exercises a general power of appoint-

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131. *Id.* at 313, 222 S.E.2d at 419. See also W. PROSSER, *supra* note 52, § 131, at 978.

132. See, e.g., *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E.2d 897 (1972), which states:

[W]e recognize merit in the modern tendency to restrict rather than to extend the application of governmental immunity. This trend is based, *inter alia*, on the large expansion of municipal activities, the availability of liability insurance, and the plain injustice of denying relief to an individual injured by the wrongdoing of a municipality. A corollary to the tendency of modern authorities to restrict rather than to extend the application of governmental immunity is the rule that in cases of doubtful liability application of the rule should be resolved against the municipality.

*Id.* at 529-30, 186 S.E.2d at 908. See generally Comment, *The Role of the Courts in Abolishing Governmental Immunity*, 1964 DUKE L.J. 888.

133. 279 N.C. 589, 184 S.E.2d 239 (1971). The court suggested that any repeal of the doctrine should come from the legislature.

134. 34 N.C. App. at 420, 240 S.E.2d at 459.

135. The court in *Steelman* noted that a bill was introduced in the General Assembly to abolish governmental immunity in its entirety, but that this bill was defeated. 279 N.C. at 594-95, 184 S.E.2d at 242-43. In N.C. GEN. STAT. § 153A-435 (1974) the legislature partially removed governmental immunity:

Purchase of liability insurance . . . waives the county's governmental immunity, to the extent of insurance coverage, for any act or omission occurring in the exercise of a governmental function. By entering into an insurance contract with the county, an insurer waives any defense based upon the governmental immunity of the county.

136. There is some indication that when courts abrogate governmental immunity in specific areas, legislatures are prompted to consider more comprehensive solutions to the problem. See Comment, *supra* note 132, at 895 n.15, 900.

ment held by the testator at his death.<sup>1</sup> The legislature has established, in G.S. 31-43,<sup>2</sup> a presumption that a general devise in a will exercises any general power of appointment held by a decedent unless an intent to the contrary appears "by the will."<sup>3</sup> In *Planter's National Bank & Trust Co. v. United States*,<sup>4</sup> the United States District Court for the Eastern District of North Carolina was required to decide under this statute whether a residuary devise effectively exercised a power of appointment, thus allowing a larger estate tax marital deduction. In so doing, the court was required to decide what evidence of intent could be admitted to determine the effect of the residuary clause in question.

Decedent executed her will in 1949 which, in pertinent part, provided that "[a]ll the rest and residue of my estate . . . I give . . . to my husband . . . and my adopted sons . . . in the proportion of one-third to each."'<sup>5</sup> In 1959 decedent established a trust that conditioned the receipt by the husband of a share in the trust estate upon his surviving until their youngest son reached the age of thirty, or if neither son reached thirty, surviving the last one living.<sup>6</sup> Decedent retained the power to change beneficiaries and to alter the disposition of her property by her will.<sup>7</sup> The Internal Revenue Service claimed that the interest given to decedent's husband under the trust was terminable under section 2056 of the Internal Revenue Code<sup>8</sup> and thus did not qualify for the marital deduction. The administrator's position, upheld by the district court, was that the trust gave decedent a general power of appointment<sup>9</sup> over the trust property that was

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1. *E.g.*, *Schaeffer v. Haseltine*, 228 N.C. 484, 46 S.E.2d 463 (1948); *Walsh v. Friedman*, 219 N.C. 151, 13 S.E.2d 250 (1941); *Johnson v. Knight*, 117 N.C. 122, 23 S.E. 92 (1895).

2. N.C. GEN. STAT. § 31-43 (1976) provides:

A general devise of the real estate of the testator . . . shall be construed to include any real estate . . . which he may have power to appoint in any manner he may think proper; and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator . . . shall be construed to include any personal estate . . . which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

3. *Id.*

4. 425 F. Supp. 1179 (E.D.N.C. 1977).

5. *Id.* at 1180-81.

6. *Id.* at 1181.

7. *Id.*

8. I.R.C. § 2056 allows a marital deduction for any interest in property passing to a surviving spouse provided that this interest does not include certain life estates or certain terminable interests. The marital deduction is limited to the greater of 50% of the adjusted gross estate or \$250,000.

9. The North Carolina Supreme Court has held that § 31-43 only applies to general powers of appointment. *Wachovia Bank & Trust Co. v. Hunt*, 267 N.C. 173, 148 S.E.2d 41 (1966).

In *Planter's*, the IRS argued that the provision in the trust was not a general power of appointment because "the power could not be exercised in favor of her husband and sons who were already the beneficiaries under the trust instrument." 425 F.Supp. at 1182. Thus, it was

exercised by her will and that, therefore, the property passed outright to her husband under the will.<sup>10</sup> Thus the court allowed the marital deduction.<sup>11</sup>

In reaching this result, the court was faced with the issue whether G.S. 31-43 limits the expression of a contrary intent to the will itself or whether extrinsic evidence may be introduced to show the intent of the testator.<sup>12</sup> North Carolina state courts have not yet confronted this question, but courts in other jurisdictions, construing statutes comparable to G.S. 31-43, have required an intent to not exercise the power to appear on the face of the will.<sup>13</sup> In this respect the court in *Planter's* noted a decision of the United States Court of Appeals for the Third Circuit<sup>14</sup> construing Pennsylvania law in which plaintiff alleged that a residuary clause did not exercise a power of appointment because the devisees under this clause were the ones who would take if this power were not exercised.<sup>15</sup> The Third Circuit held that decedent's intent could only be determined from the will itself; extrinsic evidence could not be used.<sup>16</sup> The *Planter's* court concluded in similar fashion that extrinsic evidence of a contrary intent is prohibited by G.S. 31-43; a contrary intent may only be expressed or implied in the will itself.<sup>17</sup> Decedent's will, therefore, effectively exercised the power of appointment granted by the subsequent trust instrument.<sup>18</sup>

The approach taken by the *Planter's* court provides a sound rule for the construction of a will under these circumstances. Limiting the evidence of intent to the will itself should lessen conflict over will dispositions. Yet this type of controversy could be avoided if drafters were more precise in their work. Had a codicil to the will been drawn after the creation of the trust, specifically referring to the power of appointment granted in that trust, no question could have been raised about decedent's intent. Use of such a precaution could be especially crucial in situations similar to that presented in *Planter's*, wherein extrinsic evidence would apparently indicate an intent to not exercise the power of appointment in the will.<sup>19</sup>

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contended, the provisions of § 31-43 would not apply. The court held, however, that the power to "alter the disposition of her property" did not restrict her right to dispose of the property in any manner she wished and was, therefore, a general power of appointment. *Id.*

10. 425 F. Supp. at 1181.

11. *Id.* at 1183.

12. *Id.* at 1182.

13. *E.g.*, *In re Deane's Will*, 4 N.Y.2d 326, 151 N.E.2d 184, 175 N.Y.S.2d 21 (1958); *Lederer v. Safe Deposit & Trust Co.*, 182 Md. 422, 35 A.2d 166 (1943); *United States Trust Co. v. Winchester*, 277 Ky. 434, 126 S.W.2d 814 (1939).

14. *Keating v. Mayer*, 236 F.2d 478 (3d Cir. 1956).

15. *Id.* at 480.

16. *Id.* at 481.

17. 425 F. Supp. at 1183.

18. *Id.*

19. The court in *Planter's* noted that several provisions in the trust instrument were

In legislative action, the North Carolina General Assembly provided in G.S. 31-11.6 that an attested will may be made self-proved by the acknowledgment of the testator and by affidavits of the witnesses.<sup>20</sup> These state-

immediately nullified upon execution by the existing will and would therefore indicate that the trustor intended the trust property to pass outside of the will. *Id.* at 1182. The court stated that the suit was necessary because the estate planner neglected to revise an estate plan to meet the requirements of the marital deduction tax provisions that became controlling several years later. *Id.* at 1184.

The issue whether a power of appointment had been effectively exercised was also addressed by the North Carolina Court of Appeals in *First Union Nat'l Bank v. Moss*, 32 N.C. App. 499, 233 S.E.2d 88, *cert. denied*, 292 N.C. 728, 235 S.E.2d 783 (1977). The husband's will gave his wife a testamentary power of appointment and required that this power be specifically referred to in her will. *Id.* at 501, 233 S.E.2d at 90. Her will devised, in the event she survived her husband, all the residue of her estate "including any property . . . over which I have or may have any power of appointment." *Id.* at 502, 233 S.E. 2d at 91. In holding that this provision complied with the specificity requirement in the husband's will, the court looked to extrinsic evidence such as the fact that the wills were executed on the same day with the same witnesses. The court felt that it was not necessary to consider § 31-43 as it found the requirement in the husband's will reflected an intent only to avoid "an inadvertent disposition of the appointed property." *Id.* at 507, 233 S.E.2d at 94. Once again, careful drafting of the wife's will would have avoided any controversy over the exercise of this power—such as an inclusion of a term providing for a devise of the residue of the estate "including any property over which I have any power of appointment, especially that power of appointment given to me in item five of my husband's will executed on January 12, 1972."

