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# Survey of Developments in North Carolina Law 1978

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# SURVEY OF DEVELOPMENTS IN NORTH CAROLINA LAW, 1978\*

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\* This Survey discusses significant decisions handed down in 1978 by the North Carolina Supreme Court, the North Carolina Court of Appeals, and federal courts construing North Carolina law, and also discusses legislation passed in 1978 by the 1977 General Assembly.

Provisions of the North Carolina General Statutes are referred to in text as G.S.

NOTE: Cases discussed in text have been Shepardized through May 1979.

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## I. ADMINISTRATIVE LAW

A. *Open Meetings Law*<sup>1</sup>

In response to the North Carolina Supreme Court's 1977 decision in *Student Bar Association v. Byrd*,<sup>2</sup> which curtailed the reach of the state Open Meetings Law,<sup>3</sup> the General Assembly made important changes in the statute that affect both its coverage and notice provisions.<sup>4</sup>

The original statute provided:

All 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>5</sup>

Plaintiffs in *Byrd* argued that this provision extended to meetings of the faculty of the University of North Carolina School of Law. Writing for the majority, Justice Lake, however, read the words "governing" and "governmental" in the conjunctive and held in essence that the use of the words "bodies politic" indicated that the statute was to cover only meetings of governing and governmental bodies that exercise sovereign powers not exercisable by private groups.<sup>6</sup> Because decisions of the Law School faculty were subject to review by the University's Board of Governors (which the court denominated the true governing body of the school), the court held that the faculty was not a governing body; neither was it a component part of the Board of

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1. A bill that will significantly revise the state Open Meetings Law is now pending in the General Assembly. H. 183, N.C. Gen. Assembly, 1979 Sess. Unless otherwise indicated, the new bill will not alter any of the recent changes discussed herein.

2. 293 N.C. 594, 239 S.E.2d 415 (1977).

3. The application of the Open Meetings Law, ch. 638, 1971 N.C. Sess. Laws 610 (codified as amended at N.C. GEN. STAT. §§ 143-318.1 to .8 (1978 & Interim Supp. 1978)), enacted in 1971 to provide public access to the decisionmaking process of public bodies, was challenged in *Byrd* by members of the Student Bar Association Board of Governors of the University of North Carolina School of Law who had been thwarted in their attempts to attend a general faculty meeting at the Law School. 293 N.C. at 595, 239 S.E.2d at 417. The trial court decision, affirmed by the court of appeals, 32 N.C. App. 530, 232 S.E.2d 855 (1977), enjoined defendants, including University of North Carolina School of Law Dean Robert Byrd, from holding closed meetings and required the dean to post written notice of meetings at least six hours before each meeting. 293 N.C. at 596, 239 S.E.2d at 417. The state supreme court reversed both holdings. *Id.* at 606, 239 S.E.2d at 423. See *Survey of Developments in North Carolina Law, 1977*, 56 N.C.L. REV. 843, 861-67 (1978).

4. N.C. GEN. STAT. §§ 143-318.1 to .4, .8, 153A-40, 160A-71 (Interim Supp. 1978).

5. Law of June 21, 1971, ch. 638, § 1, 1971 N.C. Sess. Laws 611 (formerly codified at N.C. GEN. STAT. § 143-318.2 (amended 1978)).

6. 293 N.C. at 601, 239 S.E.2d at 420.

Governors, the court said, but rather a "group of employees of the Board."<sup>7</sup> The court in dictum went on to state that even if the faculty were a component part of the Board, the Board was not a governmental body and, therefore, neither the Board nor the faculty were required to hold public meetings. Governmental bodies, according to the court, must exercise powers exclusive to a sovereign political entity, and the operation of an educational system is not an exercise of a governmental power because private concerns can also carry out such activities.<sup>8</sup>

The revised statute requires that "public" bodies<sup>9</sup> rather than "governing and governmental bodies" hold open meetings, and defines public bodies broadly to include any group with at least two members that is a part of government and that exercises "any legislative, policy-making, quasi-judicial, administrative, or advisory function."<sup>10</sup> This general coverage, however, is restricted somewhat; G.S. 143-318.2(b)(2) requires that public bodies be formally established by

(i) the State Constitution, (ii) an act or resolution of the General Assembly, (iii) a resolution or order of a State Agency, pursuant to a statutory procedure under which the agency establishes a political subdivision or public corporation, (iv) an ordinance, resolution, or other action of the governing board of one or more counties, cities, school administrative units, or other political subdivisions or public corporations, or (v) an executive order of the Governor or formal action of the head of a principal State office or department . . . or of a division thereof.<sup>11</sup>

Because of the broad language of the new statute, it is clear that the General Assembly intended the original statute to have broader coverage than the court in *Byrd* interpreted it to have. The new language rejects the lengthy dicta in *Byrd* concerning governing and gov-

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

8. *Id.* at 603-04, 239 S.E.2d at 421-22. In his dissent, Justice Exum objected to this narrow interpretation of the statute, and argued that a strict reading defeated the statute's purpose of ensuring that the public's business is conducted in the public view. *Id.* at 606-16, 239 S.E.2d at 423-29 (dissenting opinion).

9. N.C. GEN. STAT. § 143-318.2 (Interim Supp. 1978).

10. *Id.* § 143-318.2(b)(1). The statute clearly, however, does not extend to bodies that exercise a judicial function, *i.e.*, the courts. See REPORT OF THE LEGISLATIVE STUDY COMMISSION FOR STATE POLICIES ON THE MEETINGS OF GOVERNMENTAL BODIES 5 (1978) [hereinafter cited as REPORT OF THE LEGISLATIVE STUDY COMMISSION].

11. N.C. GEN. STAT. § 143-318.2(b)(2) (Interim Supp. 1978). In addition, if a group is a public body, its committees are also considered public bodies. *Id.* § 143-318.2(b). The statute also specifically subjects the governing boards of public hospitals to the open meetings requirement, *see id.*, in order to assure "coverage of non-profit corporations that operate hospitals owned by local government." REPORT OF THE LEGISLATIVE STUDY COMMISSION, *supra* note 10, at 5. Hospital committees that do not make policy, however, are exempted from the requirement. N.C. GEN. STAT. § 143-318.2(b) (Interim Supp. 1978).

ernmental bodies, including the observation that the University's Board of Trustees was not required to hold open meetings; however, it does not appear to affect the narrow holding of the case as it pertains to the Law School faculty because that body is not established by any of the described methods.<sup>12</sup> The language also appears to exempt nonprofit corporations appropriated money by the state<sup>13</sup> as, for example, a chamber of commerce or a private university. In addition to these changes, the new statute specifically exempts the professional staffs of state agencies,<sup>14</sup> because they are considered not to make final policy, and the Judicial Standards Commission,<sup>15</sup> which has authority under its own statute<sup>16</sup> to meet in confidential session.

Notice provisions varying with the type and circumstances of meetings were also enacted to clarify the diverse judicial interpretations that the original statute yielded. Originally, North Carolina was one of the few states that had no notice provision in its open meetings law.<sup>17</sup> While many lower courts throughout the state read requirements of reasonable notice into the former statute on the basis that otherwise the

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12. While it may be argued that a group such as the Law School faculty is established by the method set out in § 143-318.2(b)(2)(iv), the report of the committee that devised the new language indicates that subsection (iv) was intended to extend only to local units. *See* REPORT OF THE LEGISLATIVE STUDY COMMISSION, *supra* note 10, at 5.

13. Because nonprofit corporations are created by filing articles of incorporation, they do not meet the specific requirements of § 143-318.2(b)(2).

14. N.C. GEN. STAT. § 143-318.2(c) (Interim Supp. 1978) exempts meetings of the professional staff of a public body, unless the staff is a public body established by appropriate formal action described in § 143-318.2(b)(2). The report of the legislative study commission, in reference to this section, gives the following example: A monthly meeting of a county manager with his department heads or a conference between a director of a state division and two or three assistants could be held in private. If a city council, however, established a standing committee of four department heads to review federal grant requests originating within city government, meetings of that committee would be subject to the open meetings requirement. REPORT OF THE LEGISLATIVE STUDY COMMISSION, *supra* note 10, at 6.

15. N.C. GEN. STAT. § 143-318.4(4) (Interim Supp. 1978). A new provision also specifies that any public body specifically authorized by law to meet in executive or confidential session may do so. *Id.* § 143-318.4(11).

16. N.C. GEN. STAT. § 7A-377(a) (Cum. Supp. 1977).

17. Like North Carolina, other states have recently amended their open meetings laws to include provisions for notice. *See* S.C. CODE § 30-4-80 (Cum. Supp. 1978); W. Va. CODE § 6-9A-3 (Cum. Supp. 1978). Only a few states—Alabama, Colorado, Florida, Georgia, Minnesota, Montana, North Dakota and South Dakota—still have no notice provision. *See* ALA. CODE tit. 13, § 5-1 (1975); COLO. REV. STAT. § 29-9-101 (1977); FLA. STAT. ANN. § 286.011 (West 1975 & Supp. 1978); GA. CODE ANN. § 40-3301 (1975 & Supp. 1978); MINN. STAT. ANN. § 471-705 (West 1977); MONT. REV. CODES ANN. §§ 82-3401 to -3406 (1966 & Supp. 1977); N.D. CENT. CODE § 44-04-19 (1978); S.D. COMPILED LAWS ANN. §§ 1-25-1 to -5 (1974). The Supreme Court of Minnesota, however, has read into its open meetings law an implied provision for notice, *see* Sullivan v. Credit River Township, 299 Minn. 170, 217 N.W.2d 502 (1974), and the Attorney General of Florida has stated that some regulatory boards are required to give notice of all meetings at which official action is to be taken, *see* FLA. STAT. ANN. § 286.011 note 10 (West 1975)(citing Op. Att'y Gen. 072-400 (1972)).

law would not afford the protection it was intended to offer,<sup>18</sup> both the majority and the dissent in *Byrd* agreed that no notice was required.<sup>19</sup> The new law requires those public bodies that have established a schedule of regular meetings to keep the schedule on file in a central location.<sup>20</sup> If a regular meeting is adjourned or recessed until a later date, however, no further notice is required if the time and place of the later meeting is announced at the first session.<sup>21</sup> Special meetings (a category that appears to include the meetings of those bodies that hold regular meetings on indefinite dates) require at least forty-eight hours notice by posting an announcement in a specified place and mailing or delivering it to any local news medium that has filed a prior written request for notice.<sup>22</sup> Finally, emergency meetings, called because of unexpected circumstances that require immediate consideration, may be held as soon as members can be contacted and convened and notice is given to local news media that have requested emergency notice.<sup>23</sup>

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18. See, e.g., *News & Observer Publishing Co. v. Interim Bd. of Educ.*, 29 N.C. App. 37, 223 S.E.2d 580 (1976); *Weathers v. Shelby Bd. of Alcoholic Control*, 75 CVS 290 (Cleveland County, N.C. Super. Ct., July 16, 1975).

19. 293 N.C. at 596, 239 S.E.2d at 418; *id.* at 616, 239 S.E.2d at 429 (Exum, J., dissenting). Their reasoning was based on the lack of a notice provision.

20. N.C. GEN. STAT. § 143-318.8(a) (Interim Supp. 1978). State agencies file their schedules with the Secretary of State; county agencies, with the clerk of the board of county commissioners; city agencies, with the city clerk; and all other agencies, with their own clerk, secretary, or clerk to the board of commissioners in the county in which the agency normally meets. *Id.*

21. *Id.* § 143-318.8(b)(1).

22. *Id.* § 143-318.8(b)(2).

23. *Id.* § 143-318.8(b)(3). Notice is given either by telephone or by the same method used in notifying the body's members and must be given immediately after the members have been notified. In addition, only business related to the emergency can be considered at an emergency meeting. *Id.*

While the changes in the statute are consistent with the purpose underlying open meetings laws of providing public access to governmental decisionmaking processes, there are still other provisions lacking in clarity that seem to undercut this purpose. In 1978, for example, the North Carolina Court of Appeals held in *Godsey v. Poe*, 36 N.C. App. 682, 245 S.E.2d 522 (1978), that a board of education could hold a closed meeting to discuss personnel matters without first voting to do so in regular open session. The holding was dictated by the curious wording of a provision in the Open Meetings Law. The introductory language of N.C. GEN. STAT. § 143-318.3(a) (Interim Supp. 1978) sets out a procedure for calling executive sessions that requires a board to vote first to do so during a regular or special meeting. The subsection, however, lists only certain subject matters allowed under the statute to be discussed privately. The remainder of the subjects that may be discussed in a private meeting, including personnel matters, are set out in *id.* § 143-318.3(b), (c) (1978 & Interim Supp. 1978), to which the procedure of subsection (a) does not apply. As a result, meetings concerning subjects listed in subsections (b) and (c), unlike those concerning subjects listed in subsection (a), can be held with no public evidence that they ever occurred. A revision of the Open Meetings Law now pending in the General Assembly, however, does away with this distinction and requires a board to vote during its regular session to hold a closed meeting prior to discussing all matters allowed to be discussed in private. H. 183, N.C. Gen. Assembly, 1979 Sess.

### B. Campaign Finance

The North Carolina campaign finance laws were interpreted for the first time in *Loucheim, Eng & People, Inc. v. Carson*,<sup>24</sup> a civil case involving an alleged illegal corporate expenditure. G.S. 163-278.19 (a),<sup>25</sup> a criminal statute, makes it unlawful for a corporation to make to a candidate any contribution or expenditure, both of which are defined to include an advance.<sup>26</sup> In *Carson*, plaintiff, a public relations corporation hired by state attorney general candidate James H. Carson, Jr., sued to recover over \$20,000 that Carson allegedly owed it from his unsuccessful campaign.<sup>27</sup> Plaintiff claimed that, as media campaign manager, it had been authorized by Carson and his staff to do everything necessary to handle the media portion of the campaign, and had been assured by Carson that it would be paid fully for all services rendered and money advanced. Plaintiff further asserted that in reliance on these assurances, it had rendered full services to Carson, including advancing money for purchases pending receipt by the committee of campaign funds.<sup>28</sup> In defense, Carson argued that the debt was an illegal advance within the scope of G.S. 163-278.19(a) and thus should not be honored as a contractual obligation.<sup>29</sup> The trial court granted Car-

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24. 35 N.C. App. 299, 241 S.E.2d 401 (1978).

25. N.C. GEN. STAT. § 163-278.19(a) (1976) provides that, in general:

[I]t shall be unlawful for any corporation, business entity, labor union, professional association or insurance company directly or indirectly;

(1) To make any contribution or expenditure . . . in aid or in behalf of or in opposition to any candidate or political committee in any election or for any political purpose whatsoever . . . .

26. *Id.* § 163-278.6(6), (9) (1976). The statutes interpreted in *Carson* are identical in language to the provisions of the Federal Campaign Finance Law that prohibit corporate contributions and expenditures, *see* 2 U.S.C.A. § 441(b) (West Cum. Supp. 1977), and define them to include an advance, *see id.* § 431(e), (f). While there have been many cases interpreting the federal statute, *see, e.g.,* *United States v. Lewis Food Co.*, 366 F.2d 710 (9th Cir. 1966); *United States v. Chestnut*, 394 F. Supp. 581 (S.D.N.Y. 1975), *aff'd*, 533 F.2d 40 (2d Cir. 1976); *Miller v. American Tel. & Tel. Co.*, 394 F. Supp. 58 (E.D. Pa. 1975), *aff'd*, 530 F.2d 964 (3d Cir. 1976); *United States v. First Nat'l Bank*, 329 F. Supp. 1251 (S.D. Ohio 1971), none of these cases involved the same issue as presented in *Carson*, *i.e.*, whether a campaign finance law that prohibits corporate contributions and expenditures, including advances, precludes a candidate's corporate media manager from paying for the candidate's advertising and later seeking reimbursement.

27. 35 N.C. App. at 300-01, 241 S.E.2d at 403. The candidate had from time to time paid portions of the amounts outstanding. The remaining outstanding amount was \$22,251.65, which included \$10,000 that the candidate had paid by a check that was returned because of insufficient funds. *Id.* at 301, 241 S.E.2d at 403.

28. *Id.* at 301, 303-04, 241 S.E.2d at 403-04.

29. *Id.* at 302, 241 S.E.2d at 403. Carson also filed a counterclaim, alleging that plaintiff damaged his reputation in the amount of \$50,000 by knowingly and wilfully violating the law in arranging an unlawful extension of credit. The trial court's judgment did not dispose of defendant's counterclaim. *Id.*, 241 S.E.2d at 403-04.

son's motion for judgment on the pleadings.<sup>30</sup>

In affirming, the court of appeals held that the money the corporation advanced to the various media for advertising purchases under its contract to manage the candidate's media campaign was the type of advance the law was aimed to prevent and that, therefore, it could not enforce the contract between the corporation and Carson for payment.<sup>31</sup> In answer to plaintiff's contention that "advance" so construed would prohibit normal credit transactions between corporation and candidate, the court found that this payment for media advertising was not typical of ordinary extensions of credit, which are not barred by the statute.<sup>32</sup> The court, however, suggested that the part of the debt representing plaintiff's commissions might be recovered if the commissions were not earned by plaintiff in connection with the other illegal advancements.<sup>33</sup>

The court's application of a broad definition of advance in a context in which the corporation is, in essence, an agent of the candidate rather than an independent contributor, should be carefully scrutinized in light of the policies of the campaign finance laws. The purpose of these laws prohibiting corporate contributions and expenditures is two-fold: to prevent corporate influence over elections; and to protect shareholders from the use of corporate funds for a political purpose without their consent.<sup>34</sup> There is, however, a countervailing concern that must be dealt with when, as here, the corporation is not unconnected with the candidate but, to the contrary, has been hired by him to render services. As has been recognized in the context of banks loaning money to candidates,<sup>35</sup> the statute cannot unconstitutionally intrude into normal business transactions. The Federal Election Commission,

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30. *Id.*

31. *Id.* at 304, 307, 241 S.E.2d at 405, 406.

32. *Id.* at 305, 241 S.E.2d at 405. In drawing a distinction between ordinary and extraordinary extensions of credit, the court also rejected plaintiff's argument that the campaign finance laws infringed its right to contract and to carry on a lawful business in violation of the due process clause of the United States Constitution and the law of the land clause of the North Carolina Constitution. *Id.* at 306-07, 241 S.E.2d at 405-06. For a suggestion that the statute may be unconstitutional on these grounds, see this Survey, *Constitutional Law: Fourteenth Amendment: Due Process*.

33. *Id.* at 306-07, 241 S.E.2d at 406. Work done on a commission basis appears to be a prime example of a transaction involving an ordinary extension of credit.

34. *See, e.g.,* Miller v. American Tel. & Tel. Co., 394 F. Supp. 58 (E.D. Pa. 1975), *aff'd*, 530 F.2d 964 (3d Cir. 1976).

35. In *United States v. First Nat'l Bank*, 329 F. Supp. 1251 (S.D. Ohio 1971), the court held that when construed to prohibit a bank from making a fully secured loan to a candidate the statute violated the fifth amendment by intruding unnecessarily into the bank's ordinary course of business.

in carrying out the provisions of a federal statute that also prohibits advances by corporations,<sup>36</sup> has attempted to deal with this problem in the following regulation:

A corporation may extend credit to a candidate, political committee, or other person in connection with a Federal election provided that the credit is extended in the ordinary course of the corporation's business and the terms are substantially similar to extensions of credit to nonpolitical debtors which are of similar risk and size of obligation . . . .<sup>37</sup>

Although the court in *Carson* relied heavily on federal authority,<sup>38</sup> it made no reference to this regulation and applied its interpretation of the state law prohibiting corporate advances in a manner inconsistent with the regulation. While recognizing that ordinary, as opposed to extraordinary, extensions of credit are not barred by the statute, the court did not, as the federal regulation appears to contemplate, remand the case for an examination of the ordinary business practices of public relations corporations nor remand to determine what the ordinary business practices of this particular corporation were.<sup>39</sup> Instead, the court concluded that plaintiff had violated the campaign finance law simply on the basis of inferences drawn from certain language in plaintiff's complaint. Plaintiff stated in its complaint that it had "advanced money" for the purchase of advertising<sup>40</sup> and that "defendant knew that the media advertising had to be currently paid and was aware of the [campaign] laws and regulations concerning media expenses."<sup>41</sup> From this the court concluded that plaintiff was also aware that "in paying the defendant's expenses, it was going beyond the mere extension of credit."<sup>42</sup> A plaintiff's interpretation of the law, however,

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36. 2 U.S.C.A. § 441(b) (West Cum. Supp. 1977).

37. 11 C.F.R. § 114.10 (1977).

38. 35 N.C. App. at 304, 241 S.E.2d at 404-05.

39. If a particular firm, however, extends credit in such a manner to candidates and non-candidates alike, then there is no reason to believe the firm is trying to buy political favors—the concern behind the enactment of the statute prohibiting corporate advances.

40. 35 N.C. App. at 301, 241 S.E.2d at 403.

41. *Id.* at 305, 241 S.E.2d at 405. It is unclear to what laws and regulations plaintiff was referring. There are apparently no other laws or regulations prohibiting a public relations firm from "advancing" payment for a candidate's advertising.

42. *Id.* It is interesting to note that the former North Carolina Attorney General was apparently also in violation of the statute, since the statute also prohibits candidates from accepting illegal contributions or expenditures and subjects them to the same penalties as the donor. *See* N.C. GEN. STAT. § 163-278.19(c) (1976). The court implicitly recognized the candidate's situation in its statement that "we regard the worthless check [with which Carson had attempted to pay part of the debt] as nothing more than an acknowledgment by the defendant that the plaintiff had advanced money in his behalf" but went on to classify that acknowledgment as only a moral obligation that the defendant felt compelled to fulfill. 35 N.C. App. at 305, 241 S.E.2d at 405.



should not serve as a substitute for reasoned legal analysis.

The danger in the court's analysis is that it fails to recognize the practicalities in rendering services to a candidate. A public relations firm, as an agent of the candidate, manages the media portion of his campaign—an expensive undertaking for which the candidate must usually pay in periodic installments. In determining whether a particular "advance" by a public relations firm to a candidate is the type of activity that the law aims to prevent, the courts should take into account this practicality and examine whether a firm's particular extension of credit to a political candidate is consistent with normal business practices.

### C. Regulation of Utilities<sup>43</sup>

In 1978 the courts were faced with litigation arising out of the natural gas shortage that first affected the nation in the early 1970's.<sup>44</sup> Influenced primarily by the severity of natural gas curtailments to North Carolina,<sup>45</sup> the North Carolina Supreme Court in *State ex rel. Utilities Commission v. Edmisten*<sup>46</sup> upheld a Utilities Commission rule allowing

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43. In *In re Duke Power Co.*, 37 N.C. App. 138, 245 S.E.2d 787, cert. denied, 295 N.C. 646, 248 S.E.2d 257 (1978), the court of appeals upheld a Utilities Commission order in the face of an environmental challenge to Duke Power Company's proposed construction of a nuclear power plant along the Yadkin River. Based on findings of the need for additional electrical capacity and of the appropriateness of the proposed plant's site and design, the Commission in 1977 granted Duke a certificate of public convenience and necessity (a prerequisite to most utility construction) for the building of a nuclear generating plant. The certificate, however, imposed limitations on the use of water from the Yadkin River, including the requirements that Duke receive construction and operating licenses from the Nuclear Regulatory Commission and the North Carolina Department of Natural and Economic Resources and that its operations be subject to periodic review by the Environmental Management Commission. *Id.* at 139-40, 245 S.E.2d at 789-90.

Petitioner, a nonprofit corporation "organized to promote recreational benefits and property values," *id.* at 139, 245 S.E.2d at 789, in an area downstream from the proposed plant site, was allowed to intervene in the Commission's hearings and appealed the granting of the certificate on the ground that flaws in the plant's design and placement that would cause pollution of the river and consume too much of its water were not adequately taken into account. The court, however, was satisfied that the Commission considered all facts required by law and issued an order supported by substantial evidence. *Id.* at 142, 245 S.E.2d at 791. Stating that the purpose of requiring the certificate—to prevent costly overbuilding—leaves environmental concerns to other agencies except as they affect the cost and efficiency of a proposed plant, *id.* at 141, 245 S.E.2d at 791, the court found that the limitations contained within the certificate evidenced the Commission's concern for the quality of water in the Yadkin River, *id.* at 142, 245 S.E.2d at 791. In addition, the court disposed of petitioner's arguments based on the legal rights of riparian owners by declaring that no "taking" of property rights had occurred. *Id.*

44. See Harrison & Formby, *Regional Distortions in Natural Gas Allocations: A Legal and Economic Analysis*, 57 N.C.L. Rev. 57, 61 (1978).

45. Next to South Carolina, North Carolina experienced more severe curtailments than any other state. See Harrison & Formby, *supra* note 44, at 84-85.

46. 294 N.C. 598, 242 S.E.2d 862 (1978).

state natural gas distributors to engage in exploration and development programs for new gas supplies and to pass the costs of these programs directly to their customers in the form of rate increases.<sup>47</sup>

In *Edmisten*, the attorney general of North Carolina argued that the Commission exceeded its statutory authority in allowing the costs to be charged as operating expenses of the utility, thereby permitting them to be passed directly to the consumer without the necessity of a general ratemaking hearing.<sup>48</sup> Such an accounting procedure, he maintained, assigns a function to the operating expense that it was not intended to bear—attraction of capital—and thus shifts the risks of gas exploration from willing investors to the consuming public.<sup>49</sup> The attorney general proposed that the costs of the programs should have been financed instead out of retained earnings or otherwise, and recouped through a variation in the utility's rate base,<sup>50</sup> a procedure that would require a general ratemaking proceeding to determine whether the net profits in comparison with the rate base allow the utility a "fair rate of return."<sup>51</sup>

Relying on the Commission's unchallenged findings of fact that natural gas utilities needed additional supplies to render adequate service, that exploration programs were the most feasible means of obtaining supplies, and that the programs could not be financed through traditional methods,<sup>52</sup> the court held that the Commission acted within the authority granted it by the legislature<sup>53</sup> to promote adequate, eco-

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47. *Id.* at 612, 242 S.E.2d at 871.

48. *Id.* at 603, 242 S.E.2d at 866. By statute, a utility is allowed a "fair rate of return" on the value of its property that is "used and useful" in rendering service to the public. N.C. GEN. STAT. § 62-133(b) (1975). The rate of return may be represented by the formula  $r = (R - E) \div V$ , in which  $r$  is the rate of return expressed as a percentage,  $R$  is the revenues obtained from rates,  $E$  is the operating expenses, and  $V$  is the value of the utility's depreciated property, or what is more commonly known as the rate base. See E. CLEMENS, *ECONOMICS AND PUBLIC UTILITIES* 52-53 (1950); see also N.C. GEN. STAT. § 62-133 (1975 & Cum. Supp. 1977). An increase in operating expenses can be accompanied by a proportionate increase in rates without disturbing the rate base and rate of return, and thus, a general ratemaking hearing will not be required. See N.C. GEN. STAT. § 62-137 (1975). Another way of accounting for costs is by ascertaining the value of the property a utility is currently using, which will be attributed to the rate base, and the operating expenses incurred in using that property. These factors are then considered in determining the amount of an increase in revenues that will produce a fair rate of return. Because all factors in the rate structure are affected by this method of accounting, a general ratemaking hearing is required. See *id.* §§ 62-133, -137.

49. 294 N.C. at 604-05, 242 S.E.2d at 867.

50. *Id.* at 603, 242 S.E.2d at 866.

51. See note 48 *supra*. The net profits are represented in the formula by the factor  $R - E$  (the difference between revenues and operating expenses).

52. 294 N.C. at 605-06, 242 S.E.2d at 867.

53. See N.C. GEN. STAT. §§ 62-2, -32, -42, -131(b) (1975 & Cum. Supp. 1977).

nomical, and efficient utility services and to render reliable supplies.<sup>54</sup> It further found that a strict interpretation of the operating expense element of the ratemaking formula "would severely limit the ability of the Commission to act in the best interest of the consuming public in emergency situations."<sup>55</sup> In a strong dissent,<sup>56</sup> Justice Lake argued that the Commission had no authority "to conscript capital from unwilling investors . . . in order to finance a . . . prospecting venture"<sup>57</sup> because the definition of public utility—"a person . . . owning or operating in this State equipment or facilities for . . . [p]roducing, generating, transmitting, delivering or furnishing . . . piped gas"<sup>58</sup>—does not include the business of prospecting or exploring for natural gas, particularly when conducted in another state.<sup>59</sup>

Although the distinction between production and exploration may be too slight to negate the Commission's authority to regulate development of gas resources, the scope of the Commission's authority should not go unscrutinized. The majority's opinion is an example of result-oriented reasoning; a contrary result could have just as easily been reached had the court not been so willing to label the costs of development as operating expenses.<sup>60</sup> Indeed, capital investment is not nor-

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54. 294 N.C. at 606, 242 S.E.2d at 868.

55. *Id.* at 607, 242 S.E.2d at 868. The court also rejected the attorney general's contentions that the proceedings in which various utility companies were allowed specific rate increases to account for the costs of exploration should have been declared to be general rate cases, and that the failure to do so prejudiced him because it obviated the necessity for the special procedures provided in N.C. GEN. STAT. § 62-81 (Cum. Supp. 1977). Characterizing the rate increases as "permitted" or "allowed" rates that, pursuant to N.C. GEN. STAT. § 62-134(a) (1975), are allowed to go into effect for good cause without a hearing, the court found good cause for the increases in the Commission's determination, pursuant to the standards set out in its rule allowing such increases, that the adjustment would not raise the utility's rate of return above the level most recently approved in a general rate case. 294 N.C. at 609-10, 242 S.E.2d at 869. The court found the attorney general was not prejudiced because N.C. GEN. STAT. § 62-132 (1975) subjects these "permitted" or "allowed" rates to later challenge by any interested person, and provides for a hearing on their "just and reasonable" nature. 294 N.C. at 609-10, 242 S.E.2d at 869-70. In addition, the court rejected the attorney general's arguments that the orders violated the due process and equal protection clauses of the United States and North Carolina constitutions. *Id.* at 610-12, 242 S.E.2d at 870-71.

56. The language used by Justice Lake is indeed strong. For example, see his characterization of the facts of the case at *id.* at 616-18, 242 S.E.2d at 873-74 (dissenting opinion).

57. *Id.* at 622, 242 S.E.2d at 876.

58. N.C. GEN. STAT. § 62-3(23)a.1. (Cum. Supp. 1977).

59. 294 N.C. at 618-22, 242 S.E.2d at 874-76.

60. In so labeling these costs, the court relied on a 1935 Arkansas opinion, which stated that when a restrictive interpretation of the operating expense element of an act would frustrate the act's purposes, the element should be given a liberal construction. *Id.* at 606, 242 S.E.2d at 868 (citing *Bourland v. City of Fort Smith*, 190 Ark. 289, 78 S.W.2d 383 (1935)). The court could just as easily have relied on its own language in *Little v. Stevens*, 267 N.C. 328, 148 S.E.2d 201 (1966): "If an act is susceptible to more than one construction, the consequences of each are a potent

mally associated with operating expenses; however, the court felt justified in holding that operating expenses were involved because of the abnormal emergency situation. As a short-term measure, allowing utilities to meet a present emergency by a direct increase in rates may be necessary. Exploration and development, however, is not a short-term solution<sup>61</sup> to a temporary crisis but rather a long-term approach to a continuing need for energy supplies. Because of this continuing "emergency," utility companies that have traditionally been engaged solely in the business of distributing energy may be permitted in the future to engage more and more in exploration and development programs at no risk to themselves. In such a situation, the attorney general's proposal requiring general ratemaking proceedings to determine whether a utility should be allowed an increase in rates may be necessary in order to curtail abusive spending. Such a proposal appears to be a valid compromise: by allowing the utility to calculate the costs of exploration and development programs into its rate base, the risks involved in the programs are still shifted to the consumer, but only after public scrutiny of the utility's fair rate of return.

In *State ex rel. Utilities Commission v. Public Service Co.*,<sup>62</sup> the court of appeals approved a Commission order establishing a new method for adjusting utility rates to reflect the curtailment of natural gas supplies.<sup>63</sup> Because curtailment levels had fluctuated making it impossible accurately to predict future revenues and expenses, the Commission authorized Public Service Company's use of a formula known as the Volume Variation Adjustment Factor (VVAf). The VVAf is a rate set for the future, based on projected volumes of gas, that is designed to track the effects of increased or decreased curtailment on revenues and avoid the necessity for a general rate case each time curtailment levels change.<sup>64</sup>

In June 1976, Public Service sought to revise upwards the VVAf factor it had submitted less than a month earlier. The factor first submitted reflected a curtailment estimate based upon five and one-half months of historical supply levels and six and one-half months of fore-

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factor in its interpretation, and undesirable consequences will be avoided if possible." *Id.* at 336, 148 S.E.2d at 207.

61. In contrast, North Carolina's purchase of large volumes of emergency gas during the winter of 1977-1978, see Harrison & Formby, *supra* note 44, at 79 n.160, was a short-term response to the curtailment problem.

62. 35 N.C. App. 156, 241 S.E.2d 79 (1978).

63. *Id.* at 162, 241 S.E.2d at 83.

64. *Id.* at 156-57, 241 S.E.2d at 80.

casted future supplies, while the June revision was calculated on the basis of annualizing the upcoming summer period curtailment level. Although the Commission had apparently approved use of either method, it changed its mind after the attorney general intervened on behalf of the using and consuming public and filed a motion to rescind approval of the June rate increase.<sup>65</sup> Following a hearing on the matter, the Commission concluded that the historical/future method should serve as the basis for the VVAF calculation and should be "trued-up" periodically to account for the actual curtailment experienced. It ordered that the difference between the rate in effect and the "true" rate be refunded to customers and applied this order to the revised June VVAF factor, which had been employed in calculating Public Service's rates pending termination of the hearing.<sup>66</sup>

On appeal, Public Service argued that the refund provisions exceeded the authority of the Commission because they constituted retroactive ratemaking, and proposed that instead of refunding it should be allowed to "true-up" by offsetting its new VVAF.<sup>67</sup> While retroactive changes in existing rates are not allowed,<sup>68</sup> the court concluded that the VVAF is not an established rate but rather a permitted or allowed rate under G.S. 62-132<sup>69</sup> that can be subject to refund upon a determination by the Commission that it is unjust and unreasonable.<sup>70</sup> In rejecting Public Service's proposal, the court accurately pointed out that, unlike the Commission order, the proposal would benefit only those who remained Public Service customers—a group that may not include all who paid the higher amounts.<sup>71</sup>

Another issue arising in the public utility context was whether a two-way radio service offered to members of a county medical society as an adjunct to a telephone answering service is a "public utility" within the meaning of G.S. 62-3<sup>72</sup> and thus subject to regulation by the Utilities Commission. In *State ex rel. Utilities Commission v. Simpson*,<sup>73</sup> the supreme court affirmed a Commission ruling that the service is a public utility. The decision turned on whether the service was of-

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65. *Id.* at 157-58, 241 S.E.2d at 80.

66. *Id.* at 158, 241 S.E.2d at 81.

67. *Id.* at 160-61, 241 S.E.2d at 82.

68. *See, e.g., State ex rel. Utils. Comm'n v. Edmisten*, 291 N.C. 451, 468, 232 S.E.2d 184, 194 (1977).

69. N.C. GEN. STAT. § 62-132 (1975).

70. 35 N.C. App. at 161, 241 S.E.2d at 82.

71. *Id.*, 241 S.E.2d at 83.

72. N.C. GEN. STAT. § 62-3(23) (Cum. Supp. 1977).

73. 295 N.C. 519, 246 S.E.2d 753 (1978).

ferred to the "public"—a term that the court noted "'does not mean everybody all the time.'" <sup>74</sup> Although an earlier North Carolina case had held that a two-way radio service offered to anyone who applies for it is "offered to the public," <sup>75</sup> *Simpson* was more complicated because the class to whom the service was offered consisted only of physicians within one county; however, because the class comprised approximately one-half of the radio communications market in the county, the court found that regulation of the service as a public utility was proper. <sup>76</sup> In light of the court's admission that a determination of whether a service is offered to the public is difficult to standardize and must often be made by resort to the facts of a particular case, <sup>77</sup> the decision may prove to be of little guidance in delineating the point at which a private enterprise becomes subject to regulation as a public utility.

A final issue affecting utilities involved the continued vitality of the common law rule that a privately owned utility is required to remove or relocate its facilities along a public street at its own expense when necessary for the public use and convenience. <sup>78</sup> In *Southern Bell Telephone & Telegraph Co. v. Housing Authority*, <sup>79</sup> the court of appeals confronted the issue, raised in North Carolina for the first time, whether state urban redevelopment laws mandate a result contrary to the common law when a telephone company is compelled by a city to relocate its telephone lines from an area undergoing urban redevelopment. The court refused to depart from the common law rule. <sup>80</sup>

The court observed that reimbursement might be authorized by the urban redevelopment statutes in two possible ways: (1) as compensation for an eminent domain taking under G.S. 160A-512(6), <sup>81</sup> or (2) because the cost of removal is an expenditure necessary to carry out the purposes of the Urban Redevelopment Law <sup>82</sup> under G.S. 160A-

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74. *Id.* at 522, 246 S.E.2d at 755 (quoting *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252, 255 (1916)).

75. *State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co.*, 267 N.C. 257, 148 S.E.2d 100 (1966).

76. 295 N.C. at 525, 246 S.E.2d at 757.

77. *Id.* at 524, 246 S.E.2d at 756.

78. *See* 39A C.J.S.2d *Highways* § 139c (1976).

79. 38 N.C. App. 172, 247 S.E.2d 663 (1978), *cert. denied*, 296 N.C. 414, 251 S.E.2d 473 (1978).

80. *Id.* at 176, 247 S.E.2d at 667.

81. N.C. GEN. STAT. § 160A-512(6) (1976).

82. *Id.* §§ 160A-500 to -526.

512(11)<sup>83</sup> and thus an expenditure that a city's urban redevelopment commission is empowered to make.<sup>84</sup> Finding that Southern Bell had no property or interest in the land upon which its facilities were located, the court held that there was not a taking, and noted that, even if there were, the situation is analogous to cases in which a leasehold is condemned and the tenant is required to pay his own relocation costs.<sup>85</sup> On the issue of whether the removal and relocation costs were necessary expenditures under the Urban Redevelopment Law, the court simply indicated that absent specific legislative language, it felt compelled to adhere to the established result.<sup>86</sup>

The court's observation that reimbursement would be authorized if the cost of removal were an expenditure necessary to carry out the purposes of the Redevelopment Law does not take into account the ultimate question whether a statutory authorization to make such an expenditure precludes an urban redevelopment commission from requiring the public utility to bear the expense. Arguably, according to the court's analysis, reimbursement should be authorized on the ground that because the power to remove utility lines is by statutory definition a power necessary to carry out the Act's purposes<sup>87</sup> (and thus a power that the commission can exercise), then an expenditure pursuant to that power is also necessary to carry out the Act's purposes. Nevertheless, the court failed to reach this result, maintaining in a conclusory statement that "we cannot hold Southern Bell's relocation expenses to be 'necessary expenditures' . . . since at common law no such reimbursement was required."<sup>88</sup> It is possible, however, that the legislature's grant of power to an urban redevelopment commission to make necessary expenditures, which as illustrated include those for the removal of utility lines, indicates an intent to alter the common law.

#### *D. State and Local Government*<sup>89</sup>

##### 1. State Employees

The 1978 General Assembly passed two statutes that will have an

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83. *Id.* § 160A-512(11) (1976).

84. *Id.* § 160A-512 (1976); 38 N.C. App. at 174, 247 S.E.2d at 665.

85. 38 N.C. App. at 174, 247 S.E.2d at 666. See, e.g., *Williams v. State Hwy. Comm'n*, 252 N.C. 141, 113 S.E.2d 263 (1960).

86. 38 N.C. App. at 176, 247 S.E.2d at 667.

87. N.C. GEN. STAT. § 160A-512(11) (1976).

88. 38 N.C. App. at 176, 247 S.E.2d at 666.

89. The General Assembly took action this year to limit public access to the State Bank Commissioner's records. See Law of June 16, 1978, ch. 1181, 1977 N.C. Sess. Laws, 2d Sess. 1978,

important effect on state employees. The more significant statute eliminates automatic wage increases for state employees and replaces them with increases based on merit.<sup>90</sup> In the past, North Carolina has taken a compromise position on wage increases; employees at lower levels were granted automatic increases and those at higher levels received increases based on performance.<sup>91</sup> In theory, at least, the elimination of automatic increases is an attempt to promote efficiency and productivity in government through a salary incentive.<sup>92</sup> Because there are numerous ways to circumvent such a statute,<sup>93</sup> however, it remains to be seen whether the goal will be accomplished.

In addition, the State Personnel Privacy Act<sup>94</sup> was amended<sup>95</sup> to allow state department heads to make public the reasons why an employee was demoted, suspended or dismissed and to allow public access to that employee's personnel file.<sup>96</sup> Although the date on which the

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at 70 (codified at N.C. GEN. STAT. §§ 53-99, -117 (Interim Supp. 1978)). An interim measure that expires on June 30, 1979, the new Act provides that records compiled during state and federal banking examinations, borrowers' records, and records containing information compiled in preparation or anticipation of litigation are not subject to public inspection. N.C. GEN. STAT. § 53-99 (Interim Supp. 1978). Any letters, reports, memoranda, recordings, charts or other documents that would disclose the information in these confidential records are also confidential. *Id.*; Law of Apr. 2, 1931, ch. 243, § 10, 1931 Pub. Laws 301 (formerly codified at N.C. GEN. STAT. § 53-99 (1975)) (amended 1978). Prior to these amendments the statute was silent about what records were not available to the public. In addition, the legislature created a commission to study the area of access and confidentiality of the Bank Commissioner's and State Banking Commission's records. While the study commission has proposed in effect the retention of the recent restrictions, it has also recommended that reports containing information about "insider" transactions be subject to public inspection, *see* Proposed Bill of the Study Commission on Access to and Confidentiality of Banking Records (released February 7, 1979) (copy on file in office of *North Carolina Law Review*), an important provision in light of the numerous instances involving such transactions that have allegedly occurred in recent years. Congress recently enacted a similar statute regarding release of information about insider transactions that applies to any bank, whether state or national, insured by the Federal Deposit Insurance Corporation. Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, § 901, 92 Stat. 3641 (amending 12 U.S.C. § 1817).

90. Law of June 16, 1978, ch. 1213, 1977 Sess. Laws, 2d Sess. 1978, at 142 (codified at N.C. GEN. STAT. § 126-7 (Interim Supp. 1978)).

91. Law of May 20, 1965, ch. 640, 1965 N.C. Sess. Laws 711 (formerly codified at N.C. GEN. STAT. § 126-7 (Cum. Supp. 1977)) (amended 1978).

92. This was also the purpose behind the passage of the Civil Service Reform Act of 1978, considered to be the most extensive revamping of the federal employment scheme since the establishment of the Civil Service System approximately 100 years ago. *See* 36 CONG. Q. 2945 (1978). The Act provides for merit pay for employees at levels GS-13 through GS-15. Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 5402, 92 Stat. 1111.

93. For example, job supervisors who perhaps feel that wage increases should be based on length of service could recommend merit increases without fully scrutinizing the performance of each employee.

94. N.C. GEN. STAT. §§ 126-22 to -29 (Cum. Supp. 1977).

95. Law of June 16, 1978, ch. 1207, 1977 Sess. Laws, 2d Sess. 1978, at 134 (codified at N.C. GEN. STAT. § 126-24 (Interim Supp. 1978)).

96. In order to release the information, the department head must first determine that the



action was taken is public information,<sup>97</sup> under the former law what an employee did to merit the action was not.<sup>98</sup> Prior to this amendment, an employee's statement was the only public information available. The new statute provides a means for testing the accuracy of employee statements and for providing the public with more complete information concerning the demotion, suspension or dismissal of public employees.

Also considered in 1978, in *Williams v. Greene*,<sup>99</sup> was the case of a dismissed state employee who brought a section 1983<sup>100</sup> action against his employer, the North Carolina Highway Patrol, in which he asked for a preliminary injunction to reinstate him to his position with back pay pending a hearing before the State Personnel Commission.<sup>101</sup> A preliminary injunction is traditionally granted, pending trial on the merits, when there is probable cause to believe that plaintiff will be able to establish his case and when there is reasonable apprehension that he will suffer irreparable loss without it.<sup>102</sup> In *Williams*, the court of appeals announced that the availability to plaintiff of an administrative remedy would be weighed heavily in determining if plaintiff will suffer irreparable loss.<sup>103</sup> Primarily because the State Personnel Commission could award Williams reinstatement and back pay,<sup>104</sup> the courts found

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release of the information or the inspection and examination of the file is essential to maintaining the integrity of his department or to maintaining the level or quality of services provided by his department, and must prepare a supporting statement. *Id.*

97. N.C. GEN. STAT. § 126-23 (Cum. Supp. 1977).

98. Law of May 12, 1975, ch. 257, 1975 N.C. Sess. Laws 249 (formerly codified as amended at N.C. GEN. STAT. § 126-24 (Cum. Supp. 1977)) (amended 1978).

99. 36 N.C. App. 80, 243 S.E.2d 156, *appeal dismissed, cert. denied*, 295 N.C. 471, 246 S.E.2d 12 (1978).

100. 42 U.S.C. § 1983 (1976).

101. Plaintiff, a North Carolina Highway Patrolman, was involved in a roadblock incident in 1976 in which a Virginia State Patrolman, who was being held hostage, was killed. After an investigation of the incident by the State Department of Transportation, plaintiff was dismissed from his job on the grounds "that he was imprudent and careless in the use of his weapon . . . , that he jeopardized the safety of a hostage . . . by firing into a vehicle, and that he used excessive force while attempting to apprehend a dangerous criminal." 36 N.C. App. at 81-82, 243 S.E.2d at 157-58. Plaintiff promptly requested a hearing before the State Personnel Commission, but none had been scheduled as of the time he brought his lawsuit. *Id.* at 82, 243 S.E.2d at 158. In his suit, plaintiff averred that because of adverse publicity surrounding his dismissal, his professional reputation had been damaged and other job opportunities foreclosed, and that without reinstatement, irreparable injury to his reputation and livelihood would ensue. *Id.*

102. N.C.R. Civ. P. 65.

103. The court also held, consistent with the recent trend of authority, *see, e.g., McCray v. Burrell*, 516 F.2d 357, 365 (4th Cir. 1975), *cert. denied*, 426 U.S. 471 (1976), that a party suing under § 1983 does not have to exhaust his administrative remedies before seeking judicial relief. 36 N.C. App. at 85, 243 S.E.2d at 160.