The court of appeals in *In re Grady*, 33 N.C. App. 477, 235 S.E.2d 425 (1977), applied the Rule in Shelley's Case to find a fee simple ownership in a devisee who received real property for life with the remainder to go to her "estate in Fee Simple." *Id.* at 478, 235 S.E.2d at 427. The court found that this devise could be either a testamentary power of appointment or a limitation to intestate succession. In either case, the life tenant was still vested with a fee simple estate. If the provision is construed as a testamentary power of appointment, the life tenant's deed of the property extinguished her power. As the will contained no residuary clause, the remainder passed to her heirs and their interest merged with the life tenant's to create a fee simple. *Id.* at 480-81, 235 S.E.2d at 428-29. If the provision is construed to require the property to pass under intestate succession, the remainder to the heirs again merges with the life estate to create a fee simple. *Id.* at 482, 235 S.E.2d at 429.

The surviving spouse was the subject of legislative action and several judicial decisions. The North Carolina General Assembly proposed, and the voters approved, a constitutional amendment that allows a surviving spouse of either sex to assert the homestead exemption instead of allowing only the wife to take advantage of the exemption. N.C. CONST. art. X, § 2(3) (giving effect to N.C. GEN. STAT. § 1-389 (Cum. Supp. 1977)). The court of appeals maintained the North Carolina principle of not requiring an election by the surviving spouse. *See, e.g., Breece v. Breece*, 270 N.C. 605, 155 S.E.2d 65 (1967); *North Carolina Nat'l Bank v. Barbee*, 260 N.C. 106, 131 S.E.2d 666 (1963). In *Lambeth v. Fowler*, 33 N.C. App. 596, 235 S.E.2d 914 (1977), the court found that the testator's devise of "my" land, which actually was owned by the testator and his wife as tenants by the entirety, was a mistake. Thus the widow was not required to elect between the devise under the will and her survivorship interest in the land held by the entirety. *Id.* at 599, 235 S.E.2d at 917.

The court of appeals also ruled on several cases concerning the right of a surviving spouse to dissent from a will. In *Phillips v. Phillips*, 34 N.C. App. 428, 238 S.E.2d 790 (1977), *cert. granted*, 294 N.E. 183, 241, S.E.2d 518 (1978), the court for the first time held that the net estate is to be used in computing the intestate share of the surviving spouse, as required by N.C. GEN. STAT. § 29-14 (1976), to determine the spouse's right to dissent pursuant to *id.* § 30-1(a). In *In re Estate of Cox*, 32 N.C. App. 765, 233 S.E.2d 926, *cert. denied*, 292 N.C. 729, 235 S.E.2d 783 (1977), the court held that a dissent must be filed within six months after letters testamentary have been issued, as required by N.C. GEN. STAT. § 30-2 (1976), but the spouse need not establish the right to dissent prior to this filing.

20. N.C. GEN. STAT. § 31-11.6 (Supp. 1977). Prior to this enactment, wills could not be

ments must be made in front of an "officer authorized to administer oaths under the laws of this State,"<sup>21</sup> and may be made at the time the will is executed or any time thereafter. This provision, in conjunction with G.S. 31-18.1,<sup>22</sup> which regulates the manner of probate of attested written wills, allows probate of a will without the testimony of the attesting witnesses if it has been self-proved.<sup>23</sup> As a result, delays resulting from the deaths of attesting witnesses will be avoided.

### B. Trusts

Quite often the situation arises in which a decedent, in his life insurance policy, has named as beneficiary the "trustee to be named in my will." In doing so, the testator intends to avoid probate administration of the policy proceeds<sup>24</sup> but this is often not the result of his efforts. Some courts have upheld these provisions,<sup>25</sup> but others have required that the proceeds pass through the estate.<sup>26</sup> To avoid the latter result, several states have enacted statutes that uphold the effectiveness of this type of provision<sup>27</sup> and, in the newly revised trust act, the North Carolina General Assembly has now provided for this type of estate plan in G.S. 36A-100(c).<sup>28</sup>

In analyzing the effect of this statute, a helpful comparison can be

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probated without the testimony of the attesting witnesses or other competent evidence. *Id.* § 31-18.1(a)(1) to (3) (Supp. 1977).

21. *Id.* § 31-11.6.

22. *Id.* § 31-18.1.

23. *Id.* § 31-18.1(a)(4).

24. P. HASKELL, PREFACE TO THE LAW OF TRUSTS 48 (1975).

25. *E.g.*, *United States v. First Nat'l Bank & Trust Co.*, 133 F.2d 886 (8th Cir. 1943); *Boston Safe Deposit & Trust Co. v. Commissioner*, 100 F.2d 266 (1st Cir. 1938).

26. *See, e.g.*, *Pavy v. Peoples Bank & Trust Co.*, 135 Ind. App. 647, 195 N.E.2d 862 (1964); *Frost v. Frost*, 202 Mass. 100, 88 N.E. 446 (1909).

27. *E.g.*, *MISS. CODE ANN.* § 83-7-7 (1972); *OHIO REV. CODE ANN.* § 2107.64 (1976); *WASH. REV. CODE ANN.* § 48.18.452 (Supp. 1976).

28. *N.C. GEN. STAT.* § 36A-100(c) (Supp. 1977) provides:

A person having the right to designate the beneficiary under a life insurance policy . . . may designate as such beneficiary a trustee named or to be named in his will whether or not the will is in existence at the time of the designation. The proceeds received by the trustee shall be held and disposed of as part of the trust estate under the terms of the will as they exist at the death of the testator. If no qualified trustee makes claim to the proceeds within six months after the death of the decedent or if within that period it is established that no trustee can qualify to receive the proceeds, payments shall be made to the personal representative of the estate of the person making the designation unless it is otherwise provided by an alternative designation or by the policy or plan. The proceeds received by the trustee shall not be subject to claims against the estate of the decedent or to inheritance taxes to any greater extent than if the proceeds were payable directly to the beneficiary or beneficiaries named in the trust. The proceeds may be commingled with any other assets which may properly become part of such trust, but the proceeds shall not become part of the decedent's estate for purposes of trust administration unless the will of the decedent expressly so provides.

The same rules govern annuities "or other payment described in Section 2039(c) of the Internal Revenue Code of 1954." *Id.* § 36A-100(d).

drawn between the testamentary trust approved under the new act and a pour-over trust.<sup>29</sup> In a pour-over trust, the testator devises property by his will to an inter vivos insurance trust established prior to the will execution.<sup>30</sup> Both types of trusts avoid probate administration of the insurance proceeds and allow these proceeds, plus other probate assets, to be administered in one trust.<sup>31</sup> Under the new law, however, use of the testamentary trust will be subject to additional requirements, such as the filing of inventories and annual accounts.<sup>32</sup> Furthermore, the value of the proceeds of the policy may be included in the estate for estate tax purposes since the testator has essentially retained the right to change the beneficiary;<sup>33</sup> the testator may alter the trust provisions in his will anytime prior to his death. In addition, if the designated trustee of a testamentary trust is unable to qualify and no alternative disposition of the funds is provided in the policy, the proceeds will vest in the personal representative.<sup>34</sup> Apparently these funds would then become subject to estate administration, thus defeating the purpose of the beneficiary designation.

The testamentary trust nevertheless provides some benefits that may be useful in a particular estate plan. In both a pour-over trust and a testamentary trust the testator can exercise more control over the use of the funds by having the policy proceeds paid to the trustee rather than to the ultimate beneficiaries. Yet by postponing establishment of the trust until he dies, the expenses of an inter vivos trust can be avoided.<sup>35</sup> Since the proceeds generally are not subject to probate administration, the use of the funds will avoid potential administrative delay.<sup>36</sup> Furthermore, the proceeds cannot be

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29. North Carolina allows a pour-over trust. *Id.* § 31-47 (1976) provides:

A devise or bequest in a will . . . may be made in form or substance to the trustee of any trust, including an existing testamentary trust, if established in writing prior to the execution of such will. Such devise or bequest shall not be invalid because the trust is amendable or revocable or both by the settlor or any other person or persons; nor because the trust instrument or any amendment thereto was not executed in the manner required for wills, nor because the trust was amended after execution of the will. Unless the will provides otherwise, such devise or bequest shall operate to dispose of property under the terms of the trust as they appear in writing at the testator's death and the property shall not be deemed held under a testamentary trust. An entire revocation of the trust prior to the testator's death shall invalidate the devise or bequest.

30. 1 N. WIGGINS, WILLS AND ADMINISTRATION OF ESTATES IN NORTH CAROLINA § 78, at 201 (1964).

31. P. HASKELL, *supra* note 24, at 49.

32. See N.C. GEN. STAT. § 36A-107 (Supp. 1977).

33. I.R.C. § 2042(2). Under the pour-over trust, however, if the testator releases all powers over the policy and the trust instrument, the proceeds may not be taxable to his estate. See C. LOWNDES, R. KRAMER & J. MCCORD, FEDERAL ESTATE AND GIFT TAXES § 9.15, at 212 (3d ed. 1974).

34. N.C. GEN. STAT. § 36A-100(c) (Supp. 1977).

35. P. HASKELL, *supra* note 24, at 49.

36. Haskell, *Testamentary Trustee as Insurance Beneficiary: An Estate Planning Gim-mick*, 41 N.Y.U.L. REV. 566, 566 (1966).



diverted to pay estate expenses such as executor's fees,<sup>37</sup> and, as provided in G.S. 36A-100(c), the policy proceeds will not be subject to claims against the estate.<sup>38</sup> These claims would include not only those of creditors<sup>39</sup> but also those of a dissenting spouse claiming a forced share.<sup>40</sup> Thus, pursuant to G.S. 30-1,<sup>41</sup> the right of a surviving spouse to dissent will not be based on the insurance proceeds and, if the surviving spouse does dissent, that spouse may not receive any part of these proceeds.<sup>42</sup> These aspects of the new act make the designation of a testamentary trustee as beneficiary of an insurance policy a potentially attractive technique for estate planners.<sup>43</sup>

### C. *Fiduciaries*

#### 1. The Prudent Fiduciary

In 1977 the North Carolina legislature effected substantial revisions in the laws affecting fiduciaries—trustees, executors, administrators and guardians. In general, these alterations have diminished the restrictions imposed upon the fiduciary. For example, the bond requirements for personal representatives and guardians have been reduced<sup>44</sup> as have the provisions prohibiting self-dealing by trustees.<sup>45</sup> One major revision, more drastic in

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37. *Id.*

38. N.C. GEN. STAT. § 36A-100(c) (Supp. 1977), *quoted in note 28 supra*.

39. In an unrelated enactment, the legislature proposed, and the voters approved, a constitutional amendment that allows a person to insure his life for the benefit of his family and establishes that the proceeds will pass free of claims of the insured's or the insured's estate's creditors. N.C. CONST. art. X, § 5 (giving effect to N.C. GEN. STAT. § 58-205 (Supp. 1977)).

40. Haskell, *supra* note 36, at 567.

41. N.C. GEN. STAT. § 30-1 (1976).

42. *Id.*

43. During 1977, the General Assembly also amended the perpetual care trust provisions to specifically require a corporate trustee and to establish the trustee's qualifications. N.C. GEN. STAT. §§ 65-60.1, -61, -64, -70 (Cum. Supp. 1977). The North Carolina Court of Appeals dealt with the construction of a resulting trust in *Cline v. Cline*, 34 N.C. App. 495, 238 S.E.2d 673 (1977), *cert. granted*, 294 N.C. 182, 241 S.E.2d 517 (1978) (No. 112 PC). Plaintiff sought to establish a resulting trust in land that she had farmed with her husband for 25 years prior to their divorce. The land was owned by the husband's parents until his father's death. Plaintiff and her husband agreed to work the farm in exchange for the deed to the land but the deed was recorded in the husband's name only. The court held that the evidence was sufficient to support a finding of a resulting trust inasmuch as plaintiff had advanced consideration for the farm equal to that advanced by her husband. Nevertheless, a new trial was ordered as the jury was not instructed to find that this consideration was advanced prior to the passing of legal title, as required by prior case law. In *Rauchfuss v. Rauchfuss*, 33 N.C. App. 108, 234 S.E.2d 423 (1977), the court of appeals also found a resulting trust in favor of a wife when a husband caused a mortgagee to reconvey property, previously held by the entirety, to him individually. For a further discussion of this case, see this Survey, *Property: Deeds*.

44. N.C. GEN. STAT. §§ 28A-8-1.1, 33-13.2 (Supp. 1977) provide that in computing the bond for guardians and personal representatives, money deposited in a bank or savings and loan institution that cannot be withdrawn without court authorization may, in the court's discretion, not be included. Section 28A-8-1 eliminates the bond requirement for personal representatives under certain enumerated circumstances. *Id.* § 28A-8-1.

45. Under the new trust act, trustees may loan funds to a trust, *id.* § 36A-64, may loan

theory than in fact, repeals the legal list statutes for investments by fiduciaries,<sup>46</sup> and enacts in its stead a prudent man standard.<sup>47</sup>

Newly enacted G.S. 36A-2 provides that in carrying out his duties as custodian of another's property, "a fiduciary shall observe the standard of judgment and care under the circumstances then prevailing, which an ordinarily prudent man of discretion and intelligence, who is a fiduciary of the property of others, would observe as such fiduciary."<sup>48</sup> This new statute thus establishes a standard by which the courts may judge the validity of investments made by fiduciaries. Nevertheless, the trust instrument under which the fiduciary acts is still the controlling factor in setting the permissible investments standards for the trustee.<sup>49</sup>

The prudent man rule originated in the venerable Massachusetts case of *Harvard College v. Amory*,<sup>50</sup> in which the court stated:

All that can be required of a trustee to invest, is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of the capital to be invested.<sup>51</sup>

This judicial standard has been codified by the majority of states<sup>52</sup> with several variations,<sup>53</sup> and is to be distinguished from the legal list standard, which allows the trustee to invest only in those investments that are authorized by statute.<sup>54</sup> The prudent man rule not only allows the fiduciary more flexibility but also eliminates the necessity for constant amendment of the legal lists to reflect the proper investments of the time.<sup>55</sup>

Prior to the enactment of G.S. 36A-2, North Carolina was a permissive list state.<sup>56</sup> The legal lists set out in the repealed statutes were not binding on

funds of one trust to another, *id.* § 36A-65, and may sell assets of one trust to another if the trust instruments so authorize, *id.* § 36A-68.

46. Law of June 8, 1977, ch. 502, § 1, 1977 N.C. Sess. Laws 583 (repealing chapter 36 of the North Carolina General Statutes, N.C. GEN. STAT. §§ 36-1 to -4.1 (1976)).

47. N.C. GEN. STAT. § 36A-2 (Supp. 1977).

48. *Id.* This statute applies to guardians, personal representatives, collectors, trustees and others. *Id.* § 36A-1.

49. *Id.* § 36A-3.

50. 26 Mass. 446, 9 Pick. 454 (1830).

51. *Id.* at 469, 9 Pick. at 461.

52. G. BOGERT & G. BOGERT, HANDBOOK OF THE LAW OF TRUSTS § 106, at 389 (5th ed. 1973).

53. See, e.g., CAL. CIV. CODE § 2261 (West Cum. Supp. 1978); CONN. GEN. STAT. ANN. § 45-88 (West Cum. Supp. 1978); MINN. STAT. ANN. § 501.125 (West 1947). See generally P. HASKELL, *supra* note 24, at 109 (discussion of the various types of fiduciary standards currently in effect).

54. P. HASKELL, *supra* note 24, at 109.

55. G. BOGERT & G. BOGERT, *supra* note 52, § 106, at 388.

56. Markham, *Trust Investments in North Carolina*, 14 N.C.L. REV. 160, 164 (1936).

the trustee but could be considered as a guide.<sup>57</sup> Thus the trustee could invest outside of these legal lists but was still obliged to invest prudently.<sup>58</sup> The North Carolina Supreme Court first addressed the question of these investment standards in *Sheets v. J.G. Flynt Tobacco Co.*<sup>59</sup> in which wards, having reached their majority, sued for revocation of an investment made by their guardian. The court stated that there was no statutory authority for the investment in question but that a guardian is generally authorized to invest in order to benefit the ward.<sup>60</sup> In so investing, the guardian was held to a standard of diligence and good faith by the court, citing *Harvard College*.<sup>61</sup> Thus, prior to the enactment of G.S. 36A-2, North Carolina fiduciaries were required to invest with due diligence and in good faith whether or not their investments were within the legal lists.<sup>62</sup> As North Carolina was thus a permissive list state, the move to a prudent man standard does not present a major change in the standard of care imposed upon fiduciaries.<sup>63</sup> It is interesting to note, however, that the standard set in G.S. 36A-2 is that of a "prudent fiduciary,"<sup>64</sup> a seemingly more conservative standard than that imposed by other states, which have defined the standard as that of a prudent man investing in his *own affairs*.<sup>65</sup> Whether this distinction will significantly affect the courts' future construction of the new prudent fiduciary standard remains to be seen.<sup>66</sup>

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57. *Id.*

58. P. HASKELL, *supra* note 24, at 109.

59. 195 N.C. 149, 141 S.E.2d 355 (1928).

60. *Id.* at 152, 141 S.E.2d at 357.