104. The State Personnel Commission has the authority to grant reinstatement, back pay and attorneys' fees under N.C. GEN. STAT. §§ 126-4(9), -4(11) (Cum. Supp. 1977).

that he would not suffer irreparable loss of income.<sup>105</sup> In reversing a trial court order granting a preliminary injunction, the court, however, failed to analyze the issue of irreparable damage to plaintiff's reputation and simply concluded that "any damage to plaintiff's reputation . . . must be balanced against the possible harm to the state in retaining plaintiff on the North Carolina Highway Patrol."<sup>106</sup>

## 2. Local Government

Numerous challenges to the powers of local government were considered by the courts in 1978.<sup>107</sup> In *In re Ordinance of Annexation No. 1977-4*,<sup>108</sup> a case of first impression, the North Carolina Supreme Court upheld the power of a city to annex federal property—a power that has been upheld in other jurisdictions in almost every instance in which it has been challenged.<sup>109</sup> The court noted that the only limitation on this power is that it be exercised in accordance with the state's statutes.<sup>110</sup> Asserting that the city did not meet the latter requirement,<sup>111</sup> plaintiff argued that the statutory requirement that there be a

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105. 36 N.C. App. at 86, 243 S.E.2d at 160.

106. *Id.*

107. In *Big Bear, Inc. v. City of High Point*, 294 N.C. 262, 240 S.E.2d 422 (1978), the supreme court upheld the validity of a city ordinance that required business operations to pay a fee for city garbage collection. Plaintiffs sued to recover fees they had paid in protest on the ground that the payments were coercive, and thus involuntary and illegal, because the city had threatened to discontinue service if payments were not made. Because a section of the ordinance allowed others to engage in garbage collection with the city's permission, the court concluded that plaintiffs were not forced to contract with the city, and thus required plaintiffs to pay fees for the city services they had voluntarily accepted. The holding comports with the decisions of many other states that have allowed municipalities, in exercising their police powers, and as incident to garbage regulations, to exact a fee for trash removal, and if reasonable, to charge a business a different rate from that charged to individuals. See, e.g., *Glass v. Fresno*, 17 Cal. App. 2d 555, 62 P.2d 765 (1936); *Mayor of Milledgeville v. Green*, 221 Ga. 498, 145 S.E.2d 507 (1965); *Walker v. Jameson*, 140 Ind. 591, 37 N.E. 402 (1894); *Harper v. Richardson*, 222 Mo. App. 331, 297 S.W. 141 (1927).

108. 296 N.C. 1, 249 S.E.2d 698 (1978). The case involved the City of Goldsboro's power to annex Seymour Johnson Air Force Base.

109. See, e.g., *Howard v. Commissioners of Louisville*, 344 U.S. 624 (1953); *Flynn v. Stevenson*, 4 Ill. App. 3d 458, 281 N.E.2d 438 (1972); *Kansas City v. Querry*, 511 S.W.2d 790 (Mo. 1974); *Wichita Falls v. Bowen*, 143 Tex. 45, 182 S.W.2d 695 (1944); *County of Norfolk v. City of Portsmouth*, 186 Va. 1032, 45 S.E.2d 136 (1947).

110. See *United States v. Bellevue*, 334 F. Supp. 881 (D. Neb. 1971), *aff'd*, 474 F.2d 473 (8th Cir.), *cert. denied*, 414 U.S. 827 (1973) (federal property could be annexed under state statute, but annexation violated statutory requirement that it not be for sole purpose of obtaining revenue).

111. Plaintiff, a resident of the annexed area, challenged the ordinance on numerous other grounds, including (1) that the annexation of federal property was beyond the powers delegated to the city by legislative authority; (2) that the annexation would allow imposition of an unconstitutionally unequal tax because military personnel are exempted from local taxation; and (3) that the annexation violated the purposes of the annexation statute because it was inconsistent with "sound urban development" as required by N.C. GEN. STAT. § 160A-45 (1976). 296 N.C. at 16-18, 249 S.E.2d at 707-08.

"total resident population" of two persons per acre of annexed land<sup>112</sup> was not met because military personnel, not subject to taxation in the annexing unit and thus not eligible to vote therein, were counted as residents.<sup>113</sup> In rejecting plaintiff's argument, the court distinguished the words "residence" (a person's actual place of abode, whether permanent or temporary) and "domicile" (one's permanent, established home), and held that a finding of the latter was not required.<sup>114</sup> A person is properly counted as a member of the "total resident population," the court held, if he would have been counted as an inhabitant of the area under rules governing the last federal census.<sup>115</sup> Plaintiff also contended that the statutes were not followed because the city did not have funds budgeted to provide municipal services to the annexed area;<sup>116</sup> however, the court pointed out that the clear intent of the statute is to require only that the city show how it will provide these services.<sup>117</sup>

The powers of a regional council of governments, a quasi-governing body composed of two or more units of local government,<sup>118</sup> were considered for the first time in *Kloster v. Region D Council of Governments*,<sup>119</sup> in which the court of appeals held that a council does not have the inherent authority to own real estate or construct an office building.<sup>120</sup> Defendant, a council of governments located in western North Carolina, received a federal grant that it used to purchase land. It planned to construct an office building on the land, partly for its own use and partly for rental purposes, and to use the profits from the building to establish a retirement fund for its employees. Because a state statute allows a council to occupy space provided by a member government at the latter's expense,<sup>121</sup> the Council argued that it had the implied power to own and occupy a building constructed by funds from a

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112. N.C. GEN. STAT. § 160A-48(c) (1976) requires that "part or all of the area to be annexed must be developed for urban purposes," and sets out as one of the standards for determining if this requirement has been met that the area have "a total resident population equal to at least two persons for each acre of land included within its boundaries . . . ."

113. 296 N.C. at 13-14, 249 S.E.2d at 705-06.

114. *Id.* at 15, 249 S.E.2d at 706.

115. *Id.* Authority for this method of estimating population is found in N.C. GEN. STAT. § 160A-54(1) (1976).

116. As a prerequisite to annexation, N.C. GEN. STAT. § 160A-47 (1976) requires, in part, that the municipality prepare a report that includes a statement of "the method under which the municipality plans to finance extension of services into the area to be annexed."

117. 296 N.C. at 16, 249 S.E.2d at 707.

118. See N.C. GEN. STAT. §§ 160A-470 to -478 (1976).

119. 36 N.C. App. 421, 245 S.E.2d 180, *cert. denied*, 295 N.C. 466, 246 S.E.2d 215 (1978).

120. Plaintiff, a local taxpayer, challenged the Council's authority. For a discussion of plaintiff's standing to bring suit, see this Survey, *Civil Procedure: Jurisdiction*.

121. N.C. GEN. STAT. § 160A-476 (1976).

federal grant it had received. G.S. 160A-475, however, allows only specific enumerated powers to be conferred on a regional council by charter, and allows member governments to delegate other powers to the council by resolution.<sup>122</sup> Since the Council did not possess the power to own real estate or construct an office building by virtue of statutory or delegated authority, the court, considering these to be the exclusive means by which a regional council could obtain power, rejected defendant's theory of implied power.<sup>123</sup>

In *Cooke v. Futrell*,<sup>124</sup> the court of appeals clarified the extent of a municipality's power to impose penalties for failure to pay a municipal license tax. The municipal resolution in question imposed a one dollar fine on motor vehicle owners who failed to purchase municipal license tags by a certain date. In construing the resolution to uphold its validity,<sup>125</sup> the court confined those vehicles subject to the municipal tax and penalty to only those previously licensed by the state. Plaintiff could not be forced to pay a municipal license tax penalty before his car was licensed by the state because, according to state law, the local license could not be required until the state had licensed the vehicle.<sup>126</sup> In reaching this construction, the court relied on two state statutes—G.S. 160A-206,<sup>127</sup> which gives cities the power to tax only as specifically provided by statute and gives them an inherent power to penalize along with a power to tax, and G.S. 20-97,<sup>128</sup> which authorizes cities and towns within certain counties to levy at most one dollar annually on the use of a vehicle licensed by the state.<sup>129</sup>

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122. *Id.* § 160A-475(1)-(8). Prior to 1975, the statute allowed councils powers other than those specifically set out without requiring that the member governments delegate these other powers; however, the council had applied for the federal grant after the new language requiring delegation was adopted. 36 N.C. App. at 429, 245 S.E.2d at 185.

123. *Id.* at 428-29, 245 S.E.2d at 184-85.

124. 37 N.C. App. 441, 246 S.E.2d 65 (1978).

125. Plaintiff alleged that the Town of Rich Square and its agent violated North Carolina statutory law as well as the North Carolina and United States constitutions, which protect against unjust taxation.

126. Because it was unclear whether, when plaintiff purchased his state tags the day after he paid the penalty, this was a new license or delinquent renewal, the court remanded the case for a factual finding. *Id.* at 443-44, 246 S.E.2d at 66-67.

127. N.C. GEN. STAT. § 160A-206 (1976) provides in part:

A city shall have power to impose taxes only as specifically authorized by act of the General Assembly. Except when the statute authorizing a tax provides for penalties and interest, the power to impose a tax shall include the power to impose . . . penalties or interest for failure to pay taxes lawfully due within the time prescribed by law or ordinance.

128. *Id.* § 20-97 (1978).

129. 37 N.C. App. at 443, 246 S.E.2d at 66.

*E. Unemployment Compensation*

With its decision in *In re Sarvis*,<sup>130</sup> the North Carolina Court of Appeals established that striking employees who offer to return to work but have been replaced by permanent employees are not necessarily barred from unemployment benefits.<sup>131</sup> The issue in *Sarvis* centered on an interpretation of G.S. 96-14(5)<sup>132</sup> that disqualifies an employee from benefits during any week in which his unemployment "is caused by a labor dispute in active progress." In reversing the trial court's conclusion that unemployment originally caused by a dispute is not changed in respect of its cause by subsequent events, the court focused on the words "active progress" in the statute and the decisions of other states that have held a dispute terminated upon replacement of the employees and/or an unconditional offer to return to work.<sup>133</sup> The issue whether the dispute was still in progress was complicated, however, by the employees' filing, subsequent to their offer to return, of a petition for certification of a bargaining representative before the National Labor Relations Board. Holding that the dispute would be deemed over if the petition were found to be unrelated to the original strike,<sup>134</sup> the court remanded the case for a determination of this factual issue.<sup>135</sup>

*F. Liquor by the Drink*

In 1978 the General Assembly passed legislation<sup>136</sup> to allow cities

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130. 36 N.C. App. 476, 245 S.E.2d 176 (1978), *rev'd*, 296 N.C. 475, 251 S.E.2d 434 (1979).

131. Appellants, 16 employees of the High Point Sprinkler Company, struck the plant in a dispute over economic benefits and their employer's decision to transfer an employee. Shortly thereafter, the employer demanded that they return to work the following day or else permanent replacements would be sought. When the employees offered to return 4 days after the ultimatum 14 of the 16 jobs had been filled. *Id.* at 477, 245 S.E.2d at 177.

132. N.C. GEN. STAT. § 96-14(5) (1975).

133. 36 N.C. App. at 477-78, 245 S.E.2d 178-79 (citing *Ruberoid Co. v. California Unemployment Ins. Appeals Bd.*, 59 Cal. 2d 73, 378 P.2d 102, 27 Cal. Rptr. 878 (1963); *Knight-Morley Corp. v. Employment Sec. Comm'n*, 352 Mich. 331, 89 N.W.2d 541 (1958); *Sprague & Henwood, Inc. v. Unemployment Compensation Bd. of Review*, 207 Pa. Super. 112, 215 A.2d 269 (1965); *Special Prods. Co. v. Jennings*, 209 Tenn. 316, 353 S.W.2d 561 (1961); *Texas Employment Comm'n v. Hodson*, 346 S.W.2d 665 (Tex. Civ. App. 1961)). The supreme court agreed that unemployment is no longer caused by "a labor dispute in active progress" when employees offer to return to work. 296 N.C. at 481, 251 S.E.2d at 438.

134. The employees had also filed unfair labor practices charges before the NLRB that alleged discrimination in hiring and tenure in order to discourage membership in a labor organization; however, the court found these charges unrelated to the strike. 36 N.C. App. at 481-82, 245 S.E.2d at 179-80.

135. The supreme court, holding that the petition pending before the NLRB could not cause unemployment and thus could not serve as a basis for disqualifying employees from receiving benefits, reversed this holding of the court of appeals. 296 N.C. at 481-82, 251 S.E.2d at 437-38.

136. Law of June 15, 1978, ch. 1138, 1977 N.C. Sess. Laws, 2d Sess. 1978, at 36 (codified at

and counties with ABC stores to hold elections on the sale of mixed drinks in restaurants<sup>137</sup> and social establishments.<sup>138</sup> The bill as finally adopted prohibits "brown-bagging" in restaurants located in cities or counties that have approved mixed drink sales, raises the tax on liquors from five dollars to ten dollars a gallon, and provides that nine dollars of the tax will go to the local unit while one dollar will go to alcoholism treatment and research.

The regulations concerning mixed drinks,<sup>139</sup> promulgated by the State ABC Board in conjunction with a special advisory committee, allow hotels with restaurants to apply for a permit<sup>140</sup> and allow qualified restaurants<sup>141</sup> and hotels to operate a lounge separate from the dining area.<sup>142</sup> Strict regulations have been adopted to ensure that a "social establishment" is bona fide, that is, not open to the general public, including the requirement that it have a thirty-day waiting period for membership.<sup>143</sup>

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N.C. GEN. STAT. §§ 18A-2, -8, -15, -25, -29 to -31, -40, -51, -54 (Interim Supp. 1978)) (repealing N.C. GEN. STAT. § 18A-13).

137. A restaurant is required to be "engaged primarily and substantially in preparing and serving meals." N.C. GEN. STAT. § 18A-30(4) (Interim Supp. 1978); see 4 N.C. AD. CODE 2L § .0201 (1978). Grills, snack bars, lunch counters and fast food outlets are not considered restaurants. *Id.* While a restaurant must, at a minimum, have an inside dining area with a capacity to seat at least 36 persons, *id.*, there are numerous other characteristics that will be considered by the State ABC Board before it issues a permit. These factors include: (1) whether the facility has a printed menu listing full meals with substantial entrees; (2) whether it has full cooking and refrigeration equipment; (3) whether the largest portion of the food sold is prepared in its own kitchen; (4) whether the largest portion of the food sold is consumed on its premises; (5) whether there are separate kitchen and service staffs; (6) whether seating for dining is primarily at tables; and (7) whether only a small portion of the premises is devoted to activities other than dining. *Id.* § .0201(b).

138. A social establishment is a "private facility organized and operated . . . solely for a social, recreational, patriotic or fraternal purpose." *Id.* § .0301.

139. A copy of the regulations, which are quite extensive, can be obtained from the State ABC Board, P.O. Box 25249, Raleigh, N.C. 27611.

140. 4 N.C. AD. CODE 2L §§ .0205-.0206. Hotels include "hotels, motels and similar places which furnish lodging." *Id.* § .0205. "A hotel with a restaurant is a facility open to the general public, engaged primarily and substantially in the business of furnishing lodging and including on its premises a restaurant which has a kitchen and inside seating for at least 36 persons. . . . To qualify for a mixed beverages permit as a hotel with a restaurant, a majority of the gross receipts of the business must come from furnishing lodging." *Id.* In addition, the eligibility of a restaurant within a hotel is dependent on the considerations listed in *id.* § .0201(b), discussed in note 137 *supra*.

141. 4 N.C. AD. CODE 2L § .0201 (1978). The lounge in a restaurant must share a common kitchen and entrance with the dining area, cannot have a separate outside entrance and can remain open only so long as the dining area is open. Although the lounge does not have to serve meals, it must have food available at all times. *Id.*

142. *Id.* § .0205(b). A hotel's restaurant and lounge do not have to be connected if the restaurant's services are available in the lounge. Sales are also allowed in convention rooms, meeting rooms and similar places but only during scheduled events and only after a sign indicating the nature of the event has been posted. No sales, however, are allowed through room service. *Id.*

143. *Id.* § .0302(b). Some of the other requirements are: (1) that the facility collect an annual

Although the regulations are comprehensive,<sup>144</sup> questions remain about administering the liquor by the drink system. Restaurants in a local unit that has approved mixed drinks can no longer have brown-bagging,<sup>145</sup> while social establishments are allowed to have both. Yet seemingly, the rationale behind the bill—that allowing sales of mixed drinks permits greater control over consumption than brown-bagging does—should also apply to social establishments. Legislation has been introduced that would force some social establishments to choose between the two.<sup>146</sup> The most serious question, perhaps, concerns who may hold a mixed drink referendum. The statute allows the local governing board or twenty percent of the voters in cities and counties with ABC stores to call a referendum.<sup>147</sup> In those cities that have passed local laws creating city ABC systems in counties in which there is no county-wide system,<sup>148</sup> only a city-wide vote may be held.<sup>149</sup> If there is a county-wide ABC system and no separate city system, however, the statute is ambiguous about whether any city within the county could call a separate election to vote on mixed drinks.<sup>150</sup>

### G. Health Care

In 1978, only five years after certificate of need legislation was struck down as unconstitutional by the North Carolina Supreme Court,<sup>151</sup> the General Assembly again enacted such legislation<sup>152</sup> as re-

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membership fee separate from any cover charge; (2) that it maintain a written policy on the granting of memberships; (3) that it require each prospective member to complete a detailed application; and (4) that it have a membership committee of at least three persons to review all applications and make recommendations to the full membership. *Id.* § .0302. In addition, there are numerous other factors that will be considered in determining whether a facility qualifies as a social establishment. *See id.* § .0301(b).

144. Other important regulations place strict limits on advertising. *See id.* §§ .0501-.0505. For example, restaurants and hotels, but not social establishments, can have a single exterior sign, with specific size limits, stating "mixed beverages" or "all ABC permits" in letters no higher than five inches. These words are the only ones allowed in media advertising. In addition, advertisements of prices and "happy hours" are barred. Interior advertising is restricted to a separate mixed drink menu and the display of bottles to be used in mixing drinks. When a social establishment advertises in any manner, the words "not open to the general public" must be included. *Id.*

145. N.C. GEN. STAT. § 18A-31(e) (Interim Supp. 1978).

146. H. 206, N.C. General Assembly, 1979 Sess.

147. N.C. GEN. STAT. § 18A-51(b).

148. North Carolina law has traditionally provided only for county-wide ABC elections. *See id.* § 18A-51.

149. *See id.* § 18A-51(b).

150. Legislation has also been introduced to allow such cities, under certain circumstances, to hold mixed drink elections. H. 631, N.C. General Assembly, 1979 Sess.

151. *In re Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542, 193 S.E.2d 729 (1973).

152. North Carolina Health Planning and Resource Development Act of 1978, ch. 1182, 1977

quired under the National Health Planning and Resources Development Act of 1974<sup>153</sup> as a condition to receiving certain federal health care funds.

The new state legislation is designed to restrict the unnecessary capital expenditures in the health care industry that many claim have contributed to the rising costs of health care<sup>154</sup> by requiring a certificate of need to be obtained from a state agency before the development of new health care services and facilities.<sup>155</sup> The statute describes the review process for securing a certificate, assigns reviewing roles to the North Carolina Department of Human Resources and local health planning agencies, and sets forth criteria that the reviewing agency must consider.<sup>156</sup> Violation of the certificate requirements is ground for injunctive relief, loss of licensing and public funding, and civil fines of up to \$20,000.<sup>157</sup>

While certificate of need legislation is widely considered a reasonable solution to the problem of spiraling health care costs,<sup>158</sup> it has had problems in North Carolina. In the 1973 case of *In re Certificate of Need for Aston Park Hospital, Inc.*,<sup>159</sup> the North Carolina Supreme Court declared the state's 1971 certificate of need statute to be a deprivation of liberty without due process in violation of the North Carolina

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N.C. Sess. Laws, 2d Sess. 1978, at 71 (codified at N.C. GEN. STAT. §§ 131-175 to -188 (Interim Supp. 1978)).

153. 42 U.S.C. §§ 300k-300t (1976). The Act provides for the establishment of agencies and procedures for implementing a national health planning policy. In order to qualify for funds under a variety of federally funded programs, a state must meet the detailed criteria of the Act. *Id.* § 300m(d). One of the criteria is that the state implement a certificate of need program. *Id.* § 300m-2(a)(4)(B).

154. For a discussion of the background and rationale of certificate of need legislation, see Havighurst, *Regulation of Health Facilities and Services by "Certificate of Need,"* 59 VA. L. REV. 1143 (1973). In a typical industry, increased capital expenditures normally result from an increase in consumer demand for the industry's goods and services. Proponents of certificate of need legislation contend that the health care industry, however, is not responsive to these normal market pressures, but that instead physicians, the suppliers of health services, primarily control the demand for new and larger hospital services by determining if hospitalization is necessary, selecting the hospital to be used, and deciding what services are needed during the hospitalization. *Id.* at 1162-63. See also Blumstein & Sloan, *Health Planning and Regulation Through Certificate of Need: An Overview*, 1978 UTAH L. REV. 3, 3-7.

155. In general, a certificate of need is required for any capital expenditure over \$150,000 by or on behalf of a health care facility. N.C. GEN. STAT. § 131-178 (Interim Supp. 1978).

156. The criteria include: (1) an area's need for the services; (2) availability of alternatives; (3) financial feasibility and impact of the proposed services; (4) relationship of the services to the State Health Plan (required by the federal government in order to receive federal health care funds); and (5) availability of supporting resources, including medical personnel. *Id.* § 131-181(a).

157. *Id.* § 131-187.

158. See text accompanying note 168 *infra*.

159. 282 N.C. 542, 193 S.E.2d 729 (1973).



Constitution<sup>160</sup> because it prohibited the building of health care facilities with private funds on the sole basis of a Medical Commission finding of lack of need. Unconvinced that the health care industry was an atypical industry in its response to free market competition and suspicious that the statute was special interest legislation for the benefit of existing hospitals, the court found that there was no rational relationship between certificate of need legislation and the promotion of any public good.<sup>161</sup>

In light of *Aston Park*, North Carolina in *North Carolina ex rel. Morrow v. Califano*<sup>162</sup> challenged the constitutionality of the federal Health Planning Act's requirement of certificate of need programs as a prerequisite to receiving federal funds, claiming the requirement was an unlawful federal interference with the state because it would compel the state to amend its constitution in order to qualify for federal monies.<sup>163</sup> The United States Supreme Court affirmed the district court finding that the Act was not coercive but merely put reasonable conditions on obtaining federal aid.<sup>164</sup> Consequently, North Carolina was required to enact new certificate of need legislation or lose millions of federal dollars used to fund over forty state health care programs.<sup>165</sup>

The new North Carolina certificate of need legislation which became effective on January 1, 1979, follows generally the regulations promulgated to implement the federal act and is much more comprehensive than the 1971 statute. Nevertheless, its constitutionality is likely to be challenged. Because the state supreme court found certifi-

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160. See N.C. CONST. art. I, § 19.

161. 282 N.C. at 549-51, 193 S.E.2d at 734-35. The court held that the statute also violated the provisions of the North Carolina Constitution that forbid exclusive emoluments and monopolies. *Id.* at 551, 193 S.E.2d at 736.

162. 445 F. Supp. 532 (E.D.N.C. 1977), *aff'd mem.*, 98 S. Ct. 1597 (1978). The State sought to enjoin the enforcement of the certificate of need requirement in the Health Planning Act.

163. Acknowledging that the federal government may attach conditions to grants when the conditions are legitimately related to the grants' purposes, North Carolina argued that the power to attach conditions did not extend to coercing a state either to amend its constitution or to give up needed federal aid. *Id.* at 533-35. The point at which conditional federal appropriation grants exceed the Congressional spending power and become weapons by which states can be coerced to act in accordance with the conditions is an issue that has pervaded constitutional law. See, e.g., *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127 (1947); *Stewart Mach. Co. v. Davis*, 301 U.S. 548 (1937).

164. 98 S. Ct. 1597 (1978). The district court, finding the certificate of need requirement to be a reasonable condition designed to ensure that federal funds not contribute to the inflation of health care costs, reasoned that such conditions could not be defeated by "some oddity" of a state's constitution. 445 F. Supp. at 535. In addition, because North Carolina stood to forfeit less than \$50 million in federal aid compared with state revenues in 1974 of over \$3 billion, the court believed that the degree of coercion was exaggerated. *Id.*

165. 445 F. Supp. at 535.

cate of need legislation itself to be unconstitutional, it is unlikely that it will be able to uphold the new statute without overruling *Aston Park*. There are many factors, however, that may justify overruling that decision. First, while the record in *Aston Park* did not adequately explain the need for singling out the health care industry,<sup>166</sup> an extensive legislative study<sup>167</sup> on the need for a certificate of need law with findings of fact that are incorporated in the statute will make it easier to demonstrate that the statute is a reasonable response to an important social problem. That Congress has encouraged certificate of need legislation, that more than two-thirds of the states have passed such laws,<sup>168</sup> and that the laws have been upheld in every instance in which they have been challenged<sup>169</sup> further emphasizes the rational basis for certificate of need legislation. Finally, because of the complexities of the problem, the new statute is the kind of legislation for which judicial deference to a legislative judgment is appropriate. If the supreme court does not overrule its prior decision, however, then North Carolina will be forced to decide whether to sacrifice approximately \$55 million a year in federal funds or to amend its constitution.

#### H. Coastal Area Management Act

The North Carolina General Assembly in 1974 passed the Coastal Area Management Act (CAMA),<sup>170</sup> designed to establish a program for the orderly development of North Carolina's coastal area, and for the preservation of its natural resources.<sup>171</sup> Under the Act, a Coastal Re-

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166. The major arguments presented to justify the certificate of need requirement were (1) that there was a shortage of medical personnel in the area to be served by the proposed facility that would be aggravated by the presence of another hospital and (2) that there were costs to society involved in the construction of unnecessary hospital facilities. Brief for Appellant at 11-12. Similar arguments, however, might apply to other industries.

167. LEGISLATIVE COMMISSION ON MEDICAL COST CONTAINMENT, INTERIM REPORT TO THE GENERAL ASSEMBLY OF NORTH CAROLINA, SECOND SESSION 80 (1978).

168. See Blumstein & Sloan, *supra* note 154, at 3. In addition, more than twenty of these states had done so before the enactment of the federal Health Planning Act. See Havighurst, *supra* note 154, at 1144.

169. The constitutionality of certificate of need legislation has been affirmed in four other cases. *Goodin v. Oklahoma*, 436 F. Supp. 583 (W.D. Okla. 1977); *Simon v. Cameron*, 337 F. Supp. 1380 (C.D. Cal. 1970); *Merry Heart Nursing & Convalescent Home, Inc. v. Dougherty*, 131 N.J. Super. 412, 330 A.2d 370 (1974); *Attoma v. State Dep't of Social Welfare*, 26 A.D.2d 12, 270 N.Y.S.2d 167 (1966).

170. Law of April 1, 1974, ch. 1284, § 1, 1973 N.C. Sess. Laws, 2d. Sess. 1974, 463 (codified at N.C. GEN. STAT. § 113A-100 to -128 (1978)).

171. N.C. GEN. STAT. § 113A-102(b) (1978). See generally Schoenbaum, *The Management of Land and Water Use in the Coastal Zone: A New Law is Enacted in North Carolina*, 53 N.C.L. REV. 275, 275-79 (1974).

sources Commission (CRC) was established,<sup>172</sup> among whose duties are the promulgation of guidelines for the development of the coastal zone,<sup>173</sup> and the designation of certain "areas of environmental concern" (AEC) for special protection.<sup>174</sup> In *Adams v. North Carolina Department of Natural and Economic Resources*,<sup>175</sup> the first court test of the CAMA, the North Carolina Supreme Court found the act to be constitutional. The court held that there had been no unlawful delegation of legislative power to the CRC, and, for the first time, held that the presence of procedural safeguards may be considered in evaluating a delegation of power.

Plaintiffs in *Adams* were several landowners in two coastal counties whose lands had been designated as interim AEC's by the CRC.<sup>176</sup> Among other constitutional challenges,<sup>177</sup> plaintiff alleged that in giving the CRC the authority to promulgate guidelines for the coastal zone, the General Assembly had unlawfully delegated legislative power to an administrative agency.<sup>178</sup> In holding that there had been no unlawful delegation of legislative power,<sup>179</sup> the supreme court for the first time explicitly recognized that one policy underlying the nondelegation doctrine is the prevention of the arbitrary exercise of power by administrative agencies. Thus the presence of procedural safeguards is relevant in evaluating a delegation of legislative power.

The nondelegation doctrine is derived from two provisions of the

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172. N.C. GEN. STAT. § 113A-104(a) (1978). The CRC consists of 15 members, at least 12 of whom must be experienced in some activity related to the coastal zone, or in local government in the coastal zone. *Id.* at § 113A-104(b). The members are all appointed by the Governor, from among persons nominated by the boards of commissioners of coastal counties. *Id.* § 113A-104(c).

173. *Id.* § 113A-102(b)(4).

174. *Id.* § 113A-113(a). The statute lists the types of lands that may be designated as AEC's. These include coastal wetlands, estuarine waters, fragile or historic areas, and natural hazard AEC's in land use planning. See Schoenbaum and Silliman, *Coastal Planning: The Designation and Management of Areas of Critical Environmental Concern*, 13 URB. L. ANN. 15 (1977).

175. 295 N.C. 683, 249 S.E.2d 402 (1978).

176. *Id.* at 703, 249 S.E.2d at 414.

177. Plaintiffs also argued that the CAMA was a local act prohibited by N.C. CONST. art. II, § 24. 295 N.C. at 689, 249 S.E.2d at 406. The court rejected this argument, holding that the CAMA was a general law, and noted that a statute that by its terms applies only to a particular part of the state will be considered a general law if the classification is reasonable and based on rational distinctions related to the purposes of the statute. *Id.* at 691, 249 S.E.2d at 407. See this Survey, *Constitutional Law: North Carolina Constitution*.

Furthermore, plaintiffs argued that the CAMA and the guidelines adopted by the CRC deprived them of property without due process of law, and that the CAMA authorized unconstitutional warrantless searches. 295 N.C. at 702, 249 S.E.2d at 413. In each instance, the court held that the complaints were premature, as the plaintiffs had failed to show injury resulting from either of the alleged constitutional defects. *Id.* at 703-05, 249 S.E.2d at 414-15.

178. 295 N.C. at 689, 249 S.E.2d at 406.

179. *Id.* at 698, 249 S.E.2d at 411.

North Carolina Constitution. Article I, section 6 provides: "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." Article II, section 1 provides: "The legislative power of the State shall be vested in the General Assembly . . . ." The court has interpreted these provisions to mean that the General Assembly may not delegate its legislative power to another branch of the government.<sup>180</sup> Nevertheless, it is generally recognized today that a modern government must delegate a certain portion of the legislative power to administrative agencies. As a result, the real issue under the nondelegation doctrine concerns the limits of a valid delegation. In the test that has been applied in North Carolina, as well as in most other states, courts insist that a delegation of power be accompanied by standards adequate to guide the agency in its exercise of power.<sup>181</sup>

In *Adams*, the court explicitly recognized that the nondelegation doctrine serves both to prevent the abdication by the legislature of its policymaking responsibilities, and to guard against the abuse of discretionary power by administrative agencies.<sup>182</sup> By recognizing the policy of curbing agency discretionary power, the court for the first time made the presence of procedural safeguards a relevant consideration in assessing the validity of a particular delegation.<sup>183</sup> Thus in addressing the delegation to the CRC of the power to promulgate guidelines, the court discussed both the guiding standards and procedural safeguards supplied by the legislature.

The standards provided to guide the CRC in the promulgation of guidelines for the coastal zone are contained primarily in the CAMA's statement of goals;<sup>184</sup> the court found additional standards in the CAMA's statement of legislative findings,<sup>185</sup> and in the criteria required to be considered by the CRC in the designation of AEC's.<sup>186</sup> The court held these standards to be sufficiently clear to guide the CRC

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180. *Id.* at 696, 249 S.E.2d at 410; *State Educ. Assistance Auth. v. Bank of Statesville*, 276 N.C. 576, 589, 174 S.E.2d 551, 561 (1970); *Redev. Comm'n v. Security Nat'l Bank*, 252 N.C. 595, 608, 114 S.E.2d 688, 697-98 (1960).

181. *See, e.g., Carolina-Virginia Coastal Highway v. Coastal Turnpike Auth.*, 237 N.C. 52, 74 S.E.2d 310 (1953). *See generally* 1 F. COOPER, *STATE ADMINISTRATIVE LAW* 54-70 (1965).

182. 295 N.C. at 697-98, 249 S.E.2d at 411.

183. *Id.* at 698, 249 S.E.2d at 411.

184. The guidelines promulgated by the CRC must be consistent with the goals of the CAMA. N.C. GEN. STAT. § 113A-107(a) (1978). The goals of the Act are set forth at *id.* § 113A-102(b).

185. 295 N.C. at 700, 249 S.E.2d at 412. These findings are set forth at N.C. GEN. STAT. § 113A-102(a) (1978).

186. 295 N.C. at 700, 249 S.E.2d at 412. These criteria are set forth at N.C. GEN. STAT. § 113A-113(b) (1978).

in the promulgation of guidelines. The court noted that the standards were "as specific as circumstances permit,"<sup>187</sup> and that the promulgation of guidelines would require considerable expertise, which the CRC would possess.<sup>188</sup>

The court then discussed the procedural framework within which the CRC must operate. The court found four different procedural safeguards for the promulgation of guidelines by the CRC:<sup>189</sup> those contained within the CAMA;<sup>190</sup> those in North Carolina's Administrative Procedures Act (APA);<sup>191</sup> those provided by the Administrative Rules Committee of the General Assembly;<sup>192</sup> and those in North Carolina's "sunset" legislation.<sup>193</sup> The court then held that since there were sufficiently specific guiding standards and adequate procedural safeguards, the delegation of power to the CRC was constitutional.<sup>194</sup>

The court presented little argument or explanation for the incorporation of a procedural safeguards criterion into the nondelegation doctrine. It stated only that a key purpose of the guiding standards test is to prevent arbitrary action by an administrative agency,<sup>195</sup> and the procedural safeguards tend to "encourage adherence to legislative standards."<sup>196</sup> The court then stated that it was joining the "growing trend of authority," citing Professor Davis' *Administrative Law Treatise*.<sup>197</sup> The court was apparently referring to decisions cited by Professor Davis holding that procedural safeguards should be considered in evaluating a delegation of power. These courts generally have recognized as

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187. 295 N.C. at 700, 249 S.E.2d at 412 (quoting *North Carolina Turnpike Auth. v. Pine Island, Inc.*, 265 N.C. 109, 115, 143 S.E.2d 319, 323 (1965)).

188. 295 N.C. at 700-01, 249 S.E.2d at 412.

189. *Id.* at 701, 249 S.E.2d at 412.

190. *Id.* at 701, 249 S.E.2d at 413. These procedures are set forth at N.C. GEN. STAT. § 113A-107 (1978).

191. 295 N.C. at 702, 249 S.E.2d at 413. The court stated that amendments to the guidelines would be subject to the requirements of the Administrative Procedures Act, N.C. GEN. STAT. § 150A-1 to -64 (1978).

192. 295 N.C. at 702, 249 S.E.2d at 413. The Administrative Rules Review Committee is a committee of the Legislative Research Commission, N.C. GEN. STAT. § 120-30.26 (Supp. 1977), which reviews agency rules to "determine whether or not the agency acted within its statutory authority in promulgating the rule," *id.* § 120-30.28(a).

193. 295 N.C. at 702, 249 S.E.2d at 413. Under the "sunset" legislation, N.C. GEN. STAT. § 143-34.10 to .21 (1978), the CAMA will be repealed as of July 1981. *Id.* § 143-34.12. Prior to its termination, the CAMA will be reviewed by the Governmental Evaluation Committee, which will recommend to the General Assembly that the Act be continued, modified, or terminated. *Id.* § 143-34.16.

194. 295 N.C. at 702, 249 S.E.2d at 413.

195. *Id.* at 698, 249 S.E.2d at 411.

196. *Id.*

197. *Id.* (citing 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* 210 (2d. ed. 1978)).

underlying the nondelegation doctrine the same policies noted by the court in *Adams*.<sup>198</sup>

While the court did not cite any North Carolina authority, the adoption of a procedural safeguards criterion is consistent with North Carolina case law. Although the court has never before explicitly acknowledged that a purpose of the nondelegation doctrine is to prevent arbitrary administrative action, that had been a significant factor in some cases.<sup>199</sup> With this explicitly stated policy behind the doctrine, any factors that may limit the ability of administrative agencies to act in an arbitrary manner become relevant. Procedural safeguards are probably the most effective restriction on the discretionary power of administrative agencies.<sup>200</sup>

The court's decision in *Adams* should provide some guidance to the legislature in the drafting of future statutes. If the legislature believes that a broad delegation of power to an administrative agency is appropriate in a given situation, that delegation should be accompanied by procedural safeguards. It seems clear after *Adams* that such a delegation is more likely to survive a constitutional attack if so drawn. This position is appropriate, since there is a greater potential for arbitrary action by an administrative agency when the delegation is broad,

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198. See, e.g., *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 213, 346 A.2d 269, 291 (1975); *Jennings v. Exeter-West Greenwich Regional School Dist. Comm.*, 116 R.I. 90, 98-99, 352 A.2d 634, 638-39 (1976).

199. See, e.g., *Carolina-Virginia Coastal Highway v. Coastal Turnpike Auth.*, 237 N.C. 52, 74 S.E.2d 310 (1953). The court held invalid a delegation of power to the Municipal Board of Control. The General Assembly had authorized this agency to organize a municipal corporation to construct a toll road if it determined the road to be "in the public interest." *Id.* at 56, 74 S.E.2d at 313. The court held that "the power to determine whether the construction . . . of a toll road . . . will be 'in the public interest' is purely a legislative question to be resolved only in the exercise or under the direction of legislative powers of guidance and control." *Id.* at 63, 74 S.E.2d at 315. The court also noted that the statute attempted to "clothe the members of this administrative agency with apparent power in their unguided discretion to give or withhold the benefits of the law in any given case or cases." *Id.*

For other cases in which the court has apparently been concerned about the abuse of discretionary power by administrative agencies, see *State v. Williams*, 253 N.C. 337, 117 S.E.2d 444 (1960) (statute requiring that persons soliciting students for schools be licensed because issuance of license in given situation depended on "unlimited discretion of the administrative body" held invalid) and *Harvell v. Scheidt*, 249 N.C. 699, 107 S.E.2d 549 (1959) (delegation to Commissioner of Motor Vehicles of power to revoke license of any person who was a "habitual violator of the traffic laws" held unlawful). Other factors appear to have influenced the court in various cases. It has been suggested that the court will permit a broader delegation of authority when the delegation is to a body with expertise in the subject matter of the delegation. Glenn, *The Coastal Area Management Act in the Courts: A Preliminary Analysis*, 53 N.C.L. Rev. 303, 319 (1974). In addition, it seems fairly clear that the court will not insist on more detailed standards than is practicable. In *North Carolina Turnpike Auth. v. Pine Island, Inc.*, 265 N.C. 109, 143 S.E.2d 319 (1965), the court approved a delegation of power for which the legislature had provided standards that were "as specific as the circumstances permit."

200. See 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* 214-15 (2d ed. 1978).

and the need for safeguards is greater.<sup>201</sup>

It is also possible, as a result of the decision in *Adams*, that it will be more difficult for a constitutional attack based on the delegation doctrine to succeed. Two of the procedural safeguards the court found significant, the APA and the Administrative Rules Review Committee, are presumably of general applicability. The "sunset" legislation also may be applicable if new statutes are brought under it. These will provide some procedural safeguards and some legislative oversight of any new delegation of power, in addition to whatever standards and safeguards might accompany the delegation. These factors certainly would not preclude a successful constitutional attack, but may make one less likely.

### *I. Professional Responsibility and Administration of Justice*

In *Aetna Casualty & Surety Co. v. United States*,<sup>202</sup> a suit arising out of a 1974 Eastern Airlines plane crash in Charlotte, the United States Court of Appeals for the Fourth Circuit considered the question of when an attorney may represent multiple defendants without violating the Code of Professional Responsibility of the North Carolina State Bar. Plaintiffs, having paid claims based on the crash, brought suit in federal district court<sup>203</sup> as subrogees against the United States under the Federal Tort Claims Act and against four air traffic controllers, employees of the Federal Aviation Administration, claiming that defendants negligently caused the crash. All defendants were represented by counsel provided by the United States Department of Justice and by the United States attorney. On plaintiffs' motion, the district judge disqualified government counsel from representing the air traffic controllers. The court found an irreconcilable conflict of interest in the multiple representation in violation of Disciplinary Rule 5-105(B),<sup>204</sup>

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201. See *City of Amsterdam v. Helsby*, 37 N.Y.2d 19, 332 N.E.2d 290, 299 371 N.Y.S.2d 404 (1975).

202. 570 F.2d 1197 (4th Cir. 1978).

203. 438 F. Supp. 886 (W.D.N.C. 1977), *rev'd*, 570 F.2d 1197 (4th Cir. 1978).

204. NORTH CAROLINA CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(B) provides: "A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C)." DR 5-105(C) permits multiple representation "if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." *Id.* EC 5-15 provides, in pertinent part: "A lawyer should never represent in litigation multiple clients with conflicting interests and there are few situations in which he would be justified in representing in litigation multiple clients with potentially conflicting interests."

which prohibits multiple representation when the attorney's independent professional judgment in behalf of one client will or is likely to be impaired by his representation of another client. The court of appeals reversed, however, finding that defendant's attorneys had met the dual requirements of DR 5-105(C), which allows an attorney to represent multiple clients "if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."<sup>205</sup>

The significance of *Aetna* lies not in the courts' disagreement over the applicability of DR 5-105(C),<sup>206</sup> but in the scope of review used by the court of appeals and in the court's consideration of factors not expressly mentioned in the disciplinary rules. The court declined to limit the scope of its review to determining whether the district court had abused its discretion. Following the lead of the United States Court of Appeals for the Fifth Circuit, it asserted that it would inquire, "in [a case] where the facts are not in dispute, . . . whether the District Court's disqualification order was predicated upon a proper understanding of applicable ethical principles."<sup>207</sup> This scope of review would give little deference to the district court opinion.

In its inquiry under this broad scope of review, the court consid-

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205. *Id.* DR 5-105(C).

206. The district court declined to presume that a client's consent could be fully informed when procured without the advice of a lawyer with no conflict of interest. 438 F. Supp. 886, 888 (W.D.N.C. 1977). The court held that the second requirement of DR 5-105(C), that the attorney have an "obvious" ability to represent adequately each defendant's interest, was not met because of the possibility that each defendant might wish to avoid liability by suggesting that one or more of his codefendants was responsible, to the exclusion of himself. *Id.* at 887-88. The district court was also concerned about the possible liability of individual defendants for damages, should they be found negligent. *Id.* at 889. Regarding the other defendant, the government, the district court expressed concern about the right of taxpayers to be represented by a district attorney or attorney general whose loyalty is not clouded by possible conflicting claims or rights of the controllers themselves. *Id.* at 888.

The court of appeals found no authority to support the district court's theory regarding informed consent. It noted that, in any event, counsel for the air controllers' union had participated in discussions between the individual defendants and the Department of Justice; the court thought it "reasonable to assume that he was aware of any problems and properly advised the controllers with respect to their best interests." 570 F.2d at 1202. In rejecting as conjecture the district court's concern about possible conflicts of interest among the codefendants, the court stressed the assurance by Government counsel that there was no dispute among defendants with respect to the duties of the controllers or the details of the plane crash. *Id.* at 1201. Concerning the individual liability of defendants, the court concluded there was "little or no possibility . . . of personal liability." *Id.* The issue of scope of employment was conceded, so a finding of negligence against the air controllers would be imputed to the Government. A finding of joint liability would bar the entry of any contemporaneous or subsequent judgment against the air controllers. *Id.*

207. 570 F.2d at 1200 (quoting *Woods v. Covington County Bank*, 537 F.2d 804, 810 (5th Cir. 1976)).



ered several factors in addition to the considerations set out in the disciplinary rules. First, the court noted the advantage to the air traffic controllers of representation by Government counsel with access to "the reservoir of the Government's expertise."<sup>208</sup> Also of considerable concern to the court was the increasing number of motions to disqualify upon "alleged ethical grounds."<sup>209</sup> The court suspected that in moving to disqualify, plaintiff was motivated "more by [an apparent] desire to fragmentize the defense than by any sensitivity to the ethical considerations involved."<sup>210</sup>

This approach to disqualification on ethical grounds has also been taken by the Court of Appeals for the Second Circuit, which rejected "a mechanical and didactic application of the [Disciplinary] Code to all situations,"<sup>211</sup> and by the Court of Appeals for the Fifth Circuit, which stated: "A court should be conscious of its responsibility to preserve a reasonable balance between the need to ensure ethical conduct on the part of lawyers . . . and other social interests, which include the litigant's right to freely chosen counsel."<sup>212</sup> By considering factors in addition to those explicitly the concern of the Code, rigid application of the disciplinary rules leading to an excessive number of disqualifications can be avoided. The adoption by the Court of Appeals for the Fourth Circuit of a similarly broad approach should lead to an increasing number of denials of motions to disqualify.

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208. *Id.* at 1202. The court referred also to the "burden upon [the air traffic controllers'] time and resources incident to the employment of independent counsel." *Id.* Whether there would also be a financial burden is not clear. The district court quoted from a Justice Department policy statement, which stated the Department's intent to "[p]ay for representation by a private attorney when several employees, otherwise entitled to representation by the Department, have sufficiently conflicting interests which in the Department's view preclude representation of each of them by the Department." 438 F. Supp. 886, 890 (W.D.N.C. 1977)(quoting United States Department of Justice, STATEMENTS OF POLICY: Order No. 683-77 (Jan. 19, 1977)).

209. 570 F.2d at 1202; *cf.* Woods v. Covington County Bank, 537 F.2d 804, 819 (5th Cir. 1976) ("Inasmuch as attempts to disqualify opposing counsel are becoming increasingly frequent, we cannot permit Canon 9 (prohibiting conduct which gives the appearance of impropriety) to be manipulated for strategic advantage on the account of an impropriety which exists only in the minds of imaginative lawyers.").

210. 570 F.2d at 1201 n.7. The court also distinguished Canon 4 (preserving confidences and secrets of a client), which protects the rights of both adversaries in the litigation and provides firmer ground for a motion to disqualify opposing counsel, from Canon 5 (exercise of independent professional judgment on behalf of client), which is addressed solely to the relationship between the attorney and his immediate clients. *Id.*

211. International Elecs. Corp. v. Flanzner, 527 F.2d 1288, 1293 (2d Cir. 1975) (quoting Amicus Curiae Brief of the Connecticut Bar Association).

212. Woods v. Covington County Bank, 537 F.2d 804, 810 (5th Cir. 1976). The district court in *Aetna* had asserted that the ethical principles involved should be considered without regard to other factors, such as the cost to taxpayers or individuals of private counsel for individual defendants. 438 F. Supp. 886, 889 (W.D.N.C. 1977).

The North Carolina Court of Appeals considered *Aetna's* implications in *Swenson v. Thibaut*,<sup>213</sup> a shareholders' derivative suit in which defendant moved to disqualify plaintiff's attorney on the basis of alleged violations of canons two, four, five and nine.<sup>214</sup> The trial judge denied these motions. On appeal, defendant, citing *Aetna*, urged the court of appeals to look beyond a possible abuse of discretion, and consider whether the trial judge had correctly applied ethical principles to the evidence before him.<sup>215</sup> The court of appeals interpreted this suggestion as "placing this Court in the position of functionally sitting as a court of original jurisdiction to consider these ethical questions without reference or deference to the proceedings below."<sup>216</sup> The court expressed reluctance to follow what it perceived to be the *Aetna* approach, indicating that it would not ignore or give only minimal deference to the trial judge's findings and conclusions in reference to the ethical questions.<sup>217</sup> In affirming the trial judge's decisions, however, the court sounded as if it were applying the *Aetna* scope of review: "The rulings of the trial judge, upon the evidence before him, are in complete agreement with the conclusions we reach upon the same evidence . . . ."<sup>218</sup> This language suggests that the court of appeals will not defer in cases in which it reaches different conclusions from those of the trial judge.

The *Swenson* court was more clearly in agreement with the *Aetna* court regarding the consideration on a motion to disqualify of practical factors in addition to the conflict of interest concerns of the disciplinary rules. It asserted that "the court's inherent power is not limited or bound by the technical precepts contained in the Code of Professional Responsibility as administered by the Bar."<sup>219</sup>

While the question whether a strict or flexible approach to motions to disqualify will be followed in North Carolina seems settled at the court of appeals level by *Swenson*, the question of the scope of judicial review may have to await a case in which the court of appeals disagrees

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213. 39 N.C. App. 77, 250 S.E.2d 279 (1978).

214. NORTH CAROLINA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 2 (improper solicitation); *id.* Canon 4 (breach of the confidential attorney-client relationship); *id.* Canon 5 (improper interest in the subject matter of the litigation); *id.* Canon 9 (appearance of professional impropriety).

215. 39 N.C. App. at 108, 250 S.E.2d at 299.

216. *Id.*

217. *Id.* at 109, 250 S.E.2d at 299.

218. *Id.* at 114, 250 S.E.2d at 302.

219. *Id.* at 109, 250 S.E.2d at 299.

with a trial court decision on a motion to disqualify, and must clarify its holding in *Swenson*.

Several 1978 North Carolina cases concerned the power of the courts to discipline attorneys. In *In re Palmer*,<sup>220</sup> a superior court hearing had resulted in a dismissal of a disbarment proceeding against attorney Palmer. The attorney general petitioned the court of appeals for a writ of certiorari to review the dismissal, and the writ was granted. The court of appeals subsequently found the grant of the writ to have been improvident on the ground that since G.S. 84-28(h)<sup>221</sup> precludes appeal by the State, to grant review on petition for certiorari would be "to allow by indirect means that which is forbidden by direct means."<sup>222</sup> The supreme court reversed, holding that by virtue of the appellate courts' supervisory powers, the State could seek review by writ of certiorari of judicial disciplinary proceedings.<sup>223</sup>

Orders suspending the licenses of attorneys for failure to perfect appeals were vacated in *In re Robinson*<sup>224</sup> and *In re Dale*.<sup>225</sup> In both cases the court of appeals found that the superior court judge may have prejudged the attorneys' conduct before hearing any evidence.<sup>226</sup> Rather than dismissing the charges or remanding for a new hearing, however, the court decided to hold the rehearings itself, in the exercise of its inherent power to discipline attorneys.<sup>227</sup> On rehearing both

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220. 37 N.C. App. 220, 245 S.E.2d 791 (1978), *rev'd*, 296 N.C. 638, 252 S.E.2d 784 (1979).

221. N.C. GEN. STAT. § 84-28(h) (Cum. Supp. 1977) provides for an appeal of right for attorneys from an adverse decision, but excludes any mention of the State. Law of April 3, 1933, ch. 210, § 11, 1933 N.C. Pub. Laws 313 (formerly codified as amended at N.C. GEN. STAT. 84-28(3)(f) (1975))(amended 1975), provided a right of appeal for both parties in a disciplinary proceeding against an attorney.

222. 37 N.C. App. at 222, 245 S.E.2d at 793.

223. 296 N.C. 638, 646, 252 S.E.2d 784, 789 (1979).

224. 37 N.C. App. 671, 247 S.E.2d 241 (1978).

225. 37 N.C. App. 680, 247 S.E.2d 246 (1978).

In an address by Harold A. Coley, Jr., counsel to the North Carolina State Bar, to a class in professional responsibility at the University of North Carolina School of Law (January 25, 1979), Mr. Coley stated that the largest category of complaints received by his office against practicing attorneys concerns failure to appear in court and failure to perfect appeals.

226. In his Specifications of Charges No. 1, Judge Snapp used the words "negligently and willfully" in characterizing the alleged conduct of attorney Robinson, 37 N.C. App. at 678, 247 S.E.2d at 245, and the word "negligently" in the specification regarding attorney Dale, 37 N.C. App. at 681, 247 S.E.2d at 247. Speculating that Judge Snapp's "unfortunate and inappropriate choice of words came from the idea of necessity for specific allegations in a third party complaint, rather than from bias or prejudice," 37 N.C. App. at 684, 247 S.E.2d at 249, the court nevertheless concluded in both cases that it could not allow the orders to stand. 37 N.C. App. at 678, 247 S.E.2d at 246; 37 N.C. App. at 684, 247 S.E.2d at 249.

227. 37 N.C. App. at 679, 247 S.E.2d at 246; 37 N.C. App. at 685, 247 S.E.2d at 249. Judge Britt, concurring in the *Dale* result, questioned the power of the court to suspend or disbar an attorney. *Id.* at 686, 247 S.E.2d at 250 (concurring opinion).

Robinson and Dale were suspended from the practice of law.<sup>228</sup>

In *In re Hardy*,<sup>229</sup> the North Carolina Supreme Court stated in dictum that it had the power to go beyond a Judicial Standards Commission (JSC) recommendation and order removal of a judge for whom the JSC had recommended censure. In *Hardy*, however, the court declined to exercise its newly stated power and followed the JSC recommendation of censure.<sup>230</sup> The court based its assertion of power upon its construction of the Judicial Standards Commission Act, which provides in pertinent part: "The Supreme Court may approve the recommendation [of the JSC], remand for further proceedings, or reject the recommendation."<sup>231</sup> Construing the Judicial Standards Commission Act in light of the presumed legislative intent, the court read the options in the statute as permissive, authorizing the court, unfettered in its adjudication by the recommendation of the JSC, not only to reject the recommendation but to make whatever final judgment it deemed proper.<sup>232</sup>

The majority's broad interpretation of the statute was answered with a strong dissent by Justice Lake.<sup>233</sup> Justice Lake deemed the majority's interpretation "a distortion of the plain language of the statute"<sup>234</sup> and disagreed with the court's characterization of the JSC as "[a]n arm of this Court,"<sup>235</sup> describing it instead as an independent

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228. *In re Dale*, 39 N.C. App. 370, 372, 250 S.E.2d 82 (1979); *In re Robinson*, 39 N.C. App. 345, 349, 250 S.E.2d 79, 82 (1979). Both attorneys were found to have violated NORTH CAROLINA CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A), which prohibits lawyers from handling legal matters that they are not competent to handle, or handling legal matters without adequate preparation, or neglecting legal matters entrusted to them. Dale was suspended for 90 days and Robinson for 12 months from practice before the Courts of the Appellate Division and for 6 months from practice in criminal cases.

229. 294 N.C. 90, 240 S.E.2d 367 (1978).

230. Judge Hardy was found to have entered and altered traffic court judgments without the knowledge or consent of the prosecuting attorney. The court found this case to be similar to three earlier judicial misconduct cases, and concluded that fairness required a similar result. *Id.* at 98, 240 S.E.2d at 273.

231. N.C. GEN. STAT. § 7A-377(a) (Cum. Supp. 1977).

232. 294 N.C. at 97, 240 S.E.2d at 372. The court cited, in support of its holding, decisions from other jurisdictions that have considered the question: *In re Robson*, 500 P.2d 657 (Alas. 1972); *Spruance v. Commission on Judicial Qualifications*, 13 Cal. 3d 778, 532 P.2d 1209, 119 Cal. Rptr. 841 (1975); *Geiler v. Commission on Judicial Qualifications*, 10 Cal. 3d 270, 515 P.2d 1, 110 Cal. Rptr. 201 (1973); *In re Kelly*, 238 So. 2d 565 (Fla. 1970); *In re Diener*, 268 Md. 659, 304 A.2d 587 (1973), *cert. denied*, 415 U.S. 989 (1974).

233. 249 N.C. at 98, 240 S.E.2d at 373 (dissenting opinion). Justices Branch and Moore joined the dissent. Justice Lake had dissented from earlier judicial discipline cases, questioning the constitutionality of the statutes creating the JSC. *In re Nowell*, 293 N.C. 235, 252, 237 S.E.2d 246, 237 (1977) (dissenting opinion); *In re Crutchfield*, 289 N.C. 597, 605, 223 S.E.2d 822, 827 (1975) (dissenting opinion).

234. 294 N.C. at 103, 240 S.E.2d at 376 (dissenting opinion).

235. *Id.* at 104, 240 S.E.2d at 376 (quoting majority opinion, *id.* at 97, 240 S.E.2d at 372).

body created by the legislature.<sup>236</sup> According to his dissent the only function of the supreme court in the procedure is to act as a check and restraint upon the JSC.<sup>237</sup> Under the majority's view, Justice Lake observed, four supreme court judges could remove from office a judge whom the JSC and the other three supreme court judges thought deserved no more than censure.<sup>238</sup>

*In re Martin*,<sup>239</sup> the next judicial misconduct case considered by the court, presented the court with a challenge to its jurisdiction over the censure and removal of judges. In 1971, a constitutional amend-

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236. *Id.*, 240 S.E.2d at 376.

237. *Id.* Responding to the majority's statement that other jurisdictions support its conclusion, the dissent maintained that such decisions are less helpful in interpreting statutes than in resolving questions of common law. *Id.* at 100, 240 S.E.2d at 374. When the statutory or constitutional language is almost identical in the two jurisdictions, however, a decision from the foreign jurisdiction interpreting that language can be helpful. An Alaska constitutional amendment provides that "a justice or judge may be disqualified from acting as such and may be suspended, removed from office, retired, or censured by the supreme court upon recommendation of the [Commission on Judicial Qualifications]." ALASKA CONST. art. IV, § 10. This language closely parallels the language of N.C. GEN. STAT. § 7A-376 (Cum Supp. 1977). The Alaska court, in deciding to publicly censure a judge whom the Commission had recommended be privately reprimanded, considered that it would be "tantamount to an abdication of our constitutional and statutory obligations if we were to automatically adopt the commission's sanction recommendations." *In re Robson*, 500 P.2d 657, 660 (Alas. 1972).

The Maryland Supreme Court decided, four to three, to remove from office a judge whom the Commission on Judicial Disabilities had recommended be censured. *In re Diener*, 268 Md. 659, 304 A.2d 587 (1973), *cert. denied*, 415 U.S. 989 (1974). The Maryland constitutional amendment that established the procedure provides: "Upon any recommendation of the Commission, the Court of Appeals, after a hearing and upon a finding of misconduct . . . may remove the judge from office or may censure [him] . . ." CONSTITUTION OF MARYLAND, art. IV, § 4B(b). Although this grant of authority, mandating a second hearing by the court of appeals, seems even broader than the grants to the Alaska and North Carolina courts, a strong dissent viewed a recommendation for removal as a condition precedent to an order of removal by the court. 268 Md. at 697, 304 A.2d at 607 (Smith, J., dissenting).

238. 294 N.C. at 100, 240 S.E.2d at 374 (Lake, J., dissenting).

239. 295 N.C. 291, 245 S.E.2d 766 (1978). The *Martin* court, unlike the court in *Hardy*, did substitute its judgment for that of the JSC. As the court decided to censure a judge whom the JSC had recommended be removed, however, the effect of the court's possibly exceeding its power was not as profound as it would be were the court to reject censure in favor of removal.

The court adopted the findings of the JSC regarding several charges of ex parte disposition of cases by the judge. *Id.* at 305-06, 245 S.E.2d at 773-74. Characterizing the judge's conduct in these matters as strikingly similar to, but no more indiscreet than, the judicial misconduct that resulted in censure in previous cases, the court cited its conclusion in *Hardy* that "fairness requires a similar result here." *Id.* at 306, 245 S.E.2d at 775 (quoting *In re Hardy*, 294 N.C. at 98, 240 S.E.2d at 373). Concerning the most serious charge, which amounted to suborning perjury, the court rejected the JSC's findings as unsupported by clear and convincing evidence. *Id.* at 307, 245 S.E.2d at 775. The JSC found as a fact that Judge Martin had requested a police officer to testify under oath that he was not present when a breathalyzer test was administered, although Judge Martin knew the officer was present. *Id.* at 295, 245 S.E.2d at 769. The court found the evidence on this charge to be in sharp conflict. An attorney for the charged party, who was present during the encounter between Judge Martin and the police officer, gave testimony before the JSC tending to show that Judge Martin merely meant to inform the officer that he could not, as an arresting officer, testify to breathalyzer results. *Id.* at 307-08, 245 S.E.2d at 776.

ment was proposed that mandated the creation of a new procedure for judicial discipline,<sup>240</sup> but did not expressly provide for jurisdiction in the supreme court. Seventeen months before the ratification of the constitutional amendment, the Judicial Standards Commission Act was passed, which does provide for enforcement of judicial discipline by the supreme court. Appellant in *Martin* challenged the jurisdiction of the court on the ground that because the legislature is not authorized by the North Carolina Constitution<sup>241</sup> to confer appellate jurisdiction on the supreme court, but rather jurisdiction is conferred directly by the constitution, there was no constitutional basis for the jurisdiction. The court nevertheless claimed jurisdiction based upon the "clear implication"<sup>242</sup> of the new amendment, and upon the Judicial Standards Commission Act.<sup>243</sup> The court asserted that ratification of the amendment with knowledge of the passage of the Act carried with it an expression of the will of the people that the jurisdiction be conferred.<sup>244</sup>

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240. N.C. CONST. art. IV, § 17(2) provides in pertinent part: "The General Assembly shall prescribe a procedure, in addition to impeachment and address set forth in this section, for the removal of a Justice or Judge . . . ."

241. *Id.* § 12(1) provides that "[t]he supreme court shall have jurisdiction to review upon appeal any decision of the courts below . . . ." See also Note, *Judicial Discipline—The North Carolina Commission System*, 54 N.C.L. REV. 1074 (1976).

242. 295 N.C. at 299, 245 S.E.2d at 771.

243. N.C. GEN. STAT. § 7A-376 (Cum. Supp. 1977) provides in pertinent part: "Upon recommendation of the Commission, the Supreme Court may censure or remove any justice or judge for wilful misconduct in office . . . ."

244. 295 N.C. at 300, 245 S.E.2d at 771. "The effective date of the Act, however, was made contingent upon the ratification of the amendment . . . ." *Id.*; see Law of June 14, 1971, ch. 560, § 3, 1971 N.C. Sess. Laws 488.

The court buttressed its conclusion with the observation that "it seems both appropriate and in accordance with the constitutional plan that the Supreme Court, to which the Constitution gives 'general supervision and control over the proceedings of the other courts' should also have final jurisdiction over the censure and removal of judges and justices." 295 N.C. at 299-300, 245 S.E.2d at 771 (quoting N.C. CONST. art. IV, § 12(1)).

The court's position does not adequately answer the argument that jurisdiction has not been conferred by the constitution and cannot be conferred by statute. It has been suggested that the court may have implicitly determined that the 1972 amendment "overrode" the jurisdiction limitation of article IV, § 12(1), which grants the supreme court jurisdiction to hear only decisions of courts. N.C. CONST. art. IV, § 12(1), quoted in note 241 *supra*; see Note, *Judicial Discipline—The Power of the North Carolina Supreme Court to Remove State Judges—In re Hardy*, 14 WAKE FOREST L. REV. 1187, 1203 n.105 (1978). As the 1972 amendment does not explicitly confer jurisdiction, however, this argument depends upon the court's "will of the people" premise. It is arguable that the voters in ratifying the amendment were not thinking of the contingent enactment of the Judicial Standards Commission Act assigning jurisdiction to the supreme court, but were merely favoring the creation of a new procedure for judicial discipline. Had the amendment explicitly conferred jurisdiction on the court, the will of the people would have been clearly expressed.

*J. Insurance*

## 1. Ratemaking

In two cases involving the ratemaking powers of the Commissioner of Insurance, the supreme court and the court of appeals reaffirmed the necessity for administrative agencies to follow statutory requirements regarding ratemaking. *State ex rel. Commissioner of Insurance v. North Carolina Automobile Rate Administrative Office*<sup>245</sup> involved motorcycle insurance rates set by the Commissioner pursuant to the enactment in 1975 of G.S. 58-30.3, .4,<sup>246</sup> a new classification system for motor vehicle insurance that prohibits classifications of drivers on the basis of age or sex. The Commissioner set two rates for motorcycle insurance based solely on the size of the engine.<sup>247</sup> These rates were challenged by the Automobile Rate Administrative Office, which claimed that under the new statute motorcycles were intended to be classified according to primary use and subclassified according to the driving experience of the insured, in the same manner as automobiles.<sup>248</sup>

The Commissioner defended the new rates on the ground that the legislature had in its 1975 enactment implicitly removed motorcycles from the general classification system of G.S. 58-30.4.<sup>249</sup> This argument was rejected by the court,<sup>250</sup> which noted that any doubt that may have existed about the legislature's intent in 1975 had been removed by the enactment in 1977 of an amendment to Chapter 58 of the General Statutes<sup>251</sup> that makes clear that motorcycles are to be classified and subclassified in the same manner as automobiles for insurance ratemaking purposes.<sup>252</sup> The court took note of the evidence presented

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245. 294 N.C. 60, 241 S.E.2d 324 (1978).

246. Law of June 18, 1975, ch. 666, § 1, 1975 N.C. Sess. Laws 808 (codified as amended at N.C. GEN. STAT. § 58-30.3, .4 (Cum. Supp. 1977)).

247. Before the enactment of § 58-30.3, .4, the Commissioner had attempted to set new motorcycle insurance rates in which all classification and subclassification plans were abolished. The court of appeals found this conduct to be in excess of his statutory authority. *State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Administrative Office*, 24 N.C. App. 223, 210 S.E.2d 441 (1974), *cert. denied*, 286 N.C. 412, 211 S.E.2d 801 (1975).

248. 294 N.C. at 63, 241 S.E.2d at 326.

249. The Commissioner's claim was based on his assertion that when H. 28, N.C. Gen. Assembly, 1977 Sess., was initially introduced the word "motorcycles" appeared in that portion of the bill that later was codified as § 58-30.4. When the bill ultimately was enacted, however, the word "motorcycles" was deleted from that portion of the bill. See 294 N.C. at 64-65, 241 S.E.2d at 327.

250. See 294 N.C. at 67, 241 S.E.2d at 329.

251. Law of June 30, 1977, ch. 828, § 2, 1977 N.C. Sess. Laws 1119 (codified in scattered sections of N.C. GEN. STAT. § 58-131.35 (Cum. Supp. 1977)).

252. N.C. GEN. STAT. § 58-131.35 (Cum. Supp. 1977) included motorcycles in its definition of

by the Commissioner that premiums for motorcycle liability insurance are higher than they should be, and invited him to institute proper proceedings to reduce the rates, admonishing him that this could not be done by "unlawfully abolishing classifications and subclassifications which are required by statute."<sup>253</sup>

The issue of the date of effectiveness of revised automobile medical payments insurance rates was addressed by the court of appeals in *North Carolina Automobile Rate Administrative Office v. Ingram*.<sup>254</sup> In 1971, the Rate Office had filed with former Commissioner Lanier a proposed rate reduction in medical insurance premium rates.<sup>255</sup> No action was taken on the proposal until 1974, when Commissioner Ingram approved the reduction. He attempted, however, to put the rate change into effect immediately,<sup>256</sup> rather than sixty days after the change was announced, as is the standard practice.<sup>257</sup> The court of appeals sustained the Rate Office's challenge of the Commissioner's conduct, finding the Commissioner to be statutorily precluded from changing the sixty-day rule that had been adopted by the Governing Committee of the Rate Office without first giving notice, conducting a hearing, and taking evidence.<sup>258</sup> As the proper rulemaking procedures had not been

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private passenger motor vehicles. N.C. GEN. STAT. § 58-30.4 lists the classifications (including primary use classifications) and subclassifications (including safe driver subclassifications) that are to be observed regarding coverage of private passenger motor vehicles. This portion of § 58-30.4 was not affected by the 1977 amendments.

Before passage of either of the legislative enactments discussed here, the court of appeals had held that "automobile" liability insurance includes "motorcycle" liability insurance and that the same laws apply to both. *State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Administrative Office*, 24 N.C. App. 223, 226, 210 S.E.2d 441, 443 (1974), *cert denied*, 286 N.C. 412, 211 S.E.2d 801 (1975).

253. 294 N.C. at 72, 241 S.E.2d at 332.

254. 35 N.C. App. 578, 242 S.E.2d 205 (1978).

255. Because of the similarity in the type of hazard, medical payments insurance premium rates are determined by reference to bodily injury insurance rates. Although the Rate Office had filed with the Commissioner's office proposed revisions in bodily injury liability insurance rates, which were approved in December 1972, the medical insurance premium rates had never been approved. *Id.* at 578-79, 242 S.E.2d at 205-06.

256. *Id.* at 579-80, 242 S.E.2d at 206.

257. *Id.* at 582, 242 S.E.2d at 207.

If a policy is issued no more than sixty days prior to its effective date, the standard rule of application generally eliminates the necessity of rewriting or reissuing the policy by permitting the policy to go into effect at its old rate unless the policyholder requests otherwise. This rule has the effect of protecting the policyholder from insurance rate increases occurring after the policy is issued if the policy is issued no more than sixty days prior to its effective date, but it permits the policyholder, if he so requests, to take advantage of rate decreases occurring after the policy is issued but before the policy's effective date.

*Id.*

258. *Id.* at 587, 242 S.E.2d at 210. The court did not identify the relevant statute, but apparently the reference was to § 58-246(1), which assigned to the Rate Office the function of maintaining rules and regulations and fixing rates for automobile bodily injury insurance. Law of April 4,



followed, the court found the Commissioner's order to be arbitrary and capricious, and affirmed the superior court in setting it aside.<sup>259</sup>

## 2. Construction of Policy Terms

In *Woods v. Nationwide Mutual Insurance Co.*,<sup>260</sup> the North Carolina Supreme Court for the first time showed a willingness to find some ambiguity in an "apply separately" clause in an insurance policy covering two or more automobiles, and thereby permit stacking, or pyramiding (multiplying the liability limitation in a policy by the number of cars covered). When stacking is recognized, a policy with a \$1000 medical payments limitation on each of three cars could result in a \$3000 claim on a single injury.<sup>261</sup> Most jurisdictions recognize stacking of medical payment insurance when the named insured owns two or more vehicles, both covered under the same policy.<sup>262</sup> The policy reasons for stacking include the special purpose of medical payments insurance, which is to provide a ready fund for the insured without the requirement of establishing fault,<sup>263</sup> and the prevailing rule of resolving any ambiguous language in the policy in favor of the insured.<sup>264</sup>

In a 1970 split decision, *Wachovia Bank & Trust Co. v. Westchester Fire Insurance Co.*,<sup>265</sup> the North Carolina Supreme Court reversed a court of appeals decision that had interpreted the "apply separately" provision in a multiple-automobile liability insurance policy to allow the insured to stack his medical payments coverage. Justice Sharp joined Chief Justice Bobbitt in dissent, agreeing with the court of appeals that the double payment of premiums implied a separate contract on each insured automobile, with consideration owing from the insurer

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1939, ch. 394, 1939 N.C. Pub. Laws 859 (formerly codified as amended at N.C. GEN. STAT. § 58-246(1) (1975)) (repealed 1977).

259. 35 N.C. App. at 588, 242 S.E.2d at 211.

A third case, *State ex rel. Comm'r of Ins. v. Motors Ins. Corp.*, 294 N.C. 360, 241 S.E.2d 332 (1978), was dismissed as moot by the supreme court. This appeal was from a 1975 order of the Commissioner revising auto collision insurance rates. Since the order had never become effective because of pending appeals, the new statute and a comprehensive order approving new liability and collision rates mooted the questions raised on the appeal.

260. 295 N.C. 500, 246 S.E.2d 773 (1978).

261. A single insurance policy on two or more automobiles often contains a clause stating that the terms of the policy shall "apply separately" to each automobile. The premiums paid reflect the number of cars covered.

262. See Note, *Insurance—Pyramiding Medical Payment Coverages in Automobile Policies*, 10 WAKE FOREST L. REV. 737 (1974).

263. *Id.* See also *Dyer v. Nationwide Mut. Fire Ins. Co.*, 276 So.2d 6, 7 (Fla. 1973); *Jackson v. Country Mut. Ins. Co.*, 41 Ill. App. 2d 300, 305, 190 N.E.2d 490, 492 (1963).

264. See, e.g., *Duke v. Mutual Life Ins. Co.*, 286 N.C. 244, 210 S.E.2d 187 (1974).

265. 276 N.C. 348, 172 S.E.2d 518 (1970).

on each contract.<sup>266</sup> In *Woods* the supreme court, in an opinion written by Chief Justice Sharp, softened the position it had taken in *Wachovia*. Two insurance policies were at issue in *Woods*, each with an "apply separately" provision. Plaintiff Woods was injured while driving a car belonging to one Spencer, who carried on his three cars a policy almost identical to the one construed in *Wachovia*.<sup>267</sup> The court did not allow stacking under the Spencer policy, reasoning that even if the independent contract interpretation argued in *Wachovia* had been accepted, it would not apply to this policy, because the coverage-limiting clause referred to injuries to persons "while occupying the owned automobile." The court pointed out that this language unambiguously limits the coverage to a specific vehicle—the owned automobile occupied at the time of the collision.<sup>268</sup>

The second policy was carried by plaintiff Woods' father on two cars. Under her father's policy, however, plaintiff as a member of the "named insured's" family was entitled to medical payments for bodily injury "caused by accident while occupying or being struck by an automobile."<sup>269</sup> Another clause limited the insurer's liability to \$500 per person, creating an ambiguity that, under its usual practice,<sup>270</sup> the court resolved against the insurer. Since coverage was not tied to a specific vehicle, the court allowed stacking under the Woods policy, resulting in an additional \$500 recovery. The court carefully distinguished *Wachovia* as a situation in which the policy tied coverage even of family members to the specific, occupied car.<sup>271</sup>

Policy language so poorly drafted that Justice Lake termed it a "baffling mystery" led the supreme court to reverse a court of appeals dismissal of plaintiff's claim in *Grant v. Emmco Insurance Co.*<sup>272</sup> Plaintiff claimed coverage of a leased tractor under a "newly acquired" vehicles provision in an insurance policy covering an owned tractor. Policies extending coverage to "newly acquired" vehicles that replace the vehicle named in a policy generally require that the new vehicles be "owned," which in North Carolina requires a properly executed certificate of title.<sup>273</sup> Plaintiff's policy, however, did not require that the

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266. *Id.* at 361, 172 S.E.2d at 527 (Bobbitt, C.J., dissenting).

267. 295 N.C. at 506, 246 S.E.2d at 777-78.

268. *Id.* at 507-08, 246 S.E.2d at 778.

269. *Id.* at 508, 246 S.E.2d at 779 (emphasis by court).

270. *See, e.g.,* *Duke v. Mutual Life Ins. Co.*, 286 N.C. 244, 210 S.E.2d 187 (1974).

271. 295 N.C. at 510, 246 S.E.2d at 780.

272. 295 N.C. 39, 44, 243 S.E.2d 894, 898 (1978).

273. *See* *Nationwide Mut. Ins. Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970).

newly acquired vehicle be owned; because of this silence about leased vehicles, the court found that the tractor came within the meaning of "newly acquired." But, the policy language was ambiguous about whether the newly acquired vehicle, to be covered, had to replace the described vehicle. Although the court could simply have construed this ambiguity against the insurer and found that replacement was not required, it addressed defendant's argument that the leased tractor did not replace the described tractor and was therefore not covered. This argument had convinced two of three judges on the court of appeals.<sup>274</sup> The supreme court, recalling its frequently cited decision in *State Farm Mutual Automobile Insurance Co. v. Shaffer*,<sup>275</sup> applied the rule of that case to the *Grant* facts. Under *Shaffer*, replacement cannot be found if the described vehicle continues to be owned by the policyholder, under his control and in operable condition;<sup>276</sup> the absence of one of these factors allows a finding that the described vehicle has been replaced. The described tractor, although still owned by and under the control of Grant, was undergoing repairs and was not in operable condition during the lease term of the tractor. It therefore did not fall afoul of the *Shaffer* rule.<sup>277</sup>

### 3. Construction of Statutory Provisions

In *Caison v. Nationwide Insurance Co.*,<sup>278</sup> the court of appeals considered whether the term "permission," as used in an insurance policy provision extending coverage to persons using the vehicle with permission of the named insured or his spouse, is synonymous with "lawful possession" as used in G.S. 20-279.21(b)(2),<sup>279</sup> which requires that "persons in lawful possession" of the insured vehicle be covered under mandatory liability insurance policies. The policy in *Caison* provided

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274. *Grant v. Emmco Ins. Co.*, 35 N.C. App. 246, 241 S.E.2d 114, *rev'd*, 295 N.C. 39, 243 S.E.2d 894 (1978). Judge Webb dissented, finding the policy terms ambiguous.

275. 250 N.C. 45, 108 S.E.2d 49 (1959).

276. *Id.* at 52, 108 S.E.2d at 54.

277. The risk to the insurance company of being liable for damages to two vehicles at the same time, should the described tractor be struck while standing in a garage, was dismissed as minimal. 295 N.C. at 48, 243 S.E.2d at 900.

Defendant's final argument, that ambiguous terms in a collision insurance policy should not be construed against the insurer, was rejected. Defendant cited no authority, but suggested a distinction between liability and collision insurance based on the public policy of requiring the former, as embodied in the Vehicle Financial Responsibility Act, N.C. GEN. STAT. §§ 20-309 to 319 (1978). The court took judicial notice of the custom of providing both collision and liability coverage in the same insurance policy, and said that in both kinds of policies, ambiguous provisions will be construed against the insurer. *Id.* at 54, 243 S.E.2d at 904.

278. 36 N.C. App. 173, 243 S.E.2d 429 (1978).

279. N.C. GEN. STAT. § 20-279.21(b)(2) (1978).

coverage for persons using the insured's car, "provided the actual use of the automobile is by the Named Insured or such spouse or with the permission of either."<sup>280</sup> The policy limit on liability for bodily injury was \$25,000 per person, while the statute mandated coverage of the same class only to a \$10,000 limit.<sup>281</sup> Plaintiff was injured by the insured vehicle, which was driven by a person who was stipulated to be in lawful possession. Upon this stipulation, the trial court granted plaintiff's summary judgment motion and awarded damages in the amount of \$12,000. Defendant appealed, contending that permission and lawful possession are not synonymous, so that the policy coverage for one with permission did not apply to one merely in lawful possession and that plaintiff was therefore limited to a \$10,000 recovery.<sup>282</sup>

The court of appeals reversed the trial court's grant of summary judgment, concluding that the terms were not synonymous and that plaintiff could recover an amount in excess of the statutory requirement only when she established that the use of the insured vehicle was with the permission of the insured. Since the additional policy coverage was voluntary, plaintiff had to show that the driver of the insured's car met the terms of the policy (permission) rather than the terms of the statute (lawful possession). The court looked particularly at the terms of G.S. 20-279.21(g),<sup>283</sup> which provides that the excess of additional coverage provided by a policy is governed by the terms of the policy and not by the terms of the statute. This holding is consistent with cases construing the term "lawful possession."<sup>284</sup> It encourages insurers to offer greater coverage than the statute requires, by allowing insurers to limit the class of persons to whom the excess coverage will apply.

In *Turner v. Masias*,<sup>285</sup> a contest between insurance companies, the court of appeals was required to interpret the relationship between the

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280. 36 N.C. App. at 177, 243 S.E.2d at 431.

281. *Id.* at 176-77, 243 S.E.2d at 430-31. See N.C. GEN. STAT. § 20-279.21(b)(2) (1978).

282. 36 N.C. App. at 175-76, 243 S.E.2d at 430. In *Packer v. Travelers Ins. Co.*, 28 N.C. App. 365, 221 S.E.2d 707 (1976), the court of appeals expressly ruled that permission is not an essential element of lawful possession, so that it is possible to have lawful possession without having permission.

283. N.C. GEN. STAT. § 20-279.21(g) (1978) provides that "such excess or additional coverage shall not be subject to the provisions of this Article."

284. See *Packer v. Travelers Ins. Co.*, 28 N.C. App. 365, 221 S.E.2d 707 (1976), discussed in note 282 *supra*; cf. *Nationwide Mut. Ins. Co. v. Chantos*, 25 N.C. App. 482, 214 S.E.2d 438 (1975), *rev'd on other grounds*, 293 N.C. 431, 238 S.E.2d 597 (1977) (person who had received permission to use vehicle from the original permittee, son of insureds, was deemed to be in "lawful possession"); *Engle v. State Farm Mut. Auto. Ins. Co.*, 37 N.C. App. 127, 245 S.E.2d 532, *cert. denied*, 295 N.C. 645, 248 S.E.2d 250 (1978) (reaffirming *Chantos* as matter of law). The policies in *Chantos* and *Engle* did not provide coverage in excess of the amounts required by statute.

285. 36 N.C. App. 213, 243 S.E.2d 401 (1978).

statutorily required uninsured motorist provision in a liability insurance policy<sup>286</sup> and the policy's reduction clause, which provided that payment under the policy should be reduced by the amount paid to the insured by any other policy of property insurance.<sup>287</sup> Turner, who had collision insurance with American Security Insurance Co. and liability insurance with Allstate Insurance Co., had recovered under his collision policy the amount of his damages suffered in an accident, less fifty dollars deductible. American later discovered that the driver of the car that had collided with Turner's car was a thief, not in lawful possession of the car; the "uninsured motorist" provision of Turner's liability coverage with Allstate Insurance Co. arguably therefore required payment of insured's damages. Allstate refused to reimburse American on the ground that its reduction clause relieved it of any obligation to pay. American sued, charging that Allstate's reduction clause was unenforceable as violative of the uninsured motorist statute.<sup>288</sup>

The court held that, although a reduction clause would not be enforced if the result would limit an insured's recovery to an amount less than the actual damages suffered,<sup>289</sup> that was not the case here. The purpose of the statute requiring insurance for damage to property caused by uninsured motorists is the protection of the insured, who in this case had already been made whole. Which insurance company paid was not a concern of the statute or of public policy, so Allstate was therefore entitled to have its reduction clause enforced.<sup>290</sup>

The facts of *Turner v. Masias* made it easy for the court to enforce the reduction clause; Allstate's deductible was \$100, so the insured did better by collecting from American, whose policy deductible was only \$50.<sup>291</sup> Also, American's policy had no reduction clause.

*Autry v. Aetna Life and Casualty Insurance Co.*<sup>292</sup> presented the court of appeals with a question involving the definition of the "uninsured vehicle" as used in the uninsured motorist statute, G.S. 20-279.21(b)(3),<sup>293</sup> the statute providing for mandatory uninsured motorist coverage in liability insurance policies. At issue in *Autry* was inclusion

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286. N.C. GEN. STAT. § 20-279.21(b)(3) (1978) requires that mandatory liability insurance policies protect the insured against destruction of their property caused by an owner or operator of an uninsured vehicle.

287. 36 N.C. App. at 214, 243 S.E.2d at 403.

288. *Id.* at 215, 243 S.E.2d at 403.

289. See *Moore v. Hartford Fire Ins. Co.*, 270 N.C. 532, 543, 155 S.E.2d 128, 136 (1967).

290. 36 N.C. App. at 217, 243 S.E.2d at 404.

291. *Id.*

292. 35 N.C. App. 628, 242 S.E.2d 172, cert. denied, 295 N.C. 89, 244 S.E.2d 257 (1978).

293. N.C. GEN. STAT. § 20-279.2(b)(3) (1978).

within the coverage of that statute of a three-wheeled motorcycle powered by a Volkswagen engine; plaintiff was injured by the vehicle in the yard of the vehicle's owner.<sup>294</sup> The vehicle was not used on public highways and was therefore not required to be registered.<sup>295</sup> The court concluded that the term "uninsured motor vehicle" was intended to include motor vehicles that should be insured but are not, or, though not subject to compulsory insurance, are at some time operated on the public highways.<sup>296</sup> As the vehicle met neither of those criteria, it was found not to be an uninsured motor vehicle within the meaning of the statute.<sup>297</sup> Plaintiff's liability insurance policy therefore did not provide coverage.<sup>298</sup>

#### 4. Proof of Loss

In the area of accident insurance,<sup>299</sup> insurers have a repertoire of terms that can result in the exclusion of coverage to the disappointment of the insured or his beneficiaries. Courts interpreting such terms are faced with choosing among the strict interpretation urged by the insurer, the liberal interpretation preferred by the plaintiff, or a moderate approach that finds an exception for plaintiff but preserves the exclusion. If the facts of the case are persuasive for plaintiff, even a generally strict court often will follow the third path.

This was the result in both *Dixon v. Mid-South Insurance Co.*<sup>300</sup> and *Emanuel v. Colonial Life & Accident Insurance Co.*,<sup>301</sup> two cases decided by the court of appeals in 1978. In *Dixon*, the insurance policy provided coverage for "accidental bodily injuries."<sup>302</sup> The insured died as a result of an air embolism following surgery.<sup>303</sup> Defendant urged that this was not an "accidental means" of injury and sought to persuade the court to apply the strict rule that is triggered by the term "accidental means." Under this rule, "[i]f the result, although unexpected, flows directly from an ordinary act in which the insured voluntarily engages, then such is not deemed to have been produced by

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294. 35 N.C. App. at 629, 242 S.E.2d at 173.

295. *Id.* at 629-30, 242 S.E.2d at 174.

296. *Id.* at 632, 242 S.E.2d at 175.

297. *Id.* at 633, 242 S.E.2d at 176.

298. *Id.*

299. The term "accident insurance" is used to include both accident policies and life insurance policies with accident features.

300. 37 N.C. App. 595, 246 S.E.2d 561 (1978).

301. 35 N.C. App. 435, 242 S.E.2d 381 (1978).

302. 37 N.C. App. at 596, 246 S.E.2d at 561.

303. *Id.* at 599, 246 S.E.2d at 563.

accidental means."<sup>304</sup> Noting that a contract covering only "injury by accidental means" could easily have been drafted,<sup>305</sup> the court found the term "accidental bodily injury" to be synonymous,<sup>306</sup> with "accidental injury," a term that requires proof only that the result was unexpected.<sup>307</sup> The court also rejected with little comment defendant's argument that the cause of death was not even an accidental injury but a known risk of the surgery undergone by the insured.<sup>308</sup>

In *Emanuel*, the insurer tried to use another term, "preexisting disease," to escape coverage. The policy excluded losses that were caused or contributed to by any preexisting disease. Plaintiff's decedent was sixty-three when an automobile accident caused fractures of both legs, necessitating surgery; he died a few weeks later of a myocardial infarction to which a preexisting arteriosclerotic condition contributed.<sup>309</sup> Plaintiff sued as beneficiary of decedent's policy and obtained summary judgment.

Courts are divided on the proper approach in cases in which both the accident and the disease contribute to the death of the insured.

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304. *Mehaffey v. Provident Life & Accident Ins. Co.*, 205 N.C. 701, 705, 172 S.E. 331, 333 (1934). The rule has been applied to deny recovery in various medical settings. *E.g.*, *Fletcher v. Security Life & Trust Co.*, 220 N.C. 148, 16 S.E.2d 687 (1941) (death resulting from spinal anesthesia); *Scott v. Aetna Life Ins. Co.*, 208 N.C. 160, 179 S.E. 434 (1935) (death resulting from blood clot following surgery).

The rule has been criticized by a number of commentators. *See, e.g.*, Clifford, *Survey of North Carolina Case Law—Insurance*, 45 N.C.L. REV. 955, 963-64 (1967); Note, *Insurance—Accidental Means v. Accidental Death or Tweedledum v. Tweedledee*, 46 N.C.L. REV. 178, 187-88 (1967).

305. Defendant Mid-South clearly knew how to draft such a policy, having done so before. *See Mozingo v. Mid-South Ins. Co.*, 29 N.C. App. 352, 224 S.E.2d 208 (1976).

306. *Hicks v. Old Republic Life Ins. Co.*, 29 N.C. App. 561, 225 S.E.2d 164 (1976), had left unanswered the question of the relationship between the terms "accidental injury," "accidental means," and "accidental bodily injury." In *Hicks*, the insured had fallen from a scaffold, but the autopsy indicated death was caused by a myocardial infarction. *Id.* at 563, 225 S.E.2d at 166. Summary judgment for the defendant, who had insured against "accidental bodily injury," was affirmed.

307. *See, e.g.*, *Henderson v. Hartford Accident & Indem. Co.*, 268 N.C. 129, 132-33, 150 S.E.2d 17, 19-20 (1966); *Fletcher v. Security Life & Trust Co.*, 220 N.C. 148, 150, 16 S.E.2d 687, 688 (1941). *See also Survey of Developments in North Carolina Law, 1976*, 55 N.C.L. REV. 895, 1062 (1977).

308. 37 N.C. App. at 599-600, 246 S.E.2d at 564. The surgery was to remove the insured's left arm and shoulder, a procedure known as a forequarter amputation. The surgery was necessitated by a malignancy under the insured's arm. *Id.* at 598, 246 S.E.2d at 563.

309. The doctor who performed the autopsy stated in deposition that the arteries of Emanuel's heart were "five or six times their normal thickness," but whether "normal" referred to normal for a man of his age or for a younger man was not made clear. 35 N.C. App. at 436, 242 S.E.2d at 382. He also stated that the injuries sustained in the accident, combined with the surgery, forced the heart to increase circulation, and could have caused sufficient stress to initiate the occlusion of the coronary artery. *Id.* Other evidence established that Emanuel's prior physical condition was good, with no history of heart disease. *Id.* at 442, 242 S.E.2d at 385.

Some courts employ a proximate cause analysis, allowing recovery if the accident injuries accelerate the effect of the disease and cause an early death;<sup>310</sup> other courts deny recovery whenever the disease merely contributes to death.<sup>311</sup> North Carolina follows the latter rule.<sup>312</sup>

When the preexisting condition is arteriosclerosis as in *Emanuel*, the problem becomes more complicated because there is a question whether arteriosclerosis is a disease, or merely a physical characteristic of aging. The *Emanuel* court declined to rule as a matter of law on the categorization of arteriosclerosis. Three previous North Carolina cases<sup>313</sup> that involved insureds whose accident injuries were minor and who had been suffering from longstanding, preexisting arteriosclerosis that in each case at least contributed to death, had all been decided in favor of insurers. The policy in each case had a preexisting disease clause similar to the one in *Emanuel*.

The *Emanuel* court discussed several cases from other jurisdictions in which the question whether arteriosclerosis was a preexisting disease had been submitted to the jury,<sup>314</sup> and then set forth the factors the jury should consider in making its factual determination.<sup>315</sup> One factor was the health of the insured prior to the accident; another was the seriousness of the accident. The latter, it seems, should have no bearing on the determination of whether the insured had a preexisting disease. The court noted, however, that in cases denying recovery the arteriosclerotic condition was well-established and the accident usually minor.<sup>316</sup> Because application of these factors necessarily involves a factual determination, an issue of fact existed requiring reversal of plaintiff's

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310. See, e.g., *Preston v. Aetna Life Ins. Co.*, 174 F.2d 10 (7th Cir.), cert. denied, 338 U.S. 829 (1949) (applying Illinois law); *Life & Casualty Ins. Co. v. Jones*, 230 Ark. 979, 328 S.W.2d 118 (1959). But see *Britton v. Prudential Ins. Co.*, 205 Tenn. 726, 732, 330 S.W.2d 326, 328 (1959) ("[I]n accident insurance contracts the liability is measured by the contract, and the doctrine of proximate cause is applicable only in determining whether or not an injury is caused solely by the act or accident . . . while in ordinary negligence cases the proximate cause determines the existence of liability.").

311. See, e.g., *Scharmer v. Occidental Life Ins. Co.*, 349 Mich. 421, 84 N.W.2d 866 (1957); *Adkins v. American Cas. Co.*, 124 S.E.2d 457 (W. Va. 1962).

312. *Penn v. Standard Life Ins. Co.*, 160 N.C. 399, 76 S.E. 262 (1912).

313. *Horn v. Protective Life Ins. Co.*, 265 N.C. 157, 143 S.E.2d 70 (1965); *Skillman v. Phoenix Mut. Ins. Co.*, 258 N.C. 1, 127 S.E.2d 789 (1962); *Hicks v. Old Republic Life Ins. Co.*, 29 N.C. App. 561, 225 S.E.2d 164 (1976).

314. *Preferred Accident Ins. Co. v. Combs*, 76 F.2d 775 (8th Cir. 1935); *Reed v. United States Fidelity & Guar. Co.*, 176 Colo. 568, 491 P.2d 1377 (1971); *Police & Firemen's Ins. Ass'n v. Blunk*, 107 Ind. App. 279, 20 N.E.2d 660 (1939); *Novick v. Commercial Travelers Mut. Accident Ass'n*, 203 Misc. 830, 118 N.Y.S.2d 533 (1953).

315. 35 N.C. App. at 449, 242 S.E.2d at 389.

316. *Id.* at 448, 242 S.E.2d at 389.



judgment and remand for trial.<sup>317</sup>

The court was also correct in affirming the denial of defendant's motion for summary judgment, observing that "to hold otherwise would allow insurance companies to escape liability under an accident policy any time an insured dies as a result of injuries received in an accident, but is also suffering from even a normal degree of arteriosclerosis which may contribute to the accidental death."<sup>318</sup> Considering the strict North Carolina rule denying recovery whenever a preexisting disease contributes to death, it is fortunate that the court did not rule as a matter of law in defendant's favor. Affirming plaintiff's summary judgment would have taken the court further than other jurisdictions have gone on this difficult issue.<sup>319</sup>

### K. Workmen's Compensation Law

#### 1. Application of the Compensation Act

It is well settled in North Carolina that, in a claim by an employee against a workmen's compensation insurance carrier, the carrier may be estopped from denying that an injury to the employee was within the coverage of the compensation insurance policy.<sup>320</sup> In *Britt v. Colony Construction Co.*,<sup>321</sup> the North Carolina Court of Appeals extended this principle to a situation involving coordination of benefits between two separate compensation carriers.

Plaintiff's decedent, Britt, was employed by Cumberland Utilities,

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317. 35 N.C. App. at 449, 242 S.E.2d at 389. In a later case, *McAdams v. Union Security Life Ins. Co.*, 36 N.C. App. 463, 244 S.E.2d 692 (1978), the court affirmed a directed verdict for defendant, whose insurance policy excluded coverage of any disability to which a preexisting sickness contributed. *Id.* at 464, 244 S.E.2d at 693. Distinguishing *Emanuel*, the court stressed that all of the evidence in *McAdams* indicated a previously diagnosed condition of arteriosclerotic heart disease with coronary insufficiency, and not simple arteriosclerosis. *Id.* at 469, 244 S.E.2d at 695-96. The insurance policy in this case covered installment payments on an automobile in case the insured, because of disability by accident or sickness, became unable to continue the payments.