61. *Id.*

62. Legal lists were of considerable importance in that the trustee would be "*prima facie* protected" from charges of breach of trust if he invested in these authorized securities. Markham, *supra* note 56, at 165.

63. Courts in other jurisdictions have been faced with the question of what standard to apply to an investment made after a change in the law governing such investments. In *In re Flynn's Estate*, 205 Okla. 311, 237 P.2d 903 (1951), the trust was executed prior to the adoption of the prudent man standard. In applying that standard to the investment, the court held that "[u]nless a trustor specifically restricts the power of his trustee in investing trust funds the trustee is governed by the law in force at the time the investment is made." *Id.* at 313, 237 P.2d at 905; *accord*, *Goodridge v. National Bank of Commerce*, 200 Va. 511, 106 S.E.2d 598 (1959).

64. See text accompanying note 48 *supra*.

65. See, e.g., CAL. CIV. CODE § 2261(1) (West Cum. Supp. 1978); OR. REV. STAT. § 128.057 (1977); VA. CODE § 26-45.1 (1973).

66. The new trust statute also eliminates the requirement that all beneficiaries be nonresidents before removal of trust funds from the state is permitted, N.C. GEN. STAT. § 36A-13 (Supp. 1977), and provides for statutory removal of trustees for misfeasance, *id.* § 36A-35.

In unrelated action, the General Assembly provided that an executor or trustee may make distributions without regard to the income tax basis of the property for federal tax purposes. *Id.* § 28A-22.8. This provision takes on special significance due to the new carryover basis provisions incorporated within I.R.C. § 1023.

The legislature also amended the provisions requiring notice to creditors of the decedent to allow personal notice by mail. N.C. GEN. STAT. § 28A-14-3 (Supp. 1977). This amendment as originally proposed, made the mailing of notices obligatory. Law of May 27, 1977, ch. 446, § 1(m), 1977 N.C. Sess. Laws 484. The provision was apparently made permissive to avoid

## 2. Recovery of Attorneys' Fees

The North Carolina Supreme Court for the first time expressly stated the circumstances under which an unsuccessful executor can be compensated for attorneys' fees pursuant to G.S. 6-21(2)<sup>67</sup> which allows costs to be awarded in actions to determine the rights and duties of parties under a will. *In re Moore*<sup>68</sup> presented the issue whether a nominated executor whose letters testamentary were denied was entitled to attorneys' fees for his

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charges of breach of duty for failure to notify by mail. Law of June 29, 1977, ch. 798, § 1, 1977 N.C. Sess. Laws 798 (codified at N.C. GEN. STAT. § 28A-14-3 (Supp. 1977)). The effect of receiving notice by mail is to bar the creditor's claim under N.C. GEN. STAT. § 28A-19-3 (Supp. 1977). If the creditor is not notified by mail, then he "may be paid from any undistributed assets of the estate." *Id.* § 28A-14-3. However, the legislature has left unresolved the question whether this provision will allow creditors to seek recovery from distributees of the assets of the estate. Section 28A-19-3 specifically bars recovery against "the estate, the personal representative, the collector, the heirs, and the devisees" unless the claim is presented within the requisite time period. *Id.* § 28A-19-3. Section 28A-14-3 is not so specific in barring such recovery based on alleged lack of notice, yet it is doubtful that the legislature intended the creditor to have unlimited recovery. This interpretation would constitute a major departure from the policy codified in § 28A-19-3 of limiting creditors' rights of recovery.

The liability of funds in a joint banking account for the debts of a deceased joint tenant was expanded to include the year's allowance to the surviving spouse, funeral expenses and administrative expenses. *Id.* § 41-2.1(b)(3). In further action, the legislature provided that a guardian may now make an anatomical gift of the ward's body prior to the latter's death. *Id.* § 90-220.2(b)(5), (6) (Cum. Supp. 1977). Eligibility for custodianship of minors was expanded to include a spouse of a brother, sister, aunt or uncle. *Id.* § 33-68(11) (Supp. 1977). *See also id.* § 33-74.

The North Carolina courts also considered a suit for revocation of letters testamentary because of alleged misconduct by the executors and a suit to revoke an unauthorized conveyance by a trustee. In *In re Taylor*, 293 N.C. 511, 238 S.E.2d 774 (1977), a widow claimed that the administrator of her husband's estate was unduly harrassing her by, among other things, charging her rent for use of the land and house. Her principal evidence was a letter from the administrator's attorney to her own which, though possibly excessive in its demands, failed to establish a case of misconduct and, in fact, demonstrated an intent on the part of the administrator to fulfill his duties. *Id.* at 520, 238 S.E.2d at 779. The *Taylor* court also held that a tenancy in common estate received by the administrator under the will was not sufficient to constitute a conflict of interest that would hinder the administration of the estate. *Id.* at 521-22, 238 S.E.2d at 780.

In *Moore v. Smith*, 33 N.C. App. 275, 235 S.E.2d 102 (1977), the court of appeals held that an income beneficiary, who was also the trustee, could not make a gift of property to the defendant unless the conveyance was necessary for the support and maintenance of the income beneficiary and in the interest of the trust estate. Although the defendant had cared for the income beneficiary for eight years, the court held that the conveyance was not necessary for the beneficiary's support and revoked the deed.

67. N.C. GEN. STAT. § 6-21 (Cum. Supp. 1977) provides in pertinent part:

Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the Court:

(2) Caveats to wills and any action or proceeding which may require the construction of any will or trust agreement, or fix the rights and duties of parties thereunder . . . .

The word "costs" as the same appears and is used in this section shall be construed to include reasonable attorneys' fees . . . .

68. 292 N.C. 58, 231 S.E.2d 849 (1977).

unsuccessful litigation seeking approval of his nomination. The probated will named the nominee as executor. The widow, in her petition for probate, requested that a sale of stock made by the decedent be rescinded and that the letters testamentary be denied because of a supposed conflict of interest between the nominee and defendant in the rescission suit.<sup>69</sup> In reviewing the petition the court of appeals found that the alleged conflict of interest existed as a matter of law and, therefore, affirmed the trial court's denial of letters testamentary.<sup>70</sup> After this suit, the nominee successfully requested the trial court to grant recovery for attorneys' fees incurred in litigation concerning the letters testamentary.<sup>71</sup>

Although the court of appeals found that the award of these fees to the nominee was not authorized by G.S. 6-21(2),<sup>72</sup> the supreme court disagreed, holding that an executor named in a will is a party within the intent of G.S. 6-21(2).<sup>73</sup> Although the court felt that the testator's wishes as to who should serve as executor was sufficient to bring the nominee within the ambit of G.S. 6-21(2), the suit must also be beneficial to the interests of the estate to serve as a basis for reimbursement of fees engendered by the nominee in his attempt to secure his appointment.<sup>74</sup> The court found that the claim of this nominee was not asserted in good faith, and thus was not beneficial to the estate, because as a matter of law he was disqualified to serve as executor.<sup>75</sup> In reaching this result, the court stated:

[I]t is quite clear (1) that [the trial judge] should not award costs and attorneys' fees to an executor-designate whose claim for appointment is rejected unless the claim was reasonable, made in good faith, and prima facie in the interest of the estate; and (2) that the judge has no discretion to tax costs against an estate when the nominated executor was disqualified to act as a matter of law.<sup>76</sup>

Other courts have agreed that fees for litigating the right to letters testamentary will not be allowed unless the suit was in the interest of the estate.<sup>77</sup> This approach is prompted to some degree by the fear that a person in seeking the

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69. *Id.* at 60, 231 S.E.2d at 851.

70. *In re Moore*, 25 N.C. App. 36, 212 S.E.2d 184, *cert. denied*, 287 N.C. 259, 214 S.E.2d 430 (1975).

71. 292 N.C. at 63, 231 S.E.2d at 853.

72. 29 N.C. App. 589, 225 S.E.2d 125 (1976), *discussed in* 55 N.C.L. REV. 1109, 1113 (1977).

73. 292 N.C. at 66, 231 S.E.2d at 854.

74. *Id.*

75. *Id.*

76. *Id.* at 67, 231 S.E.2d at 855.