The court also rejected plaintiff's argument that his condition was a "disease" and not a "sickness" within the meaning of the policy exception, citing *Glenn v. Gate City Life Ins. Co.*, 220 N.C. 672, 676, 18 S.E.2d 113, 115 (1942), in which "disease" and "sickness" were deemed synonymous absent some indication of the parties' contrary intent. 36 N.C. App. at 468, 244 S.E.2d at 695.

318. *Id.* at 442, 242 S.E.2d at 385.

319. See Annot., 82 A.L.R.2d 611 (1962)(usual conclusion reached is that right of arteriosclerotic insured (or his beneficiary) to enforce policy is one for trier of fact).

320. See *Aldridge v. Foil Motor Co.*, 262 N.C. 248, 136 S.E.2d 591 (1964); *Pearson v. Newt Pearson, Inc.*, 222 N.C. 69, 21 S.E.2d 879 (1942). The theory is that, having accepted premiums for coverage of the employee, the carrier should not be permitted to disclaim liability after the employee is injured.

321. 35 N.C. App. 23, 240 S.E.2d 479 (1978).

Incorporated, a subcontractor of Colony Construction Company on a highway construction project.<sup>322</sup> During performance of the work covered by the subcontract, Utilities paid Britt for work done on other, unrelated projects, and maintained workmen's compensation insurance for him.<sup>323</sup> Colony paid Britt directly for work done under the subcontract, and withheld funds actually owed to Utilities in order to pay workmen's compensation premiums on Utilities' employees.<sup>324</sup> Britt died from injuries sustained while working on the Colony project, and his dependents instituted a proceeding under the Workmen's Compensation Act.<sup>325</sup>

The court of appeals affirmed the Industrial Commission's finding that Britt was Utilities' employee<sup>326</sup> and that Utilities and its carrier, Aetna Insurance Company, should pay benefits pursuant to the applicable statute.<sup>327</sup> But the court also accepted Aetna's contention that

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322. Colony was primarily a grading contractor, and subcontracted with Utilities because of Utilities' expertise in installing water pipe. To avoid the "red tape" involved in making Utilities an "official" subcontractor under state law, Colony and Utilities entered into a contract under which Utilities would furnish all labor, equipment, organization and incidental tools, and Colony would furnish the materials. Colony paid Utilities on a monthly basis for work performed, less 10% retainage, less the gross amount of payroll paid to employees supplied by Utilities, and less a 17% deduction based on the gross payroll to cover payroll taxes, workmen's compensation premiums for Utilities' employees and other insurance paid by Colony. *Id.* at 25-27, 240 S.E.2d at 480-81.

323. *Id.* at 28, 240 S.E.2d at 482.

324. *See* note 322 *supra*.

325. N.C. GEN. STAT. § 97-38, -39 (1972 & Cum. Supp. 1977).

326. Although members of the work crew, including Britt, were listed on Colony's payroll, reported on Colony's W-2 and W-4 forms, and directly paid by Colony, the Industrial Commission found that Utilities had hired the crew, that Utilities determined the composition, classification, and weekly pay rates of the crew, that Utilities controlled the actual performance of the crew, and that only Utilities' foreman could hire and fire crew members. 35 N.C. App. at 26-28, 240 S.E.2d at 481-82. The court of appeals found that the only supervision Colony exercised over the crew was to see that their work met United States Department of Transportation specifications. *Id.* at 31, 240 S.E.2d at 484. In cases involving lent employees, or dual employment, liability for injury to the employee is generally determined by resolving the issue of which employer had the right to control the employee's work. *Lewis v. Barnhill*, 267 N.C. 457, 148 S.E.2d 536 (1966). *See* 1B A. LARSON, WORKMEN'S COMPENSATION LAW § 44.00 (1978). "The traditional test of the employer-employee relation is the right of the employer to control the details of the work." *Id.* *See generally id.* §§ 48.00-23.

327. N.C. GEN. STAT. § 97-38 (Cum. Supp. 1977) bases death benefits for dependents on a percentage of the deceased employee's average weekly wages at the time of the accident. The "average weekly wages" are the earnings of the injured employee in the employment in which he was working at the time of his injury. *Id.* § 97-2(5) (Cum. Supp. 1977). Thus, compensation for an employee who holds two separate jobs must be based exclusively upon his average weekly wages in the job in which he was injured. *See Joyner v. A.J. Carey Oil Co.*, 266 N.C. 519, 146 S.E.2d 447 (1966); *Barnhardt v. Yellow Cab Co.*, 266 N.C. 419, 146 S.E.2d 479 (1966). For criticism of this method of determining average weekly wages, see Note, *Workmen's Compensation—Average Weekly Wage—Combination of Wages*, 44 N.C.L. REV. 1177 (1966). The court of appeals in *Britt* agreed with the Commission's finding that Britt held only one job but was paid for that job on two separate payrolls. 35 N.C. App. at 29, 240 S.E.2d at 483.

Colony and its carrier, Standard Fire Insurance Company, were estopped from denying that the employer-employee relationship existed between Colony and Britt, and that Colony and Standard Fire should pay a part of the benefits awarded to plaintiffs.<sup>328</sup> The court said Standard Fire could not escape all liability if it had accepted the premiums collected by Colony for workmen's compensation insurance on Britt's wages.<sup>329</sup> The case was, therefore, remanded to the Industrial Commission for its finding on Standard Fire's acceptance or nonacceptance of the premiums.<sup>330</sup>

The *Britt* decision represents a pragmatic and equitable response to an unusual problem. In the ordinary case of dual employment, the employer that furnishes its employee and equipment to another employer, and retains control over the employee, remains liable for any and all injuries to that employee.<sup>331</sup> The court in *Britt* adhered to the essence of this rule, since it placed the primary responsibility for compensation on Utilities and its insurance carrier.<sup>332</sup> Colony's carrier was to contribute only if it was proved that it had accepted premium payments withheld by Colony for the benefit of Britt.<sup>333</sup> The general rule governing dual employment was thus made to accommodate the equitable principle that a workmen's compensation carrier should not totally avoid a liability that it has been paid to accept.<sup>334</sup> Indeed, there is no reason why a rule that would hold Utilities and its insurance carrier solely responsible for benefits should not give way when economic realities compel a different result. Britt's dependents will be fully compen-

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328. 35 N.C. App. at 32, 240 S.E.2d at 484. The Industrial Commission had awarded plaintiffs benefits based on the wages earned by Britt while in the employ of Utilities, including the wages Utilities paid directly and those paid indirectly through Colony. *Id.* at 29, 240 S.E.2d at 483. Thus Utilities' carrier was to pay benefits based on wages Colony actually paid and against which Colony had taken a deduction for workmen's compensation insurance.

329. *Id.* at 33, 240 S.E.2d at 485.

330. *Id.* The formula for Standard Fire's contribution, if the premiums were accepted, is the proportion that the wages paid Britt by Colony bear to his total wages for the period of time during which he worked for both employers. *Id.*

331. *Lewis v. Barnhill*, 267 N.C. 457, 148 S.E.2d 536 (1966). But see N.C. GEN. STAT. § 97-51 (1972) (providing that when employee is in joint service of two or more employers at time he is injured, each employer shall contribute to employee's compensation in proportion to wages each paid the employee). *Britt* was not a joint employment case under § 97-51, since the Industrial Commission found, and the court agreed, that Britt was Utilities' employee. This finding foreclosed the possibility that Utilities and Colony would be jointly liable for benefits to Britt's dependents under § 97-51. 35 N.C. App. at 33, 240 S.E.2d at 485. See also *Collins v. James Paul Edwards, Inc.*, 21 N.C. App. 455, 204 S.E.2d 873, cert. denied, 285 N.C. 589, 206 S.E.2d 862 (1974).

332. 35 N.C. App. at 33, 240 S.E.2d at 485.

333. *Id.*

334. *Id.*

sated in any event. As a matter of policy, they should be compensated by those who were paid to accept the risk.

## 2. Third-Party Liability of Carriers

Under G.S. 97-10.1, once an employer and employee are subject to and comply with the Workmen's Compensation Act,<sup>335</sup> the employee has no right of action against the employer "at common law or otherwise" on account of work-related injury or death.<sup>336</sup> The employee's right to sue a third party, however, is unaffected by the Act.<sup>337</sup> The most important legal issue arising in this area of third-party tort liability is whether, when the applicable statute neither identifies the insurer with the employer nor indicates that the insurer should not be treated as a third party, a workmen's compensation insurance carrier may be sued for negligence in the performance of such functions as making safety inspections.<sup>338</sup> In *Smith v. Liberty Mutual Insurance Co.*,<sup>339</sup> a federal district court, on reconsideration of a prior opinion,<sup>340</sup> determined that under the North Carolina Act, which does not specify the insurer's status, the insurance carrier is not to be considered a third party suable for negligence under common law.<sup>341</sup> The court held that tort immunity is conferred upon the insurer by virtue of the provisions of G.S. 97-9<sup>342</sup> and G.S. 97-10.1,<sup>343</sup> which protect both the employer and those conducting his business.<sup>344</sup>

Plaintiff in *Smith* had been seriously injured while operating a loom at a plant for which Liberty Mutual was the workmen's compensation insurance carrier.<sup>345</sup> In her civil suit for damages against Liberty

335. N.C. GEN. STAT. §§ 97-1 to -101 (1972 & Cum. Supp. 1977).

336. *Id.* § 97-10.1 (Cum. Supp. 1977). For general rule, see 2A A. LARSON, *supra* note 326, § 65.10 (1976). In some states, an employer subject to a workmen's compensation act may be sued when the injured employee is an illegally employed minor, or when the employee's injury was occasioned by the employer's wilful misconduct or failure to provide safety devices. *Id.* § 67.21. But see N.C. GEN. STAT. §§ 97-10.3, -12 (1972 & Cum. Supp. 1977).

337. N.C. GEN. STAT. § 97-10.2 (1972).

338. See Larson, *Workmen's Compensation Insurer as Suable Third Party*, 1969 DUKE L.J. 1117, 1117-18.

339. 449 F. Supp. 928 (M.D.N.C. 1978).

340. The original opinion appears at 409 F. Supp. 1211 (M.D.N.C. 1976), discussed in *Survey of Developments in North Carolina Law, 1976*, 55 N.C.L. REV. 895, 1118-20 (1977).

341. 449 F. Supp. at 934.

342. N.C. GEN. STAT. § 97-9 (Cum. Supp. 1977).

343. *Id.* § 97-10.1.

344. 449 F. Supp. at 934. North Carolina courts have held that the employee's exclusive remedy against the employer under the Act is extended to "those conducting [the employer's] business" by § 97-9. See, e.g., *Weaver v. Bennett*, 259 N.C. 16, 129 S.E.2d 610 (1963).

345. 449 F. Supp. at 929.

Mutual, plaintiff alleged defendant was negligent in failing to exercise reasonable care in performing safety inspections at the facility.<sup>346</sup> Defendant's motion for summary judgment asserted that the exclusive remedies provided under the Workmen's Compensation Act barred plaintiff's tort claim.<sup>347</sup> This assertion was based on defendant's argument that an insurer is the equivalent of the employer for purposes of the Act.<sup>348</sup>

Defendant's argument was rejected when the district court first heard the case in 1976.<sup>349</sup> At that time, the court could find no controlling North Carolina decisions.<sup>350</sup> It therefore examined the relevant statutory provisions, noting initially that the statute's definition of "employer" does not include the employer's insurance carrier, which is instead separately defined in another section.<sup>351</sup> The court then noted that North Carolina courts have extended the employer's tort immunity to those conducting his business, but have never directly addressed the issue whether the insurance carrier falls within the employer category.<sup>352</sup> The district court then declined to decide the issue, stating that it would be premature to make the findings of fact necessary to resolve the issue on a motion for summary judgment.<sup>353</sup>

On reconsideration of defendant's motion, the district court decided to resolve the issue. To determine whether the insured is to be treated as an employer or one of those conducting his business, and is thus entitled to the statutory protection of G.S. 97-9 and G.S. 97-10.1, the court relied on two North Carolina Supreme Court decisions that it had overlooked when it previously addressed the issue.<sup>354</sup> In *Hoover v.*

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346. *Id.*

347. *Id.* at 930.

348. *Id.*

349. 409 F. Supp. 1211, 1218-19 (M.D.N.C. 1976).

350. In several states having statutes similar to the North Carolina Act, courts have read into the statutes a proscription against third-party tort liability for workmen's compensation insurance carriers. See *Horne v. Security Mut. Cas. Co.*, 265 F. Supp. 379 (D. Ark. 1967). Other courts considering similar statutes have concluded that if the carriers are to receive the same protection as employers, it is for the legislature to say so. See *Beasley v. MacDonald Eng'r Co.*, 287 Ala. 189, 249 So. 2d 844 (1971).

351. 409 F. Supp. at 1215.

352. *Id.* The court noted that North Carolina courts have given § 97-9 protection to employees, officers and agents of the employer as those conducting the employer's business. See, e.g., *Altman v. Sanders*, 267 N.C. 158, 148 S.E.2d 21 (1966); *Essick v. Lexington*, 232 N.C. 200, 60 S.E.2d 106 (1950). But North Carolina courts have denied the protection of § 97-9 to independent contractors performing work on the employer's premises but having no connection with the employment relationship. See *Lewis v. Barnhill*, 267 N.C. 457, 148 S.E.2d 536 (1966).

353. 409 F. Supp. at 1216. For the court's treatment of other arguments made by the insurer, see *Survey of Developments in North Carolina Law, 1976*, *supra* note 340, at 1119 nn.28 & 31.

354. 449 F. Supp. at 931.

*Globe Indemnity Co.*,<sup>355</sup> the North Carolina Supreme Court extended to the employer's compensation carrier the protection of G.S. 97-26,<sup>356</sup> which provides that the employer shall not be liable in damages for the malpractice of a physician furnished by him. The *Smith* court read this case as establishing an identity between the employer and the insurance carrier.<sup>357</sup> Whether *Hoover* can support such a broad reading is questionable. The *Hoover* court decided only that an employee cannot sue the employer or the carrier for malpractice by a physician furnished to treat the job-related injury.<sup>358</sup> *Hoover* should be read, therefore, as protecting the carrier against suit only when an allegedly negligent third party, the physician, is involved, because the issue of a carrier's tort liability for its independent negligent act was not before the court. The *Smith* court, however, not only used *Hoover* to support the broader proposition of absolute tort immunity for the carrier, but also relied on dictum in a second *Hoover* opinion to buttress its position.

In the second *Hoover* opinion,<sup>359</sup> the North Carolina Supreme Court observed that were the insurance carrier liable to plaintiff for malpractice by a physician in the carrier's employ, "it would seem that the North Carolina Industrial Commission would have jurisdiction . . . ."<sup>360</sup> Because the Industrial Commission has no jurisdiction over a claim against a third party, the *Smith* court concluded that the supreme court thought the carrier was not a third party suable for negligence at common law.<sup>361</sup> The district court insisted that this "holding" implicitly extended the employer's protection to the carrier, as one conducting the employer's business.<sup>362</sup> The *Hoover* court, however, did not hold that the employee's exclusive remedy against a negligent carrier is within the jurisdiction of the Industrial Commission, because that issue was not before the court for resolution.<sup>363</sup>

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355. 202 N.C. 655, 163 S.E. 758 (1932).

356. N.C. GEN. STAT. § 97-26 (1972).

357. 449 F. Supp. at 932, 934.

358. 202 N.C. at 657, 163 S.E. at 759. *Hoover* held that an injury sustained by the employee as a result of negligent treatment by a physician furnished by the employer or the carrier is a constituent element of the employee's original injury, and is therefore compensable only under the Act. *Id.*

359. 206 N.C. 468, 174 S.E. 308 (1934).

360. *Id.* at 470, 174 S.E. at 309.

361. 449 F. Supp. at 933.

362. *Id.* at 934.

363. The only issue before the *Hoover* court was whether the insurer could be liable in tort for the acts of a negligent agent (a physician) when the agent's wrongful act was outside the scope of his employment, and was not ratified or authorized by the insurer. 206 N.C. at 470, 174 S.E. at 319.

The *Hoover* opinions clearly did not constitute "persuasive authority" to support the district court's conclusion that an insurance carrier is not a third party within the meaning of G.S. 97-10.2 and therefore is immune to suit by virtue of G.S. 97-9 and 97-10.1. Neither opinion even approached the conclusion that an insurer, as one conducting the employer's business, is generally immune from tort liability for its own negligent acts. The *Smith* court, by purporting to derive that conclusion from the opinions, effectively circumvented its inability, on a summary judgement motion, to make an express finding of fact that an insurer is the employer's agent, rather than an independent contractor, and thus entitled to the protection afforded those conducting the employer's business.

The *Smith* decision can be seriously faulted for its reliance on questionable precedent to construe broadly the term "carrier" in the absence of any indication that the legislature intended such a broad construction.<sup>364</sup> Whether the workmen's compensation insurance carrier should be liable in tort for negligence in the performance of safety inspections would, ideally, involve an inquiry into the function of the insurance carrier, as well as a balancing of public policy objectives.<sup>365</sup> The functional analysis would draw a distinction between the insurer as payor of benefits under the Act, and as provider of other services related to the Act, such as performing safety inspections.<sup>366</sup> It is certainly arguable that the insurer should be liable in tort for negligence in performance of its role as safety inspector.<sup>367</sup> But this is a public policy argument and turns on facts that should be investigated by the legisla-

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364. Twenty-two state statutes specifically equate employers and their insurance carriers and exempt both from third-party tort liability. See COLO. REV. STAT. § 8-42-102 (Cum. Supp. 1976); DEL. CODE ANN. tit. 19, § 2301(8) (1975); FLA. STAT. ANN. § 440.11 (West 1977); GA. CODE ANN. § 114-101 (1973); HAW. REV. STAT. § 386-1 (1976); ILL. ANN. STAT. ch. 48, § 138.5 (Smith-Hurd Cum. Supp. 1978); IND. ANN. STAT. § 22-3-2-5 (Cum. Supp. 1978); IOWA CODE § 85A-15 (Cum. Supp. 1978-1979); ME. REV. STAT. ANN. tit. 39, § 2(6) (1964); MICH. STAT. ANN. § 17.237 (13) (Cum. Supp. 1975); MO. ANN. STAT. § 287.030.2 (Vernon 1965); NEB. REV. STAT. § 48-111 (1968); N.H. REV. STAT. ANN. § 281:2 (1966); N.M. STAT. ANN. § 59-10-4(D) (Supp. 1975); OR. REV. STAT. § 656.018(3) (1973-1974); PA. STAT. ANN. tit. 77, 501 (Cum. Supp. 1978-1979); S.D. COMPILED LAWS ANN. § 62-1-2 (1978); TENN. CODE ANN. § 50-902(a) (Cum. Supp. 1978); TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (Vernon Cum. Supp. 1967); VT. STAT. ANN. tit. 21, § 601(3) (1967); VA. CODE ANN. § 65-3 (1950); WIS. STAT. ANN. § 102.03(2) (West Cum. Supp. 1973). The provisions in the Illinois, Michigan and New Hampshire statutes were all added to protect insurance carriers after court decisions had held the carriers liable as third parties.

365. See 2A A. LARSON, *supra* note 326, § 72.90 (1976).

366. The distinction is between "paying for services and physically performing them . . . . It is virtually impossible to cause physical injury by writing a check. It is very possible to cause physical injury . . . by making a safety inspection." 2A *id.* The functional approach has been applied in *Sims v. American Cas. Co.*, 131 Ga. App. 461, 206 S.E.2d 121, *aff'd per curiam*, 232 Ga. 787, 209 S.E.2d 61 (1974).

367. See 2A A. LARSON, *supra* note 326, § 72.90 (1976).

ture before subjecting insurers who assume this role to potential tort liability.<sup>368</sup> One court has speculated, for example, that insurers will avoid tort liability altogether by not making safety inspections unless required by law to do so, and that the "ultimate losers will be workmen and their families."<sup>369</sup> This assertion has been countered by the response that the insurers' economic self-interest would be great enough to overcome the fear of potential tort liability.<sup>370</sup> Another court has admonished that no safety inspection at all is preferable to a negligent one.<sup>371</sup> The legislature is uniquely capable of determining whether insurance carriers do discontinue safety inspections when confronted with potential tort liability, and, if so, whether there are other ways to get the job done.<sup>372</sup> It is not too late for a responsible resolution of this difficult issue.

### 3. Compensable Injuries

#### a. *By Accident, Arising Out of and In the Course of Employment*

To recover under the North Carolina Workmen's Compensation Act, the claimant must show that an injury resulted from an accident<sup>373</sup> arising out of and in the course of employment.<sup>374</sup> The accident "arises out of" the employment when it occurs in the course of employment and is the result of a risk incident to the employment.<sup>375</sup> The words "in the course of" have reference to the time, place and circumstances

368. *Id.*

369. *Kotarski v. Aetna Cas. & Sur. Co.*, 244 F. Supp. 547, 558-59 (E.D. Mich. 1965), *aff'd per curiam*, 372 F.2d 95 (6th Cir. 1967).

370. *Mays v. Liberty Mut. Ins. Co.*, 323 F.2d 174, 178 (3d Cir. 1963).

371. *Fabricius v. Montgomery Elev. Co.*, 254 Iowa 1319, 1327, 121 N.W.2d 361, 366 (1963).

372. *See* 2A A. LARSON, *supra* note 326, § 72.90 (1976).

373. "The basic and indispensable ingredient of 'accident' is unexpectedness." 1B *id.* § 6 (1978). North Carolina courts remain in the minority by also requiring that the accident arise from unusual exertion. Three recent cases apply this minority rule. *Curtis v. Carolina Mechanical Sys., Inc.*, 36 N.C. App. 621, 244 S.E.2d 690 (1978) (compensation denied for hernia suffered when employee received injury while doing his usual duties in usual way); *Searsey v. Perry M. Alexander Constr. Co.*, 35 N.C. App. 78, 239 S.E.2d 847, *cert. denied*, 294 N.C. 736, 244 S.E.2d 154 (1978) (compensation allowed for back injury sustained while employee did unusual task); *Smith v. Burlington Indus., Inc.*, 35 N.C. App. 105, 239 S.E.2d 845 (1978) (compensation denied for back injury suffered when employee was doing his customary work in usual way).

374. *Bell v. Dewey Bros.*, 236 N.C. 280, 72 S.E.2d 680 (1952); *see* N.C. GEN. STAT. § 97-2(6) (Cum. Supp. 1977).

375. There must be some causal connection between the employment and the injury. *Bolling v. Belk-White Co.*, 228 N.C. 749, 750, 46 S.E.2d 838, 839 (1948). This does not mean, however, that the accident must have been caused by the employment. *Harless v. Flynn*, 1 N.C. App. 448, 162 S.E.2d 47 (1968). It does require a showing that an injury was caused by an increased risk "to which claimant as distinct from the general public, was subjected by his employment." 1 A. LARSON, *supra* note 326, § 6.



under which the accident occurs.<sup>376</sup>

In *Martin v. Bonclarken Assembly*,<sup>377</sup> the North Carolina Court of Appeals affirmed an award to dependents of a fifteen-year old laborer who drowned while swimming on his employer's premises during his lunch hour.<sup>378</sup> Although the employee had his employer's permission to use the swimming facilities when off-duty, regulations prohibited swimming during the lunch hour because the lifeguard was also off-duty.<sup>379</sup> Because no one had alerted the employee to these regulations,<sup>380</sup> the court agreed with the Industrial Commission that the death had occurred under compensable circumstances.<sup>381</sup> In allowing recovery, the court distinguished several cases in which recovery had been denied because the employee had disobeyed express orders of the employer,<sup>382</sup> and made it clear that only violations of express prohibitions

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376. *Harless v. Flynn*, 1 N.C. App. 448, 162 S.E.2d 47 (1968). See generally 1 A. LARSON, *supra* note 326, § 14; 1A *id.* § 29.

377. 35 N.C. App. 489, 241 S.E.2d 848, *cert. granted*, 295 N.C. 91, 244 S.E.2d 258 (1978).

378. Recreational injuries during the noon hour on the premises of the employer have been held compensable in the majority of cases. The presence of the activity on the employer's premises is of great importance. 1A A. LARSON, *supra* note 326, § 22.11; see *Watkins v. City of Wilmington*, 290 N.C. 276, 225 S.E.2d 577 (1976). But compensation is generally withheld for injuries received during recreational activities off the employer's premises when the employee was not required to participate. See *Perry v. American Bakeries Co.*, 262 N.C. 272, 136 S.E.2d 643 (1964); *Burton v. American Nat'l Ins. Co.*, 10 N.C. App. 499, 179 S.E.2d 7 (1971).

379. 35 N.C. App. at 490, 241 S.E.2d at 849.

380. Plaintiff's decedent had actually violated two regulations. One prohibited swimming when the lifeguard was off-duty; the other required a swimming test before swimming beyond the chained area of the lake. A sign posted at the lake, which should have been seen by Martin, did not state that the lake was closed when the lifeguard was off-duty. It did, however, state clearly that a swimming test was required for swimming beyond the chained area. The court, however, agreed with the Industrial Commission that Martin could have reasonably assumed he was within the chained area since he was unfamiliar with the lake and was within the roped area. *Id.* at 490-92, 241 S.E.2d at 849-50.

381. *Id.* at 492-93, 241 S.E.2d at 851. The court concluded that the accident arose out of decedent's employment because it was the result of a risk incident to the employment and not from a hazard common to the public. The public was not invited to swim in defendant's lake, but employees of Assembly were. *Id.* The court also found that the "time," "place," and "circumstance" conditions of the "in the course of employment" test were fulfilled. With respect to time and place, decedent drowned during his lunch hour on the employer's premises. With respect to circumstances, decedent was "doing what a man so employed may reasonably do within a time which he is employed, and at a place where he may reasonably be during that time to do that thing." *Id.* at 493, 241 S.E.2d at 851.

382. *Id.* at 493, 241 S.E.2d at 851 (distinguishing *Morrow v. State Highway & Public Works Comm'n*, 214 N.C. 835, 199 S.E.2d 265 (1938) (deceased jumped into river to recover paint brush after having been told not to do so by his employer); *Teague v. Atlantic Co.*, 213 N.C. 546, 196 S.E. 875 (1938) (employee tried to ride a crate conveyor instead of using the stairs, contrary to the rules of his employer)).

Generally, an accident is considered to have been in the course of employment even though it resulted from the employee's violation of an express prohibition or regulation, if that prohibition or regulation related to the *method* of accomplishing the employee's job, rather than to the boundaries defining the *ultimate work* to be done. A prohibited overstepping of those boundaries will

communicated to the employee<sup>383</sup> will preclude recovery for injuries sustained on the employer's premises in activities that are outside the employee's regular duties.<sup>384</sup>

The decision should serve to remind employers of their responsibility to warn employees if certain conduct, incidental to accomplishment of their jobs, is prohibited.<sup>385</sup> In light of the practical difficulty of ensuring that all employees are fully aware of regulations governing the use of such facilities, the decision may also serve to discourage employers from providing on-premises recreational facilities for employees' off-duty use.<sup>386</sup>

### b. *Extent of Incapacity for Work*

Under the Workmen's Compensation Act, a claimant's degree of disability is measured by her capacity to earn the wages she was receiv-

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remove the accident from the course of employment. 1A A. LARSON, *supra* note 326, § 31.00. *Morrow* and *Teague* fall outside these general rules, and serve to illustrate an exception noted by Larson. That exception recognizes that compensation should be denied in situations where the employer has taken thorough precautions to keep employees from places of extreme danger, and the employee's act in subjecting himself to the danger is inexplicable and little related to any reasonable necessity in connection with the accomplishment of his work. *Id.* § 31.23.

383. 35 N.C. App. at 492-93, 241 S.E.2d at 851.

384. See 1A A. LARSON, *supra* note 326, § 31.00. ("Violations of express prohibitions relating to incidental activities, such as seeking personal comfort, as distinguished from activities contributing directly to the accomplishment of the main job, are an interruption of the course of employment.")

385. The court of appeals denied recovery in *Hensley v. Caswell Action Comm.*, 35 N.C. App. 544, 241 S.E.2d 852 (1978), *rev'd*, 296 N.C. 527, 251 S.E.2d 399 (1979), an employee drowning case heard the same term as *Martin*. In *Hensley*, a 14 year old laborer drowned while wading across a reservoir to cut weeds on the other side. Because the boy had disobeyed instructions not to go in the water, the court of appeals found there was no causal connection between the employment and the accident. The supreme court held that the causal connection had not been severed, and reversed, 296 N.C. 527, 251 S.E.2d 399 (1979). The supreme court noted that the young boy was engaged in his assigned task at the time of the drowning, had received only general instructions not to go in the water, and had not been confronted with an obvious danger since the water appeared shallow. *Id.* at 531, 251 S.E.2d at 401. The court distinguished both *Morrow v. State Highway & Public Works Comm'n*, 214 N.C. 835, 199 S.E.2d 265 (1938), and *Teague v. Atlantic Co.*, 213 N.C. 546, 196 S.E. 875 (1938), as cases in which the employee's misconduct involved thrill-seeking because of the obvious danger of violating the employer's warning. *Id.* at 530-31, 251 S.E.2d at 401. *Hensley* comports with the general rule discussed by Larson—that compensation will not be denied an employee who violates a rule related to the method of accomplishing the employee's ultimate task. See note 382 *supra*. *Hensley* had been assigned the task of cutting weeds at the edge of a reservoir, and was to walk around the edge in order to do so. The method he employed—wading across the reservoir—merely departed from the method prescribed by his employer.

386. Such difficulties were apparent in *Martin*. Defendants had both a resident staff and paid laborers on the premises. All regulations were distributed to the resident staff at an orientation session. The lake regulations were posted on a sign to reach those who did not attend the orientation. But the sign suggested that the lifeguard was on-duty at a time when he was not. 35 N.C. App. at 490, 241 S.E.2d at 849.

ing at the time of her injury.<sup>387</sup> A claimant unable to work and earn any wages is compensated for total disability<sup>388</sup> unless all her injuries are included in the schedule set out in G.S. 97-31, in which case compensation is exclusively under that statute.<sup>389</sup> A claimant able to work and earn some wages, but less than she was receiving at the time of her injury, is considered partially disabled and entitled to compensation under G.S. 97-31 for any injuries listed in that schedule and to compensation under G.S. 97-30 for any impairment of wage earning capacity caused by injuries not listed in the schedule.<sup>390</sup>

Plaintiff in *Little v. Anson County Schools Food Service*<sup>391</sup> challenged an award for partial loss of use of her back under G.S. 97-31(23),<sup>392</sup> alleging that she suffered additional impairments.<sup>393</sup> The North Carolina Supreme Court remanded the case because the Industrial Commission had failed to consider all plaintiff's injuries in its award,<sup>394</sup> and had not heard plaintiff's evidence on total disability.<sup>395</sup>

387. *Dail v. Kellex Corp.*, 233 N.C. 446, 64 S.E.2d 438 (1951); see N.C. GEN. STAT. § 97-2(9) (1972).

388. N.C. GEN. STAT. § 97-29 (Cum. Supp. 1977). Disability as used in the North Carolina Act means impairment of wage earning capacity rather than physical impairment. *Priddy v. Blue Bird Cab Co.*, 9 N.C. App. 291, 176 S.E.2d 26 (1970).

389. N.C. GEN. STAT. § 97-31 (Cum. Supp. 1977); see *Loflin v. Loflin*, 13 N.C. App. 574, 186 S.E.2d 660, cert. denied, 281 N.C. 154, 187 S.E.2d 585 (1972). If an injury is one of those enumerated in the schedule of payments set forth in § 97-31, compensation is made pursuant to that schedule, without regard to loss of wage earning power and in lieu of all other compensation. *Id.* at 578, 186 S.E.2d at 663. But see 2 A. LARSON, *supra* note 326, § 58.20 (1976), in which the multiple impairment principle, recognized in a number of newer decisions, is discussed. The principle would recognize that "when two or more schedule injuries occur together, the disabling effect may be far greater than the arithmetical total of the schedule allowances added together." *Id.* In *Berg v. Sadler*, 235 Minn. 214, 50 N.W.2d 266 (1951), claimant, a road and farm worker, sustained a 40% disability of one foot and ankle and a 75% disability of the other foot and ankle. Since he could do no work involving standing or walking or use of his feet, "it seems plain enough that merely putting end-to-end the fractional schedule allowances for the two feet would be a gross miscarriage of the concept of compensable disability. The Minnesota Supreme Court, overruling the Commission, awarded total permanent disability benefits." 2 A. LARSON, *supra*.

390. N.C. GEN. STAT. § 97-30, -31 (Cum. Supp. 1977).

391. 295 N.C. 527, 246 S.E.2d 743 (1978).

392. N.C. GEN. STAT. § 97-31(23) (Cum. Supp. 1977).

393. The uncontradicted evidence tended to show that "an injury to plaintiff's spinal cord ha[d] resulted in weakness in *all of her extremities*, and numbness or loss of sensation *throughout her body*." 295 N.C. at 531-32, 246 S.E.2d at 745.

394. *Id.* at 531, 246 S.E.2d at 746.

395. Plaintiff had not presented evidence of total disability at her first hearing because a deputy commissioner told her such testimony was unnecessary. *Id.* at 532, 246 S.E.2d at 746. Under N.C. GEN. STAT. § 97-84 (1972), a claimant must have a full opportunity to be heard. Because plaintiff refrained from presenting evidence in reliance on an inaccurate statement by a deputy commissioner, the right guaranteed by the statute was abridged. In workmen's compensation cases the claimant generally bears the burden of proving the degree of disability suffered. *Hall v. Thomason Chevrolet, Inc.*, 263 N.C. 569, 139 S.E.2d 857 (1965). But see 2 A. LARSON, *supra* note 326, § 57.61, which suggests that the burden of proof shifts in certain circumstances:

The court made it clear that, if the Commission found that all plaintiff's injuries were included in the G.S. 97-31 schedule, compensation was to be exclusively under that statute. If plaintiff was found to be partially disabled, the Commission was to make an award for both schedule injuries and nonschedule injuries that impaired wage earning power. In reference to plaintiff's claim for total disability under G.S. 97-29,<sup>396</sup> the court held that the relevant inquiry in a claim for total disability is whether the particular plaintiff has a capacity to work, not whether some persons with plaintiff's degree of injury are capable of working.<sup>397</sup> Because an employee's age, education and work experience may be such that an injury causes her a greater degree of incapacity than it would some other person, these "preexisting conditions" must be considered by the Industrial Commission.<sup>398</sup>

Plaintiff in *Little* was over fifty years of age, somewhat obese, had an eighth grade education, and had been working as a laborer earning less than two dollars per hour at the time of her injury.<sup>399</sup> The court's mandate that her personal attributes be given weight in the Industrial Commission's consideration of her total disability claim is consistent with decisions in other jurisdictions,<sup>400</sup> which uniformly reject any presumption that, merely because a claimant is physically able to do light work, appropriate employment is regularly available for her.<sup>401</sup> Because a claimant's adaptability to the situation created by her physical

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If the evidence of degree of obvious physical impairment, coupled with other factors such as claimant's mental capacity, education, training, or age, places claimant *prima facie* in the odd-lot category, the burden should be on the employer to show that some kind of suitable work is regularly and continuously available to the claimant.

396. N.C. GEN. STAT. § 97-29 (Cum. Supp. 1977).

397. 295 N.C. at 531, 246 S.E.2d at 746. Although the North Carolina Supreme Court has never before mandated such an inquiry, the proposition is not altogether novel in this state. See *Mabe v. North Carolina Granite Corp.*, 15 N.C. App. 253, 189 S.E.2d 804 (1972). In *Mabe*, a case involving occupational disease rather than injury, the North Carolina Court of Appeals said that "[t]he question is what effect has the disease had upon the earning capacity of this particular plaintiff, not what effect a like physical impairment would have upon an employee of average age and intelligence." *Id.* at 255-56, 189 S.E.2d at 806. The North Carolina Court of Appeals has rejected such an inquiry, however, when all the plaintiff's injuries were encompassed in the schedule set out in § 97-31. See *Baldwin v. North Carolina Memorial Hosp.*, 32 N.C. App. 779, 233 S.E.2d 600 (1977); *Dudley v. Downtowner Motor Inn*, 13 N.C. App. 474, 186 S.E.2d 188 (1972).

398. 295 N.C. at 532, 246 S.E.2d at 746.

399. *Id.* at 531, 246 S.E.2d at 746.

400. See *Norfolk, Baltimore & Carolina Line, Inc. v. Bergeron*, 351 F. Supp. 348 (D.S.C. 1972) (62 year old claimant with third grade education, unintelligible speech, work history consisting entirely of manual labor and 63% loss of use of arm held to be totally disabled); 2 A. LARSON, *supra* note 326, § 57.51. The preexisting condition inquiry is based on the "odd-lot doctrine." Under that doctrine, "total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market." *Id.* at 10-109.

401. 2 A. LARSON, *supra* note 326, § 57.51 (1976).

injury may well be constricted by lack of education, age, and other factors, the pronouncement of the court in *Little* is eminently sensible. It also comports with the principle that claimants are entitled to have the full extent of their injury taken into consideration in awarding compensation.<sup>402</sup>

#### 4. Discharge after Compensation

Under G.S. 97-6 an employer subject to the North Carolina Workmen's Compensation Act cannot relieve himself of any obligations under the Act by contract, agreement, rule, regulation or other device.<sup>403</sup> The employer may not, for example, substitute an accident policy in lieu of compensation and other benefits required by the Act.<sup>404</sup> In *Dockery v. Lampart Table Co.*,<sup>405</sup> plaintiff argued that his discharge, after having pursued his remedies under the Act, was an attempt by his employers to create a "device" to relieve them of their obligations.<sup>406</sup> His complaint alleged a tort theory of "retaliatory discharge," which the North Carolina Court of Appeals refused to recognize.<sup>407</sup>

The court declined to follow decisions in other jurisdictions that have allowed a cause of action in tort based on the theory of retaliatory discharge.<sup>408</sup> It maintained that such a theory would violate the established common law contract rule that employment is terminable at the will of either party when there is no contract for a definite term.<sup>409</sup> Although it acknowledged that the facts alleged presented valid public policy questions, the court emphasized that such questions are for the legislature.<sup>410</sup>

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402. *Giles v. Tri-State Erectors*, 287 N.C. 219, 214 S.E.2d 107 (1975); see 2 A. LARSON, *supra* note 326, § 57.61.

403. N.C. GEN. STAT. § 97-6 (1972).

404. *Ashe v. Barnes*, 255 N.C. 310, 121 S.E.2d 549 (1961).

405. 36 N.C. App. 293, 244 S.E.2d 272, *cert. denied*, 295 N.C. 465, 246 S.E.2d 215 (1978).

406. *Id.* at 295, 244 S.E.2d at 274.

407. *Id.* at 290-300, 244 S.E.2d at 275.

408. The Indiana Supreme Court held retaliatory discharge to be a device within the meaning of the Indiana Workmen's Compensation Act and actionable. *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973). The North Carolina Court of Appeals found the reasoning of the Indiana opinion inapplicable because of the analogy that opinion drew to retaliatory eviction, which has been rejected by North Carolina courts. 36 N.C. App. at 295-96, 244 S.E.2d at 274-75 (citing *Evans v. Rose*, 12 N.C. App. 165, 182 S.E.2d 591, *cert. denied*, 279 N.C. 511, 183 S.E.2d 686 (1971)). The Texas Court of Civil Appeals decision cited by plaintiff, *Texas Steel Co. v. Douglas*, 533 S.W.2d 111 (Tex. Civ. App. 1976), was based on a statute that, unlike North Carolina's, specifically creates a cause of action in tort based on the theory of retaliatory discharge. *Id.* at 296, 244 S.E.2d at 275.

409. 36 N.C. App. at 297, 244 S.E.2d at 275.

410. *Id.* at 300, 244 S.E.2d at 277.

There was, however, a suggestion in the opinion that the court's response would have been different had this plaintiff not received his benefits pursuant to the statute,<sup>411</sup> or had he alleged a pattern of activity by an employer that discouraged employees from claiming benefits under the statute.<sup>412</sup> Had either situation prevailed the court might well have found that the employer was using a device to avoid its statutory obligations.

Since this employee did receive full compensation under the Act, the court's restraint is understandable. Because an employer who has paid benefits has not avoided its obligations, the language of G.S. 97-6 is not amenable to a construction that would hold retaliatory discharge to be a device for avoiding obligations imposed by the Act. This does not mean, however, that the facts as alleged by this plaintiff should not sustain a cause of action. Those facts, if true, not only reveal a deplorable practice, but demand legislative action to amend the statute.

ALICE M. PETTEY  
JANE HARPER PORTER  
JAMES W. RUNCIE  
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## II. CIVIL PROCEDURE

### A. *Jurisdiction*<sup>1</sup>

The court of appeals decided several major cases dealing with the

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411. *Id.* at 298, 244 S.E.2d at 275-76.

412. *Id.* at 299, 244 S.E.2d at 276.

1. *Pope v. Pope*, 38 N.C. App. 328, 248 S.E.2d 260 (1978), involved a suit for arrearages due under a separation agreement entered into in North Carolina. The court of appeals, holding that support payments constitute a "thing of value" within the meaning of § 4(5)(c) of North Carolina's long arm statute, N.C. GEN. STAT. § 1-75-4 (1969), rejected the nonresident defendant's challenge to its assertion of in personam jurisdiction over him. This provision allows the exercise of jurisdiction in any action that "[a]rises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this State, or to ship from this State goods, documents of title, or other things of value." Although the due process question was not before the court (defendant conceded that the exercise of in personam jurisdiction would not violate the fourteenth amendment), the court of appeals in dictum indicated that parties who had resided, married and separated in North Carolina would be subject to in personam jurisdiction in any suit involving the settlement agreement, so long as one of the parties is still a resident of North Carolina. The court stated that due process requirements would

due process requirements for the assertion of jurisdiction over nonresident defendants. In *Swenson v. Thibaut*,<sup>2</sup> the court upheld an application of North Carolina's corporate director consent statute<sup>3</sup> in the face of a *Shaffer v. Heitner*<sup>4</sup> challenge. *Swenson* was a shareholders' derivative suit brought against past and present officers and directors of All American Assurance Company for breach of fiduciary duties through

be met in such a situation because the defendant has "purposefully [availed] himself of the privilege of conducting activities within the forum state, [and has invoked] the benefits and protection of its law." 38 N.C. App. at 331-32, 248 S.E.2d at 262 (citing *Goldman v. Parkland*, 277 N.C. App. 223, 229, 176 S.E.2d 784, 788 (1970)). The court also noted that under a recent United States Supreme Court decision, *Kulko v. Superior Court*, 98 S. Ct. 1690 (1978), the assertion of in personam jurisdiction over defendant was consistent with due process. 38 N.C. App. at 332, 248 S.E.2d at 262.

2. 39 N.C. App. 77, 250 S.E.2d 279 (1978).

3. N.C. GEN. STAT. § 55-33 (1975) provides for long-arm in personam jurisdiction over non-resident directors or officers of a domestic corporation. *Id.* § 1-74.4(8) defines such jurisdiction as limited to "any action against a defendant who is or was an officer or director of a domestic corporation where the action arises out of the defendant's conduct as such officer or director or out of the activities of such corporation while the defendant held office as a director or officer."

4. 433 U.S. 186 (1977). The North Carolina Court of Appeals followed this landmark United States Supreme Court decision in *Balcon, Inc. v. Sadler*, 36 N.C. App. 322, 244 S.E.2d 164 (1978), declaring N.C. GEN. STAT. § 1-75.8(4) (1975) unconstitutional on grounds that the statute, which authorized quasi in rem jurisdiction based on the attachment of property within the state, failed to meet the due process standard articulated in *Shaffer*. 36 N.C. App. at 327, 244 S.E.2d at 167. Plaintiff, a Maryland corporation not doing business in North Carolina, sought to recover from defendant, a resident of Maryland, a money judgment rendered in Maryland. Because defendant owned real property in North Carolina, plaintiff attempted to invoke the court's quasi in rem jurisdiction under § 1-75.8(4) by attaching this real property under N.C. GEN. STAT. § 1-440.1(b) (1969). The trial court granted defendant's motion to dismiss for lack of jurisdiction and the court of appeals affirmed.

*Shaffer* extended to in rem and quasi in rem jurisdiction the due process standard announced by the United States Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945): "[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The Court in *Shaffer* reasoned that because "[t]he phrase 'judicial jurisdiction over a thing,' is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing," the same "minimum contacts" test must be applied to ensure that the exercise of jurisdiction over such interests is consistent with the due process clause. 433 U.S. at 207 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 56, Introductory Note (1971)).

Applying *Shaffer* to the facts in *Balcon*, the court of appeals noted that "jurisdiction [can] not be based on the mere presence of property" in the forum state. 36 N.C. App. at 326, 244 S.E.2d at 167. Defendant's ownership of land in North Carolina was his only contact with the state and the controversy underlying plaintiff's claim was in no way related to that property. The court, concluding that the "minimum contacts" requirement was not met, held that jurisdiction over the case was lacking. *Id.* The court did state, however, that "[w]here real property has some relation to the controversy, the interest of the State in realty within its borders, and the defendant's substantial relationship with the forum should support jurisdiction." *Id.* Although § 1-75.8(4) was found unconstitutional, the court found § 1-75.8(5) valid despite *Shaffer*. *Id.* at 327, 244 S.E.2d at 167. This latter subsection authorizes jurisdiction in any action "in which in rem or quasi in rem jurisdiction may be constitutionally exercised." Thus quasi in rem jurisdiction remains viable in North Carolina, but only to the extent that the exercise thereof comports with the due process standards set forth in *International Shoe*.

mismanagement of company finances.<sup>5</sup> Defendant<sup>6</sup> moved to dismiss for lack of in personam jurisdiction. Although *Shaffer* involved the constitutionality of quasi in rem jurisdiction,<sup>7</sup> defendant relied on that decision because of the substantial similarity in the facts of the two cases: both involved nonresident defendants serving as directors in domestic corporations and in both cases the directorships constituted the only real contacts between defendants and the forum states.<sup>8</sup>

In *Shaffer*, the United States Supreme Court had held that under these facts there were insufficient contacts to satisfy the due process test set forth in *International Shoe Co. v. Washington*.<sup>9</sup> Attachment of defendants' property within the state could not provide the needed contacts because the cause of action, breach of fiduciary duties, was unrelated to the property.<sup>10</sup> Despite its acknowledgement that the state had an important interest in regulating the affairs of domestic corporations and that the defendants as directors had been entitled to the benefits and protection of state law, the *Shaffer* Court concluded that these considerations, though relevant to choice of law, were not alone adequate for asserting jurisdiction.<sup>11</sup> In commenting on the quasi in rem jurisdictional statute involved the Court emphasized Delaware's failure to base expressly its assertion of jurisdiction on its interest in governing the activities of directors of domestic corporations.<sup>12</sup> The Court indicated that in the absence of such a statutory expression the director defendants were not sufficiently on notice that they would be subject to jurisdiction in the state of incorporation.<sup>13</sup>

Dictum in *Shaffer* thus seems to imply that the manner of wording a state's jurisdictional statute could have the effect of satisfying due process requirements under a fact situation that otherwise would fail the minimum contacts test.<sup>14</sup> A state's articulation of its interest in as-

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5. 39 N.C. App. at 82-84, 250 S.E.2d at 284-85.

6. The other directors named as defendants made a general appearance by moving to disqualify plaintiffs' attorneys and thus, said the court, waived their defense of lack of jurisdiction over the person. *Id.* at 92, 250 S.E.2d at 287.

7. See note 4 *supra*.

8. 433 U.S. at 189-92; 39 N.C. App. at 92-93, 250 S.E.2d at 290.

9. 326 U.S. 310 (1945). For the *International Shoe* test, see 326 U.S. at 316; 433 U.S. at 215-16, *quoted in* note 4 *supra*.

10. 433 U.S. at 213.

11. *Id.* at 215-16.

12. *Id.* at 214-15. The Court noted that "[a]lthough the sequestration procedure used here may be most frequently used in derivative suits against officers and directors . . . the authorizing statute evinces no specific concern with such actions." *Id.* at 214.

13. See *id.*; *accord*, 39 N.C. App. at 93, 250 S.E.2d at 290.

14. See Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U.L. REV. 33, 65-66 (1978).



serting jurisdiction over certain individuals serves to give the required notice. Indeed, the *Shaffer* court cited G.S. 55-33<sup>15</sup> as an example of a statute "that treats acceptance of a directorship as consent to jurisdiction in the State."<sup>16</sup> Thus the North Carolina Court of Appeals' upholding of an application of this statute in *Swenson* was not unexpected.

The notice provided by a jurisdictional statute directed solely toward directors and officers of domestic corporations affects the fairness of making such an individual defend in the state.<sup>17</sup> Whether the existence of such a statute should be enough to transform virtually no contacts into sufficient minimum contacts is questionable. G.S. 55-33 looks toward implied consent as a basis for assertion of jurisdiction although *International Shoe* laid such fictions to rest.<sup>18</sup> In light of the state's obviously important interest in regulating the affairs of domestic corporations, however, it would seem that an assertion of jurisdiction pursuant to the consent statute does not "offend traditional notions of fair play and substantial justice,"<sup>19</sup> which is the key to the due process standard.

In *Kloster v. Region D Council of Governments*,<sup>20</sup> the court of appeals considered the question whether a taxpayer has standing to challenge expenditures made by a regional council of governments.<sup>21</sup> That a citizen taxpayer has standing to contest the illegal use of public money or property has long been recognized by North Carolina courts.<sup>22</sup> *Kloster*, however, adds an interesting twist: the money to be

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15. N.C. GEN. STAT. § 55-33 (1975); see 433 U.S. at 216 n.47.

16. 433 U.S. at 216.

17. See *id.* at 214.

18. See 326 U.S. at 316-17 (1945).

19. *International Shoe Co. v. Washington*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). In applying the minimum contacts test the court of appeals relied on *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E.2d 225 (1965), noting that the following factors should be considered: whether defendant "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws," 39 N.C. App. at 94, 250 S.E.2d at 290; whether the case involves some legitimate interest of the forum state "in protecting its residents with respect to the activities and contacts of the nonresident," *id.* (this factor may have had special weight in *Swenson*, since the corporation involved was an insurance company, see *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957)); the relative convenience of the forum to both plaintiff and defendant, 39 N.C. App. at 94, 250 S.E.2d at 290; and "the extent to which the legislature of the forum state has given authority to its courts to entertain litigation against non-residents," *id.* at 93-97, 250 S.E.2d at 290-92.

20. 36 N.C. App. 421, 245 S.E.2d 180, *cert. denied*, 295 N.C. 466, 246 S.E.2d 215 (1978).

21. N.C. GEN. STAT. § 160A-470 (1976) authorizes the creation of regional councils of government by concurrent resolution of any two or more units of local government (county, city, or consolidated city-county).

22. See *Shaw v. Asheville*, 269 N.C. 90, 152 S.E.2d 139 (1967); *Wishart v. Lumberton*, 254

used by defendant came not from local taxes but from a federal grant.<sup>23</sup> Although noting decisions to the contrary,<sup>24</sup> the court of appeals followed the reasoning in *Shipley v. Smith*<sup>25</sup> and held that a taxpayer's interest in the use of public funds is sufficient to confer standing regardless of their source.<sup>26</sup> The court rejected an argument by defendant that, because it is not a taxing authority, it should not be treated as a municipality subject to suit by taxpayers.<sup>27</sup> In holding that the taxpayer here did have standing to contest the use of public funds by the council, the court indicated that standing would arise not only in situations involving the use of local or federal money or property, but also in situations involving "activities [which] may later require support by tax monies."<sup>28</sup> This latter pronouncement would seem to extend taxpayer standing to include challenges to almost every conceivable activity of state and local governmental units.

### B. Notice and Service of Process

In *Wiles v. Welparnel Construction Co.*,<sup>29</sup> the North Carolina Supreme Court, overruling prior case law, held that service of a summons directed to a person designated as the agent of a corporation is sufficient service of process on the corporation so long as the corporation is named as the defendant in both the complaint and the caption of the summons.<sup>30</sup> In reaching its decision the court reinterpreted the re-

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N.C. 94, 118 S.E.2d 35 (1961); *Merrimon v. Southern Paving & Constr. Co.*, 142 N.C. 539, 55 S.E. 366 (1906).

23. The funds were provided by the Economic Development Administration of the U.S. Department of Commerce. 36 N.C. App. at 422, 245 S.E.2d at 181.

24. *Id.* at 425, 245 S.E.2d at 183; *see, e.g., Andrews v. City of South Haven*, 187 Mich. 294, 153 N.W. 827 (1915) (taxpayers lack standing to enjoin activities totally funded with nontax or donative funds).

25. 45 N.M. 23, 107 P.2d 1050 (1940). The New Mexico court held that a taxpayer had standing to seek an order restraining the use of public funds although the money was received as a donation rather than through taxation. Comparing the taxpayer to a shareholder in a private corporation, the court noted that just as corporate directors have no more right to waste money received by the corporation as a gift than to waste money paid in by shareholders through stock purchases, a municipality cannot waste public funds regardless of their origin.

26. 36 N.C. App. at 426, 245 S.E.2d at 183.

27. *Id.* Noting that councils of government are set up to coordinate governmental functions best undertaken on a regional level, the court stated: "[We] do not believe that the General Assembly, in establishing the framework for such councils, intended that it would be a means by which local governmental functions would be isolated from local taxpayer suits designed to contest the legality of council action." *Id.* at 427, 245 S.E.2d at 184.

28. *Id.* at 427, 245 S.E.2d at 184.

29. 295 N.C. 81, 243 S.E.2d 756 (1978).

30. In so holding, the court expressly overruled a line of cases represented by *Russell v. Bea Staple Mfg. Co.*, 266 N.C. 531, 146 S.E.2d 459 (1966); *Hassell & Co. v. Daniels' Roanoke River Line Steamboat Co.*, 168 N.C. 296, 84 S.E. 363 (1915); *Plemmons v. Southern Improvement Co.*,

quirements of North Carolina Rule of Civil Procedure 4(b),<sup>31</sup> which provides that the name appearing in the directory paragraph of the summons should be that of the defendant rather than that of a process officer being ordered to summon the defendant. Up to this point North Carolina case law strictly required that the summons be directed to the defendant; a summons directed to an individual described as an agent or officer of the defendant was fatally defective.<sup>32</sup> Examining the rationale behind requirements regarding sufficiency of process, the court noted that rule 4 of the Federal Rules of Civil Procedure,<sup>33</sup> which is similar to North Carolina's rule, is intended "to provide the mechanisms for bringing notice of the commencement of an action to defendant's attention and to provide a ritual that marks the court's assertion of jurisdiction over the lawsuit."<sup>34</sup> The court, after considering the summons before it on appeal<sup>35</sup> in light of this purpose of giving notice to defendant, found that the naming of the corporation as defendant in both the caption of the summons and the accompanying complaint<sup>36</sup> eliminated any confusion that might arise from the agent being named in the directory paragraph, thus giving defendant adequate notice.<sup>37</sup>

Although a literal application of rule 4(b) would require finding the summons in question insufficient, the court was willing to look beyond the language of the rule to its purpose of providing notice. This more realistic approach indicates an increased willingness on the part of the court to apply the Rules of Civil Procedure, not as stumbling blocks in the path of an unwary party,<sup>38</sup> but as a means of facilitating litigation on the merits.

The court of appeals in *Great Dane Trailers, Inc. v. North Brook*

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108 N.C. 614, 13 S.E. 188 (1891); and *Carl Rose & Sons Ready Mix Concrete, Inc. v. Thorpe Sales Corp.*, 30 N.C. App. 526, 227 S.E. 2d 301 (1976). These cases held that a court lacks jurisdiction over the person if the summons is not *directed* to the defendant.

31. N.C.R. Civ. P. 4(b).

32. 295 N.C. at 83, 243 S.E.2d at 757; *see, e.g.*, *Carl Rose & Sons Ready Mix Concrete, Inc. v. Thorpe Sales Corp.*, 30 N.C. App. 526, 227 S.E.2d 301 (1976).

33. FED. R. CIV. P. 4.

34. 295 N.C. at 84, 243 S.E.2d at 758 (quoting 4 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1063 (1969)).

35. The summons was directed to "Mr. T.T. Nelson, Registered Agent/Welparnel Construction Company, Inc./ [address]." *Id.* at 82, 243 S.E.2d at 756.

36. N.C.R. Civ. P. 4 requires that the summons and complaint be served together.

37. 295 N.C. at 85, 243 S.E.2d at 758; *see* 4 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1088 (1969).

38. If the court had found the summons defective plaintiff would have lost forever his opportunity to bring suit, because defendant then would not have been subjected to in personam jurisdiction before the running of the statute of limitations. *See* 295 N.C. at 82, 243 S.E.2d at 757.

*Poultry, Inc.*<sup>39</sup> held that a corporate defendant was properly served with process when copies of the summons and complaint were left at the home and with the wife of its registered agent. Under rule 4(j)(6)(b) process may be served upon a corporation "[b]y delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute."<sup>40</sup> Since a registered agent for a corporation may thus be served in the same manner as an individual, service of process may be made pursuant to rule 4(j)(1)(a),<sup>41</sup> which permits service by leaving copies of the summons and complaint at an individual's home with a person of suitable age and discretion. Although the result in *Great Dane Trailers* was clear under the statutes involved, it is noteworthy because it calls attention to the difference between rule 4(j)(6)(b) and its federal counterpart. Under federal rule 4(d)(7) service may be made on a corporation "in the manner prescribed by any statute of the United States."<sup>42</sup> The courts have interpreted this rule as referring only to those statutes providing for service on corporations;<sup>43</sup> because service on a registered agent is thus not available pursuant to rule 4(d)(1),<sup>44</sup> the federal rules would not support service of process in the manner approved in *Great Dane Trailers*. Parties bringing suit in North Carolina against corporate defendants thus can make use of an alternative means of serving process not available to those using the federal forum.

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39. 35 N.C. App. 752, 242 S.E.2d 533 (1978).

40. N.C.R. Civ. P. 4(j)(6)(b).

41. *Id.* 4(j)(1)(a).

42. FED. R. CIV. P. 4(d)(7). In the North Carolina rule the words "in any manner specified by any statute" refer to service on the agent of the corporation, as well as service on the corporation itself.

43. *See* *Tyson v. Publishers Co.*, 223 F. Supp. 114 (E.D. Pa. 1963); *Bard v. Bemidji Bottle Gas Co.*, 23 F.R.D. 299 (D. Minn. 1958); *In re Eizen Furs, Inc.*, 10 F.R.D. 137 (E.D. Pa. 1950).

44. FED. R. CIV. P. 4(d)(1). This subdivision provides for service upon an individual "by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion residing therein."

### C. Amendments<sup>45</sup>

In *Gro-Mar Public Relations, Inc. v. Billy Jack Enterprises, Inc.*,<sup>46</sup> the court of appeals found an abuse of discretion in the trial court's denial of plaintiff's motion to amend its complaint to show jurisdictional grounds. Defendant had moved to dismiss for lack of jurisdiction over the person;<sup>47</sup> after holding a hearing the court granted the motion and instructed defendant's attorney to submit an order to that effect. The following day plaintiff moved under rule 15(a)<sup>48</sup> to amend its complaint to allege that it and defendant were parties to a contract to be performed in North Carolina.<sup>49</sup> The trial court denied plaintiff's motion and signed the order submitted by defendant granting its motion to dismiss. From the denial of its motion, plaintiff appealed.<sup>50</sup>

The court of appeals held that under rule 15(a)<sup>51</sup> the trial court should have granted plaintiff's motion to amend its complaint. Support for this conclusion was found in *Vernon v. Crist*,<sup>52</sup> in which the North Carolina Supreme Court noted 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

45. In *Turner Halsey Co. v. Lawrence Knitting Mills, Inc.*, 38 N.C. App. 569, 248 S.E.2d 342 (1978), the court of appeals held that the trial court erred in granting plaintiff's motion for summary judgment on the same day it granted plaintiff's motion to amend its complaint. N.C.R. Civ. P. 15(a) provides that "a party shall plead in response to an amended pleading . . . , unless the court otherwise orders." The court of appeals interpreted the rule to require that defendants be given an opportunity to answer before the court hears plaintiff's motion for summary judgment. 38 N.C. App. at 572-73, 248 S.E.2d at 345. N.C.R. Civ. P. 56(c) provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." If in amending its complaint a party makes some material alteration to its previous contentions the trial court cannot know before the other party has answered whether this alteration has given rise to a genuine issue about any material fact. Thus it seems that a simultaneous grant of leave to amend a complaint and summary judgment will be improper if the amendment is one that could give rise to a genuine issue about any material fact.

46. 36 N.C. App. 673, 245 S.E.2d 782 (1978).

47. *Id.* at 675, 245 S.E.2d at 783. Defendant also based his motion to dismiss on alleged insufficiency of summons and service of process. The court of appeals, following the decision in *Wiles*, found both summons and service of process sufficient. *Id.* at 675-76, 245 S.E.2d at 784.

48. N.C.R. Civ. P. 15(a).

49. N.C. GEN. STAT. § 55-145(a)(1) (1975) provides that a foreign corporation is subject to suit in North Carolina on any cause of action arising "[o]ut of any contract made in this State or to be performed in this State," regardless of whether the corporation has ever transacted business in the state. Defendant in this case was a foreign corporation. 36 N.C. App. at 674, 245 S.E.2d at 783.

50. 36 N.C. App. at 675, 245 S.E.2d at 783.

51. Under N.C.R. Civ. P. 15(a), when amendment is not allowed as a matter of course, "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

52. 291 N.C. 646, 231 S.E.2d 591 (1977).

thereby.”<sup>53</sup> In addition the court relied on *Foman v. Davis*,<sup>54</sup> a United States Supreme Court decision that mandated granting leave to amend, subject to certain exceptions, and warned that a denial of leave to amend without justification would constitute an abuse of discretion.<sup>55</sup>

There are several problems with the court's analysis in *Gro-Mar*. In the first place, the North Carolina rules do not require that grounds for jurisdiction be set forth in the complaint.<sup>56</sup> If an amendment is superfluous, it is difficult to understand how denial of the amendment could constitute an abuse of discretion. Second, plaintiff had an opportunity to present arguments in favor of a finding of jurisdiction at the hearing on defendant's motion to dismiss. In considering how to rule on defendant's motion, the trial court must have weighed any grounds plaintiff had put forth in support of in personam jurisdiction. Thus the trial court's grant of defendant's motion indicated a finding that grounds for jurisdiction were lacking. Consequently, its denial of leave to amend to allege grounds for jurisdiction could hardly be considered an abuse of discretion.

The *Gro-Mar* court's endorsement of *Foman v. Davis* has far-reaching implications. Language in *Foman* indicates that a court abuses its discretion if it denies leave to amend without specifically setting forth its grounds for denial, unless the reasons for denial are otherwise apparent.<sup>57</sup> Thus, in *Gro-Mar* the court pointed out that “the trial court failed to state a reason [for denying leave to amend]” and added “nor do we perceive that there are any ‘apparent’ reasons for denial of leave to amend.”<sup>58</sup> Although it would seem that reasons for denial were clear in this case, the court's use of *Foman* indicates that in future cases a court's failure to specifically set forth its rationale in denying leave to amend may constitute an abuse of discretion.

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53. *Id.* at 654, 231 S.E.2d at 596. Defendant had made no such showing.

54. 371 U.S. 178 (1962). FED. R. CIV. P. 15(a) is almost identical to North Carolina's rule.

55. 371 U.S. at 182. In the language of the Court:

In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be “freely given.” Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

*Id.*

56. N.C.R. Civ. P. 8.

57. See note 55 *supra*.

58. 36 N.C. App. at 679, 245 S.E.2d at 785.

A denial of leave to amend a complaint to add a party defendant worked a harsh result upon the plaintiff in *Callicutt v. American Honda Motor Co.*<sup>59</sup> Plaintiff had brought suit against American Honda Motor Company to recover for injuries sustained as a result of alleged negligence and breach of warranty. In its answer defendant admitted manufacturing and selling the motorcycle involved but denied negligence and breach of warranty.<sup>60</sup> After the statute of limitations had run defendant sought leave to amend its answer, asserting that it had recently become aware that Honda Motor Company, Ltd. was the actual manufacturer of the motorcycle. The trial court granted defendant's motion. Shortly thereafter plaintiff moved to amend its complaint to add Honda Motor Company, Ltd. as a party defendant. The motion was denied, and plaintiff appealed.<sup>61</sup>

The court of appeals found no abuse of discretion in the trial court's denial of leave to amend. Noting that *Foman v. Davis* acknowledged futility of amendment as sufficient justification for denying leave to amend, the court considered whether the proposed amendment would relate back; if relation back were precluded, the statute of limitations would be a complete defense to a suit by plaintiff against Honda Motor Company, Ltd., thus rendering amendment futile. The court held that under rule 15(c)<sup>62</sup> relation back could not be had because the original complaint did not give notice to Honda Motor Company, Ltd.<sup>63</sup>

Although the court of appeals concluded that the record contained nothing indicating any relationship between the two motor companies,

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59. 37 N.C. App. 210, 245 S.E.2d 558 (1978).

60. *Id.* Partial summary judgment for defendant was subsequently granted on the breach of warranty claim. *Id.*

61. *Id.* at 210-11, 245 S.E.2d at 559.

62. N.C.R. Civ. P. 15(c):

A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

Although the language of this rule is arguably not applicable to amendments adding new parties, the court of appeals relied on *Teague v. Asheboro Motor Co.*, 14 N.C. App. 736, 189 S.E.2d 671 (1972), which interpreted 15(c) to require "that the claim asserted in the amendment must be against one given notice in the original pleading of the transactions to be proved." *Id.* at 739, 189 S.E.2d at 673; *cf.* FED. R. Civ. P. 15(c) (provides for relation back of amendment changing a party if claim asserted arose out of same conduct, transaction, or occurrence set forth in original pleading and if new party "(1) has received such notice [before the running of the statute of limitations] of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him").

63. 37 N.C. App. at 211-13, 245 S.E.2d at 560.

arguably judicial notice could have been taken of what would seem a possible parent/subsidiary or manufacturer/distributor arrangement.<sup>64</sup> Alternatively, the court could have held American Honda Motor Company, Inc. to be equitably estopped from denying that it manufactured the car, since information relating to manufacture was solely within its knowledge and its timing in releasing this information worked to deprive plaintiff of a substantial part of his cause of action.<sup>65</sup> The court's failure to look beyond a technical application of procedural rules led to this unnecessarily harsh result.

#### D. Local Rules

Rule 40 of the North Carolina Rules of Civil Procedure provides that the senior resident superior court judge of each judicial district "may provide by rule for the calendaring of actions for trial in the superior court."<sup>66</sup> Once a local rule is promulgated the question arises whether the court has discretion to deviate from its provisions. This issue was addressed, at least obliquely, by the North Carolina Court of Appeals in *Forman & Zuckerman v. Schupak*.<sup>67</sup> Plaintiff, after the non-appearance of defendants in an action for unpaid legal fees, filed a motion for judgment by default together with a request that the motion be calendared for hearing.<sup>68</sup> Defendants responded by letter to the calendaring clerk indicating that the request for hearing was one day late under local rules and therefore could not be considered.<sup>69</sup> Plaintiff then wrote the calendaring clerk, forwarding a copy to defendants, indicating that the hearing appeared on the final calendar on the date requested.<sup>70</sup> When the hearing was held as scheduled and defendants did not appear, the judge entered judgment by default against them.<sup>71</sup>

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64. If such a relationship were found to exist, it could provide not only a potential basis for liability of Honda Motor Company, Ltd., see Annot., 7 A.L.R.3d 1343 (1966), but could also be indicative of whether Honda Motor Company, Ltd. was put on notice through American Honda Motor Company.

65. Cf. *Zielinski v. Philadelphia Piers, Inc.*, 139 F. Supp. 408 (E.D. Pa. 1956) (defendant made inaccurate answer which it knew, or had within its control the means of knowing, was inaccurate; held: defendant estopped from taking advantage of statute of limitations when its conduct has thus misled plaintiff).

66. N.C.R. Civ. P. 40(a).

67. 38 N.C. App. 17, 247 S.E.2d 266 (1978).

68. *Id.* at 18, 247 S.E.2d at 268.

69. *Id.* The request was made 13 days prior to the requested hearing date. The local rule provided that "[r]equests for pretrial hearings on motions will be considered by the Calendar Committee if filed by 5:00 p.m. on Monday two (2) weeks prior to the beginning of the session requested." *Id.* at 21, 247 S.E.2d at 269.

70. *Id.* at 18, 247 S.E.2d at 268.

71. *Id.* at 18-19, 247 S.E.2d at 268.



On appeal defendants argued that the court erred by calendaring plaintiff's motion in violation of local rules.<sup>72</sup> In its opinion, the court of appeals interpreted the local rule not to *prohibit* the calendaring of a motion if the request is late, but merely to allow the calendar committee not to consider late requests if it so chooses.<sup>73</sup> The court also intimated, however, that even if the rule does prohibit calendaring of a hearing if the request is tardy, the trial court has wide discretion to decide whether to apply local rules in any given instance.<sup>74</sup> The court indicated that the two considerations in the trial judge's exercise of this discretion are actual harm to the complaining party and efficient court administration.<sup>75</sup> Thus, under the court's opinion a trial judge can choose to ignore a local rule if the complaining party is not harmed and if the efficient administration of the court is not impeded.<sup>76</sup>

This view of the force of local rules is not shared by the federal courts. Their view is that although a trial judge can interpret an ambiguous rule, he cannot refuse to apply an applicable rule simply because the complaining party was not harmed nor court efficiency impeded.

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72. *Id.* at 20, 247 S.E.2d at 269. Defendants also argued that failure to abide by the local rule denied them due process. *Id.* at 19, 247 S.E.2d at 268. The court of appeals rejected this argument because defendants had actual notice of the hearing. *Id.*

73. *Id.* at 21, 247 S.E.2d at 269. It is equally plausible to read the language of the rule as prohibiting the calendaring of a motion on late request. See note 69 *supra*. When the language of a local rule is ambiguous, as it was in this case, the promulgating court is usually the best source of interpretation. See 12 C. WRIGHT & A. MILLER, *supra* note 37, § 3153 (1973). The trial court in this case, however, did not have the opportunity to interpret the local rule involved because defendant was defaulted for failure to appear and hence was not present to argue its interpretation of the local rule. Thus, in absence of a trial court's interpretation of its own rule, the court of appeals should be a proper interpreter. Moreover, under North Carolina's rule 40 local calendaring rules are promulgated, not by a majority vote of the local judges as in federal courts, Fed. R. Crv. P. 83, but by the senior resident superior court judge acting alone. Thus, it can be argued that even if there is a trial court interpretation by a nonpromulgating judge, the appellate court is at least as proper an interpreter as that judge. For this reason it is arguable that the court of appeals need not give as much deference to an interpretation by a lower court as do the federal courts.

74. 38 N.C. App. at 21, 247 S.E.2d at 269.

75. *Id.* at 20-21, 247 S.E.2d at 269. The conclusion that judges have discretion to avoid local rules in the interest of efficient court administration is clearly implied in the court's attempt to distinguish the administrative law rule that requires government agencies to follow their self-promulgated procedures even though the procedures did not originally arise from any constitutional requirement. See *id.* The court reasoned that administrative rules, unlike local court rules, "generally take on certain aspects of both procedural and substantive law," while local rules of court are adopted solely to promote effective administration of justice. *Id.* at 20, 247 S.E.2d at 269. The court does stop short of saying that local rules are only concerned with court administration by finding that the defendants in this case were in no way harmed by the calendaring of the motion despite the late request. *Id.* at 21, 247 S.E.2d at 269. This inquiry into harm indicates that not only court efficiency but also the procedural and reliance interests of the parties are considerations in the trial court's exercise of discretion.

76. The court of appeals' interpretation that the language of the local rule did not prohibit the calendaring of late requests was sufficient to dispose of the case. Therefore, the court's further discussion of the trial court's discretion to apply local rules is dictum.

"Because local rules do have the force of law, they should be held to be binding upon parties and upon the court that promulgated them . . . ."<sup>77</sup> This principle has special application in North Carolina because a single judge should not have the power to refuse to apply a rule promulgated by his senior superior court judge pursuant to specific legislative authority. Thus, while the trial court and the appellate courts have authority to interpret the language of local rules, any suggestion in the court's opinion in *Schupak* that the trial court has discretion in its application of an unambiguous rule should be ignored.

### *E. Dismissal of Actions—Rule 41*

North Carolina Rule of Civil Procedure 41(a)(1) provides that a plaintiff can dismiss his own action at any time before resting his case without having the dismissal operate as an adjudication on the merits.<sup>78</sup> If plaintiff has already rested his case, a dismissal without prejudice can be obtained only by order of the judge pursuant to rule 41(a)(2).<sup>79</sup> Rule 41(a)(2), therefore, is often invoked to avoid adjudication on the merits

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77. 12 C. WRIGHT & A. MILLER, *supra* note 37, § 3153. See also *Woods Constr. Co. v. Atlas Chem. Indus., Inc.*, 337 F.2d 888 (10th Cir. 1964). But see *Frankel v. Alan Wood Steel Co.*, 31 F.R.D. 284 (E.D. Pa. 1962).

78. N.C.R. Civ. P. 41(a)(1). Rule 41(d), however, formerly required that a plaintiff, having taken a voluntary dismissal under 41(a)(1), pay defendant's costs in the action previously dismissed before bringing a second suit on the same claim. The court was required, upon motion of the defendant, to dismiss the second suit if brought before those costs were paid. N.C.R. Civ. P. 41(d), N.C. GEN. STAT. § 1A-1 (1969); see *Thigpen v. Piver*, 37 N.C. App. 382, 246 S.E.2d 67, *cert. denied*, 295 N.C. 653, 248 S.E.2d 257 (1978). Effective January 1, 1978, this rule has been changed. Law of May 2, 1977, ch. 290, 1977 N.C. Sess. Laws 296. No longer is the court immediately required to dismiss the nonpaying plaintiff's second suit, but

the court, upon motion of the defendant, shall make an order for the payment of such costs by the plaintiff within 30 days and shall stay the proceedings in the action until the plaintiff has complied with the order. If the plaintiff does not comply with the order, the court shall dismiss the action.

N.C.R. Civ. P. 41(d). This new provision is still quite different from the federal rule, which gives a federal court discretion to decide whether to require payment of costs. FED. R. CIV. P. 41(d). This discretion is necessary in federal court because, unlike the North Carolina rule 41(d), the federal rule provides no exception for plaintiffs who are financially unable. Because North Carolina has such an exception it is not necessary to give state judges the discretion enjoyed by their federal counterparts. The old North Carolina rule, however, was too harsh in requiring immediate dismissal of the second action for failure to pay the costs, because many times there may have been good reason beyond plaintiffs' control that forced taking a voluntary dismissal. See 9 C. WRIGHT & A. MILLER, *supra* note 37, § 2375 n.41. Thus, the North Carolina version of rule 41(d) now requires the payment of costs without being overly harsh to either the indigent plaintiff or the plaintiff who had good reason to take a voluntary dismissal. Furthermore, the nondiscretionary nature of North Carolina rule 41(d) provides a stronger discouragement to plaintiff's considering a 41(a)(1) voluntary dismissal than does the federal version. Such a disincentive is needed because in contrast to federal rule 41(a)(1), which permits a voluntary dismissal to be taken only up to service of an answer or motion for summary judgment, North Carolina rule 41(a) allows such a dismissal anytime before plaintiff rests his case.

79. N.C.R. Civ. P. 41(a)(2).

when the trial judge has intimated an intention to grant an adverse directed verdict or judgment notwithstanding the verdict.<sup>80</sup> A plaintiff who dismisses pursuant to rule 41(a)(1) or (2) is allowed an additional year in which to refile.<sup>81</sup> As illustrated in *West v. Reddick, Inc.*,<sup>82</sup> a rule 41(a)(2) motion can be made after a previous dismissal to convert that previous dismissal into one under rule 41(a)(2), thus allowing the additional time to refile. The *West* court, however, failed to recognize that to effect such a result the 41(a)(2) motion must be made within ten days of the previous dismissal.

Plaintiff in *West* commenced a personal injury action within the limitation period.<sup>83</sup> Defendant then moved for and received a dismissal of plaintiff's claim for lack of personal jurisdiction.<sup>84</sup> Such a dismissal is normally without prejudice,<sup>85</sup> but in this case, the statute of limitations had expired between the time plaintiff filed his complaint and the time of the dismissal for lack of personal jurisdiction.<sup>86</sup> Plaintiff could have preempted the impending dismissal for lack of personal jurisdiction by taking a voluntary dismissal under rule 41(a)(1), which would have given him an additional year in which to bring another suit.<sup>87</sup> After the dismissal for lack of jurisdiction, however, plaintiff could no longer take a voluntary dismissal under 41(a)(1).<sup>88</sup> Alternatively, had plaintiff asked the court *at the time* of the dismissal for a

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80. W. SHUFORD, NORTH CAROLINA CIVIL PRACTICE AND PROCEDURE § 41-5 (1975 & Supp. 1978).

81. N.C.R. Civ. P. 41(a). If the 41(a) dismissal is pursuant to a stipulation by all the parties or to an order of the court the stipulation or order can specify an amount of time shorter than one year in which to refile the claim.

82. 38 N.C. App. 370, 248 S.E.2d 112 (1978).

83. *See id.*

84. *Id.* at 370, 248 S.E.2d at 113.

85. N.C.R. Civ. P. 41(b) states: "Unless the court in its order for dismissal otherwise specifies, . . . any dismissal . . . , other than a dismissal for lack of jurisdiction . . . , operates as an adjudication upon the merits."

86. Although the opinion does not mention that the statute had run, from the dates given it appears that although the complaint was filed in time, the statute had expired before the dismissal for lack of jurisdiction. A three year limitation period is applicable for personal injury due to negligence. N.C. GEN. STAT. § 1-52(5) (Cum. Supp. 1977); *see Sheppard v. Barrus Constr. Co.*, 11 N.C. App. 358, 181 S.E.2d 130 (1971). The injury occurred July 25, 1974, the complaint was filed July 22, 1976, and the dismissal for lack of jurisdiction occurred September 12, 1977.

87. *See* N.C.R. Civ. P. 41(a)(1). The one year extension is available under rule 41(a)(1) even though the court is later found to have lacked personal jurisdiction. "If an action commenced within the time prescribed therefor . . . is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal . . . ." *Id.* (emphasis added). "A civil action is commenced by filing a complaint with the court." N.C.R. Civ. P. 3 (emphasis added). Thus, it is clear that it is the filing of a complaint and not the obtaining of personal jurisdiction through a valid summons that is the prerequisite to a 41(a)(1) dismissal and the additional year in which to refile provided thereunder.

88. *See* *Wood v. Wood*, 37 N.C. App. 570, 246 S.E.2d 549 (1978).

voluntary dismissal under 41(a)(2), the court could have granted his motion, allowing him an additional year in which to refile his claim.<sup>89</sup> Plaintiff did in fact move for a 41(a)(2) voluntary dismissal, but not until three days *after* being dismissed for lack of jurisdiction. Nonetheless, the trial judge granted the motion.<sup>90</sup>

On appeal, defendant argued that it is incongruous to allow a trial judge to dismiss a case a second time after he has already dismissed it once.<sup>91</sup> The court of appeals curtly dismissed this argument by saying, "Rule 41 places no time limit on the right of a plaintiff to move for a voluntary dismissal under 41(a)(2)."<sup>92</sup> Taking this reasoning to its extreme reveals its shortcomings: if there is no time limit on when a dismissed plaintiff may ask the court to grant a dismissal pursuant to rule 41(a)(2), which allows him an additional year to bring suit, the defendant in such a situation will *never* be secure from suit on the claim despite the running of the statute of limitations. Although it does not seem unreasonable for a plaintiff to ask the trial judge three days after being dismissed to convert his dismissal into one pursuant to rule 41(a)(2), thus avoiding any statute of limitations bar to another suit, there must be a time limit on such a request.

To set a limit on this practice, perhaps a motion by a plaintiff for a 41(a)(2) voluntary dismissal made after already having been dismissed for another reason should be viewed as a motion to convert the first dismissal into one pursuant to 41(a)(2).<sup>93</sup> Under this approach the year extension of time in which to bring a second suit would begin to run, not at the time of the 41(a)(2) motion, but at the time of the original dismissal. Therefore, a 41(a)(2) motion made more than one year after a previous dismissal would be of no avail in extending the time in which to bring a second suit.

There is, however, an even more restrictive time limit that should

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89. See N.C.R. Civ. P. 41(a)(2). Unlike a voluntary dismissal under 41(a)(1) the judge must take affirmative action to grant a 41(a)(2) dismissal. In view of this distinction it can be argued that while personal jurisdiction is not a prerequisite for a 41(a)(1) dismissal, *see* note 87 *supra*, it is for a 41(a)(2) dismissal. Rule 41(a)(2), however, like rule 41(a)(1) appears to condition the additional year in which to refile only on commencement of the first suit within the statute of limitations. Because filing of a complaint constitutes commencement of a suit, it would appear that failure to obtain personal jurisdiction would not preclude the judge's granting a 41(a)(2) dismissal.

90. 38 N.C. App. at 371, 248 S.E.2d at 113.

91. See also *Wood v. Wood*, 37 N.C. App. 570, 246 S.E.2d 549 (1978).

92. 38 N.C. App. at 372, 248 S.E.2d at 113.

93. See *Wood v. Wood*, 37 N.C. App. 570, 246 S.E.2d 549 (1978). "Obviously, a voluntary dismissal under Rule 41 will lie only prior to entry of final judgment. After final judgment, any correction, modification, amendment, or setting aside can only be done by the court." *Id.* at 575, 246 S.E.2d at 552.

be applicable to a motion for a 41(a)(2) voluntary dismissal made after a previous dismissal. Rule 59(e) provides that "[a] motion to alter or amend the judgment . . . shall be served not later than 10 days after entry of the judgment."<sup>94</sup> It is clear that rule 59(e) can be invoked to alter or amend not only a judgment on the merits but an order terminating an action prior to any trial, although not an adjudication on the merits.<sup>95</sup> Thus, a motion under rule 59(e) would have been appropriate in *West* when plaintiff sought to convert dismissal for lack of personal jurisdiction into a 41(a)(2) dismissal and thereby gain additional time to refile his claim.<sup>96</sup> Therefore, the court of appeals was correct in affirming the trial judge's allowance of plaintiff's 41(a)(2) dismissal, not because such motions can be made "at any time," but because it was made within the ten day limit of rule 59(e).<sup>97</sup>

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94. N.C.R. Civ. P. 59(e).

95. In *Graddy v. Bonsal*, 375 F.2d 764, 765 (2d Cir. 1967), plaintiff's motion to vacate an earlier dismissal for lack of federal jurisdiction was regarded as a motion "to alter or amend the judgment" under Fed. R. Civ. P. 59(e)." In *Silk v. Sandoval*, 435 F.2d 1266 (1st Cir. 1971), plaintiff's motion to vacate an earlier dismissal for nonjoinder, which like a dismissal for lack of jurisdiction is not an adjudication on the merits, was also subject to the 10 day limit under rule 59(e). See also 6A MOORE'S FEDERAL PRACTICE ¶ 59.12[1], at 59-247 (2d ed. 1974) ("Relief may be sought under Rule 59(e) on a *timely* motion to amend the judgment to alter the dismissal from one without prejudice to a dismissal with prejudice, and vice versa . . ."); W. SHUFORD, *supra* note 80, ¶ 59-18 ("This section will be applicable in situations where . . . relief is sought from an order terminating the action prior to trial."). But see *Myers v. Westland Oil Co.*, 96 F. Supp. 667 (D.N.D. 1949). In *Myers* plaintiff was dismissed for lack of jurisdiction. The court granted plaintiff's motion to add the words "without prejudice" to the dismissal although the motion was made six months after the dismissal. Professor Moore calls this result "clearly untenable" because the motion should not have been granted unless made within the 10 day limit of rule 59(e). 6A MOORE'S FEDERAL PRACTICE, *supra*, ¶ 59.12[1], at 59-244 n.17.

96. If plaintiff does not make the 10 day time limit he might attempt to argue that the motion to alter the dismissal is a motion for rule 60(b)(1) relief on the grounds of mistake or excusable neglect. Plaintiff can attempt to show an excuse for not asking for a 41(b)(2) at the time of the original motion or within 10 days thereafter. Alternatively, he can argue that the court made a mistake by not dismissing pursuant to 41(b)(2). Any attempt, however, to utilize 60(b) to avoid the 10 day time limit of rule 59(e) should be a last resort. See *Silk v. Sandoval*, 435 F.2d 1266 (1st Cir. 1971) (court refused to give broad interpretation to rule 60(b)(1) and permit avoidance of rule 59(e)'s 10 day time limit).

97. The court's reliance on *King v. Lee*, 279 N.C. 100, 181 S.E.2d 400 (1971), for the "no time limit" idea is inapposite. In *King* the supreme court remanded the case to the trial court to permit a motion for a voluntary dismissal. This holding, which dealt with a case on appeal that was remanded to the trial court, cannot support the idea that once an action leaves the trial court on a final ruling the losing party can, without appealing, ask the trial court for a 41(a)(2) voluntary dismissal at any time in the future.

Fifteen days after the trial judge in *West* granted plaintiff's 41(a)(2) voluntary dismissal the judge entered a supplemental order stating that the previously allowed motion to dismiss for lack of jurisdiction was a mistake, and therefore void, and that the order granting plaintiff's 41(a)(2) was what he actually intended. 38 N.C. App. at 371, 248 S.E.2d at 113. The court of appeals held that this supplemental order "is of no effect" because (1) when the supplemental order was entered defendant had already filed an appeal of the previous order allowing the 41(a)(2) dismissal and (2) the term of court had expired. *Id.* at 372, 248 S.E.2d at 114. The rule that a party cannot seek to amend a judgment after the expiration of the term of court is old law and has been supplanted by

### F. Appeal and Error<sup>98</sup>

In North Carolina there are two ways to take an appeal from an order determining less than all the claims for relief in an action. Such an appeal lies if the trial judge certifies the appeal by entering a final judgment on one or more but fewer than all of the claims pursuant to his authority under rule 54(b).<sup>99</sup> An appeal is also allowed under G.S. 1-277 or 7A-27 without the trial judge's certification<sup>100</sup> if the interlocutory order "affects a substantial right."<sup>101</sup> Justice Exum in *Waters v. Qualified Personnel, Inc.*<sup>102</sup> admitted that this "'substantial right' test for appealability of interlocutory orders is more easily stated than applied."<sup>103</sup> Yet an examination of that case in comparison with a previous supreme court case on the issue of appealability suggests a general proposition that in many circumstances should be helpful in analyzing the substantial right issue: the right to avoid one trial on the disputed issues is not normally a substantial right that would allow an interlocu-

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the 10 day period of rule 59(e). W. SHUFORD, *supra* note 80, § 59-18, at 502. If, however, an appeal is taken before a 59(e) motion is made to transform a previous dismissal into one pursuant to rule 41(a)(2), the trial court does not have jurisdiction to entertain the motion. See *Bowen v. Hodge Motor Co.*, 292 N.C. 633, 234 S.E.2d 748 (1977). Thus, if the party adversely affected by the original dismissal or judgment appeals that order before moving to amend it under rule 59(e), the trial court will not have jurisdiction to consider amending its order. If, on the other hand, the adversely affected party moves to amend under 59(e), the time period for giving notice of appeal does not begin to run until the trial court grants or denies the 59(e) motion. 6A MOORE'S FEDERAL PRACTICE ¶ 59.12[2], at 59-253 (2d ed. 1974).

98. In *Herff Jones Co. v. Allegood*, 35 N.C. App. 475, 241 S.E.2d 700 (1978), the court of appeals held that the question of the propriety of a preliminary injunction to enforce a one year agreement not to compete is rendered moot when during the pendency of the appeal of the order granting the injunction, the one year period had expired. Plaintiff corporation had obtained a preliminary injunction to restrain defendants, its former salesmen, from competing against plaintiff in violation of their employment contracts. Justice Exum issued a writ of supersedeas that had the effect of denying enforcement of the preliminary injunction pending appeal. *Id.* at 477, 241 S.E.2d at 701. By the time the appeal was heard the one year period had expired, thus making the issue moot.

Judge Clark in dissent suggested that the writ of supersedeas should have the effect not only of staying the enforcement of the preliminary injunction but of suspending the running of the noncompetition clause as well. "[O]therwise, the supersedeas in effect would determine the substantive rights of the parties . . . to injunctive relief . . ." *Id.* at 481, 241 S.E.2d at 704 (dissenting opinion).

99. N.C.R. Civ. P. 54(b). The trial judge "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." *Id.*

100. See *Oestreicher v. American Nat'l Stores, Inc.*, 290 N.C. 118, 225 S.E.2d 797 (1976).

101. N.C. GEN. STAT. § 1-277 (Cum. Supp. 1977); *id.* § 7A-27 (1969). In addition to orders "affect[ing] a substantial right" these statutes allow an appeal of an interlocutory order that "in effect determines the action and prevents a judgment from which an appeal might be taken," or "discontinues the action" or "grants or refuses a new trial."

102. 294 N.C. 200, 240 S.E.2d 338 (1978).

103. *Id.* at 208, 240 S.E.2d at 343.

tory appeal, while the right to avoid the possibility of two trials on the same issues can be such a substantial right.

In *Waters*, defendant's grant of summary judgment was later set aside by the trial judge because of procedural irregularity.<sup>104</sup> The supreme court ruled that "an order setting aside without prejudice a summary judgment on the grounds of procedural irregularity . . . is not immediately appealable."<sup>105</sup> This decision was based on "both reason and analogous [*sic*] cases."<sup>106</sup> The analogous cases were those holding that orders denying summary judgment and other similar interlocutory orders are not appealable.<sup>107</sup> Viewing "substantial rights" from the perspective of what the defendant loses if there is no immediate appeal the court reasoned that

[a]ll defendant suffers by its inability to appeal [the order setting aside summary judgment] is the necessity of rehearing its motion. The avoidance of such a rehearing is not a "substantial right" entitling defendant to an immediate appeal. Neither, for that matter, is the avoidance of trial which defendant might have to undergo should its motion . . . be denied.<sup>108</sup>

Thus, the court indicates that the opportunity to avoid an initial trial is not a substantial right so as to allow an immediate appeal.

The court also reasoned that defendant's rights are "fully and adequately protected" by assigning error on appeal.<sup>109</sup> As shown by *Oestreicher v. American National Stores, Inc.*,<sup>110</sup> the "fully and adequately protected" concept, however, is by no means a *test* for determining when there is no right to appeal. In *Oestreicher* the trial court granted summary judgment for defendant on two of plaintiff's three related claims for relief. Although plaintiff theoretically could have protected his rights to recover under the two eliminated claims by assigning error on appeal after the trial of the third claim, the supreme court held that there was an immediate right of appeal because plaintiff had a substantial right to have all three related claims tried at one time.<sup>111</sup> The dis-

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104. *Id.* at 206-07, 240 S.E.2d at 342-43.

105. *Id.* at 208, 240 S.E.2d at 343.

106. *Id.*

107. *Id.* at 208-09, 240 S.E.2d at 344.

108. *Id.* at 208, 240 S.E.2d at 344.

109. *Id.*

110. 290 N.C. 118, 225 S.E.2d 797 (1976).

111. Because virtually any order by a trial court can be assigned as error on appeal it can be argued that there are few situations other than a final judgment or injunction in which the party will not be fully and adequately protected despite an inability to appeal immediately. Thus if adequate protection is the test for a substantial right then the substantial right statutes add nothing to rule 54(b)—in other words, all interlocutory appeals must be certified. This is the federal posi-

inction between *Oestreicher* and *Waters* is that in *Oestreicher*, if an appeal was not immediately allowed, plaintiff would be faced with a trial of the one remaining claim and then, if successful in overturning the summary judgment against his other two related claims, a second trial would be necessary.<sup>112</sup> In *Waters*, on the other hand, denial of the right to appeal the setting aside of defendant's summary judgment necessitates only a rehearing of the summary judgment and at most one trial. Thus, a comparison of *Waters* with *Oestreicher* suggests that while the opportunity to avoid an initial trial is not a substantial right, the right to avoid the possibility of two trials is.<sup>113</sup>

tion and that of North Carolina before *Oestreicher*. See *Survey of Developments in North Carolina Law*, 1976, 55 N.C.L. REV. 895, 929 (1977).

112. See also *Hudspeth v. Bunzey*, 35 N.C. App. 231, 241 S.E.2d 119, cert. denied, 294 N.C. 736, 244 S.E.2d 154 (1978). The court held that the denial of a motion to amend the answer to assert a compulsory counterclaim affects a substantial right and is immediately appealable under N.C. GEN. STAT. § 1-277 (1969). *Id.* at 234, 241 S.E.2d at 121. The court noted that "failure to assert a compulsory counterclaim will ordinarily bar future action on the claim." *Id.* at 233, 241 S.E.2d at 121. Although it seems that future action should not be barred if the denial of the amendment is later found to be error, an immediate appeal should be allowed to avoid having to try the same issues twice. Thus the substantial right affected in this case is not the bar of a future action on the compulsory counterclaim but the possibility of two trials.

113. The significance of allowing an appeal in order to avoid a possible second trial is apparent in *Tennessee-Carolina Transp., Inc. v. Strick Corp.*, 291 N.C. 618, 231 S.E.2d 597 (1977), and recognized in *Survey of Developments in North Carolina Law*, 1977, 56 N.C.L. REV. 874, 908-09 (1978) ("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."). While the *Waters* court views substantial rights from the perspective of what a party will lose by the inability to appeal, the above view is from an economic perspective.