77. *See In re Estate of Morinini*, 252 Cal. App. 2d 805, 60 Cal. Rptr. 813 (1967); *In re Estate of Baumgartner*, 274 Minn. 337, 144 N.W.2d 574 (1966) (citing Annot., 90 A.L.R. 101 (1934)); 31 AM. JUR. 2d *Executors and Administrators* § 542 (1967). *Contra*, *Hamilton v. Nunn*, 247 Ky. 715, 57 S.W.2d 655 (1933).

office of executor may be acting solely for his own pecuniary benefit.<sup>78</sup> Any costs incurred in such litigation will ultimately be assessed against the heirs if the estate must bear this expense; therefore, their interest in ensuring that such suits are ultimately for the benefit of the estate is considerable.<sup>79</sup>

Prior to *Moore*, North Carolina courts had only addressed the question of awarding fees when the interest of the estate was at stake in cases in which the validity of a will was contested.<sup>80</sup> Accordingly, the decision in *Moore* enhances the significance of G.S. 6-21(2) by applying it to nominees seeking issuance of letters testamentary. If recovery of attorneys' fees in these suits were excluded from coverage by G.S. 6-21(2) and therefore barred, nominated executors might be hesitant to bring suit even though such action would be in the interests of the estate. As this litigation is now covered by this statute, the merits of the suit and the interests sought to be established will control the award of fees. Thus, prior to instigating action, nominees should consider not only their own benefit but also the benefit to the estate to be gained by such action. In so doing, the standard established in *Moore*—that any such suit should be reasonable, undertaken in good faith, and be prima facie in the interest of the estate—should provide a helpful guideline.<sup>81</sup>

#### D. Intestate Succession

During 1977 the North Carolina Supreme Court established the circumstances under which property will escheat to the state when the intestate decedent leaves heirs. In *Newlin v. Gill*,<sup>82</sup> decedent's closest surviving

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78. Annot., *supra* note 77, at 102.

79. *Id.* at 102-03.

80. In the supreme court case of *In re Will of Slade*, 214 N.C. 361, 199 S.E. 290 (1938), several heirs filed an unsuccessful caveat to the will. The trial court, in allowing attorneys' fees, found that their suit was in good faith and in the interests of the estate. *Id.* at 362, 199 S.E. at 290. Also, in *Mariner v. Bateman*, 4 N.C. (Term) 350 (1816), the court held that costs should be awarded to an executor for unsuccessfully contesting probate of a second will because the executor was fulfilling the duties of his office. *Id.* at 351. *But see Overman v. Lanier*, 157 N.C. 544, 73 S.E. 192 (1911) (court denied attorneys' fees, finding use of attorney not for benefit of estate).

81. In other legislative action, the General Assembly provided for statutory compensation for trustees, including compensation for legal services rendered by a fiduciary who is also an attorney. N.C. GEN. STAT. §§ 32-51, -52 (Supp. 1977). Section 32-51 authorizes the clerk of court to

allow counsel fees to an attorney serving as a fiduciary or trustee (in addition to the compensation allowed him as a fiduciary or trustee) where such attorney in behalf of the trust or fiduciary relationship renders professional services, as an attorney, which are beyond the ordinary routine of management and of a type which would reasonably justify the retention of legal counsel by any fiduciary or trustee not himself licensed to practice law.

*Id.* § 32-51. This provision apparently overrides the prior judicial ruling denying attorneys' fees to an attorney fiduciary in any amount beyond his compensation as fiduciary. *Lightner v. Boone*, 221 N.C. 78, 19 S.E.2d 144 (1942).

82. 293 N.C. 348, 237 S.E.2d 819 (1977).

relative was a grandson of decedent's great-grandparents, an heir in the fifth degree.<sup>83</sup> Other heirs, also descending from these great-grandparents, were of the sixth degree. The administrator brought an action for declaratory judgment to determine who would receive the proceeds of the estate—the heirs or the state. The court held that these heirs were not within the limits of succession established by statute and thus the estate escheated to the state.<sup>84</sup>

G.S. 29-12<sup>85</sup> provides that intestates' estates shall escheat to the state if there is no surviving spouse<sup>86</sup> and no person entitled to inherit pursuant to G.S. 29-15.<sup>87</sup> Those persons entitled to take under G.S. 29-15 do not include lineal descendants of decedents' great-grandparents.<sup>88</sup> G.S. 29-7<sup>89</sup> limits the right of succession to persons within five degrees of kinship. Nevertheless, if there is no one within this degree, collateral succession is "unlimited" to prevent any property from escheating to the estate.<sup>90</sup> The *Newlin* court was thus required to determine whether the legislature, in enacting G.S. 29-7, intended to limit collateral succession to only those persons (or their lineal descendants) named in G.S. 29-15 or to allow unlimited collateral succession, even through a great-grandparent, to avoid escheat.<sup>91</sup> The court noted that the legislative purpose in enacting the intestate succession provisions was to allow inheritance by close relatives, known to the decedent, who would be included in the decedent's will had he written one.<sup>92</sup> Had the legislature intended to allow any collateral relative to inherit, the escheat provisions in G.S. 29-12 would not have been enacted.<sup>93</sup> Moreover, the court held that G.S. 29-7 does not extend succession rights to collateral relatives beyond those named in G.S. 29-15.<sup>94</sup> Thus, the court construed G.S. 29-7 as limiting collateral succession to those persons who are within five degrees of kinship and are descendants of the decedent's parents or grandparents. Unlimited succession to avoid escheat is still

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83. Provisions for computing degrees of lineal and collateral kinships are provided in N.C. GEN. STAT. § 104A-1 (1972).

84. 293 N.C. at 352, 237 S.E.2d at 822.

85. N.C. GEN. STAT. § 29-12 (1976).

86. The surviving spouse takes under *id.* § 29-14.

87. *Id.* § 29-15. This section allows only the lineal descendants; parents, brothers and sisters and their lineal descendants; uncles and aunts and their lineal descendants; and grandparents and their lineal descendants to inherit from intestates.

88. See note 87 *supra*.

89. N.C. GEN. STAT. § 29-7 (1976) provides:

There shall be no right of succession by collateral kin who are more than five degrees of kinship removed from an intestate; provided that if there is no collateral relative within the five degrees of kinship referred to herein, then collateral succession shall be unlimited to prevent any property from escheating.

90. *Id.*

91. 293 N.C. at 351-52, 237 S.E.2d at 821-22.

92. *Id.* at 352, 237 S.E.2d at 822.

93. *Id.*

94. *Id.*

limited to those persons descending from the parents or grandparents of the decedent.<sup>95</sup>

Some states have provisions that limit collateral succession to the issue of the decedent's grandparents; thus the state takes if there are no such issue.<sup>96</sup> The Kansas statute governing intestate succession, for example, is similar to the North Carolina provisions in that Kansas limits collateral succession to heirs within the sixth degree.<sup>97</sup> If there are no heirs within this degree, the estate will escheat.<sup>98</sup> Nevertheless, Kansas does not limit the common ancestor and thus lineal descendants of the decedent's great great-grandparents could inherit.<sup>99</sup> Apparently the statutory construction problem that the court faced in *Newlin* has not been addressed by any other authority.

Although G.S. 29-7 does not specifically refer to G.S. 29-15 for determining collateral kin, the court's construction of G.S. 29-7 provides a rational resolution of the issue arising from this statutory imprecision. Had the court found that the legislature intended to provide for unlimited succession, G.S. 29-12 would have been effectively nullified. The decision reached in *Newlin*, however, may be overruled by the legislature. Prior to this decision, a bill was introduced in the North Carolina legislature to amend G.S. 29-15 to extend inheritance rights to collateral kin traced through a common ancestor as far removed as the decedent's great great-grandfather.<sup>100</sup> If this amendment were adopted, the court's contention that the intestate succession provisions were intended to provide only for those persons close to the decedent would be effectively refuted.<sup>101</sup>

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95. *Id.*

96. T. ATKINSON, HANDBOOK OF THE LAW OF WILLS 97 (2d ed. 1953); *see, e.g.*, OR. REV. STAT. §§ 112.045, .055 (1977). The Uniform Probate Code allows tracing of collateral kin only through the decedent's grandparents. UNIFORM PROBATE CODE § 2-103 (4th ed. 1975). It does not, however, limit the degrees within which the heirs must be in order to inherit. *Id.* In the event there are no takers under this section, and no surviving spouse, the estate will escheat. *Id.* § 2-105.

97. KAN. STAT. § 59-509 (1976).

98. *Id.* § 59-514; *see* Brown, *Intestate Succession in Kansas*, 8 WASHBURN L.J. 284, 298-301 (1969). This statute does allow heirs of the decedent's last spouse to inherit if there are no other heirs. KAN. STAT. § 59-514 (1976).

99. Brown, *supra* note 98, at 295.

100. H. 176, N.C. Gen. Assembly, 1977 Sess.; *see* INSTITUTE OF GOVERNMENT, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, DAILY BULLETIN 121 (1977).

101. The North Carolina legislature did act to alter the intestate succession provisions for illegitimate decedents to reflect the provision of N.C. GEN. STAT. §§ 29-19(b), 19(c) (1976 & Supp. 1977) that allows fathers who have admitted paternity to inherit from their illegitimate child. Any person who acknowledges paternity is to be regarded as a parent for determining whether the intestate is survived by one or more parents. *Id.* §§ 29-21, -22 (Supp. 1977). The legislature also amended § 29-19(b)(2) to require that the father acknowledge himself as the father during the lifetime of the child as well as during his own in order to inherit from his illegitimate offspring. *Id.* § 29-19(b)(2).



## XV. WORKMEN'S COMPENSATION LAW

A. *Compensable Injuries*

## 1. By Accident, Arising Out of and in the Course of Employment

Recovery under the North Carolina Workmen's Compensation Act<sup>1</sup> requires a showing by the claimant that the injury sustained resulted from an accident arising out of and in the scope of employment.<sup>2</sup> An "accident" is generally considered to be "an unlooked for and untoward event which is not expected or designed by the injured employee"<sup>3</sup> or "a result produced by a fortuitous cause."<sup>4</sup> In addition, in situations resulting in such injuries as ruptured or slipped discs an accident "must involve more than merely carrying on the usual and customary duties in the usual way";<sup>5</sup> there must instead be "the interruption of the work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences."<sup>6</sup>

The qualifying phrase "arising out of" refers to the origin or causal connection of an accident to the employment, while "in the course of" indicates the time, place and circumstances of an accident.<sup>7</sup> In *Gallimore v. Marilyn's Shoes*,<sup>8</sup> the North Carolina Supreme Court considered whether the kidnapping, robbery and subsequent murder of an employee upon leaving work "arose out of" her employment.<sup>9</sup> Decedent was employed by defendant at a mall location where she sold merchandise, made sales reports and prepared bank deposits.<sup>10</sup> She was kidnapped when she arrived at her

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1. N.C. GEN. STAT. §§ 97-1 to -100 (1972 & Cum. Supp. 1977).

2. *See id.* § 97-2(6) (Cum. Supp. 1977).

3. *Harding v. Thomas & Howard Co.*, 256 N.C. 427, 428, 124 S.E.2d 109, 110-11 (1962).

4. *Id.*; *see, e.g.*, *Kennedy v. Martin Marietta Chems. Sodyeco Div.*, 34 N.C. App. 177, 237 S.E.2d 542 (1977) (death of employee from heart attack brought on by diminished oxygen supply in chemical tank in which he was welding held to constitute compensable death by accident).

5. *Harding v. Thomas & Howard Co.*, 256 N.C. at 429, 124 S.E.2d at 111.

6. *Id.*; *see, e.g.*, *Key v. Wagner Woodcraft, Inc.*, 33 N.C. App. 310, 235 S.E.2d 254 (1977) (injury of machine operator working primarily with finished lumber who suffered ruptured disc while lifting heavy unfinished lumber upon foreman's request held to be compensable accident).

7. *See, e.g.*, *Watkins v. City of Wilmington*, 290 N.C. 276, 225 S.E.2d 577 (1976); *Robbins v. Nicholson*, 281 N.C. 234, 188 S.E.2d 350 (1972).

8. 292 N.C. 399, 233 S.E.2d 529 (1977).

9. The court had no trouble affirming the court of appeals' finding that the assault upon the employee was an accident for purposes of compensation as it was unexpected and without design on her part. *Id.* at 402, 233 S.E.2d at 531. The more difficult issue for the court was whether it "arose out of" or "in the course of" employment.

10. *Id.* at 400, 233 S.E.2d at 530. Although decedent's mother testified that she had accompanied her daughter to a "Branch Bank" in the mall in order for decedent to make deposits, there was no evidence that decedent ever made bank deposits for defendant unless accompanied by the manager or assistant manager. *Id.* at 400-01, 233 S.E.2d at 530.

automobile in the mall lot after leaving work for the day, robbed of money in her purse and later shot and killed.<sup>11</sup>

In holding that the death did not arise out of her employment, the court relied primarily upon the fact that decedent was not carrying money belonging to her employer.<sup>12</sup> It applied the test "whether the injury is a natural and probable consequence of the nature of the employment"<sup>13</sup> and concluded that decedent's risk of being robbed and abducted was not affected by her employment, but was "essentially one common to the neighborhood . . . which could happen to anyone who patronizes a shopping mall."<sup>14</sup>

This decision comports with the general principle that injuries received by employees when traveling to or from the place of employment do not usually arise out of and in the course of employment.<sup>15</sup> It thus represents a sound policy approach to the construction of the Act by limiting recovery to those situations in which risk of injury is caused or heightened by the employment relationship. In *Strickland v. King*,<sup>16</sup> however, the state supreme court, in dealing with a corollary of the principle applied in *Gallimore*, reached a less clear result.

Plaintiffs in *Strickland* instituted civil suits to recover for personal injuries allegedly received in an automobile accident.<sup>17</sup> Plaintiffs were passengers in a car driven by a coemployee that collided with another coworker's car when leaving work at the end of the day shift.<sup>18</sup> The accident occurred about a mile and a half from the work site on a two-lane, paved road owned and maintained by their employer.<sup>19</sup> The question whether plaintiffs' injuries, received while leaving the place of employment, arose out of and in the course of employment was important because, if they were,

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11. *Id.* at 401, 233 S.E.2d at 530-31. The individual accused of the robbery and murder, who later pleaded guilty to second degree murder, testified that a friend informed him that decedent carried large sums of money, although not identifying these sums as belonging to defendant, and that she had only a regular handbag when abducted. *Id.*

12. *Id.* at 405, 233 S.E.2d at 533. There was nothing that could have caused the murderer to believe she was carrying money; for example, she did not have a deposit bag. In addition, there was no evidence that decedent ever deposited defendant's money alone or that the murderer believed her to carry defendant's money. See notes 10 & 11 *supra*.

13. 292 N.C. at 404, 233 S.E.2d at 532-33.

14. *Id.* at 405, 233 S.E.2d at 533.

15. One exception arises when the employer furnishes the means of transportation as part of the employment contract. See *Whittington v. A.J. Schnierson & Sons, Inc.*, 255 N.C. 724, 122 S.E.2d 724 (1961); *Smith v. City of Gastonia*, 216 N.C. 517, 5 S.E.2d 540 (1939). Another exception applies when going to or leaving the workplace on premises owned or maintained by the employer. See *Bass v. Mecklenburg County*, 258 N.C. 226, 128 S.E.2d 570 (1962); text accompanying notes 16-23 *infra*.

16. 293 N.C. 731, 239 S.E.2d 243, *rev'g* 32 N.C. App. 222, 231 S.E.2d 193 (1977).

17. *Id.* at 732, 239 S.E.2d at 243.

18. *Id.* at 732, 239 S.E.2d at 243-44.

19. *Id.* at 732-33, 239 S.E.2d at 244. This road was the only means of ingress and egress from the employer's parking lot to the public highway. *Id.* at 732, 239 S.E.2d at 244.

plaintiffs could not maintain their common law actions against their co-employees.<sup>20</sup> By holding that the Workmen's Compensation Act had no application to the case, the North Carolina Supreme Court allowed suits against the coemployees to continue and reversed the decisions of both courts below.<sup>21</sup>

The court read very narrowly the rule that injuries received by an employee while going to or from the place of employment on premises owned or controlled by the employer are usually considered to have arisen out of and in the course of employment<sup>22</sup> in order to exempt this case from the Act. It found four distinguishing factors in the circumstances in this case: the road differed insignificantly from a public highway; the risks employees were exposed to on this road were not materially different from those encountered on a public highway; the accident occurred substantially far away from the work site; and the coemployees were not conducting their employer's business by the carpool arrangement.<sup>23</sup> The weight the court gave these various factors is not clear. It is thus uncertain where it will draw the line in similar cases in the future. Moreover, perhaps an unstated reason behind the court's decision was the existence of a third party, the co-employees, to bear the cost of the injury allegedly caused by that party, coupled with a dissatisfaction with the broad application of the Workmen's Compensation Act to employee injuries occurring within the travel zone of the place of employment. If there had been no third party to bear the cost of the injury in this instance, the court's decision might have resulted in a denial of recovery to plaintiffs as workmen's compensation would have been the only possible source of recovery. It thus may be questionable whether the supreme court would reach the outcome of this case in similar circumstances in which no alternate method of compensation exists.

## 2. Intoxication Forfeiture

The court of appeals decision in *Inscoe v. DeRose Industries, Inc.*<sup>24</sup> was affirmed by the North Carolina Supreme Court in 1977,<sup>25</sup> but a new rule

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20. The North Carolina Workmen's Compensation Act limits a covered employee's remedy against his employer or those conducting the employer's business to compensation under the Act. See N.C. GEN. STAT. §§ 97-9, -10.1 (Cum. Supp. 1977). When an employee is injured by the negligence of a fellow employee and the injuries are deemed to arise out of and in the course of employment, the injured employee cannot sue the coworker in a tort action under § 97-9. *Burgess v. Gibbs*, 262 N.C. 462, 137 S.E.2d 806 (1964); *Warner v. Leder*, 234 N.C. 727, 69 S.E.2d 6 (1952).

21. 293 N.C. at 734, 239 S.E.2d at 245.

22. See *Bass v. Mecklenburg County*, 258 N.C. 226, 231-33, 128 S.E.2d 570, 574-75 (1962).

23. 293 N.C. at 734, 239 S.E.2d at 245.