The one-trial/two-trial distinction should have been employed by the court of appeals in *Jones v. Clark*, 36 N.C. App. 327, 244 S.E.2d 183 (1978), to avoid a piecemeal appeal of a third-party claim. In *Jones* the defendant/seller in a breach of warranty action impleaded as third-party defendants the manufacturer and a firm that had inspected the goods. The trial court granted summary judgment for the inspection firm and the defendants/third-party plaintiffs appealed. The court of appeals, without fully resolving whether defendant had a right to an immediate appeal under the substantial rights statutes, decided the case on the merits. *Id.* at 329-30, 244 S.E.2d at 185. Allowing this uncertified piecemeal appeal was not only a waste of judicial efforts but wrong under the law. Defendant's substantial rights as defined in *Oestreicher* and *Waters* would not have been affected by the inability to immediately appeal the adverse summary judgment on his third-party complaint. If the trial on the underlying claim continues while the third-party claim is appealed, the defendant will unavoidably endure two trials if his appeal on the third-party complaint succeeds. Therefore, because defendant can protect his third-party claim by assigning error in the grant of summary judgment, and because an immediate appeal will not avert the possibility of a second trial, defendant has no substantial right that would allow an uncertified appeal.

The key to this analysis is that the trial on the underlying claim will continue during the appeal of the third-party claim. Section 1-294 states:

When an appeal is perfected as provided by this article it stays all further proceeding in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.

N.C. GEN. STAT. § 1-294 (1969) (emphasis added). Although it is not entirely clear whether the



In *Parrish v. Cole*<sup>114</sup> the court of appeals considered the question whether a notice of appeal bars a subsequent but timely motion under rule 52(b)<sup>115</sup> to amend findings of fact. Under the general rule, a timely notice of appeal terminates the jurisdiction of the trial court and places the case in the appellate court;<sup>116</sup> thus the trial court would be precluded from amending its findings of fact. The *Parrish* court rejected this result, however, and held that notice of appeal does not bar a 52(b) motion.<sup>117</sup> The court distinguished *Wiggins v. Bunch*,<sup>118</sup> in which the North Carolina Supreme Court found a 60(b) motion barred by a prior notice of appeal, by pointing out that a 60(b) motion may be made up to one year after entry of judgment and does not toll the time for filing notice of appeal, while a 52(b) motion must be made within ten days after entry of judgment and does toll the time for filing notice of ap-

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italicized portion of the statute will allow the court to try the underlying claim while the third-party claim is appealed, the few cases interpreting this provision indicate that the court below may proceed if the subject matter of the appeal is not the same as that in the underlying action. See *Safie Mfg. Co. v. Arnold*, 228 N.C. 375, 387, 45 S.E.2d 577, 585 (1947) (citing *Herring v. Pugh*, 126 N.C. 852, 36 S.E. 287 (1900)). Under rule 14, defendant/third-party plaintiff can only implead a third-party defendant "who is or may be liable to [the third-party plaintiff] for all or part of the plaintiff's claim against him." N.C.R. Civ. P. 14(a). To recover on a third-party claim the defendant/third-party plaintiff must show (1) he is liable on the plaintiff's claim and (2) the third-party defendant is in turn liable to defendant for indemnification or contribution because of their particular relationship. A determination of nonliability on a third-party claim before the underlying action is resolved necessarily means that the court has determined that the requisite relationship between defendant/third-party plaintiff and third-party defendant did not exist. Such a determination has nothing to do with the subject matter of the underlying claim but only with the relationship between the third-parties plaintiff and defendant. Thus, the underlying claim may proceed under § 1-294. Any holding to the contrary would invite the potential abuse of allowing defendant to delay a trial by simply making many unsubstantial third-party claims and appealing the summary judgments.

The situation involved in *Jones* is clearly distinguishable from *Oestreicher* in which an appeal from a summary judgment on two of plaintiff's three claims for relief was allowed. Because all three claims in *Oestreicher* involved the same subject matter (a breach of a lease agreement) the trial on the remaining claim was stayed under § 1-294 while the appeal was taken. Thus, unlike *Jones*, an appeal in *Oestreicher* could avert the possibility of two trials.

114. 38 N.C. App. 691, 248 S.E.2d 878 (1978).

115. N.C.R. Civ. P. 52(b) provides in part: "upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly."

116. See *American Floor Mach. Co. v. Dixon*, 260 N.C. 732, 133 S.E.2d 659 (1963). There are several exceptions to this rule: the trial court has jurisdiction to settle the case during pendency of appeal, and the trial court may adjudge whether the appeal has been abandoned. *Id.* at 735-36, 133 S.E.2d at 662; see *Bowen v. Hodge Motor Co.*, 292 N.C. 633, 234 S.E.2d 748 (1977).

117. 38 N.C. App. at 694, 248 S.E.2d at 879. In so holding the court relied on *Elgen Mfg. Corp. v. Ventfabrics, Inc.*, 314 F.2d 440 (7th Cir. 1963): "[A] quick filing of notice of appeal by one party [cannot] defeat the adverse party's right to have the district court consider the merits of a timely filed motion under Rule 52(b)." *Id.* at 444. FED. R. CIV. P. 52(b) is equivalent to North Carolina's rule.

118. 280 N.C. 106, 184 S.E.2d 879 (1971).

peal.<sup>119</sup> In reaching its decision the court noted that "the primary purpose of Rule 52(b) is to enable the appellate court to obtain a correct understanding of the factual issues determined by the trial court."<sup>120</sup> The use of rule 52(b) can also help avoid the need for remand by the appellate court for further findings of fact, which may in turn eliminate the possibility of multiple appeals. Because a 52(b) motion must be made within ten days after entry of judgment any disruption in the appellate process will be slight.<sup>121</sup> And as the court correctly pointed out, although an appeal will still be available should either party object to the findings, it is possible that these new or amended findings will satisfy the parties and thus remove the need for an appeal.<sup>122</sup>

### G. *New Trial—Excessive Damages—Rule 59*

If the jury returns a verdict awarding an amount of damages unacceptable to the trial judge, subsections (6) and (7) of rule 59(a) authorize a grant of a new trial<sup>123</sup> on the grounds of: "(6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice; [or] (7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law."<sup>124</sup> Although historically the decision of the trial judge whether to grant a new trial because of excessive or inadequate damages was not reviewable on appeal,<sup>125</sup> today federal as well as North Carolina courts recognize that such a new trial order is reviewable for abuse of discretion.<sup>126</sup> Until the 1978

119. 38 N.C. App. at 695, 248 S.E.2d at 880. As the court noted, "a Rule 60(b) motion has a greater potential for disrupting the appellate process because an appeal may have been substantially advanced at the time the motion is made." *Id.* Another basis for distinction is that in *Wiggins* the same party who made the 60(b) motion had filed the notice of appeal, while in *Parrish* plaintiff made the 52(b) motion after defendant had filed his notice of appeal. 280 N.C. at 107, 184 S.E.2d at 879; 38 N.C. App. at 692, 248 S.E.2d at 879.

120. 38 N.C. App. at 694, 248 S.E.2d at 879 (quoting C. WRIGHT, LAW OF FEDERAL COURTS § 96 (3d ed. 1976)).

121. *Id.* at 694, 248 S.E.2d at 880.

122. *Id.*

123. When the error relates solely to the amount of damages, the new trial is frequently limited to that issue; however, it may be necessary to order a new trial on both liability and damages when the two issues are closely interwoven. *Survey of Developments in North Carolina Law, 1977*, 56 N.C.L. REV. 843, 909 (1978).

124. N.C.R. Civ. P. 59(a)(6), (7).

125. 11 C. WRIGHT & A. MILLER, *supra* note 37, § 2820, at 127-28.

126. "While the Supreme Court has not explicitly ruled on the question, all eleven Circuits, are today committed to a doctrine that there should be some appellate supervision over the size of jury verdicts." 6A MOORE'S FEDERAL PRACTICE ¶ 59.08[6], at 59-182 (2d ed. 1974). For North Carolina's recognition, see 12 STRONG'S NORTH CAROLINA INDEX 3D *Trial* §§ 52, 52.1 (1978) and cases cited therein.

court of appeals decision *Howard v. Mercer*,<sup>127</sup> however, there had been no reported North Carolina decision in which an appellate court found such an abuse of discretion.<sup>128</sup> The *Howard* jury, in a personal injury action in which plaintiff had shown \$5,645 of special damages, returned a total verdict of \$20,000, which the trial judge set aside as "excessive and contrary to the weight of the evidence."<sup>129</sup> The court of appeals found that it was not unreasonable to award the 59-year-old handyman general damages of \$14,355 for pain, suffering and permanent partial disability in addition to the special damages of \$5,645. They therefore held "that the able trial judge abused his discretion in setting aside the verdict."<sup>130</sup>

The court recognized one trial court and two appellate court standards for determining whether a jury verdict is excessive. These standards were first articulated in *Taylor v. Washington Terminal Co.*,<sup>131</sup> from which the court quoted extensively. According to the *Taylor* analysis, adopted by the court of appeals, the trial judge should determine a "maximum limit of a reasonable range" and if the jury verdict is *obviously outside* that maximum he should grant a new trial or a remittitur.<sup>132</sup> The scope of appellate review of the trial level decision is limited in two respects, deference to the trial judge's opportunity to observe witnesses and evidence at trial and deference to the jury's finding of fact.<sup>133</sup> The standard used in appellate review depends on the force of these two factors. If the trial judge agrees with the jury's verdict and therefore denies a new trial both factors "press in the same direction," hence the "appellate court should be certain indeed that the award is *contrary to all reason*" before finding an abuse of discretion.<sup>134</sup> If, on the other hand, the trial court sets aside a jury verdict as excessive, the judge factor and the jury factor are at odds, hence the appellate court can find an abuse of discretion if the jury's verdict is *clearly within* the appellate court's maximum reasonable range.<sup>135</sup> Therefore the two fac-

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127. 36 N.C. App. 67, 243 S.E.2d 168, *cert. granted*, 295 N.C. 466, 246 S.E.2d 9 (1978) (No. 132 PC).

128. *See* Settee v. Charlotte Elec. Ry., 170 N.C. 365, 86 S.E. 1050 (1915), *quoted in* Setzer v. Dunlap, 23 N.C. App. 362, 208 S.E.2d 710 (1974); W. SHUFORD, *supra* note 80, § 59-9.

129. 36 N.C. App. at 67, 243 S.E.2d at 169.

130. *Id.* at 73, 243 S.E.2d at 172.

131. 409 F.2d 145 (D.C. Cir.), *cert. denied*, 396 U.S. 835 (1969).

132. 36 N.C. App. at 71, 243 S.E.2d at 171 (citing *Taylor v. Washington Terminal Co.*, 409 F.2d at 147-49).

133. *Id.* at 70, 243 S.E.2d at 170.

134. *Id.* (emphasis added).

135. *Id.* at 71, 243 S.E.2d at 171.

tors limiting appellate review necessitate two standards for that review, the choice between which depends upon whether the new trial was granted or denied.

*Howard's* significance is not the articulation of these "standards." Indeed, the language of the standards *does not show clearly* the difference between the "obviously outside a reasonable range" standard, the "contrary to all reason" standard and the "clearly within a reasonable range" standard. Rather, the significance of the opinion is that while North Carolina courts in the past have given lip service to the notion that the trial judge could abuse his discretion by denying or granting a new trial for an excessive verdict, they never before have indicated when or even if such a situation could arise.

The *Howard* decision has revealed that in some situations it is easier for the trial judge to abuse his discretion than in others. Thus, if the trial judge sets aside a jury verdict, allowing a new trial or remittitur, he will have abused his discretion if the verdict is clearly within what the appellate court perceives to be a reasonable range, but if he denies the new trial he can only be overturned if the verdict is contrary to all reason. The court makes it clear that there is a difference between these two standards and under the latter, the trial judge's determination is less apt to be reversed.<sup>136</sup> This case, therefore, will have the effect of making trial judges wary of setting aside jury verdicts even if they think they are excessive. It is ironic that this first affirmative exercise of the court of appeals's right to review the amount of jury awards could lead to more excessive awards. It is hoped, however, that the court of appeals, having taken the necessary first step, will also be willing to find

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136. This decision should not be read to imply that a trial judge should only under the most extraordinary circumstances be found to have abused his discretion if he *denies* a new trial. Indeed, many federal appellate courts have reversed trial court denials of a new trial when they thought the verdict was excessive. See 11 C. WRIGHT & A. MILLER, *supra* note 37, § 2820, at 128-29 nn. 84 & 85 (1973 & Supp. 1978). Some courts view a reversal of the trial court's denial of a new trial as tantamount to finding that the trial judge abused his discretion in not finding the jury abused their discretion. See, e.g., *Miller v. Maryland Cas. Co.*, 40 F.2d 463, 465 (2d Cir. 1930) (Learned Hand, J.). Under such a "discretion squared" argument it seems there could be no appellate reversal of a trial judge's denial to grant a new trial on grounds of an excessive verdict. The better view, however, is that such a reversal, although rare, can occur in the appropriate case. The "contrary to all reason" standard for reversal of a denial of a new trial, announced in the *Taylor* case, seems to give little help in discerning the instances when a denial of a new trial should be reversed. Perhaps the "contrary to all reason" standard can be likened to the "clearly within the reasonable range" standard except the reasonable range would be larger if the trial judge agreed with the jury (and hence denied a new trial) than if he disagreed (and hence ordered a new trial or a remittitur).

abuse of discretion in the denial of a new trial when it is convinced a verdict is excessive.

#### H. Relief from Judgments—Rule 60(b)

Rule 60(b) provides that "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding."<sup>137</sup> Among the reasons for allowing this relief are "excusable neglect" and "any other reason justifying relief from the operation of the judgment."<sup>138</sup> Three cases last year, *Standard Equipment Co. v. Albertson*,<sup>139</sup> *Sides v. Reid*,<sup>140</sup> and *Texas Western Financial Corp. v. Mann*,<sup>141</sup> indicate that the court of appeals is misapplying rule 60(b) by minimizing the trial judge's discretionary power to set aside judgments.

In all three cases a default judgment was initially entered against one of the parties but later set aside by the trial judge under rule 60(b). In *Standard Equipment* and *Texas Western*, the court of appeals reversed the trial judge's order to set aside because it did not agree that the conduct leading to default was excusable.<sup>142</sup> In *Sides*, the court of appeals reversed a trial judge's reopening a judgment under the "any other reason" provision of rule 60(b) because it did not think the reasons were sufficiently compelling.<sup>143</sup> These decisions can be criticized

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137. N.C.R. Civ. P. 60(b).

138. *Id.* There are four other reasons for relief set out in rule 60(b). In addition to finding one of the appropriate reasons, the trial court, in order to set aside a judgment, must also find that the movant has a meritorious claim or defense. *Sawyer v. Sawyer*, 1 N.C. App. 400, 161 S.E.2d 625 (1968); W. SHUFORD, *supra* note 80, § 60-2, at 504.

139. 35 N.C. App. 144, 240 S.E.2d 499 (1978).

140. 35 N.C. App. 235, 241 S.E.2d 110 (1978).

141. 36 N.C. App. 346, 243 S.E.2d 904 (1978).

142. 35 N.C. App. at 147, 240 S.E.2d at 501; 36 N.C. App. at 349, 243 S.E.2d at 907.

143. 35 N.C. at 238, 241 S.E.2d at 112. The court in the *Sides* case refused to consider the motion as one under rule 60(b)(1) for excusable neglect, but rather interpreted the motion as one under 60(b)(6) which allows relief from a judgment for "any other reason justifying relief from the operation of the judgment." *Id.* at 237, 241 S.E.2d at 112. This refusal was because "defendant did not assert *excusable neglect* as a grounds for relief nor did the trial court find the same as fact in its order setting aside the judgment." *Id.* at 237, 241 S.E.2d at 112. The movant, however, need not specify in his motion which 60(b) ground he is proceeding under, *Brady v. Town of Chapel Hill*, 277 N.C. 720, 178 S.E.2d 446 (1971), nor is the trial judge required to find the facts upon which he bases his order absent a request to do so, *Commercial Union Assurance Cos. v. Atwater Motor Co.*, 35 N.C. App. 397, 241 S.E.2d 334 (1978). Furthermore, defendant's motion to set aside asserted that he did not properly answer the complaint because "not being familiar with the legal requirements and not having the financial resources to employ counsel" he thought that a letter to the Clerk of Superior Court setting forth his defenses would be a sufficient answer. Record on Appeal at 21. This motion is easily interpretable as asserting an excuse for defendant's default. Thus, the court of appeals' conclusion that "defendant did not assert excusable neglect as a grounds for relief" appears unjustified.

because it is questionable whether a grant of a 60(b) motion is immediately appealable and because the determination of whether a set of facts constitutes "excusable neglect" should be within the sound discretion of the trial judge and reviewable only for abuse of discretion.

Under the federal rules a grant of a 60(b) motion to reopen a judgment is usually an interlocutory order and hence unappealable.<sup>144</sup> North Carolina, however, unlike the federal courts, allows an immediate appeal of a grant of a new trial.<sup>145</sup> Frequently it is necessary for the trial judge to hold a hearing to determine damages before entering the default judgment.<sup>146</sup> Vacating such a default judgment may be analogized to a grant of a new trial thus allowing an immediate appeal. If, on the other hand, a default judgment has been entered without a hearing, for example, when the damages are a sum certain and the opposing party has failed to appear,<sup>147</sup> reopening this judgment would not be analogous to an order of a new trial because there was no first "trial." Appealability might be found nevertheless under the North Carolina statutes that allow an immediate appeal from orders that affect a "substantial right."<sup>148</sup> The supreme court, however, has held that the setting aside of a summary judgment is not immediately appealable because the possibility of avoiding a trial if the summary judgment is reinstated is not a "substantial right."<sup>149</sup> It is difficult to see why the setting aside of a default judgment should be treated any differently.<sup>150</sup> Thus, although the court of appeals has been allowing 60(b) appeals

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144. 7 MOORE'S FEDERAL PRACTICE § 60.30[3], at 431 (2d ed. 1978).

145. N.C. GEN. STAT. § 1-277 (Cum. Supp. 1977); *id.* § 7A-27 (1969).

146. A hearing may be necessary "to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to take an investigation of any other matter." N.C.R. Civ. P. 55(b)(2).

147. The clerk can enter a default judgment "[w]hen the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain" and the defendant who is not an infant or incompetent has failed to appear. *Id.* 55(b)(1). The default judgments in *Texas Western* and *Sides* were granted pursuant to this rule. See 36 N.C. App. at 347, 243 S.E.2d at 905; 35 N.C. App. at 236, 241 S.E.2d at 111.

148. N.C. GEN. STAT. § 1-277 (Cum. Supp. 1977); *id.* § 7A-27 (1969).

149. See *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978), discussed in text accompanying notes 99-113.

150. When the "substantial rights" test is viewed from the perspective of what a party will suffer or lose if an appeal is not allowed, as did the court in *Waters*, it would seem that appealability of a setting aside of a default judgment is even less compelling than that for the setting aside of a summary judgment. To win on summary judgment the prevailing party makes an adversary presentation after discovery leading to the conclusion that there are no remaining issues of material fact. For a default judgment, on the other hand, all that is often required is an ex parte showing that the defendant has been properly served with process. Thus, it can be argued that a party who loses a default judgment loses only a windfall whereas a party who loses a summary judgment loses a ruling obtained at considerably more effort. Therefore, if losing a summary judgment does not affect a "substantial right," *a fortiori*, losing a default judgment does not.

without discussion, the reopening of a default judgment entered without a hearing should not be appealable as a grant of a new trial or as affecting a substantial right.

Not only has the court of appeals improvidently accepted these 60(b) appeals, it has not shown proper deference to the trial judge's discretion to reopen a judgment for excusable neglect. The court consistently holds in cases in which a default judgment has been set aside that the determination of whether a particular set of facts constitutes excusable neglect is a matter of law that is reviewable on appeal rather than a discretionary ruling reviewable only for abuse.<sup>151</sup> According to the court of appeals' interpretation of rule 60(b), it is only when the facts constitute an excuse as a matter of law, and there is a meritorious defense, that the trial judge may exercise his discretion and set aside a judgment.<sup>152</sup> Although the federal rule 60(b) is virtually identical to North Carolina's, the federal courts, unlike our court of appeals, respect the trial judge's discretion in the determination of excusable neglect. The federal practice is summarized by Professor Moore:

If the District Court has power to grant relief, then its determination to grant or deny relief normally involves a discretionary appraisal of the facts of the particular case and the relief, if any, to be granted: This matter, then, is largely within the judicial discretion of the trial court.

. . . .

Where timely relief is sought from a default judgment and the movant has a meritorious defense, doubt, if any, should be resolved in favor of the motion to set aside the judgment so that cases may be decided on their merits. . . . [although] litigants and their counsel may not properly be allowed to disregard process or procedural rules with impunity.<sup>153</sup>

Under the federal interpretation the threshold question in determining whether the trial judge has discretionary power to set aside a judgment is whether the motion *states any reason* for relief under 60(b).<sup>154</sup> Thus, if the movant offers no excuse for his neglect nor any other reason for reopening the judgment, the trial judge does not have

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151. The rule that excusable neglect is a question of law is traceable to *Ellison v. White*, 3 N.C. App. 235, 164 S.E.2d 511 (1968), *cert. denied*, 275 N.C. 137 (1969). *Ellison* in turn relies on 2 A. MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE § 1717 (2d ed. 1956), which, at *id.* § 1717(b) n.69, cites four supreme court cases from the early 1900's. These four cases rely on earlier supreme court precedent, the earliest being *Powell v. Weith*, 68 N.C. 342 (1872).

152. See 2 A. MCINTOSH, *supra* note 151, § 1717.

153. 7 MOORE'S FEDERAL PRACTICE ¶ 60.19, at 227-35 (2d ed. 1978).

154. *Id.* at 226. The motion also must have been made within the maximum time period allowed in the rule.

the power to exercise his discretion to set it aside. In all three cases above, however, the movants did offer colorable excuses for their defaults.<sup>155</sup> Therefore, under the federal interpretation, the trial judge would have had discretionary power, reviewable only for abuse, to set aside the judgments. A mere disagreement with the trial judge about the validity of the excuse should not be a sufficient reason to reverse a discretionary trial court ruling.<sup>156</sup>

The court of appeals' interpretation of rule 60(b) is inconsistent with that of federal courts. Although the North Carolina Supreme Court has specifically stated that it will look to federal decisions under rule 60(b) "for interpretation and enlightenment,"<sup>157</sup> the court of appeals judges have seemingly not consulted those interpretations of 60(b), assuming instead that rule 60(b) continued the prior North Carolina law on excusable neglect.<sup>158</sup> The supreme court, however, has never made such a determination.<sup>159</sup>

The supreme court cases ultimately relied on by the court of appeals for the proposition that excusable neglect is a matter of law reviewable on appeal date from the early part of this century. Because the North Carolina Court of Appeals interpretation of recently enacted rule 60(b) is vastly different from the federal interpretation of a virtually identical rule, the supreme court should consider whether the federal interpretation should be the law of North Carolina.

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155. It did not appear that the movants disregarded the process and procedure rules with impunity. In *Standard Equipment*, plaintiff's excuse for default was that he had no notice of trial because he did not receive the trial calendar after discharging his attorney of record. 35 N.C. App. at 145, 240 S.E.2d at 500. Defendant's excuse in *Texas Western* was that plaintiff's attorney had misrepresented to defendant that defendant would be allowed to inspect plaintiff's files (apparently before answering). 36 N.C. App. at 347, 243 S.E.2d at 905. Defendant's excuse in *Sides* was that he thought a letter to the Clerk of Superior Court sufficed as an answer. See note 143 *supra*.

156. It cannot be argued that the court of appeals is actually finding an abuse of discretion in reversing these 60(b) grants of relief in *Standard Equipment* and *Texas Western*. *Ellison v. White*, 3 N.C. App. 235, 164 S.E.2d 511 (1968), *cert. denied*, 275 N.C. 137 (1969), relied on by the court of appeals in both *Standard Equipment* and *Texas Western* (indirectly in *Standard Equipment*), specifically states that because the court of appeals did not think there was excusable neglect as a matter of law, they "do not reach the question as to whether there was an abuse of discretion by the trial judge." *Id.* at 242, 164 S.E.2d at 515-16.

157. *Wiggins v. Bunch*, 280 N.C. 106, 110, 184 S.E.2d 879, 881 (1971).

158. See *Doxol Gas, Inc. v. Barefoot*, 10 N.C. App. 703, 179 S.E.2d 890 (1971).

159. The supreme court did deny certiorari in *Kirby v. Asheville Contracting Co.*, 11 N.C. App. 128, 180 S.E.2d 407, *cert. denied*, 278 N.C. 701, 181 S.E.2d 602 (1971), which stated that the cases under former North Carolina excusable neglect law are still applicable under rule 60(b).

In *Brady v. Town of Chapel Hill*, 277 N.C. 720, 178 S.E.2d 446 (1971), the supreme court said that the *procedure* under rule 60(b) is *analogous* to that under prior law. *Id.* at 724, 178 S.E.2d at 448 (emphasis added). In the context of that case this statement should be taken to mean only that relief from an irregular judgment is obtainable through a motion to the trial court, not through appeal.



There are strong arguments for the federal interpretation of rule 60(b). First, the federal interpretation is fairer to the parties involved. Only the trial judge is aware of the many nuances that could lead to a decision to reopen a judgment because of excusable neglect. To allow a detached appellate court to reverse that determination deprives the losing party of a firsthand determination of his rights only to reinstate a windfall for his opponent. Second, the federal approach saves judicial time. There are an infinite number of factual settings that could give rise to excusable neglect. Allowing an appellate court to review each situation to determine the sufficiency of an excuse is a time consuming process yielding little precedential value because of the unique factual settings. Finally, a major consideration in determining whether an issue should be a matter of law fully reviewable on appeal or a discretionary determination reviewable only for abuse is the desirability of a fixed legal standard that can be relied on in the planning of future conduct. If a fixed legal standard for excuse exists, arguably the conduct of litigants will tend to be just on the excusable side of this legal limit, whereas if there were no precise legal formulation of excusable neglect, litigants would tend to be more cautious, not knowing whether a particular trial judge in his discretion would find their conduct excusable. Thus, a discretionary standard for excusable neglect is preferable to a fixed legal standard because the former will encourage litigants to be more cautious by not providing a sure escape from certain legally excusable, neglectful conduct.<sup>160</sup>

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160. Just as the court of appeals in *Standard Equipment* and *Texas Western* underemphasized the trial judge's discretion in the excusable neglect determination, the court in *Standard Equipment* and *Sides* did the same to the trial judge's determination of what is "any other reason justifying relief from the operation of the judgment." Furthermore, just as with excusable neglect, the federal interpretation of the "other reasons" clause is that if the trial judge has the power to grant relief then his determination is reversible only for abuse of discretion. 7 MOORE'S FEDERAL PRACTICE ¶ 60.27[1], at 351-52 (2d ed. 1978). It is true that even under the federal interpretation "absent exceptional and compelling circumstances, a party will not be granted relief from a judgment under the [any other reason] clause." *Id.* at 348. Once, however, the trial judge grants such relief it should not be permissible for an appellate court to reverse merely because it does not think that as a matter of law the situation was exceptional or compelling enough.

*Additional Developments.* In *Wachovia Mortgage Co. v. Autry-Barker-Spurrier Real Estate, Inc.*, 39 N.C. App. 1, 249 S.E.2d 727 (1978), the court of appeals held that the party opposing a motion for summary judgment cannot create an issue of fact simply by filing an affidavit contradicting his testimony taken via deposition. In this situation the only issue possibly raised by the affidavit is the affiant's credibility. *Id.* at 9, 249 S.E.2d at 732. The court of appeals followed the rationale of the federal court's decision in *Perma Research & Dev. Co. v. Singer, Co.*, 410 F.2d 572 (2d Cir. 1969), in which the court noted that "[i]f a party who has been examined at length on

## III. COMMERCIAL LAW

A. *The Uniform Commercial Code*

## 1. Negotiable Instruments

a. *Treatment of Branches as Separate Banks*

In *North Carolina National Bank v. Harwell*,<sup>1</sup> the North Carolina Court of Appeals faced for the first time the question of the applicability and effect of G.S. 25-4-106,<sup>2</sup> which deals with the status of branch and separate bank offices as separate banks for certain purposes under Articles 3 and 4 of the Uniform Commercial Code.<sup>3</sup> In *Harwell*, a check was drawn on the drawer's account with the Wilmington branch of North Carolina National Bank (NCNB) and was presented at that branch by defendant for deposit to his account in the High Point branch of NCNB.<sup>4</sup> The check was subsequently dishonored because of insufficient funds and the amount of the check was charged back against the provisional credit that had been entered on defendant's account.<sup>5</sup> Prior to the time he received the notice of dishonor, defendant drew a check on his account that caused the bank's subsequent charge-

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deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." *Id.* at 578. For the reasons stated by the *Perma* court, the adoption of this rule by the North Carolina court is sensible.

A trial court's entry of default judgment as a sanction for defendant's failure to attend a scheduled deposition was approved by the court of appeals in *Cutter v. Brooks*, 36 N.C. App. 265, 243 S.E.2d 423 (1978). N.C.R. Civ. P. 37(d) authorizes the imposition of certain sanctions upon any party who fails to "appear before the person who is to take his deposition, after being served with proper notice." (These sanctions, enumerated in 37(b)(2)(a)-(c), range from an order that certain facts be deemed established to an order for entry of default judgment.) In ruling on the propriety of the trial court's action, the court of appeals cited the comment to 37(d), which suggests that the flexibility of sanctions available "eliminates any need to retain the requirement that the failure to appear or respond be 'willful' . . . [I]n view of the possibility of light sanctions, even a negligent failure should come within Rule 37(d)." See 8 C. WRIGHT & A. MILLER, *supra* note 38, §§ 2281, 2284. The court of appeals indicated its concurrence in this interpretation of 37(d) by finding that the trial court did not abuse its discretion in entering a default judgment even though defendant's failure to appear was not willful. 36 N.C. App. at 267-68, 243 S.E.2d at 424; see 8 C. WRIGHT & A. MILLER, *supra*, § 2291. The decision in *Cutter* may foreshadow a movement toward increased use of sanctions as a means of streamlining the litigation process.

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1. 38 N.C. App. 190, 247 S.E.2d 720 (1978), *cert. denied*, 296 N.C. 410, 251 S.E.2d 468 (1979).

2. N.C. GEN. STAT. § 25-4-106 (Cum. Supp. 1977) provides: "A branch or separate office of a bank is a separate bank for the purpose of computing the time within which and determining the place at or to which action may be taken or notices or orders shall be given under this article and under article 3."

3. *Id.* §§ 25-3-101 to -4-407 (1965 & Cum. Supp. 1977).

4. 38 N.C. App. at 191, 247 S.E.2d at 721.

5. *Id.*

back to result in an overdraft.<sup>6</sup> After defendant refused the bank's request for reimbursement, NCNB brought an action to recover the overdraft.<sup>7</sup> Defendant appealed from the trial court's summary judgment for the bank.

On appeal, defendant argued that the bank's charge-back was improper because notice of dishonor was not sent within the midnight deadline from the time defendant presented the check for deposit,<sup>8</sup> as is required under the Code when the bank qualifies as both the "payor" and "depository" bank.<sup>9</sup> The bank argued, however, that the Wilmington and High Point branches qualify as separate payor and depository banks pursuant to G.S. 25-4-106<sup>10</sup> and that notice of dishonor was sent to the customer by the High Point branch well within the time period prescribed by the Code section governing the right to charge-back of a nonpayor bank.<sup>11</sup> The court of appeals held that the two branches,

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6. Defendant had written a \$3,300 check on his account with the High Point branch. The subsequent charge-back of the \$3,356.32 dishonored check resulted in an overdraft in defendant's account of \$3,282.98. *Id.*

7. *Id.*; see N.C. GEN. STAT. § 25-4-212(1) (1965).

8. The "midnight deadline" with respect to a bank "is midnight on its next banking day following the banking day on which it receives the relevant item or notice or from which the time for taking action commences to run, whichever is later." N.C. GEN. STAT. § 25-4-104(h) (1965). The check was presented for deposit at the Wilmington branch on a Friday, but since it was presented after the bank's "cutoff hour" it was treated for purposes of the notice requirements as being presented at the opening of the banking day on the following Monday. 38 N.C. App. at 191, 247 S.E.2d at 724; see N.C. GEN. STAT. § 25-4-107 (1965). The check was dishonored on Tuesday and notice of dishonor and the dishonored check itself were sent to the High Point branch. Notice of dishonor was not sent to defendant, however, until Wednesday. Thus, under one construction, notice was not sent to defendant until a day after the running of the midnight deadline. 38 N.C. App. at 191, 247 S.E.2d at 721.

9. A payor bank is a "bank by which an item is payable as drawn or accepted," while a depository bank is "the first bank to which an item is transferred for collection even though it is also the payor bank." N.C. GEN. STAT. § 25-4-105(a), (b) (1965). If a bank is both the depository and payor bank, its right to charge-back is governed by *id.* § 25-4-212(3), which provides that the charge-back must be "in accordance with the section governing return of an item received by a payor bank for credit on its books." The relevant section states that the bank, in order to revoke credit or recover any amount withdrawn, must return the check or send notice of dishonor before final payment is made and before its midnight deadline. *Id.* § 25-4-301(1), (2).

10. Quoted in note 2 *supra*.

11. N.C. GEN. STAT. § 25-4-212(1) (1965), governing the right to charge-back of the nonpayor, collecting bank, provides:

If a collecting bank has made a provisional settlement with its customer for an item and itself fails by reason of dishonor . . . to receive a settlement for the item which is . . . final, the bank may revoke the settlement given by it, charge-back the amount of any credit given for the item to its customer's account or obtain a refund from its customer . . . if by its midnight deadline or within a longer reasonable time after it learns the facts it returns the item or sends notification of the facts. These rights to revoke, charge-back and obtain refund terminate if and when a settlement for the item received by the bank is or becomes final . . . .

If the High Point branch is treated as the separate collecting bank, plaintiff correctly argued that the High Point branch preserved its right to charge-back by sending notice of dishonor on

whose ledgers were administered at separate operations centers,<sup>12</sup> should be treated as separate banks and that the High Point branch had preserved its right to charge-back when it sent notice of dishonor within the midnight deadline after it learned of the dishonor from the Wilmington branch.<sup>13</sup> The decision is apparently the first in the country in which section 4-106 of the Uniform Commercial Code has been utilized to reach a result favorable to a bank in a case involving the timeliness of notice of dishonor.<sup>14</sup>

In support of its application of G.S. 25-4-106 the court of appeals pointed to several factors. First, the court thought that the 1967

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Wednesday. A provisional credit was entered in defendant's High Point account, and the High Point branch failed to receive a final settlement of the item by reason of dishonor. 38 N.C. App. at 191, 247 S.E.2d at 721. No final payment of the item occurred under the separate bank construction of the transaction since the Wilmington branch sent notice of dishonor to the collecting High Point branch within the midnight deadline from the time it received the item. See N.C. GEN. STAT. § 25-4-213 (1) (1965). Finally, the High Point branch sent notice of dishonor to defendant on the same day it learned of the dishonor from the Wilmington branch, well within its midnight deadline. 38 N.C. App. at 191, 247 S.E.2d at 721.

12. The drawer's account with the Wilmington branch was administered through NNCB's Eastern Operations Center in Raleigh. Defendant depositor's account with the High Point branch was administered through NNCB's Western Operations Center in Charlotte. 38 N.C. App. at 194, 247 S.E.2d at 723.

13. *Id.* at 195, 247 S.E.2d at 723. The court also noted that the High Point branch received no final settlement on the item that would terminate its right to charge-back since the Wilmington branch acted within its midnight deadline. *Id.* at 198, 247 S.E.2d at 725. It is unclear from the court's opinion when the Wilmington branch's midnight deadline began to run. Presumably it would begin to run from the day the check was presented for payment at the Wilmington branch. Defendant presented the check in Wilmington for deposit to his High Point account and a provisional credit was wired to defendant's High Point ledger from the Eastern Operations Center. The court treated the High Point branch as the collecting bank and transferor of the check for payment, although it did not have physical possession of the check until after it was dishonored and sent to High Point from the Eastern Operations Center. *Id.* at 196, 247 S.E.2d at 724. The court apparently construed presentment for payment by the High Point branch as occurring on Monday when the provisional credit was wired from Wilmington. Under this construction, the legal date of presentment for deposit by defendant payee and presentment for payment by the collecting bank both occurred on Monday. See N.C. GEN. STAT. § 25-4-107; note 8 *supra*. Thus, it is not clear if the running of the midnight deadline for the payor bank's right to send notice of dishonor began when it came into physical possession of the check or when the legal presentment for payment was made. In a more typical collecting transaction this problem would not occur because the payor bank does not come into physical possession of the check until presentment for payment is made; yet it could be important in a case such as *Harwell* if physical possession and presentment for payment were to occur on different days. The better rule would seem to be that the deadline should begin to run when the payor bank comes into physical possession of the instrument even if it precedes legal presentment for payment by the collecting branch, because this is the event that begins the collection process.

14. The few other reported decisions that could have applied the section in such cases either refused to apply it or found it unnecessary for the decision. See *Manufacturers Hanover Trust Co. v. Akpan*, 91 Misc. 2d 622, 398 N.Y.S.2d 477 (Civ. Ct. N.Y. 1977) (refusing to apply § 4-106 to preserve branch bank's right to charge-back when notice of dishonor was sent to branch by central office two days after midnight deadline); *Kirby v. First & Merchant's Nat'l Bank*, 210 Va. 88, 168 S.E.2d 273 (1969) (decided on ground that check that bank attempted to dishonor and charge-back had been finally paid over the counter for cash).

amendment to G.S. 25-4-106<sup>15</sup> deleting the provision requiring maintenance of separate ledgers for qualification as a separate bank was indicative of legislative intent to encourage a more liberal application of the section.<sup>16</sup> In addition the court noted that the two branches, operating through separate operation centers, functioned as two separate banks in the collection process and therefore presented a situation for which G.S. 25-4-106 was drafted.<sup>17</sup>

The decision seems sound; it provides consistent support for the legislature's encouragement of statewide branch banking<sup>18</sup> without greatly sacrificing the interests of the customer.<sup>19</sup> The question of how far courts will be willing to extend the application of *Harwell* and G.S. 25-4-106 remains.<sup>20</sup> The *Harwell* holding is limited to its facts and leaves open the question of the applicability of G.S. 25-4-106 to situations involving two branches operating through the same operations center.<sup>21</sup> Careful examination of the court's reasoning suggests, however, that although the section probably will not be applied in timeli-

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15. Law of May 23, 1967, ch. 562, § 1, 1967 N.C. Sess. Laws 603. The former version of § 25-4-106 stated:

A branch or separate office of a bank *maintaining its own deposit ledgers* is a separate bank for the purpose of computing the time within which and determining the place at or to which action may be taken or notices or orders shall be given under this article and under article 3.

Law of May 26, 1965, ch. 700, § 1, 1965 N.C. Sess. Laws 768 (emphasis added). The 1967 amendment deleted the italicized phrase, an optional provision in the official version of the Uniform Commercial Code. See U.C.C. § 4-106. For the current version of § 25-4-106, see note 2 *supra*.

16. 38 N.C. App. at 194, 247 S.E.2d at 723.

17. *Id.* at 194-95, 247 S.E.2d at 723.

18. See N.C. GEN. STAT. § 53-62 (1975 & Cum. Supp. 1977). The record suggests that the bank needed the extra time in sending notice of dishonor provided by separate bank status because it operated through two separate operations centers. A requirement of processing checks as quickly as if it had only one processing center would create hardships for the bank and discourage the growth of statewide branch banking. See 38 N.C. App. at 194, 247 S.E.2d at 723.

19. Although defendant received notice one day later than would be required if the whole NNCNB branch system were treated as one bank for purposes of notice, use of the extra time was reasonable. Two branches, operating through separate administration centers, required longer to process the check. The dishonor notice had to be sent from the payor Wilmington branch to the collecting High Point branch, and then to the customer. If defendant had wanted quicker verification of the sufficiency of funds in the drawer's account he could have presented the check for payment at the Wilmington branch. Instead, defendant chose to deposit the check in his High Point account by presentment in Wilmington. The customer benefited from the convenience of the statewide branch banking system and should not be heard to complain when he must wait an extra day for verification of the validity of the check.

20. The court made clear that application of § 25-4-106 is not mandatory. 38 N.C. App. at 193, 247 S.E.2d at 722.

21. "Since each branch operates through a different operations center, it is not necessary to determine whether two branches operating through the same operations center should be entitled to separate bank status." 38 N.C. App. at 195, 247 S.E.2d at 723. The court, however, placed strong emphasis on the functionally separate nature of the two branches as justification for the longer time period for sending notice of dishonor. *Id.* at 194, 247 S.E.2d at 723. This logic would

ness of notice cases involving branches administered through the same operations center, the court may apply G.S. 25-4-106 for other purposes regardless of the presence of a common center.<sup>22</sup>

*b. Proof of Loss Sustained from Wrongful Payment of a Check*

Pursuant to G.S. 25-4-403(1) the drawer of a check has the right to prevent payment of the check by sending a timely stop payment order to the drawee bank.<sup>23</sup> If the check is paid in violation of a binding order, the drawer may proceed against the bank, but has the burden under G.S. 25-4-403(3) of establishing "the fact and amount of loss resulting from the payment."<sup>24</sup> In *Mitchell v. Republic Bank & Trust Co.*,<sup>25</sup> the North Carolina Court of Appeals for the first time faced the issue of what constitutes such proof of loss.

Defendant bank paid a check contrary to its customer's valid stop payment order and deducted the amount of the check from the drawer's account.<sup>26</sup> The drawer's appointed receiver brought an action seeking damages in the face amount of the check plus interest.<sup>27</sup> Admitting payment of the check contrary to the stop payment order, the bank, as subrogee to the rights of the payee<sup>28</sup> pursuant to G.S. 25-4-407,<sup>29</sup> denied that plaintiff had suffered any loss by payment. The trial court then granted plaintiff's motion for summary judgment before defendant had received answers to its interrogatories concerning the facts underlying the transaction between the drawer and payee of the

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not support application of § 25-4-106 in dishonor notice timeliness cases involving common operations centers.

22. For text of statute, see note 2 *supra*. Perhaps a stop payment order delivered to one branch should not function as notice to other branches of the same bank that are administered through the same operations center to prevent the bank from making payment on the check without incurring liability for wrongful payment over a valid stop payment order. See generally N.C. GEN. STAT. § 25-4-106, Official Comment (1965).

23. N.C. GEN. STAT. § 25-4-403(1) (1965).

24. *Id.* § 25-4-403(3).

25. 35 N.C. App. 101, 239 S.E.2d 867 (1978).

26. *Id.* at 102, 239 S.E.2d at 868.

27. *Id.* at 103, 239 S.E.2d at 869.

28. *Id.* at 102, 239 S.E.2d at 868.

29. N.C. GEN. STAT. § 25-4-407 (1965) provides for this subrogation right as follows:

If a payor bank has paid an item over the stop payment order of the drawer . . . , to prevent unjust enrichment and only to the extent necessary to prevent loss to the bank by reason of its payment of the item, the payor bank shall be subrogated to the rights

(a) of any holder in due course on the item against the drawer or maker; and

(b) of the payee or any other holder of the item against the drawer or maker either on the item or under the transaction out of which the item arose . . . .

check.<sup>30</sup> On appeal the bank argued that the summary judgment was erroneous because a genuine issue of material fact—the “fact and amount of loss”—remained. In support of its position the bank noted that the answers to the interrogatories would possibly reveal that the payee had a claim against plaintiff up to the face amount of the check on either the underlying transaction<sup>31</sup> or the drawer’s engagement.<sup>32</sup> Therefore, the bank concluded, plaintiff, by alleging no more than the payment of the face amount of the check, had failed to establish his right to recover.<sup>33</sup>

The court of appeals agreed with the bank’s conclusion and vacated the trial court’s grant of summary judgment. The court held that if a bank pleads non-loss by the customer, the customer “must show some loss other than the mere debiting of his bank account in the amount of the check” in order to recover for payment contrary to a valid stop payment order.<sup>34</sup> The court reasoned that because the bank was subrogated to the rights of the payee pursuant to G.S. 25-4-407(b), through which it may have reduced the amount of its liability, it would be improper to define the term “loss” in G.S. 25-4-403(3) to mean the face amount of the check.<sup>35</sup> The court stated further that a drawer-customer can establish a *prima facie* case under G.S. 4-403 by showing that the bank paid a check in violation of a valid stop payment order. “Then the bank, exercising its subrogation rights created by G.S. 25-4-

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30. 35 N.C. App. at 102, 239 S.E.2d at 868.

31. The Code provides that the taking of a check for payment suspends the underlying obligation until presentment and that if the check is dishonored, action may be maintained on either the instrument or the underlying obligation. N.C. GEN. STAT. § 25-3-802(1)(b) (Cum. Supp. 1977).

32. “The drawer engages that upon dishonor of the draft and any necessary notice of dishonor or protest he will pay the amount of the draft to the holder or to any indorser who takes it up.” *Id.* § 25-3-413(2) (1965).

33. See Appellant’s Brief at 4-6.

34. 35 N.C. App. at 103, 239 S.E.2d at 869.

35. *Id.* Even though the defendant may have a good defense to plaintiff’s claim under § 25-4-403 for the face amount, payment of the check may still result in damages for which plaintiff may recover under the Code. For example, payment of a check over a valid stop payment order may create a deficiency in the drawer’s account causing subsequently drawn checks to be dishonored for insufficient funds and may give rise to an action under N.C. GEN. STAT. § 25-4-402 (1965), which provides: “A payor bank is liable to its customer for damages proximately caused by wrongful dishonor of an item.” The dishonor of the subsequently drawn checks is wrongful if the condition of insufficient funds in the customer’s account was created by improper conduct on the part of the bank. The customer’s statutory right to stop payment of a check is not grounded in the customer’s assertion of a valid claim against the payee and, as such, payment in violation of a valid stop payment order is considered improper payment regardless of the merits of the underlying transaction. See *id.* § 25-4-403, Official Comment No. 8. See also *Sunshine v. Bankers Trust Co.*, 34 N.Y.2d 404, 413 n.5, 314 N.E.2d 800, 865 n.5, 358 N.Y.S.2d 113, 121 n.5, *modified*, 34 N.Y.2d 994, 318 N.E.2d 608, 360 N.Y.S.2d 419 (1974).

407, has the burden of coming forward and presenting evidence of an absence of actual loss sustained by the customer. When the bank meets the burden of coming forward, the customer must sustain the ultimate burden of proof.”<sup>36</sup>

The holding in *Mitchell* gives meaning to the proof of loss requirement in G.S. 25-4-403(3). A proceeding under G.S. 25-4-403(1) requires a showing that the bank paid a check contrary to the customer's order, an event that necessarily involves debiting the amount of the check to the customer's account. Surely, therefore, the proof of loss language contained in subsection (3) was intended to require that the customer show more than the mere debiting to his account of the face amount of the check before the customer is allowed to recover for violation of his stop payment order.