24. 30 N.C. App. 1, 226 S.E.2d 201 (1976); see *Survey of Developments in North Carolina Law*, 1976, 55 N.C.L. REV. 895, 1122-23 (1977).

25. 292 N.C. 210, 232 S.E.2d 449 (1977). In *Inscoe*, plaintiff was en route to finish a job

established by the lower court's interpretation of the "occasioned by" language of former G.S. 97-12<sup>26</sup> was relegated to a position of mere dictum. The court of appeals, in awarding compensation, had held that in order for intoxication to preclude recovery, it must be the *sole* proximate cause of an employee's accidental injuries.<sup>27</sup> The supreme court left this holding intact, but reduced its precedential value by finding it unnecessary to reach the issue in order to decide the case.<sup>28</sup>

The supreme court instead based its decision upon the role of the courts in reviewing the findings of fact made by the Industrial Commission in any given case.<sup>29</sup> Under G.S. 97-86, the Commission's findings are conclusive on appeal when supported by competent evidence,<sup>30</sup> "even though the record may support a contrary finding of fact."<sup>31</sup> After analyzing the evidence before the Commission, the supreme court concluded that, while the facts supported a finding for either party, the evidence reasonably supported the finding that the accident was not occasioned by plaintiff's intoxication, whether as the *sole* or a proximate cause.<sup>32</sup> Therefore, it found no reason to reach the meaning of the "occasioned by" language.

A 1975 amendment to the intoxication forfeiture provision replaced the words "occasioned by" with the language "proximately caused by."<sup>33</sup> While the "occasioned by" language no longer exists, the court of appeals' decision is still important because its construction of that phrase could apply with equal force to the "proximately caused by" language of the amended provision. The supreme court never expressly rejected that interpretation of the statutory language, even though it criticized the court of appeals for

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when his vehicle was struck by an oncoming vehicle traveling at a high rate of speed. *Id.* at 212, 232 S.E.2d at 450. Both plaintiff and the driver of the other vehicle were arrested for driving under the influence of intoxicating beverages. *Id.* at 212-13, 232 S.E.2d at 450-51.

26. The court of appeals dealt with the meaning of the intoxication forfeiture provision, which provided that "[n]o compensation shall be payable if the injury or death was *occasioned by* the intoxication of the employee." Law of Mar. 11, 1929, ch. 120, § 13, 1929 N.C. Pub. Laws 117 (formerly codified at N.C. GEN. STAT. § 97-12 (1972)) (amended 1975) (emphasis added).

27. 30 N.C. App. at 8, 226 S.E.2d at 205.

28. 292 N.C. at 215, 232 S.E.2d at 452.

29. *Id.* at 215-18, 232 S.E.2d at 452-53.

30. N.C. GEN. STAT. § 97-86 (Cum. Supp. 1977); see *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 233 S.E.2d 529 (1977). The court in *Inscow* further explained: "The court does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." 292 N.C. at 215, 232 S.E.2d at 452 (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)).

31. 292 N.C. at 215, 232 S.E.2d at 452 (quoting *Rice v. Thomasville Chair Co.*, 238 N.C. 121, 124, 76 S.E.2d 311, 313 (1953)).

32. *Id.* at 218, 232 S.E.2d at 453-54.

33. "No compensation shall be payable if the injury or death of the employee was *proximately caused by*: . . . [h]is intoxication . . ." N.C. GEN. STAT. § 97-12 (Cum. Supp. 1977) (emphasis added).

deciding the case on that basis.<sup>34</sup> The lower court opinion remains as an expression of that court's acceptance of a liberal reading of G.S. 97-12,<sup>35</sup> whether it contains the former "occasioned by" or the present "proximately caused by" language.

### B. Application of the Act

The North Carolina Court of Appeals broadened the application of the Workmen's Compensation Act to dependent minor children in *Caldwell v. Marsh Realty Co.*<sup>36</sup> Decedent-employee died from an accident on the job within the scope of coverage of the Act; the only issue was the length of time his two dependent children would receive death benefits.<sup>37</sup> An interpretation of a 1974 amendment to G.S. 97-38(3)<sup>38</sup> was required for resolution of the case. The wording and punctuation of the amendment created the difficulty in its meaning and the conflicting interpretations. Plaintiffs maintained that the provision allowed continuation of death benefits after the statutorily established 400 weeks to the dependent children until each reached eighteen years of age.<sup>39</sup> Defendants argued that the language of the amendment provided for benefits to continue to the dependent children beyond 400 weeks until each reached eighteen *only if* a disabled, unremarried widow or widower existed.<sup>40</sup>

The court of appeals, relying upon the legislative history of the amendment, held that under G.S. 97-38, payments to dependent children could continue until eighteen years of age without the existence of a disabled, unremarried widow or widower.<sup>41</sup> By holding that dependent minor children should be treated as an independent class of recipients of workmen's

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34. 292 N.C. at 215, 232 S.E.2d at 452.

35. See *Survey of Developments in North Carolina Law, 1976*, *supra* note 24, at 1123 & n.56.

36. 32 N.C. App. 676, 233 S.E.2d 594, *cert. denied*, 292 N.C. 728, 235 S.E.2d 782 (1977).

37. *Id.* at 676-77, 233 S.E.2d at 594-95.

38. The 1974 amendment provides:

Compensation payments due on account of death shall be paid for a period of 400 weeks from the date of the death of the employee; provided, however, after said 400-week period in case of a widow or widower who is unable to support herself or himself because of physical or mental disability as of the date of death of the employee, compensation payments shall continue during her or his lifetime or until remarriage and compensation payments due a dependent child shall be continued until such child reaches the age of 18.

Law of Apr. 12, 1974, ch. 1308, 1973 N.C. Sess. Laws, 2d Sess. 1974, at 609 (codified at N.C. GEN. STAT. § 97-38 (Cum. Supp. 1977)) (emphasis added).

39. 32 N.C. App. at 678, 233 S.E.2d at 596.

40. *Id.*

41. *Id.* at 679-81, 233 S.E.2d at 596-98. The definition of widower in N.C. GEN. STAT. § 97-2(15) (Cum. Supp. 1977) was amended last year to bring it into line with the broader definition of its female counterpart, the widow, in *id.* § 97-2(14) (1972). Section 97-2(15) now reads: "The term 'widower' includes only the decedent's husband living with or dependent for support upon her at the time of her death or living apart for justifiable cause or by reason of her desertion at such time." *Id.* § 97-2(15) (emphasis added).

compensation death benefits, the court has rendered a sound policy decision. It has recognized that *all* dependent children under eighteen experience some economic deprivation from the death of a parent independent of the loss suffered by the surviving parent. Therefore, rather than creating arbitrary distinctions among these children by basing recovery upon the status or circumstances of their surviving parent, the court has allowed members of each class who have been harmed by an employee's death to be compensated separately.

### C. Amount<sup>42</sup> and Items of Recovery

In *Thompson v. Frank IX & Sons*,<sup>43</sup> the court of appeals considered for the first time the meaning of "hand" under G.S. 97-31(12).<sup>44</sup> Claimant had received a fracture of both bones in his left forearm while at work, requiring surgery that left scarring.<sup>45</sup> Defendants agreed to pay claimant permanent partial disability for twenty-five percent loss of the use of his left hand.<sup>46</sup> Thereafter, claimant filed for additional compensation for disfigurement due to the surgical scars on his forearm.<sup>47</sup>

The meaning of "hand" was important because if the hand encompassed all parts of the arm below the elbow joint, claimant would have been foreclosed from receiving additional compensation for disfigurement to his "hand" as he had already received disability benefits for it.<sup>48</sup> The court,

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42. In 1977 the legislature amended three statutory subsections to increase the amounts of compensation available under each. The monetary awards for serious facial or head disfigurement, serious bodily disfigurement, and loss of or permanent injury to important organs or parts of the body were raised in each instance to \$10,000. N.C. GEN. STAT. § 97-31(21), (22), (24) (Cum. Supp. 1977). In addition, the General Assembly augmented the funding of the Second Injury Fund, administered by the Industrial Commission, by doubling the maximum assessments the Commission might make against an employer or its insurance carrier when injuries resulting in partial disabilities occur on the employer's premises. *Id.* § 97-40.1. In the case of the loss, or loss of use, of minor body members from which permanent partial disability occurs, the maximum assessment is now \$50.00; when a 50% or more loss or loss of use of a major body member occurs, the assessment is now \$200. *Id.*

43. 33 N.C. App. 350, 235 S.E.2d 250 (1977).

44. N.C. GEN. STAT. § 97-31(12) (Cum. Supp. 1977).

45. 33 N.C. App. at 350, 235 S.E.2d at 251.

46. *Id.*

47. *Id.* at 351, 235 S.E.2d at 251.

48. See N.C. GEN. STAT. § 97-31 (Cum. Supp. 1977), which allows compensation to be paid for disability resulting from loss or loss of use of various members of the body according to the schedule provided therein and makes such payment "in lieu of all other compensation, including disfigurement." *Id.* This provision presents the only bar to recovery for both disability and disfigurement of the same part of the body. See 2 A. LARSON, WORKMEN'S COMPENSATION LAW § 58.31 (1976) in which it is contended that:

Apart from special statutory restrictions or other special circumstances, there is no reason why loss of use and disfigurement of the same member should not both be recognized. Interference with presumed future earning capacity, which is the justification for a disfigurement award, may or may not accompany a schedule loss; there is no reason to suppose that any allowance was made for it in the original schedules, since

upon examining definitions of "hand" from other jurisdictions, concluded that the common and ordinary meaning of "hand" was the "fingers and thumb, the hand proper and the wrist"<sup>49</sup> and on this basis allowed recovery for the disfigurement.

As North Carolina disallows compensation for loss of use and disfigurement of the same member, definitions given the various members become more significant. The adoption of narrow, less exclusive meanings results in a broader application of the Workmen's Compensation Act to disfigurement claims accompanying disability compensation. In addition, it provides for easy and certain computation of payments in disability cases, while minimizing the prohibitory application of G.S. 97-31 to disfigurement claims.

#### D. Procedure<sup>50</sup>

##### 1. Jurisdiction of the Industrial Commission

In *Spivey v. Oakley's General Contractors*,<sup>51</sup> the court of appeals held that the Industrial Commission had jurisdiction to determine whether an employer's workmen's compensation policy had been properly cancelled, even though the employer and the employee had settled the claim in issue.<sup>52</sup> Defendant insurance company had disclaimed liability for employee's injury because of the alleged cancellation of the policy for nonpayment of premium prior to the accident; the claim was then settled by the employer and the employee.<sup>53</sup>

Although many commissions are not allowed jurisdiction when the employee's rights are not in issue<sup>54</sup> as was the case here, the court concluded that the North Carolina Industrial Commission should have jurisdiction in this situation. In so doing, it relied upon previous supreme court decisions granting the Commission jurisdiction in other circumstances when

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they were calculated on loss of function, in many instances at a time when disfigurement had not yet been recognized as having a place in workmen's compensation. If such interference does accompany the schedule loss, it is appropriate to make allowance for it. The presence of such presumed interference will depend on many variables, particularly the nature of the work . . . .

49. 33 N.C. App. at 355, 235 S.E.2d at 253.

50. The legislature extended the length of time in which a party may appeal the decision of a hearing commissioner to the full Commission from seven to fifteen days, and also provided that the chairman of the Commission could designate a deputy commissioner to replace a commissioner on the review of any case. N.C. GEN. STAT. § 97-85 (Cum. Supp. 1977). Out-of-state attorneys are now allowed, in the discretion of the Commission, to practice before the Commission. *Id.* § 84-4.1.

51. 32 N.C. App. 488, 232 S.E.2d 454 (1977).

52. *Id.* at 491, 232 S.E.2d at 456.

53. *Id.* at 489, 232 S.E.2d at 454-55.

54. See 4 A. LARSON, *supra* note 48, § 92.40.

employees' rights were not challenged.<sup>55</sup> The court's decision appears logically sound because the Commission would have had jurisdiction over the policy cancellation issue had no settlement occurred.<sup>56</sup> Determination of the issue was thus within the Commission's expertise. The court's decision will allow the fullest use of this expertise in regulating the overall framework of workmen's compensation.

The North Carolina Court of Appeals examined the limited jurisdiction of the Commission in third party recovery suits<sup>57</sup> in *Williams v. Insurance Repair Specialists, Inc.*<sup>58</sup> Insurance Repair Specialists (employer), Reliance Insurance Company (its compensation carrier) and an employee's widow filed a written admission of liability for benefits and the agreed compensation award with the Commission.<sup>59</sup> Subsequently, having been notified by Reliance of its subrogation right to any wrongful death settlement proceeds, Liberty Mutual Insurance Company (the third-party tortfeasor's liability carrier) settled the wrongful death claim with the employee's estate and paid the settlement.<sup>60</sup> Reliance then petitioned the Commission for an order of distribution of the settlement pursuant to G.S. 97-10.2,<sup>61</sup> which would require Liberty Mutual to pay to Reliance the amount of the compensation award.<sup>62</sup>

The court of appeals held that the Commission had jurisdiction to issue

55. See, e.g., *Moore v. Adams Elec. Co.*, 264 N.C. 667, 142 S.E.2d 659 (1965) (dispute between employer and alleged carriers); *Greene v. Spivey*, 236 N.C. 435, 73 S.E.2d 488 (1952) (dispute between employer and carrier); *Wake County Hosp. Sys., Inc. v. Industrial Comm'n*, 8 N.C. App. 259, 174 S.E.2d 292 (1970) (N.C. GEN. STAT. § 97-91 (1972) not limited solely to questions arising out of employer-employee relationship or to determination of injured employee's rights).

56. 32 N.C. App. at 490, 232 S.E.2d at 455.

57. See N.C. GEN. STAT. § 97-10.2 (1972). Third party recovery suits involve the situation in which "the injury or death was caused under circumstances creating a liability in some person other than the employer to pay damages therefor, such person . . . being . . . the 'third party.'" *Id.* § 97-10.2(a). If the injured or deceased employee receives workmen's compensation benefits, and then successfully sues the third party in a tort action, any money received from the third party is subject to a subrogation interest of the employer or the employer's insurance carrier. *Id.* § 97-10.2(e)-(g).

58. 32 N.C. App. 235, 232 S.E.2d 5, cert. denied, 292 N.C. 735, 235 S.E.2d 789 (1977).

59. *Id.* at 236, 232 S.E.2d at 6.

60. *Id.* at 236-37, 232 S.E.2d at 6-7.

61. N.C. GEN. STAT. § 97-10.2 (1972); see note 57 *supra*.

62. N.C. GEN. STAT. § 97-10.2(f)(1) (1972) provides in part:

If the employer has filed a written admission of liability for benefits under this Chapter with . . . the Industrial Commission, then any amount obtained by any person by settlement with . . . the third party by reason of such injury or death shall be disbursed by order of the Industrial Commission for the following purposes and in the following order of priority:

c. Third to the reimbursement of the employer for all benefits by way of compensation or medical treatment expense paid or to be paid by the employer under award of the Industrial Commission.



the distribution order under G.S. 97-10.2.<sup>63</sup> It was not convinced by arguments that the employee's widow had already spent her entire share of the wrongful death settlement and that none of the payments could be recouped because of her insolvency.<sup>64</sup> Nor did it feel that Liberty Mutual lacked notice of Reliance's subrogation interest.<sup>65</sup> According to the court, the preliminaries<sup>66</sup> to acquiring the G.S. 97-10.2 limited jurisdiction had been followed, and the actions of the Commission had been taken in pursuance of the statute's directives.<sup>67</sup>

## 2. Preliminary Awards

The North Carolina General Assembly enacted a new statute in 1977 that allows the Commission to direct the payment of workmen's compensation awards in certain cases pending appeal to the North Carolina Court of Appeals.<sup>68</sup> This procedure can be followed in those situations in which the Commission determines that "any part of the award appealed from is not appealed by the issues raised by such appeal."<sup>69</sup> When all parties concede the compensability of an employee's claim, the amount is undisputed, and the only issue is which employers or carriers are liable, the Commission is empowered to order payment to the employee while the case is on appeal.<sup>70</sup>

The effects of this statute should be beneficial. Claimants will no longer have to wait indefinitely for payments rightly forthcoming, but delayed by other issues on appeal. Unfortunately, the language of the statute, rather than mandating this outcome when the proper situation arises, gives broad discretion to the Commission in directing such payments. In order to conform to the overall statutory purpose of facilitating compensation, this discretion should generally be exercised in favor of immediate payment.

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63. 32 N.C. App. at 242, 232 S.E.2d at 9.

64. *Id.* at 240-41, 232 S.E.2d at 9.

65. *Id.* at 241, 232 S.E.2d at 9.

66. *See* note 62 *supra*.

67. 32 N.C. App. at 240, 232 S.E.2d at 8.

68. N.C. GEN. STAT. § 97-86.1 (Cum. Supp. 1977).

69. *Id.* § 97-86.1(a). This can be determined on the basis of the Commission's own motion. In addition, when the only issue on appeal is the amount of the average weekly wage, the Commission can order payment of that part of the award that is not in dispute, but only upon the claimant's motion. *Id.*

70. *Id.* § 97-86.1(b). The payment order must provide that the party ordered to pay will be reimbursed by the party ultimately held liable. *Id.* The Commission has the authority to order this same result with respect to the other provisions of Chapter 97 as well. *Id.* § 97-86.1(d).