It is still unclear, however, what should be considered sufficient proof of “actual loss” by the customer. Presumably a defendant bank may assert, as was done in *Mitchell*, that the payee has a valid claim to which defendant is subrogated for all or part of the face amount of the check and the customer will be required to show actual loss by establishing that he has a valid defense to payment. A customer might, however, be required to show that he has exhausted his remedy of recovering payment from the payee.<sup>37</sup> Thus, a customer could be required to litigate against the payee,<sup>38</sup> reduce the claim to judgment, and demonstrate that the payee is “judgment proof” before the customer would be held to have established “actual loss” due to payment of the check in violation of the stop payment order. While not discussed by the court, this additional litigation requirement should not be placed on the customer since it would appear to conflict with the overall policy expressed in G.S. 25-4-403 that the customer's right to stop payment “is a service to which he is entitled without regard to any inconvenience or occasional loss to the bank, and such right need not be predicated on proof of sound legal grounds” arising out of the underlying transaction.<sup>39</sup>

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36. 35 N.C. App. at 104, 239 S.E.2d at 869 (citing *Thomas v. Marine Midland Tinkers Nat'l Bank*, 86 Misc. 2d 284, 381 N.Y.S.2d 797 (Civ. Ct. N.Y. 1976)).

37. This requirement might be pressed by a defendant bank on the ground that absent such a showing the customer has failed to demonstrate that his economic position has actually been damaged by the payment.

38. The customer could bring suit against the payee under a theory of unjust enrichment.

39. *Thomas v. Marine Midland Tinkers Nat'l Bank*, 86 Misc. 2d 284, 287, 381 N.Y.S.2d 797, 800 (1976) (citations omitted).



## 2. Letters of Credit

The North Carolina Supreme Court had an opportunity in *O'Grady v. First Union National Bank*<sup>40</sup> to discuss the issue of the rights of a customer to prevent the issuing bank from honoring a letter of credit when presented with a draft by a credit beneficiary. Plaintiff O'Grady, as guarantor of a note executed by a group of land developers to obtain a loan from First Union bank, caused a letter of credit to be issued by the Bank of North Carolina in favor of defendant First Union.<sup>41</sup> The letter of credit conditioned the honor of drafts upon the presentation of a "[c]ertified and true photostatic copy of each instrument causing this establishment of credit to Thomas O'Grady to be called upon."<sup>42</sup> First Union presented a draft for honor under the letter of credit and, in accordance with the stated condition, attached a note upon which the land developers had defaulted as evidence of O'Grady's guarantor liability.<sup>43</sup> In an action involving numerous other parties and claims, O'Grady brought suit to enjoin the issuing Bank of North Carolina from honoring the draft and to cancel the letter of credit.<sup>44</sup> O'Grady asserted that the attached note did not conform with the note that he had agreed to guarantee in that the note presented did not contain the signature of one of the principals O'Grady claimed had been present on the earlier draft of the instrument, and whose signature was a condition of the credit.<sup>45</sup> Therefore, O'Grady argued, he should be allowed to prevent honor of the draft.<sup>46</sup> Although the court of appeals affirmed the trial court's dismissal of plaintiff's suit, the supreme court reversed and remanded the case for further factual determination.<sup>47</sup>

In reaching its decision the court assumed that the note presented as documentation of O'Grady's liability was, as O'Grady contended, materially different from the note that O'Grady had intended to guarantee.<sup>48</sup> The court acknowledged that under the provisions of article 5 of the Uniform Commercial Code, the issuer generally has a duty to

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40. 296 N.C. 212, 250 S.E.2d 587 (1978).

41. *Id.* at 216, 250 S.E.2d at 591.

42. *Id.* at 229, 250 S.E.2d at 598-99.

43. *Id.* at 234, 250 S.E.2d at 602.

44. *Id.* at 215, 250 S.E.2d at 590-91.

45. *Id.* at 230, 250 S.E.2d at 593.

46. N.C. GEN. STAT. § 25-5-114(2)(b) (1965) expressly recognizes the power of a court of appropriate jurisdiction to enjoin the honor of a draft when one of the § 25-5-114(2) exceptions is shown. For a list of exceptions, see note 50 *infra*.

47. 296 N.C. at 217, 236, 250 S.E.2d at 592, 602.

48. 296 N.C. at 230, 250 S.E.2d at 599. Because the trial court failed to enter a finding of

honor drafts upon presentation by the beneficiary regardless of disputes that may exist between the beneficiary of the letter of credit and the issuing bank's customer, so long as conditions of credit are fulfilled.<sup>49</sup> G.S. 25-5-114(2), however, provides certain limited exceptions to the general rule regarding the stringent duty of honor,<sup>50</sup> and the supreme court sought to determine whether O'Grady's contentions, if proved, would allow him relief under that statute.

Citing extensive authority from other jurisdictions, the court held that "knowing and intentional attachment of a guaranty letter of credit, as collateral security, to a negotiable instrument which that letter was not intended to secure, and the eventual presentation of these documents to the issuing bank for purposes of honor of the letter of credit" constitutes presentation of "fraudulent documents" as contemplated by G.S. 25-5-114(2) and, given adequate proof of the contention, would allow the plaintiff to enjoin honor of the draft.<sup>51</sup>

The decision seems to comport with the interpretation of the majority of jurisdictions.<sup>52</sup> Moreover, the court's opinion represents a cautious and proper balance of interests of the customer and beneficiary in the letter of credit scheme. The court's extensive discussion of the issuer's generally stringent duty to honor the letter of credit in spite of alleged infirmities in the underlying transaction reflects an important purpose of letters of credit, which is to eliminate the risk that the customer will refuse or halt payment because of alleged deficiencies in the beneficiary's performance.<sup>53</sup> On the other hand, the court, by recognizing the possibility of an injunction when the documents presented differ materially from the ones in the underlying transaction, properly acknowledged that the policy favoring stringent duty of honor will not be carried so far that it will promote fraud upon the customer.

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facts on the issue the court was forced to assume O'Grady's factual contention in order to address the legal question.

49. N.C. GEN. STAT. § 25-5-114(1) (1965) provides: "An issuer must honor a draft or demand for payment which complies with the terms of the relevant credit regardless of whether the goods or documents conform to the underlying contract for sale or other contract between the customer and the beneficiary . . . ." See also *Courtaulds N. America, Inc. v. North Carolina Nat'l Bank*, 387 F. Supp. 92 (M.D.N.C.), *rev'd on other grounds*, 528 F.2d 802 (4th Cir. 1975).

50. "These exceptions are: (1) the failure of certain documents to conform to certain specified warranties, (2) the presentation of forged or 'fraudulent' documents, and (3) 'fraud in the transaction.'" 296 N.C. at 232, 250 S.E.2d at 600 (construing N.C. GEN. STAT. § 25-5-114 (1965)).

51. *Id.* at 234-35, 250 S.E.2d at 601-02 (citing, e.g., *Dynamics Corp. of America v. Citizens & S. Nat'l Bank*, 356 F. Supp. 991 (N.D. Ga. 1973); *Marine Midland Grace Trust Co. v. Banco Del Pais, S.A.*, 261 F. Supp. 884 (S.D.N.Y. 1966)).

52. See, e.g., cases cited note 51 *supra*.

53. See J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* § 18-4, at 616 (1972).

## 3. Secured Transactions

*a. Commercial Reasonableness in the Disposition of Collateral*

A secured party, upon default, may dispose of collateral by public or private sale, but G.S. 25-9-504 provides that "every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable."<sup>54</sup> When suing for a deficiency,<sup>55</sup> a creditor has the burden of proving the sale was conducted in a commercially reasonable manner.<sup>56</sup> If the creditor disposes of collateral at a public sale, the North Carolina version of the Uniform Commercial Code allows a creditor to prove compliance with the commercial reasonableness requirement by demonstrating that the sale was conducted in "substantial compliance" with the procedures contained in part 6 of article 9.<sup>57</sup> G.S. 25-9-601 provides that proof of "substantial compliance" with the public sale procedures in part 6 raises a conclusive presumption that the sale was commercially reasonable.<sup>58</sup> Failure to substantially comply with the procedures in part 6 in conducting a public sale of collateral does not preclude a finding that the sale was commercially reasonable,<sup>59</sup> but does deprive the secured party of the conclusive presumption and raises a question of fact whether the public sale was otherwise conducted in a commercially reasonable manner.<sup>60</sup> If the disposition of collateral is made in a private proceeding the sale must also be commercially reasonable, but the North Carolina version of the Code does not provide the creditor who disposes of his collateral by private sale a means of obtaining a conclusive presumption of commercial reasonableness.

Failure to demonstrate that a public or private sale of collateral was conducted in a commercially reasonable fashion, however, does not necessarily prevent a secured party from obtaining a deficiency

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54. N.C. GEN. STAT. § 25-9-504(3) (Cum. Supp. 1977).

55. The Code provides: "If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency." *Id.* § 25-9-504(2).

56. *ITT-Industrial Credit Co. v. Milo Concrete Co.*, 31 N.C. App. 450, 458, 229 S.E.2d 814, 820 (1976).

57. N.C. GEN. STAT. § 25-9-601 (Cum. Supp. 1977); *Graham v. Northwestern Bank*, 16 N.C. App. 287, 293, 192 S.E.2d 109, 113, *cert. denied*, 282 N.C. 426, 192 S.E.2d 836 (1972). The procedures, N.C. GEN. STAT. §§ 25-9-601 to -607 (Cum. Supp. 1977), are not part of the official text of the Uniform Commercial Code and are apparently peculiar to North Carolina. *ITT-Industrial Credit Co. v. Milo Concrete Co.*, 31 N.C. App. 450, 457, 229 S.E.2d 814, 819 (1976).

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

59. *Hodges v. Norton*, 29 N.C. App. 193, 196-97, 223 S.E.2d 848, 850 (1976).

60. *ITT-Industrial Credit Co. v. Milo Concrete Co.*, 31 N.C. App. 450, 457-58, 229 S.E.2d 814, 819-20 (1976).

judgment in North Carolina.<sup>61</sup> As a remedy for a noncommercially reasonable sale, G.S. 25-9-507(1) merely allows the debtor to offset any deficiency judgment by the amount of damages the debtor has suffered as a result of the secured party's failure to dispose of collateral in a commercially reasonable manner.<sup>62</sup> In establishing his claim the debtor has the benefit of a presumption that the "collateral was worth at least the amount of the debt" and the creditor must prove "market value of the collateral by evidence other than the resale price."<sup>63</sup>

### (i) Public Sale of Collateral

Several cases in 1978 presented the North Carolina courts with the opportunity to further clarify a secured party's duty to dispose of collateral in a commercially reasonable manner. Plaintiff creditor in *North Carolina National Bank v. Burnette*,<sup>64</sup> after a public sale of collateral,<sup>65</sup> brought suit to obtain a deficiency judgment. Defendant debtor's answer averred that the sale was not conducted in a commercially reasonable manner as required by G.S. 25-9-504.<sup>66</sup> The jury found for the debtor on the issue of commercial reasonableness and offset plaintiff's award by the total amount of the deficiency.<sup>67</sup> The trial court granted plaintiff's motion for judgment notwithstanding the verdict and defendant appealed.<sup>68</sup>

Evidence presented at trial indicated that plaintiff posted and mailed notice of the sale within the time prescribed by G.S. 25-9-603,<sup>69</sup>

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61. *Hodges v. Norton*, 29 N.C. App. 193, 198, 223 S.E.2d 848, 851 (1976).

62. "[T]he debtor . . . has a right to recover from the secured party any loss by a failure to comply with the provisions of this part." N.C. GEN. STAT. § 25-9-507(1) (Cum. Supp. 1977).

63. *Hodges v. Norton*, 29 N.C. App. 193, 198-99, 223 S.E.2d 848, 851-52 (1976). See also *Associates Discount Corp. v. Cary*, 47 Misc. 2d 369, 262 N.Y.S.2d 646 (Civ. Ct. 1965).

64. 38 N.C. App. 120, 247 S.E.2d 648 (1978), cert. granted, 296 N.C. 410, 251 S.E.2d 468 (1979) (No. 116 PC).

65. Two separate sales were conducted. *Id.* at 121, 247 S.E.2d at 649-50. Plaintiff's conduct in the second sale, involving the disposition of some road grading equipment, was the focal point of the commercial reasonableness section of the court's opinion.

66. *Id.* at 122, 247 S.E.2d at 650.

67. *Id.*

68. *Id.* at 123, 247 S.E.2d at 650.

69. N.C. GEN. STAT. § 25-9-603 (Cum. Supp. 1977) provides:

Posting and mailing notice of sale—(1) In each public sale conducted hereunder, the notice of sale shall be posted on a bulletin board provided for the posting of such legal notices, in the courthouse, in the county in which the sale is to be held, for at least five days immediately preceding the sale.

(2) In addition to the posting of notice required by subsection (1), the secured party or other party holding such public sale shall, at least five days before the date of sale, mail by registered or certified mail a copy of the notice of sale to each debtor obligated under the security agreement:

but that the notice was mailed to the wrong address<sup>70</sup> and did not reach defendant until after the sale had been conducted.<sup>71</sup> The court of appeals held that in light of this evidence the trial judge erred in granting plaintiff's judgment N.O.V. motion.<sup>72</sup> Extending its decision in *ITT-Industrial Credit Co. v. Milo Concrete Co.*,<sup>73</sup> the court held that the creditor has the burden of proving that notice was properly sent to the debtor.<sup>74</sup> Because there was contradictory evidence concerning notice, the jury might reasonably have found that plaintiff creditor failed to meet the burden of adequate notice and therefore the court reasoned that granting the judgment N.O.V. was improper.<sup>75</sup> The court further stated that "the notice requirement under G.S. 25-9-603 is mandatory and is a distinct and separate requirement from the requirement for commercial reasonableness."<sup>76</sup> The court based its decision on the language employed in the various sections of part 6 of article 9. While G.S. 25-9-602, dealing with the contents of notice, mandates that notice "shall substantially" include certain items of information and G.S. 25-9-604 and 25-9-605 dealing with exceptions for perishable property and

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(a) at the actual address of the debtors, if known to the secured party, or

(b) at the address, if any, furnished the secured party, in writing, by the debtors, or otherwise at the last known address.

(3) In the case of consumer goods, no other notification need be sent. In other cases, in addition to mailing a copy of the notice of sale to each debtor, the secured party shall also mail a copy of said notice by registered or certified mail to any other secured party from whom the secured party has received (before sending the notice of sale to the debtor(s)) written notice of a claim of an interest in the collateral.

70. The evidence indicated that the notice was sent to Route 1, Little Switzerland, North Carolina, even though a different address appeared on the security agreement, that notice of sale of other collateral securing the indebtedness had been sent to the correct address, and that plaintiff's agent responsible for sending the notice admitted that he knew there was no Route 1, Little Switzerland. 38 N.C. App. at 126, 247 S.E.2d at 652.

71. The notice for the sale scheduled for October 31, 1974, was mailed October 24, 1974, and did not reach defendants until November 7, 1974. *Id.* at 125-26, 247 S.E.2d 652.

72. *Id.* at 125, 247 S.E.2d at 652.

73. 31 N.C. App. 450, 229 S.E.2d 814 (1976). The *Milo* court held that a creditor, when suing for deficiency, has the burden of proving the sale was conducted in a commercially reasonable manner. *Id.* at 458, 229 S.E.2d at 820. For additional authority holding that the creditor also has the burden of proving that reasonable notice was sent to the debtor see *Universal C.I.T. Credit Co. v. Rone*, 248 Ark. 665, 669, 453 S.W.2d 37, 39 (1970).

74. 38 N.C. App. at 125, 247 S.E.2d at 651.

75. *Id.* The court noted that the test for determining the appropriateness of a judgment N.O.V. is the same as applied on a motion for directed verdict. *Id.* at 124, 247 S.E.2d at 651 (citing *Snelling v. Roberts*, 12 N.C. App. 476, 183 S.E.2d 872, *cert. denied*, 279 N.C. 727, 184 S.E.2d 886 (1971)). Because the North Carolina Supreme Court in *Cutts v. Casey*, 298 N.C. 390, 180 S.E.2d 297 (1971) held that the granting of a directed verdict in favor of the party with the burden of proof will be more closely scrutinized than for the party without the proof burden, the *Burnette* court considered it significant that plaintiff movant had the burden of proof on the issue of notice. 38 N.C. App. at 124, 247 S.E.2d at 651.

76. 38 N.C. App. at 127, 247 S.E.2d at 653.

postponement of public sale use the discretionary word "may,"<sup>77</sup> the court noted that G.S. 25-9-603 governing notice uses the unmodified word "shall" and should be interpreted as a separate and mandatory requirement.<sup>78</sup>

While the court appears to have reached the correct result in the case,<sup>79</sup> its reasoning is troublesome. The *Burnette* court's reasoning that strict compliance with G.S. 25-9-603 is required for the purpose of the separate notice requirement because of the use of "mandatory" language in the section may also be used to support an argument that because G.S. 25-9-603 is contained in the provisions of part 6, strict compliance with this section is necessary to meet the substantial compliance test of G.S. 25-9-601 governing application of the statutory presumption of commercial reasonableness. Such a reading, however, would conflict with the statutory language and prior case law and would undermine the purpose of part 6.

Prior conflicting authority is found in *Wachovia Bank & Trust Co. v. Murphy*,<sup>80</sup> a case before the court of appeals earlier in 1978, in which the notice publication procedures of G.S. 25-9-603 were in issue. In *Murphy* plaintiff creditor brought suit to recover the deficiency remaining on the balance of defendants'<sup>81</sup> indebtedness following the public disposition of collateral.<sup>82</sup> At the close of all the evidence the trial judge directed a verdict for plaintiff in the amount prayed.<sup>83</sup> Defendant debtors appealed, alleging that the sale was not conducted in sub-

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77. N.C. GEN. STAT. § 25-9-602, -604, -605 (Cum. Supp. 1977).

78. 38 N.C. App. at 127, 247 S.E.2d at 653. For text of § 25-9-603, see note 69 *supra*.

79. The court could have easily concluded that the evidence demonstrated as a matter of law that plaintiff creditor had not substantially complied with the mailing of notice requirement contained in § 25-9-603, could not benefit from the statutory presumption of commercial reasonableness provided by § 25-9-601, and therefore would be required to prove the sale was otherwise commercially reasonable, a burden that was not sustained by the evidence. See generally *ITT-Industrial Credit Co. v. Milo Concrete Co.*, 31 N.C. App. 450, 229 S.E.2d 814 (1976). In *Hodges v. Norton*, 29 N.C. App. 193, 223 S.E.2d 848 (1976) the court of appeals held that when a creditor posts notice on the courthouse door but fails to send written notice to the debtor, the creditor has not substantially complied with the notice requirements of G.S. 25-9-603. *Id.* at 197, 223 S.E.2d at 850-51. It would not stretch the imagination to extend the holding in *Hodges* to a case like *Burnette* in which notice was sent to the wrong address and was not received by the debtor until after the sale.

80. 36 N.C. App. 760, 245 S.E.2d 101, *appeal dismissed, cert. denied*, 295 N.C. 557, 248 S.E.2d 734 (1978).

81. Three persons were liable for the debt. Donnie Murphy executed a note and security agreement to obtain funds for the purchase of a dump truck and as further condition for receipt of the loan he had his mother and father, Charles and Louise Murphy, sign the note and security agreement with him. *Id.* at 761, 245 S.E.2d at 102.

82. *Id.*

83. *Id.*

stantial compliance with part 6 and therefore plaintiff was not entitled to the conclusive presumption that the sale was commercially reasonable in all respects.<sup>84</sup> Defendants' only claim was that the creditor failed to comply with the requirement that notice of sale be mailed to "each debtor obligated under the security agreement."<sup>85</sup> Defendants' evidence showed that notice was mailed to two of the debtors collectively at their common address and that the return receipt was signed by only one of them.<sup>86</sup> The court of appeals, speaking through Chief Judge Brock, concluded that while "the better practice would be for the secured party to make separate mailings of notice to each debtor . . . the mailing of a joint notice to husband and wife at the residence address where they both lived was substantial compliance within the meaning of G.S. 25-9-601."<sup>87</sup> Thus, while the court did not specifically state that substantial compliance with G.S. 25-9-603—and the other provisions of part 6—is all that is necessary to obtain the statutory presumption of commercial reasonableness, such a conclusion is clearly to be implied from the court's language.<sup>88</sup>

Additional support for the argument that strict compliance with the notice procedures of G.S. 25-9-603 is not required for a secured party to benefit from the conclusive presumption of commercial reasonableness is found in the language of G.S. 25-9-601. While it is true that G.S. 25-9-603 contains mandatory language unmodified by any phrase contained in the section, the mandate must be read in conjunction with the prefatory provision of G.S. 25-9-601 that modifies the remainder of part 6 with language indicating that substantial compliance with each provision is all that is necessary for purposes of the statutory presumption. Thus, in light of the plain language of G.S. 25-9-601 and the implicit conclusions derived from *Murphy*, *Burnette* should not be interpreted as requiring strict compliance with procedures of G.S. 25-9-

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84. Defendants also challenged the constitutionality of § 25-9-601 on the ground that it violates the due process clause of the fourteenth amendment. *Id.* The court pointed to the protection provided the debtor through the notice requirements and concluded that the procedures comport with due process. *Id.* at 762-63, 245 S.E.2d at 103.

85. N.C. GEN. STAT. § 25-9-603(2) (Cum. Supp. 1977) (emphasis added).

86. The return receipt was signed for debtor Charles Murphy by his mother but it was not signed by or for Murphy's wife Louise. 36 N.C. App. at 764, 245 S.E.2d at 104.

87. *Id.*

88. The same conclusion can be drawn from the court's language in *ITT-Industrial Credit Co. v. Milo Concrete Co.*, 31 N.C. App. 450, 229 S.E.2d 814 (1976). Although the court in *Milo* thought the evidence presented was insufficient to establish that the secured party had substantially complied with the requirements of §§ 25-9-602, -603, the court's language suggests that only substantial compliance with the procedures of § 25-9-603 and with the other sections of part 6 is required to give rise to the presumption of commercial reasonableness. *Id.* at 457, 229 S.E.2d at 819.

603 before a secured party can benefit from the conclusive presumption of commercial reasonableness in a public sale.<sup>89</sup>

(ii) Private Sale of Collateral

The court of appeals faced a question of commercial reasonableness in a case involving a private sale of collateral in *Allis-Chalmers Corp. v. Davis*.<sup>90</sup> Plaintiff creditor brought an action to recover a deficiency. Defendant debtors denied deficiency liability and counterclaimed for damages under G.S. 25-9-507, alleging that the secured party did not sell in a commercially reasonable manner as required by G.S. 25-9-504.<sup>91</sup> Choosing not to contest the commercial reasonableness of the method, manner or time of the disposition, defendants argued solely that the secured party had accepted an unreasonably low price for the collateral.<sup>92</sup> At the close of all the evidence, the trial court granted plaintiff's motion for a directed verdict on its deficiency claim and on defendant's counterclaim; defendants appealed.<sup>93</sup>

Ruling that price is one of the "terms" of sale falling under the commercial reasonableness requirement of G.S. 25-9-504(3),<sup>94</sup> the court of appeals held that when a private sale is otherwise commercially reasonable the price received for the collateral is presumed to be commercially reasonable,<sup>95</sup> but when the debtor offers independent evidence of a "gross inadequacy in price"<sup>96</sup> a question of commercial rea-

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89. In most cases, however, a creditor will probably have to present evidence of notice that approaches strict compliance or its functional equivalent before a court will find that the creditor is entitled to the statutory presumption.

90. 37 N.C. App. 114, 245 S.E.2d 566 (1978).

91. *Id.* at 116, 245 S.E.2d at 568.

92. *Id.* at 117, 245 S.E.2d at 569.

93. *Id.* at 116, 245 S.E.2d at 568.

94. *Id.* at 117, 245 S.E.2d at 569. This is apparently the first time a North Carolina court has held that price is one of the terms of sale that must be commercially reasonable pursuant to the provisions of N.C. GEN. STAT. § 25-9-504 (Cum. Supp. 1977). This interpretation seems to be accepted in most other jurisdictions. *J. WHITE & R. SUMMERS, supra* note 53, § 26-11, at 986; *see, e.g., Associates Fin. Co. v. Teske*, 190 Neb. 747, 212 N.W.2d 572 (1973).

95. 37 N.C. App. at 119, 245 S.E.2d at 570. The court cited *Community Management Ass'n, Inc. v. Tousley*, 32 Colo. App. 33, 505 P.2d 1314 (1973). The *Tousley* court held that when value is in issue there is an initial presumption that collateral has the same value as the outstanding debt, but that when the creditor demonstrates that the sale was otherwise commercially reasonable a presumption arises that the price received was the fair market value of the collateral. *Id.* at 36, 505 P.2d at 1316-17.

96. The collateral, an Allis-Chalmers 615 loader and backhoe, was purchased subject to the security agreement in October 1972 for \$14,971.32. When the collateral was repossessed in September 1974 a balance of \$6,282.64 was owed on the debt. The collateral was sold at wholesale to Godley Auction Co. for \$3,500 in April 1975. Defendants presented the following evidence to support their claim that the price accepted by plaintiff was unreasonably low: (a) testimony by defendant Davis that in his opinion the machine had a fair market value of \$8,500; (b) testimony



sonableness sufficient to avoid a directed verdict is raised.<sup>97</sup> The court rejected plaintiff's argument that various provisions found in G.S. 25-9-507(2) preclude an inquiry into the commercial reasonableness of price.<sup>98</sup> First, the court ruled that the language in the section that provides "[t]he fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner"<sup>99</sup> does not give the secured party "unbridled discretion" in the price that is accepted for the collateral.<sup>100</sup> While the opinion suggests that a price that is "slightly inadequate" might be protected, G.S. 25-9-507(2) will not serve to bar examination of the commercial reasonableness of the resale price when the debtor presents evidence that might lead a jury to conclude that the price accepted was "grossly inadequate."<sup>101</sup> Second, the court ruled that the language of G.S. 25-9-507(2), which states that if a secured party "has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner,"<sup>102</sup> offered no benefit to the creditor since a sale for a commercially unreasonable price does not conform with "reasonable commercial practices among dealers."<sup>103</sup>

While not specifically mentioned in the court's opinion, the holding in the recent case of *First Union National Bank v. Tectamar, Inc.*<sup>104</sup> is clarified by *Allis-Chalmers*. Defendant debtor in *Tectamar*, like defendant in *Allis-Chalmers*, argued that plaintiff accepted an unreasona-

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by Michael Duckett, a disinterested witness, that he saw a similar backhoe (which he believed to be the machine in question) on the lot of Godley Auction Co. and that Godley was asking \$6,500 for the machine; and (c) testimony by Duckett that he believed the value of the backhoe to be between \$6,500 and \$7,000 in that area of the state in April 1975. 37 N.C. App. at 115-16, 245 S.E.2d at 568.

97. *Id.* at 117-18, 245 S.E.2d at 569. The court, extending the application of its reasoning in *ITT-Industrial Credit Co. v. Milo Concrete Co.*, 31 N.C. App. 450, 229 S.E.2d 814 (1976), noted that the creditor has the burden of proving that the price was commercially reasonable in order to fulfill the mandate of § 25-9-504(3). The court's language seems to suggest that this burden is fulfilled in a private sale situation when the creditor offers proof that the sale was otherwise commercially reasonable; when the debtor offers evidence of a gross inadequacy in price, however, the presumption is rebutted and the burden must be fulfilled by independent evidence that the price was reasonable.

98. N.C. GEN. STAT. § 25-9-507(2) (Cum. Supp. 1977).

99. *Id.*

100. 37 N.C. App. at 118, 245 S.E.2d at 569.

101. *Id.*

102. N.C. GEN. STAT. § 25-9-507(2) (Cum. Supp. 1977).

103. 37 N.C. App. at 118, 245 S.E.2d at 570.

104. 33 N.C. App. 604, 235 S.E.2d 894 (1977).

bly low price for the collateral at a private sale.<sup>105</sup> The court of appeals refused to reverse on the basis of this argument the trial court's grant of summary judgment for plaintiff.<sup>106</sup> Citing G.S. 25-9-507(2), the court held that defendant's evidence concerning price when combined with the lack of evidence disputing the commercial reasonableness of any other aspect of the sale was insufficient to raise a genuine issue of material fact.<sup>107</sup> It was unclear whether the court meant by this holding to exclude all inquiries into the inadequacy of price in cases in which no other aspect of the private sale is challenged.<sup>108</sup> *Allis-Chalmers* makes clear that when evidence of a "gross inadequacy" in price is presented, neither the provisions of G.S. 25-9-507(2) nor an absence of dispute concerning the commercial reasonableness of any other aspect of the private disposition preclude a debtor from reaching the jury on the issue of commercial reasonableness of the sale.

The opinion in *Allis-Chalmers* seems consistent with the need to provide greater protection to debtors in deficiency suits when the collateral has been disposed of in a private sale. If the secured party in a public sale situation follows the requirements in part 6, the debtor and the market are adequately informed and the debtor can protect his interest in seeing that the collateral reaps as high a price as possible by "paying the debt, finding a buyer, or being present at the sale to bid."<sup>109</sup> The debtor in a private sale situation, on the other hand, must rely more heavily upon the selling efforts of the secured party. The commercial realities of the private sale, therefore, demand that the debtor be given the protection of contesting the adequacy of the price when the debtor's evidence suggests the need for such an inquiry even if other aspects of the sale are uncontested. This reasoning suggests that the holding in *Allis-Chalmers* should be applied to the public sale situation when the secured party fails to show substantial compliance with the procedures in part 6.<sup>110</sup>

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105. *Id.* at 604-05, 235 S.E.2d at 895.

106. The judgment of the lower court was reversed on other grounds. *Id.* at 606-07, 235 S.E.2d at 896.

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

108. It seems that the court may simply have been unpersuaded by the quality of defendant's evidence, which consisted principally of the rebutted testimony of an arguably interested witness. *See id.* at 604-06, 235 S.E.2d at 895-96.

109. *Hodges v. Norton*, 29 N.C. App. 193, 197, 223 S.E.2d 848, 850 (1976).

110. If a creditor is able to show that a public sale was conducted in substantial compliance with the procedures in part 6 the conclusive presumption of commercial reasonableness provided in § 25-9-601 will preclude any inquiry into the commercial reasonableness of the resale price, although the procedures in part 6 are not designed to govern directly the price accepted. *Graham v. Northwestern Bank*, 16 N.C. App. 287, 293, 192 S.E.2d 109, 113, *cert. denied*, 282 N.C. 426, 192

Although the decision in *Allis-Chalmers* was well reasoned, several questions regarding the application of the holding to future cases remain unanswered. First, the court failed to define what considerations should be employed in determining whether a price is "grossly inadequate." Such a concept is difficult to define, however, and trial judges should be given the discretion to apply equitable judgment according to the facts of each case.<sup>111</sup> Second, the court did not specify whether the resale price should be judged against evidence of the retail or wholesale market value of the collateral. Some authority suggests that the comparison should vary depending upon whether the creditor has the facilities to reach the retail or wholesale market with the least marketing and administrative costs.<sup>112</sup> Finally, it is unclear what sort of evidence will satisfy the debtor's burden of production. There is authority to support the acceptance of three types of evidence: expert testimony,<sup>113</sup> market guidebooks,<sup>114</sup> and evidence of a second resale price.<sup>115</sup>

*b. Statute of Limitations Applicable to Security Agreements Under Seal*

In *North Carolina National Bank v. Holshouser*,<sup>116</sup> the North Carolina Court of Appeals addressed the question of which statute of limita-

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S.E.2d 836 (1972). If a secured party does not substantially comply with those procedures no conclusive presumption is raised and the commercial reasonableness of the sale must be proven. *ITT-Industrial Credit Co. v. Milo Concrete Co.*, 31 N.C. App. 450, 457-58, 229 S.E.2d 814, 819-20 (1976). A debtor in such a situation should have the same right to question the commercial reasonableness of the price as he would if the collateral were sold in a private proceeding.

111. There is authority that suggests that in deciding whether a resale price is unreasonably low, the trial court should examine evidence concerning the creditor's good faith and the extent of the creditor's efforts in disposing of the collateral. *J. WHITE & R. SUMMERS, supra* note 53, § 26-11, at 991. Interestingly, the court of appeals in *Allis-Chalmers* seemed unpersuaded by the creditor's extensive efforts to locate a buyer for the collateral. *See* 37 N.C. App. at 115-16, 245 S.E.2d at 568, and Record at 20 (testimony of James M. Dixon, Central Credit Manager for *Allis-Chalmers Credit Corp.*).

112. *J. WHITE & R. SUMMERS, supra* note 53, § 26-11, at 990-91. Although the retail market will normally yield the higher price, creditor efforts should not be judged against an estimated retail market value if it appears that the marginal gains of entering the retail market are outweighed by the creditor's administrative costs incurred in entering this market.

113. *J. WHITE & R. SUMMERS, supra* note 53, § 26-11, at 989. Proof by expert testimony may have been presented in *Allis-Chalmers*. Although it is unclear from the opinion, the testimony of Michael Duckett, *see* note 96 *supra*, may have qualified as expert testimony.

114. *J. WHITE & R. SUMMERS, supra* note 53, § 26-11; *see, e.g., Atlas Constr. Co. v. Dravo-Doyle Co.*, 3 U.C.C. Rep. Serv. 124 (Pa. C.P. 1965). This type of evidence may have limited application, however, since many markets lack such guidebooks and the guidebooks are usually incapable of adjusting price according to the condition of the collateral.

115. *J. WHITE & R. SUMMERS, supra* note 53, § 26-11, at 989.

116. 38 N.C. App. 165, 247 S.E.2d 645 (1978).

tions applies to a deficiency action brought after the repossession and sale of collateral by the holder of a purchase money security agreement under seal. Plaintiff, assignee of a purchase money security agreement executed under seal by defendant for the purchase of an automobile, brought this deficiency action a little more than four years after the collateral was repossessed and disposed of by public sale.<sup>117</sup> The trial court granted judgment on the pleadings for defendant on the ground that the action was barred by the four year statute of limitations applicable in actions for breach of any contract of sale contained in article 2 of the Uniform Commercial Code.<sup>118</sup> On appeal plaintiff contended that the four year statute of limitations is inapplicable to deficiency actions brought pursuant to a security agreement governed by article 9.<sup>119</sup> Since the action was brought on a sealed security instrument plaintiff averred that the ten year limitations period for actions on sealed instruments provided by G.S. 1-47<sup>120</sup> governed and, therefore, the suit was timely.<sup>121</sup>

A majority of the court of appeals agreed with plaintiff and reversed the trial court's judgment. The court based its decision on "the plain language of Article 2" and certain legislative action pertinent to G.S. 1-47.<sup>122</sup> Acknowledging that the purchase money security agreement executed by defendant acted as both a sales contract and a security instrument, the court held that the language in G.S. 25-2-102<sup>123</sup> and

117. *Id.* at 165-66, 247 S.E.2d at 645. The purchase money security agreement was executed on June 25, 1970. Defendant defaulted immediately and the automobile was repossessed. The vehicle was sold by public sale on September 28, 1970 but the deficiency suit was not filed until November 1, 1974. *Id.*

118. *Id.* at 166, 247 S.E.2d at 645, citing N.C. GEN. STAT. § 25-2-725(1) (1965) ("An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued.").

119. Article 9 of the Uniform Commercial Code covers secured transactions.

120. The statute only governs actions against the *principal* obligees on a sealed instrument. N.C. GEN. STAT. § 1-47 (1969) provides:

Ten Years—Within ten years an action—

(2) Upon a sealed instrument against the principal thereto. Provided, however, that if action on a sealed instrument is filed, the defendant or defendants in such action may file a counterclaim arising out of the same transaction or transactions as are the subject of plaintiff's claim, although a shorter statute of limitations would otherwise apply to defendant's counterclaim.

121. 38 N.C. App. at 166, 247 S.E.2d at 645.

122. *Id.* at 171, 247 S.E.2d at 648.

123. The statute provides:

Scope: certain security and other transactions excluded from this article.—Unless the context otherwise requires, this article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this article

its related comments<sup>124</sup> defining the scope of provisions contained in article 2 indicates that the provisions of article 2 govern the pure sales aspects and the provisions of article 9 govern the security aspects of the transaction.<sup>125</sup> Since the deficiency action was brought on the security agreement pursuant to rights provided in article 9,<sup>126</sup> the court reasoned that G.S. 25-2-725, the four year statute of limitations found in article 2, was inapplicable.<sup>127</sup> Because article 9 contains no limitations provision the court looked to prior law and determined that the ten year limitations period for actions on sealed instruments provided by G.S. 1-47(2) governed the suit.<sup>128</sup>

In addition to analysis of the statutory language the court of appeals noted that in 1969 the legislature amended G.S. 1-47<sup>129</sup> to allow principals sued on sealed instruments to assert claims or defenses they might have by joinder of third parties even though the applicable statutes of limitations may otherwise have barred such third party claims. The court argued that the amendment was enacted to ameliorate the "potential for harsh results in the situation where a financial institution could wait to sue for deficiency after repossession and sale of collateral security until *after* the buyer's rights of action against sellers for any breach of warranty were barred" and was indicative of legislative acknowledgement that the ten year statute was to apply to actions on

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impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

N.C. GEN. STAT. § 25-2-102 (1965).

124. The Official Comment states: "The Article leaves substantially unaffected the law relating to purchase money security such as conditional sale or chattel mortgage though it regulates the general sales aspects of such transactions. . . ." *Id.*, Official Comment.

The North Carolina Comment provides further clarification: "This section sets out the scope of the Code, limiting it to transactions in goods . . . and indicates that the article on sale does not apply to transactions intended as security even though in the form of an unconditional contract of sale or to sell . . ." *Id.*, North Carolina Comment.

125. 38 N.C. App. at 169, 247 S.E.2d at 647. Furthermore, the court noted that the "four year limitation of actions found in G.S. § 25-2-725(1) applies on its face only to actions for breach of any contract for sale." *Id.* (construing N.C. GEN. STAT. § 25-2-725(1) (Cum. Supp. 1977)).

126. N.C. GEN. STAT. § 25-9-504(1) (Cum. Supp. 1977) provides for the right to bring a deficiency action.

127. 38 N.C. App. at 169, 247 S.E.2d at 647 (citing N.C. GEN. STAT. § 25-2-725 (Cum. Supp. 1977)). In addition the court noted that the provision of "G.S. § 25-2-203, which makes seals of no effect on contracts for sale, is similarly limited in its effects to the pure sales aspects of the transactions, and is not relevant to purchase money security agreements . . . regulated by Article 9 generally." *Id.* (construing N.C. GEN. STAT. § 25-2-203 (1965)).

128. *Id.*

129. Law of June 11, 1969, ch. 810, § 1, 1969 N.C. Sess. Laws 862. Although the language of § 1-47(2) allows such defendants in sealed instrument actions to file counterclaims that might otherwise be untimely, the court apparently interpreted the statute as also saving third-party claims. 38 N.C. App. at 170, 247 S.E.2d at 647.

purchase money security agreements under seal.<sup>130</sup>

Although a strict reading of the language of the Code and comments may provide support for the holding in *Holshouser*, the result seems unduly harsh to the consumer-debtor and persuasive argument for a contrary holding can be found. First, the opinion ignores the essential similarities of deficiency suits to suits for breach of contract for sale and, therefore, creates a potential for inconsistent statute of limitations treatment for very similar actions. A deficiency suit is an in personam action for the excess of the debtor's obligation unpaid after the sale of collateral, an action to enforce the buyer's obligation to pay the full sale price. Thus at least one court has concluded on this sparsely litigated question that a deficiency action is more closely related to the sales aspect of a combination sales-security agreement than to its security aspect and should be controlled by the four year limitations period.<sup>131</sup> If a seller, holding a combination sales-security instrument ignored the security and brought an action for the unpaid price, the four year limitations period would surely apply.<sup>132</sup> It seems inconsistent to hold, as the court in *Holshouser* did, that if the buyer pursued a similar remedy by bringing a deficiency action under the security agreement affixed with a seal that he would have the benefit of a ten year limitations period.

Second, the court's conclusion that the amendment to G.S. 1-47 is indicative of legislative approval of the application of the ten year statute of limitations period to deficiency actions on sealed purchase money security agreements is questionable. A deficiency action on a sealed purchase money security agreement is not the only situation in

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130. 38 N.C. App. at 170, 247 S.E.2d at 647.

131. *Associates Discount Corp. v. Palmer*, 47 N.J. 183, 187-88, 219 A.2d 858, 861 (1966) (applying Pennsylvania law). The court in *Holshouser* rejected the analysis of the New Jersey Supreme Court and distinguished the *Palmer* holding on the ground that the Pennsylvania legislature expressed an intention in the comments to § 2-102 to have article 2 govern all aspects of a combination sales-security instrument. 38 N.C. App. at 170-71, 247 S.E.2d at 648. The language cited by the court, however, does not clearly indicate a contrary intent to that expressed in the North Carolina Comment, note 124 *supra*. The Pennsylvania Comment does not specifically state, as the court of appeals seems to believe, that all aspects of a combination agreement are to be governed in Pennsylvania by article 2; if read as consistent with the Official Comment, note 124 *supra*, it provides that the sales aspects of such an instrument are subject to article 2 and the secured transactions aspects are subject to article 9. Therefore, the argument made by the court in *Palmer* that a deficiency suit is more closely akin to the sales aspects of the instrument and should be subject to the four year limitations period cannot be disregarded as being unique to the Pennsylvania legislature's intent and inconsistent with the North Carolina Comment. Indeed, the North Carolina Comment does not preclude a court from reaching the conclusion of the *Palmer* court based on a recognition of the essential nature of a deficiency suit.

132. *Associate Discount Corp. v. Palmer*, 47 N.J. 183, 193, 219 A.2d 858, 864 (1966) (Hall, J., concurring).

which the amendment could provide protection,<sup>133</sup> and, therefore, without more, the amendment should not be viewed as an indication of legislative support for the application of a ten year statute of limitations to such situations. Moreover, while the amendment would certainly grant some protection to the debtor from the potential harsh results of the ten year statute of limitations,<sup>134</sup> other interests favoring application of a shorter limitations period, such as preservation of witness memories, are unaffected by the legislation. It appears that the holding in *Holshouser* is based on a questionable interpretation of statutory language and legislative intent and, therefore, could be subject to further scrutiny in future litigation.

## B. Contracts

### 1. Relationship of Contract and Tort

In *North Carolina State Ports Authority v. Fry Roofing Co.*<sup>135</sup> the North Carolina Supreme Court addressed the troublesome question of when a breach of contract may also be a tort. The court rejected the holding of the court of appeals<sup>136</sup> that a promisee's allegation of breach of contract against the promisor may also support an action in tort whenever the breach is negligent. In disallowing the action in tort the supreme court distinguished prior cases holding a promisor liable in tort for the negligent performance of his contract as involving more than the simple failure to discharge a contractual obligation.<sup>137</sup>

Plaintiff in *Ports Authority* contracted with Dickerson, Incorporated, a general contractor, to construct a shed and warehouse. Four years after the buildings were completed and delivered to plaintiff, the roofs began to leak.<sup>138</sup> Plaintiff sued Dickerson for breach of the building contract and in tort for its negligent performance—the failure to exercise reasonable care in supervising the installation of the roofs—

133. For example, it would apply to actions brought in connection with real property sealed deeds of trust. See *Serls v. Gibbs*, 205 N.C. 246, 171 S.E. 56 (1933).

134. See text accompanying note 129 *supra*.

135. 294 N.C. 73, 240 S.E.2d 345 (1978).

136. 32 N.C. App. 400, 232 S.E.2d 846 (1977), *aff'd on other grounds*, 294 N.C. 73, 240 S.E.2d 345 (1978). "Appellant petitioned [the supreme court] for review of [the court of appeals'] judgment 'in part and only as to that Court's reversal of the Trial Court judgment dismissing Plaintiff's action in tort as to the Defendant Dickerson.'" 294 N.C. at 86, 240 S.E.2d at 353. The supreme court concluded that the appeals court had reached the right result but was wrong in holding that the complaint alleged an action in tort. *Id.* at 83, 86, 240 S.E.2d at 350, 352.

137. 294 N.C. at 81-82, 240 S.E.2d at 350.

138. *Id.* at 75, 240 S.E.2d at 347.

and sought to recover the cost of repairing the roof.<sup>139</sup> The court held that in cases in which defendant promisor contracts to construct buildings, including roofs, in accordance with certain plans and specifications, and plaintiff alleges that defendant did not so construct the roofs, the only injury suffered is a loss of the benefit of the promised performance, which is purely contractual in nature.<sup>140</sup> In other words, because there was no extra-contractual duty, common law or otherwise, to do the thing agreed to be done, it was immaterial that the breach was due to negligence.

The *Ports Authority* rule, simply stated, is that a suit should proceed for all substantive and procedural purposes on a contract theory when it appears from the facts set out in the complaint and the prayer for relief that the plaintiff is suing for loss of the benefit of his bargain.<sup>141</sup> The distinction between contract related injuries that can support an action in tort for the violation of a common law duty of due care and those that cannot is thus based on the nature of the injury as characterized by the particular facts alleged.<sup>142</sup>

The *Ports Authority* tort preclusion rule is sound for several reasons. As a matter of substantive law, it seems only fair that a plaintiff should not be permitted to transform a breach of contract action into

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139. *Id.* at 75, 240 S.E.2d at 346.

140. *Id.* at 83, 240 S.E.2d at 351.

141. The court rejected plaintiff's argument that, regardless of the existence of a contract, Dickerson had committed the tort of misfeasance by failing to exercise reasonable care in the construction of the buildings, see Brief for Plaintiff Appellee at 11, and thus declined to follow the traditional nonfeasance-misfeasance doctrine for determining when a tort remedy is cumulative. See Prosser, *The Borderland of Tort and Contract*, in *SELECTED TOPICS ON THE LAW OF TORTS* 380 (1954). Consequently, the rule that "accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done," *Pinnix v. Toomey*, 242 N.C. 358, 362, 87 S.E.2d 893, 898 (1955), was inapplicable in *Ports Authority*. 294 N.C. at 81-83, 240 S.E.2d at 350-51.

142. The court explained, 294 N.C. at 82, 240 S.E.2d at 350-51, that the cases constituting exceptions to the general rule that an injury arising out of the performance of a contract does not constitute a tort fall into four categories: (1) The injury so caused was to the person or property of a third party. See generally *Pinnix v. Toomey*, 242 N.C. 358, 87 S.E.2d 893 (1955); *Council v. Dickerson's, Inc.*, 233 N.C. 472, 64 S.E.2d 551 (1951). (2) The injury so caused was to the property of the promisee other than the property that was the subject of the contract, or was a personal injury to the promisee. See generally *Firemen's Mut. Ins. Co. v. High Point Sprinkler Co.*, 266 N.C. 134, 146 S.E.2d 53 (1966); *Jewell v. Price*, 264 N.C. 459, 142 S.E.2d 1 (1965); *Toone v. Adams*, 262 N.C. 403, 137 S.E.2d 132 (1964); *Shearin v. Lloyd*, 246 N.C. 363, 98 S.E.2d 508 (1957). (3) The injury consisted of loss or damage to the promisee's property, which was the subject of the contract, and the promisor was charged by law, as a matter of public policy, with the duty to use care in the safeguarding of the property from harm, as in the case of a common carrier, an innkeeper or other bailee. See generally *Miller's Mut. Fire Ins. Ass'n v. Parker*, 234 N.C. 20, 65 S.E.2d 341 (1951). (4) The injury so caused was a wilful injury to or conversion of the property of the promisee, which was the subject of the contract, by the promisor. See generally *Williamson v. Dickens*, 27 N.C. (5 Ired.) 259 (1844); *Simmons v. Sikes*, 24 N.C. (2 Ired.) 98 (1841).



an action in tort and thereby avail himself of such advantages as a more liberal measure of damages or a more favorable standard of liability. Second, because many procedural and substantive issues such as conflict of laws, jurisdiction, limitations, and survival of actions turn on whether the plaintiff has in fact brought his suit in contract or tort, confining the plaintiff to one theory of recovery at the outset of the litigation facilitates efficient suit administration. Moreover, such an approach is consistent with the conceptual distinction between contract and tort that has evolved from the divergence of the action of assumpsit from trespass on the case.<sup>143</sup>

In *CF Industries v. Transcontinental Gas Pipe Line Corp.*<sup>144</sup> the United States District Court for the Western District of North Carolina confronted a slightly different version of the *Ports Authority* question—whether a third party may sue in tort on a negligent performance of contract theory to recover profits lost because of the promisor's failure to discharge a contractual obligation. Defendant Transcontinental Gas Pipe Line Corporation (Transco), a wholesale supplier of natural gas, failed to fully deliver on its contract to supply gas to a retail distributor.<sup>145</sup> CF Industries (CFI), a customer of the retail distributor, suffered production curtailments as a result of inadequate gas supplies, and sued Transco in tort for negligence as well as in contract as a third-party beneficiary.<sup>146</sup> The district court denied Transco's motion for summary judgment on both claims and held not only that as an intended third-party beneficiary CFI could maintain an action in tort for negligence,<sup>147</sup> but that CFI's allegations that Transco undertook to per-

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143. See generally T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 284 (5th ed. 1956).

144. 448 F. Supp. 475 (W.D.N.C. 1978). For discussion of the facts of the case, see notes 157-163 and accompanying text *infra*.

145. *Id.* at 479.

146. *Id.* at 477.

147. The cases involving suits by a third party against a promisor for breach of contract or its negligent performance have not provided a consistent rule of decision concerning the question whether the third party may sue in contract or tort. The following rules espoused in the North Carolina cases, although not necessarily inconsistent, suggest some of the uncertainty surrounding third party rights: (1) A qualified third-party beneficiary of a contract may sue in contract for its simple breach. See *Gorrell v. Greensboro Water Supply Co.*, 124 N.C. 328, 32 S.E. 720 (1899). (2) A qualified third-party beneficiary of a contract may sue in tort for negligence as well as in contract for breach. See generally *Toone v. Adams*, 262 N.C. 403, 137 S.E.2d 132 (1964). (3) A qualified third-party beneficiary may sue in contract, but only if the breach was due to negligence. See *Potter v. Carolina Water Co.*, 253 N.C. 112, 116 S.E.2d 374 (1960). (4) A third party may maintain an action in tort for negligence against a promisor irrespective of its status as a qualified third-party beneficiary. See *Pinnix v. Toomey*, 242 N.C. 358, 87 S.E.2d 893 (1955); *Jones v. Otis Elevator Co.*, 234 N.C. 512, 67 S.E.2d 492 (1951); *Council v. Dickerson's, Inc.*, 233 N.C. 472, 64 S.E.2d 551 (1951).

form the contract and performed negligently, resulting in foreseeable injury to CFI, stated a tort claim independent of third-party beneficiary status.<sup>148</sup>

The *CF Industries* holding that a third party injured by the negligent performance of a contract may sue the promisor in tort is significant in two respects. Aside from the fact that plaintiff in *CF Industries* was not a party to the contract, the case is virtually indistinguishable from *Ports Authority*—the injury alleged was the loss of the benefit of Transco's promise to supply gas.<sup>149</sup> The cases relied upon by the district court that had permitted a third party to maintain a tort action for the negligent performance of a contract<sup>150</sup> were not inconsistent with the *Ports Authority* tort preclusion rule, because those cases involved injury to person or property outside the scope of the contract. Thus, under the *Ports Authority* refinement, the district court holding that a qualified third-party beneficiary could sue in tort for an injury arising out of the promisor's negligent failure to discharge a contractual obligation was error.

Second, *CF Industries* is the first case to permit a plaintiff not a party to a contract to sue on a negligence theory for the recovery of a pure economic loss—lost profits.<sup>151</sup> The North Carolina cases finding liability for negligence in the absence of privity of contract and independent of any third-party beneficiary relationship have been limited to actions for personal injury or property damage.<sup>152</sup> Although there were no cases prior to *CF Industries* that had barred such a claim, a subsequent case has cast doubt on the precedential value of the district court decision. In *McKinney Drilling Co. v. Nello L. Teer Co.*,<sup>153</sup> the

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148. 448 F. Supp. at 483.

149. Nothing in *Ports Authority* suggested that the rule of that case should not be equally applicable to suits by third parties.

150. *Council v. Dickerson's, Inc.*, 233 N.C. 472, 64 S.E.2d 551 (1951), involved an action brought by an automobile driver against a highway contractor for personal injuries and property damage caused by the contractor's failure to adequately warn the motorist of its paving activity. In *Pinnix v. Toomey*, 242 N.C. 358, 87 S.E.2d 893 (1955), another case relied upon by the court, a building contractor sought damages against a plumbing contractor who had negligently performed a contract with the Mecklenberg Board of Education resulting in water damage to plaintiff's building under construction. Thus, unlike *CF Industries*, these cases involved more than an injury consisting of the loss of the benefit of the promised performance, but rather an injury to person and property beyond the scope of the contract.

151. Economic loss as opposed to personal injury or property damage may be defined as a pecuniary loss consisting of one or both of the loss of bargain (the difference between what one has paid and the actual value of what has been received), and the consequential loss of profits.

152. See *McKinney Drilling Co. v. Nello L. Teer Co.*, 38 N.C. App. 472, 476, 248 S.E.2d 444, 447 (1978).

153. 38 N.C. App. 472, 248 S.E.2d 444 (1978).

North Carolina Court of Appeals upheld dismissal of a subcontractor's claim against a consulting engineer for damages caused by a negligent inspection and said that "we have been cited to no North Carolina decisions and have found none allowing for loss of profits to a third party injured from the negligent breach of contract."<sup>154</sup> The district court's extension in *CF Industries* of the liability of a promisor to a third party for foreseeable economic loss not connected with personal injury or property damage was questionable under the *Erie*<sup>155</sup> mandate in light of the North Carolina courts' historical reluctance to discard the privity requirement.<sup>156</sup>

## 2. Third-Party Rights

In *CF Industries v. Transcontinental Gas Pipe Line Corp.*,<sup>157</sup> the District Court for the Western District of North Carolina adopted the *Restatement (Second) of Contracts* standard<sup>158</sup> for the determination of when a third party may maintain an action for breach of contract. Plaintiff built a fertilizer plant<sup>159</sup> in northeastern North Carolina after securing assurances from defendant Transcontinental Gas Pipe Line Corporation (Transco), a major interstate gas transmission company, that the plant's natural gas requirements would be satisfied.<sup>160</sup> Because of Transco's policy of not competing with intrastate retail distributors,<sup>161</sup> North Carolina Natural Gas (NCNG) was procured to serve as intermediary.<sup>162</sup> Transco sold gas under contract to NCNG who in

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154. *Id.* at 476, 248 S.E.2d at 447.

155. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

156. See Hodge, *Products Liability: The State of the Law in North Carolina*, 8 WAKE FOREST L. REV. 481 (1972).

157. 448 F. Supp. 475 (W.D.N.C. 1978).

158. RESTATEMENT (SECOND) OF CONTRACTS § 133 (Tent. Drafts Nos. 1-7, 1973).

159. In 1973, Farmer's Chemical Association, Inc. (FCA), an agricultural cooperative corporation and owner of the plant, turned the management of the operation over to CF Industries, Inc. (CFI). In 1976 the agreement was transformed into a lease in which FCA assigned to CFI all its rights under the gas contract with North Carolina Natural Gas (NCNG). FCA and CFI, as co-plaintiffs, brought this diversity action against Transcontinental Gas Pipe Line Corporation (Transco) on May 18, 1977. 448 F. Supp. at 477 & n.1.

160. *Id.* at 478-79. FCA constructed the plant in 1969 in Tunis, North Carolina, after four years of investigation and study. Because the manufacture of nitrogen-based fertilizer requires large quantities of natural gas as a raw material, FCA's primary concern was to locate in an area where it could obtain an uninterrupted natural gas supply. Transco actively sought the location of the plant in northeastern North Carolina in order to make profitable a proposed pipeline extension into the area. *Id.* at 478.

161. This policy was dictated by certain tax considerations and because Transco's tariffs filed with the Federal Power Commission did not qualify it to sell directly to retail customers. *Id.* at 478.

162. Apparently the search and selection of an intermediary retailer was undertaken jointly by

turn sold to plaintiff.<sup>163</sup> Beginning in 1971 Transco cut back its supply of gas to NCNG, leading to curtailments in plaintiff's production. In the suit brought by CFI, the court denied defendant Transco's motion for summary judgment on plaintiff's claims for breach of contract as third-party beneficiaries of the Transco-NCNG agreement.

The district court found that while the North Carolina Supreme Court had adopted the analytical framework of the *Restatement (First) of Contracts*,<sup>164</sup> which recognizes third-party rights of action for donee and creditor beneficiaries and excludes incidental beneficiaries,<sup>165</sup> the general principle underlying North Carolina decisions was that the intention of the contracting parties, as manifested by all the surrounding circumstances, determined a third party's right to sue on the contract.<sup>166</sup> The court concluded that the North Carolina cases had not treated "the words 'donee' and 'creditor' and 'incidental' . . . as words of art but as ways to describe the result."<sup>167</sup>

Assuming the existence of the requisite intent to benefit plaintiff, the court perceived an obstacle to a literal application of the *Restatement (First)* framework—the requirement that the promisor render the promised performance directly to the beneficiary and not merely enable the promisee to satisfy his obligation to the beneficiary.<sup>168</sup> Rather

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FCA and Transco. Although NCNG was ultimately selected to serve the entire area, it had previously been agreed that FCA would organize a shell company to serve only the FCA plant. *Id.*

163. A factor that bore heavily on the court's consideration of the summary judgment motion was the highly dependent or conditional nature of each contract to the other. In an October 3, 1967, letter to NCNG, Transco agreed to the sale of certain additional gas volumes to be supplied to the new service area, conditioned upon NCNG's obtaining a firm commitment from the FCA plant to buy gas, and upon Transco's obtaining a certificate of public convenience and necessity. On November 10, 1967, FCA and NCNG entered into an agreement providing for a daily maximum supply to FCA of 50,000 Mcf of gas, conditioned upon the finalization of the Transco-NCNG service contract. The FCA plant was by far the largest user of gas in the new service area, receiving approximately one-third of the agreed additional gas volume. An NCNG officer later characterized the FCA-NCNG contract as a "transportation agreement drafted in the form of a purchase and sale." *Id.*

164. *See, e.g.,* *Matternes v. City of Winston-Salem*, 286 N.C. 1, 12, 209 S.E.2d 481, 487 (1974); *Vogel v. Reed Supply Co.*, 277 N.C. 119, 127, 177 S.E.2d 273, 278 (1970). *See also* *Chicago Title Ins. Co. v. Holt*, 36 N.C. App. 254, 244 S.E.2d 177 (1978); *Philco Fin. Corp. v. Mitchell*, 26 N.C. App. 264, 215 S.E.2d 823 (1975).

165. *RESTATEMENT (FIRST) OF CONTRACTS* § 133 (1932).

166. 448 F. Supp. at 479-80; *see, e.g.,* *Vogel v. Reed Supply Co.*, 277 N.C. 119, 177 S.E.2d 273 (1970); *Potter v. Carolina Water Co.*, 253 N.C. 112, 116 S.E.2d 374 (1960). The court's discussion of the issue of whether evidence other than the contract itself can be considered to determine the parties' intention is instructive. The court concluded that the rule that when a contract's terms are clear and unambiguous extrinsic evidence may not be adduced to explain or amplify the contract provisions is inapplicable to cases involving claims to third-party beneficiary status. 448 F. Supp. at 479-80.

167. 448 F. Supp. at 479.

168. *RESTATEMENT (FIRST) OF CONTRACTS* § 133(1)(b), illustration 9 (1932). *But see id.,*

than "undermine the overriding emphasis in the North Carolina cases . . . placed on the intention of the parties,"<sup>169</sup> the district court endorsed the *Restatement (Second) of Contracts* reformulation of third-party beneficiary theory. Accordingly, a party may qualify as a third-party beneficiary "if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and . . . the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."<sup>170</sup> "Although the North Carolina courts have not expressly accepted this revision of the *Restatement (First)*," the court noted that "its treatment of third party beneficiaries is fully consistent with the decided cases."<sup>171</sup> Applying this standard, the court held that the allegations created a material factual issue of whether plaintiff was intended to receive the benefit of the promised performance.

On its face, the court's approval of a strict "intention to benefit" test irrespective of the beneficiary's status as a "donee" or "creditor," and irrespective of the identity of the recipient of the promised performance represents a significant broadening of the protected category. Given the extensive dealings between plaintiff and Transco, the evidence of representations and reliances thereon, and the special "paper distributor" character of NCNG, however, "refusal of [a] remedy would have been out of harmony with generally prevailing ideas of justice and convenience."<sup>172</sup> Moreover, a standard that excludes from the protected class third parties who are intended by the promisee to be the ultimate beneficiaries of the promisor's performance even though that performance will be rendered directly to the promisee would be difficult to justify on contract principles. Thus, the district court's endorsement of a strict "intention to benefit" test was necessary and proper in order to allow enough flexibility to reach the only sound re-

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Comment d ("A contract for the benefit of a third person usually provides that performance shall be rendered directly to the beneficiary, but this is not necessarily the case."). Obviously, the Transco-NCNG-FCA relationship does not comport with the traditional third-party beneficiary alignment, *see* *Lawrence v. Fox*, 20 N.Y. 268 (1859). Defendant Transco was sued for breach of its promise to sell a given quantity of gas to NCNG, the promisee, and not for breach of a promise made to NCNG to deliver gas directly to plaintiff FCA. *See also* 4 A. CORBIN, CONTRACTS § 779D (1951); 2 WILLISTON ON CONTRACTS § 402 (3d ed. 1959).

169. 448 F. Supp. at 481.

170. RESTATEMENT (SECOND) OF CONTRACTS § 133 (Tent. Drafts Nos. 1-7, 1973). *Id.*, Comment a expressly states that "neither promisee nor beneficiary is necessarily the person to whom performance is to be rendered, the person who will receive economic benefit, or the person who furnished the consideration."

171. 448 F. Supp. at 481.

172. 4A A. CORBIN, CONTRACTS § 772, at 2 (1951).

sult on the facts.<sup>173</sup>

However justified on the particular facts, the result in *CF Industries*, by discarding the *Restatement (First)*'s basic framework and substituting a broad "intention to benefit" test, creates an intolerable danger that a court will subject a promisor to liability without justification. As a rule of law, the test offers a court little guidance in any particular fact situation and requires a court to undertake the difficult task of ascertaining on whom the contracting parties intended to confer benefits. These objections are not persuasive, however, because the North Carolina courts, while expressly purporting to follow the *Restatement (First)* approach, have consistently looked to the parties' intention as the controlling and decisive factor.<sup>174</sup> Thus, the change effected in *CF Industries* was more of form than substance—making the ostensible rule of decision comport with the actual one. Moreover, if the facts of *CF Industries* are used as the standard for requisite intent, the likelihood of a court unjustifiably extending liability is minimal and does not outweigh the potential for fairness and convenience in a particular case.<sup>175</sup>

The authority of *CF Industries* was bolstered by the North Carolina Court of Appeals in *Johnson v. Wall*.<sup>176</sup> Plaintiffs in *Johnson* contracted to purchase a house on the condition that the vendor submit a negative termite report.<sup>177</sup> Terminix Service II, Incorporated, inspected the house and delivered a written report to the vendor that stated that

173. A general statement of the test and one that is consistent with the approach taken in *CF Industries* is found in MURRAY ON CONTRACTS § 279, at 571 (2d rev. ed. 1974): "When it appears from all of the circumstances surrounding the transaction that the *main purpose of the promisee* was to exact the promisor's performance for the *benefit* of the third party, such third party has a right to enforce the promisor's correlative duty."

174. See, e.g., *Matternes v. City of Winston-Salem*, 286 N.C. 1, 209 S.E.2d 481 (1974); *Vogel v. Reed Supply Co.*, 277 N.C. 119, 117 S.E.2d 273 (1970).

175. An issue not discussed by the court but clearly raised by the factual allegations was whether plaintiff could maintain an action based on the doctrine of promissory estoppel or under RESTATEMENT (SECOND) OF CONTRACTS § 90 (Tent. Drafts Nos. 1-7, 1973) which provides: "(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." The existence of not only a promise made directly to plaintiff that Transco should have reasonably expected to induce action, but also a binding promise made to NCNG for the benefit of plaintiff suggests that such a claim would have been actionable. The considerations a court must make to determine liability under a theory of third-party beneficiary are strikingly similar to those required under a theory of reliance upon a promise made to one party for the benefit of a third party (*Id.*, Comment c). Moreover, the latter theory requires only that the beneficiary foreseeably rely on the promise, rather than the more rigorous showing of an intention to benefit required by the former.

176. 38 N.C. App. 406, 248 S.E.2d 571 (1978).

177. *Id.* at 407, 248 S.E.2d at 572.

there was no evidence of termite infestation, past or present, and no structural weakness.<sup>178</sup> Vendor gave the report to plaintiffs, who relied on it in purchasing the house. Plaintiffs later discovered extensive structural damage caused by a previous termite infestation, and sued Terminix for the cost of repairing the house. At the close of all the evidence, the trial court allowed Terminix' motion for a directed verdict, two of the reasons being that plaintiffs had not produced evidence of privity of contract between plaintiff and Terminix or evidence of any legal duty Terminix owed plaintiff.<sup>179</sup>

The court of appeals overruled the trial court and held that because vendor's unquestioned intent in engaging Terminix was to benefit plaintiff purchasers, and because Terminix knew or had reason to know the wood infestation report would be relied upon by a potential purchaser, plaintiffs could recover for breach of the vendor-Terminix contract.<sup>180</sup> Without saying so, the *Johnson* court followed the *CF Industries*<sup>181</sup> rule of determining plaintiff's right of action by ascertaining the intention of the contracting parties to benefit the plaintiff as evidenced by all the circumstances under which the contract was made, with special regard to the main purpose of the entire transaction.<sup>182</sup> The court did not cite the *Restatement (First)*, realizing perhaps that to

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178. The findings showed that an employee of Terminix inspected the house and reported by radio to a secretary of Terminix that the termite damage was the same as that found in an earlier inspection, and that there was no present infestation. The written report introduced into evidence, however, stated there was no sign of either a present or past infestation. The report did indicate the existence of damage to structural items, but explained those items had been replaced and that there were presently no structural weaknesses. *Id.* at 408-09, 248 S.E.2d at 572-73.

179. *Id.* at 409, 248 S.E.2d at 573.

180. The court relied mainly on two factors in holding that Terminix could be held liable to the third-party buyer of the house. It emphasized that the seller-buyer contract expressly made the sale conditional on the seller's provision of a negative wood infestation report. Thus, it was clear that the principal purpose of the vendor, or promisee, in hiring Terminix was to obtain an inspection and report for the benefit of the buyer, the seller receiving only a nominal benefit. Second, the court noted that the Terminix-seller contract itself implied that Terminix was aware that the report was for the benefit of a third party. *Id.* at 410-11, 248 S.E.2d at 575.

181. See notes 157-175 and accompanying text *supra*.

182. It is uncertain from the opinion whether on remand plaintiff may sustain his burden of proof by merely showing that he received a false or inaccurate infestation report, or whether plaintiff must prove that defendant was negligent. The standard of liability issue is further obscured by the *Johnson* court's cryptic holding that plaintiff's evidence was sufficient to raise an issue of negligence on the part of defendant Terminix. 38 N.C. App. at 412-13, 248 S.E.2d at 575. Possible interpretations of the holding and its relation to plaintiff's contract action as a third-party beneficiary include (1) that the court was merely stating the well-settled rule that a qualified third-party beneficiary may sue *ex delicto* as well as *ex contractu*, *Toone v. Adams*, 262 N.C. 403, 407, 137 S.E.2d 132, 135 (1964); (2) that although the suit was in contract, the exterminator's contractual duty to the promisee or third party was one of ordinary care and diligence. See note 187 *infra*. Absent any express warranty as to the accuracy of the report, and assuming that no implied warranty attached because the inspection and report is a service, see *Jones v. Clark*, 36 N.C. App. 327, 330, 244 S.E.2d 183, 185 (1978), it is unlikely that the court intended that plaintiff recover

deny plaintiff's cause of action because he was not a donee, creditor or direct recipient of the promised performance was unjustifiable in light of the clear evidence that the vendor had exacted Terminix' performance for the benefit of the plaintiff. The *Johnson* decision not only lends support to *CF Industries* and its eschewal of a categorical approach, but also illustrates the need for North Carolina expressly to discard the *Restatement (First)* and adopt the *Restatement (Second)* test.<sup>183</sup>

In *Chicago Title Insurance Company v. Holt*,<sup>184</sup> the North Carolina Court of Appeals upheld the dismissal of a third-party breach of contract action against an attorney who had certified title to real property and undertaken to close a five-party transaction<sup>185</sup> on the property. As a condition to insuring the mortgagee against any loss arising from a defect in the title to a group of newly constructed condominiums, plaintiff insurer required an indemnification agreement from the builder of the project. Relying on the attorney's certification of title to plaintiff, the general contractor signed the agreement and thereby warranted there were no unpaid materialmen or subcontractors, and agreed to indemnify plaintiff should it incur liability because of mechanics' liens having priority over the deeds of trust held by the mortgagee. Subsequently, plaintiff satisfied a judgment lien held by one of the builder's suppliers and instituted an action against the builder for indemnification. Defendant builder cross-claimed against the seller's attorney, who had handled the closing, for failure to exercise reasonable care in determining the existence of unpaid lien creditors.<sup>186</sup>

Addressing this issue of first impression, the court of appeals at the

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without a showing of negligence. The court did not discuss whether plaintiff could maintain a tort action independently of its third-party beneficiary status.

183. In holding that an exterminating company is liable to a person who purchases property in reliance upon a false or inaccurate wood infestation report provided to the vendor, North Carolina joins only a few jurisdictions that have so held. See *Hardy v. Carmichael*, 207 Cal. App. 2d 218, 24 Cal. Rptr. 475 (1962); *Wice v. Shilling*, 124 Cal. App. 2d 735, 269 P.2d 231 (1954); *Hamilton v. Walker Chem. & Exterminating Co.*, 233 So. 2d 440 (Fla. Ct. App. 1970); *Ruekenkorf v. McCartney*, 121 So. 2d 757 (La. Ct. App. 1960).

184. 36 N.C. App. 284, 244 S.E.2d 177 (1978).

185. Interested parties included the buyer, seller, lender, mortgagee's insurer, and the general contractor. *Id.* at 285-86, 244 S.E.2d at 178-79.

186. *Holt*, the general contractor, set forth two other grounds for relief in his complaint: (1) that defendant attorney was liable to *Holt* for any loss because of his undertaking to represent multiple parties at the closing; and (2) that the attorney was negligent in advising *Holt* to sign the indemnification agreement without first exercising his affirmative duty to discover the existence of any materialmen's or mechanics' liens. *Id.* at 286, 244 S.E.2d at 179. The court held the claims insufficient to state a claim upon which relief could be granted on the ground of lack of privity between *Holt* and the attorney. *Id.* at 288, 244 S.E.2d at 180.



outset decided that an action for attorney malpractice sounds in contract rather than tort, and thus may properly be brought only by those in privity of contract with the attorneys.<sup>187</sup> Because the attorney's client was the seller,<sup>188</sup> defendant builder's claim was barred unless he qualified as a third-party beneficiary of the attorney-seller employment contract.

The court purported to follow the third-party beneficiary categorization of the *Restatement (First)*<sup>189</sup> and summarily dismissed the claim because the builder was neither a donee nor creditor beneficiary. The court proceeded, however, to consider whether the vendor and attorney intended to benefit the builder and concluded that because the builder did not allege that the attorney promised to, or did in fact, certify the title to the builder, the builder had failed to state a claim upon which relief could be granted.<sup>190</sup>

Although not entirely clear, the *Chicago Title* holding suggests that as a matter of law a party to a real estate closing, who is not in privity

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187. The court supported its decision with the following statement of the general rule as set forth in 7 C.J.S. *Attorney and Client* § 140, at 978:

Although the liability of an attorney on the ground of negligence is ordinarily enforced by an action on the case for negligence in the discharge of his professional duties, the liability in reality rests on the attorney's employment by the client and is *contractual in its nature*. Hence, before the attorney can be made liable, it must appear the loss for which he is sought to be held arose from his failure or neglect to discharge some duty which was fairly within the purview of his employment. Moreover, *an attorney is liable* for negligence in the conduct of his professional duties *to his client alone*, that is, to the one between whom and the attorney the *contract* of employment and service existed, and not to third parties.

*Quoted in* 36 N.C. App. at 287, 244 S.E.2d at 180 (emphasis added by court).

The preceding excerpt is instructive because it explains the relationship between negligence and breach of contract in the case of an action for malpractice. Thus, there is nothing inconsistent about defining a breach of contract in terms of an allegation of negligence because the contractual standard is essentially an implied representation to the client that the attorney "will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's cause." *Hodges v. Carter*, 239 N.C. 517, 519, 80 S.E.2d 144, 146 (1954).

188. The court's conclusion that the attorney represented the seller at the closing is contrary to common practice and the normal expectations of the parties. The court did not articulate what factors determined the attorney-client relationship, and, therefore, the *Chicago Title* dictum creates uncertainty concerning whether the payment of attorneys' fees and being in the position of the party who naturally desires the assurances that title to the property is free and clear of encumbrances is enough to establish privity with the closing attorney.

189. RESTATEMENT (FIRST) OF CONTRACTS § 133 (1932).

190. Apparently the materialman's lien constituting the title defect was unrecorded at the time of the recording of the deed of trust. N.C. GEN. STAT. § 44A-12(b) (1969) permits such liens to be filed within four months of the work's completion. The lien is deemed to take effect from the time of the first furnishing of materials to the property, *id.*, which explains the insurer's liability for the lien. Defects not discoverable by an examination of the public records are generally either expressly or impliedly excluded from such certifications. Therefore, absent an allegation that the attorney purported to certify that no unrecorded liens existed, it is unlikely that the builder would have prevailed had the claim been actionable.

of contract with the certifying attorney, may sue the attorney only if the party is a recipient of the certification.<sup>191</sup> On third-party beneficiary principles the rule is problematic in that it conclusively presumes that only the parties to whom a certification was addressed were intended to benefit from it, and thus potentially distorts the realities of a particular real estate closing. Moreover, there seems to be no valid justification, in policy or otherwise, for precluding liability in the case of an attorney who furnishes a title certification to one party for the benefit of a third party, when an exterminating company that provides an infestation report under the same circumstances may be liable as in *Johnson v. Wall*.<sup>192</sup> In addition, the rule may constitute a treacherous pitfall to the real estate buyer who unsuspectingly relies on a title certification issued to his lender, and subsequently brings a malpractice action against the certifying attorney for failure to discover a title defect. The problem is compounded by the common practice of one attorney closings, and the consequent failure to define the attorney-client relationship.<sup>193</sup>

### C. *Unfair Trade*

In *Bache Halsey Stuart, Inc. v. Hunsucker*,<sup>194</sup> the North Carolina Court of Appeals held that the federal Commodity Exchange Act<sup>195</sup> as amended by the Commodity Futures Trading Commission Act<sup>196</sup> preempted the application of the state unfair trade practices law, G.S. 75-1.1,<sup>197</sup> to transactions involving the purchase or sale of commodity futures contracts. Plaintiff, a stock and commodities broker, sued to recover a deficit balance in defendant's commodities account. Defendant counterclaimed that Bache had committed unfair and deceptive acts in

191. Although there is language in the opinion that indicates the court was applying a strict "intention to benefit" test to the complaint to ascertain whether the seller (promisee) intended that the contractor benefit or rely on the title certification, the court's affirmation of the dismissal of the claim in the face of allegations that the attorney advised the contractor to sign the lien waiver suggests that intention was not determinative. The disposition of the case indicates that only parties to whom a certification was delivered, or promised to be delivered, may qualify as a third-party beneficiary.

192. See notes 176-183 and accompanying text *supra*.

193. See generally Whitman, *Transferring North Carolina Real Estate Part I: How the Present System Functions*, 49 N.C.L. REV. 413 (1971).

194. 38 N.C. App. 414, 248 S.E.2d 567 (1978), *cert. denied*, 296 N.C. 583, — S.E.2d — (1979).

195. 7 U.S.C. §§ 1-22 (1976).

196. Pub. L. No. 93-463, 88 Stat. 1389 (1974) (codified in scattered sections of 5, 7 U.S.C.).

197. The statute at issue was the former § 75-1.1(a) that provided as follows: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." Law of June 12, 1969, ch. 833, 1969 N.C. Sess. Laws 930 (formerly codified at N.C. GEN. STAT. § 75-1.1(a) (1975)) (amended 1977).

violation of G.S. 75-1.1 by making unauthorized sales and purchases of commodities in defendant's name, and subsequently liquidating defendant's accounts.<sup>198</sup>

Because the Commodity Exchange Act granted exclusive jurisdiction<sup>199</sup> to the Commodity Futures Trading Commission to hear customer complaints and award monetary damages<sup>200</sup> for the activities alleged,<sup>201</sup> the court inferred that Congress sought to regulate unfair and deceptive practices in the commodity trading field to the exclusion of the states. The court was not persuaded that a private action under G.S. 75-1.1 was merely an action at common law not in conflict with the federal regulatory scheme.<sup>202</sup> The court reasoned that because a finding that plaintiff had violated G.S. 75-1.1 could expose it to a host of legislatively created sanctions in addition to those sought, the private action was tantamount to state regulation, and thus preempted.<sup>203</sup>

The *Bache* holding that state regulation of commodities trading is preempted is in line with the few decisions that have addressed the question.<sup>204</sup> Language in the Commodity Exchange Act that "the

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198. 38 N.C. App. at 417, 248 S.E.2d at 568.

199. The jurisdiction of the Commission is set out in 7 U.S.C. § 2 (1976) and provides in part as follows:

*Provided*, That the Commission shall have exclusive jurisdiction with respect to accounts, agreements . . . and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market designated pursuant to section 7 of this title or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 15a of this title: *And provided further*, That, except as hereinabove provided, nothing contained in this section shall (i) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (ii) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws. Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State . . . .

200. *Id.* § 18.

201. Federal courts have held it a violation of the Commodity Exchange Act for an account executive in the commodity brokerage business to intentionally carry on trading transactions not authorized by his customers. *Haltmier v. Commodity Futures Trading Comm'n*, 554 F.2d 556 (2d Cir. 1977); *Silverman v. Commodity Futures Trading Comm'n*, 549 F.2d 28 (7th Cir. 1977).

202. Several courts have held that a purpose of the language in 7 U.S.C. § 2 (1976) that "[n]othing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State" is to preserve a court's jurisdiction over claims arising out of a violation of the common law. *See Arkoosh v. Dean Witter & Co.*, 415 F. Supp. 535 (D. Neb. 1976); *E.F. Hutton Co. v. Lewis*, 410 F. Supp. 416 (E.D. Mich. 1976).

203. Under N.C. GEN. STAT. § 75-14 (1975) the attorney general may obtain injunctive relief against violations of § 75-1.1. In addition, he is entitled to seek a court order to restore money or property or cancel any contracts obtained through violation of the statute. *Id.* § 75-15.1.

204. *See International Trading, Ltd. v. Bell*, 556 S.W.2d 420 (Ark. 1977), *cert. denied*, 435 U.S. 941 (1978); *State v. Money Int'l, Ltd.*, 527 S.W.2d 804 (Tex. Civ. App. 1975). *See also SEC v. Univest, Inc.*, 405 F. Supp. 1057 (D.C. Ill. 1975), *remanded*, 556 F.2d 584 (7th Cir. 1977) (SEC preempted from suing dealer in commodity options). The *Bache* court found the *Bell* case partic-

Commission shall have exclusive jurisdiction with respect to accounts, agreements . . . and transactions involving contracts of sale of a commodity for future delivery"<sup>205</sup> evinces a clear intent on the part of Congress to vest in the Commission exclusive jurisdiction over the regulation of transactions involving commodity futures contracts, and to supersede state regulation of the same subject matter.<sup>206</sup> Assuming that G.S. 75-1.1 and its concomitant enforcement provisions<sup>207</sup> are regulatory in nature, some uncertainty still remains about whether a private action pursuant to a regulatory statute is likewise preempted.<sup>208</sup> The court's conclusion that a G.S. 75-1.1 private action could potentially frustrate the federal scheme was sound given the structure of the statute and Congress' objective of providing a centralized regulatory authority designed to establish relatively consistent and uniform standards of conduct in commodity markets. Moreover, the Act's provision of a complete administrative procedure for the hearing of customer complaints and the awarding of monetary damages implies that Congress intended that the Commission's exclusive jurisdiction extend to private actions pursuant to substantive regulatory law.<sup>209</sup>

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ularly persuasive. In that case, the Arkansas securities commissioner sought an injunction against a commodities investment firm under ARK. STAT. ANN. § 67-1236(a) (Repl. 1966), a state statute designed to prevent fraud or deceit in the trading of securities. The Arkansas Supreme Court held that the trial court had no jurisdiction under the state securities law to regulate conduct in the area of commodity futures in light of a pervasive federal regulatory scheme and congressional intent to give the Commission exclusive jurisdiction.

205. 7 U.S.C. § 2 (1976).

206. The Senate Agriculture and Forestry Committee explained the meaning of the "exclusive jurisdiction" language of 7 U.S.C. § 2 (1976) as follows:

The *House* bill provides for exclusive jurisdiction of the Commission over all futures transactions. However, it is provided that such exclusive jurisdiction would not supersede or limit the jurisdiction of the Securities and Exchange Commission or other regulatory authorities.

The [Senate] *Committee* amendment retains the provision of the *House* bill but adds three clarifying amendments. The clarifying amendments make clear that (a) the Commission's jurisdiction over futures contract markets or other exchanges is exclusive and includes the regulation of commodity accounts, commodity trading agreements, and commodity options; (b) the Commission's jurisdiction, where applicable, supersedes State as well as Federal agencies . . . .

S. REP. NO. 1131, 93d Cong., 2d Sess. 54 (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 5843, 5848. The Senate provision was accepted by the Conference Committee. H.R. CONF. REP. NO. 93-1383, 93d Cong., 2d Sess. 4 (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 5894, 5897.

207. N.C. GEN. STAT. §§ 75-1 to -29 (1975 & Cum. Supp. 1977).

208. See Johnson, *The Commodity Futures Trading Commission Act: Preemption as Public Policy*, 29 VAND. L. REV. 1, 32-36 (1976).

209. The court stressed that the customer could nevertheless maintain a traditional common law action in state court. The court construed the second proviso of the jurisdictional grant, *quoted in* note 199 *supra*, as authorizing state and federal courts to adjudicate claims arising out of a violation of the common law. 38 N.C. App. at 420-21, 248 S.E.2d at 570.

In another case involving former G.S. 75-1.1, the court of appeals decided whether certain instances of false advertising violated that statute's prohibition of "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Plaintiff in *Harrington Manufacturing Co. v. Powell Manufacturing Co.*<sup>210</sup> alleged that Powell, a competitor, had violated G.S. 75-1.1 by advertising that "only the Powell Combine primes lugs through tips" when, in fact, plaintiff's combine also primed lugs through tips.<sup>211</sup> Defendant Powell counterclaimed that plaintiff had similarly violated the statute by falsely advertising that plaintiff's tobacco primer was "years ahead of any other tobacco harvester on the market,"<sup>212</sup> and that plaintiff's loading rack and curing barns were "stronger than Powell's" and had a greater loading capacity.<sup>213</sup> The court of appeals upheld dismissal of both claims on the ground that the representations, even if proved false, "did not . . . go so far beyond the tolerable limits of puffing as to constitute unfair acts proscribed by G.S. 75-1.1."<sup>214</sup> Whether false representations exceed the bounds of fairness in any particular case depends upon the extent to which the typical buyer would rely on such advertising in making a purchase. The court reasoned that when the advertisement concerned an expensive product and was aimed at a group of knowledgeable buyers, prospective purchasers would not normally rely solely upon a magazine advertisement or media broadcast, especially when accurate technical information was available.<sup>215</sup>

Although the court's ruling that puffing is not deceptive or unfair within the meaning of G.S. 75-1.1 was sound,<sup>216</sup> such a conclusion on the particular facts of this case may be criticized on several fronts. First, it is a close question whether representations of specific fact that imply that the representer has personal knowledge of the truth of the assertions (*e.g.*, "greater loading capacity," "the *only* harvester that primes lugs through tips") constitute mere puffing, no matter how so-

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210. 38 N.C. App. 393, 248 S.E.2d 739 (1978), *cert. denied*, 296 N.C. 411, 251 S.E.2d 469 (1979).

211. *Id.* at 397, 249 S.E.2d at 742.

212. *Id.* at 402, 248 S.E.2d at 744.

213. *Id.* at 402, 248 S.E.2d at 745.

214. *Id.* at 403, 248 S.E.2d at 745.

215. *Id.* at 400-01, 248 S.E.2d at 744.

216. See E. KINTNER, A PRIMER ON THE LAW OF DECEPTIVE PRACTICES 319-325 (1971). N.C. GEN. STAT. § 75-1.1(a) (Cum. Supp. 1977) is a copy of the language of § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1)-(9) (1976); the Federal Trade Commission and the reviewing courts have recognized that puffing and sales talk are not unlawful, and those decisions are generally consistent with state law definitions of puffing. See *Carlay Co. v. FTC*, 153 F.2d 493 (7th Cir. 1946); *Kidder Oil Co. v. FTC*, 117 F.2d 892 (7th Cir. 1941).

phisticated purchasers may be.<sup>217</sup> It seems that a prospective purchaser could justifiably rely on such an advertising claim.

Second, although the court's rationale is not entirely clear, it seemed to reason alternatively that because buyers of tobacco farming machinery do not rely on advertising claims in making their purchases, no deception had occurred.<sup>218</sup> Such a conclusion represents a questionable excursion into fact-finding and arguably the issue of customer reliance should have been remanded for a determination by the trier of fact.<sup>219</sup> Moreover, the wisdom of this rationale from a policy standpoint is questionable in that it sanctions virtually any advertising representation made in this market no matter how untrue or deceptive it appears to be. To this extent, the result undermines G.S. 75-1.1's purpose of promotion of commercial honesty and competition on the merits.<sup>220</sup>

The court further held that averments in the counterclaim that plaintiff had "passed off" a piece of Powell's tobacco harvesting machinery as plaintiff's own product alleged an unfair or deceptive act under former G.S. 75-1.1.<sup>221</sup> Plaintiff incorporated Powell's "CutterBar" (a defoliator) into one of its automatic tobacco harvesters and demonstrated the harvester to prospective purchasers without identifying the blade assembly as having been manufactured by Powell.<sup>222</sup> Al-

217. Whether a representation is puffing or sales talk depends on the nature of its language. Traditionally, puffing has consisted of glittering general statements rather than specific representations of fact. See E. KINTNER and cases cited note 216 *supra*.

218. See 38 N.C. App. at 401, 248 S.E.2d at 744.

219. For a statement of proper role of judge in an action under N.C. GEN. STAT. § 75-1.1, see *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975).

220. Law of June 12, 1969, ch. 833, 1969 N.C. Sess. Laws 930 (formerly codified at N.C. GEN. STAT. §§ 75-1.1(b) (1975)) (repealed 1977), provides:

The purpose of this section is to declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings between buyers and sellers at all levels of commerce be had in this State.

221. The court recognized that this form of passing off differed from the traditional common law action for the passing off of one's goods as those of a competitor. 38 N.C. App. at 404, 248 S.E.2d at 746. See generally Aycock, *Antitrust and Unfair Trade Practice Law in North Carolina—Federal Law Compared*, 50 N.C.L. REV. 199 (1972).

222. In August 1974 Harrington purchased a Powell "CutterBar" and incorporated it into one of its automatic tobacco harvesters. The patented "CutterBar" (Powell's trade name for the mechanical harvesting device generically known as the "splinter knife" type defoliator) was unique in that it consisted of a blade assembly with upward revolving blades. Harrington added a hydrosynchronizer, a device that had been invented by Harrington's engineers that synchronized by hydraulics the timing of the knife of the blade assembly with the forward motion of the harvester. Harrington demonstrated this innovation to about 300 farmers without identifying the blade assembly as Powell-made. 38 N.C. App. at 399, 248 S.E.2d at 743.

though plaintiff had a license to produce the CutterBar,<sup>223</sup> the court held that by using Powell's actual product in its demonstrations plaintiff had misappropriated a variety of values flowing from the quality of the product, including the large investment that Powell had made in experimentation, engineering and development to bring its CutterBar to a high level of quality and efficiency.<sup>224</sup>

In upholding Powell's allegation that the use of its CutterBar in plaintiff's harvester demonstration without so notifying prospective purchasers constituted an unfair method of competition under G.S. 75-1.1, the court did not identify the exact nature of the interest being protected. The injury alleged was actually a mixture of two distinct wrongs: (1) the plaintiff obtained an unfair advantage over its competitors by doing demonstrative advertising without having to incur the investment and manufacturing costs required for producing its own CutterBar,<sup>225</sup> and (2) plaintiff's failure to fully disclose the defoliator's make amounted to a representation that plaintiff had manufactured that particular defoliator with that degree of quality, causing prospective harvester buyers to purchase from plaintiff when they may not have otherwise.<sup>226</sup> The former type of appropriation, that of Powell's "production" value, appears *de minimis* because plaintiff would eventually have to duplicate Powell's investment in order to fulfill its sales contracts. Thus, while the advertising short-cut taken by plaintiff may have enabled it to make some sales a few months before it could have otherwise, the absence of any long-term crippling effect on competitors minimizes its importance.

Whether the alleged wrong consisting of plaintiff's failure to identify the defoliator as that of a competitor is legally sufficient to support a private action for the recovery of monetary damages under G.S. 75-

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223. In 1962, Powell obtained a nonexclusive license to manufacture and sell the CutterBar. On November 15, 1974, the patentee granted a nonexclusive license to Harrington to produce its own device. Harrington demonstrated its harvester with the incorporated CutterBar in September and October of 1974. Apparently, Harrington was using a Powell CutterBar in its demonstrations until it began producing its own.

224. 38 N.C. App. at 404, 248 S.E.2d at 746.

225. See generally *International News Serv. v. Associated Press*, 248 U.S. 215 (1918).

226. The difference between the two is made apparent by positing that plaintiff had fully disclosed to its customers that the defoliator demonstrated was a Powell CutterBar. Plaintiff's customers would not then have attributed any desirable characteristics of the product as deriving from plaintiff and Powell could hardly be heard to complain that plaintiff was diverting customers. But despite full disclosure of the defoliator's source a misappropriation would nevertheless exist consisting essentially of plaintiff's demonstrating its harvester with the CutterBar without having incurred the investment and manufacturing costs required to produce a CutterBar.

1.1<sup>227</sup> is difficult to assess in light of the lack of case law and extra-statutory expressions of legislative intent. Powell's argument was that plaintiff, by using Powell's actual product in its advertising demonstrations, misappropriated to its own benefit certain values of "quality" and "efficiency" inhering in the CutterBar that deceived prospective purchasers into incorrectly attributing such desirable characteristics to plaintiff's initiative.

Although plaintiff's act strikes one as unfair in that the alleged wrongdoer is reaping where he has not sown, the essence of the misappropriation in this instance was plaintiff's misrepresentation to potential purchasers that the demonstrated harvester and blade assembly was of its own manufacture. While a misappropriation that tends to deceive customers into confusing the wrongdoer's goods with those of a competitor would clearly be actionable, an inherent difficulty of proof arises when what is alleged to have been misappropriated is other than an identifying mark or characteristic.<sup>228</sup> Because a finding of liability subjects the wrongdoer to treble damages,<sup>229</sup> and because the language in the private remedy statute is compensatory,<sup>230</sup> on remand it should not be sufficient for Powell to show merely that plaintiff's sales of harvesters were proximately caused by its use of Powell's CutterBar; instead, Powell should be required to show, that customers were actually diverted.<sup>231</sup> Factors that militate against the existence of actual injury to Powell are that the CutterBar was a component of the entire product being demonstrated and that plaintiff possessed a license to make the

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227. If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed by a jury in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.

N.C. GEN. STAT. § 75-16 (Cum. Supp. 1977).

228. Judge Clark in *California Apparel Creators v. Wieder of Cal., Inc.*, 162 F.2d 893 (2d Cir. 1947), stated the general common law rule:

To recover damages or to receive protective relief against the actions of these defendants, plaintiffs must therefore show not only a representation by defendants which is false and deceitful in the sense of luring customers to their doors wrongfully, but also that plaintiffs have lost their own rightful custom thereby.

*Id.* at 900.

229. N.C. GEN. STAT. § 75-16 (Cum. Supp. 1977), *quoted in* note 227 *supra*.

230. *Id.*

231. Merely because the nondisclosure is couched in terms of a misappropriation, Powell should not be relieved of the burden of proving diversion. The theory underlying such a "misrepresentation" is essentially no different from that of the traditional common law tort of passing off. When a seller palms off his wares as those of a competitor, he diverts customers by appropriating to his own use a competitor-created value, namely, customer recognition of a mark or other identifying feature.



defoliator. Thus, given the evanescence of the values alleged to have been misappropriated and the conjectural nature of any injury, absent an allegation that plaintiff's customers were confused about the source and therefore would have purchased from Powell but for the misappropriation, the claim should arguably be dismissed.<sup>232</sup> To permit a jury to speculate on the nature and extent of Powell's injury would, it seems, be to punish plaintiff for the act of using Powell's CutterBar and thus grant a remedy not authorized by G.S. 75-16's compensatory provisions.

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#### IV. CONSTITUTIONAL LAW

##### A. *Full Faith and Credit*

In *Vincent v. Vincent*,<sup>1</sup> the North Carolina Court of Appeals upheld a district court ruling that an Alabama court's judgment modifying a North Carolina alimony decree<sup>2</sup> terminated plaintiff's rights under the North Carolina decree as of the date the Alabama judgment was entered.<sup>3</sup> Recognizing a split in authority on whether defendant is relieved of his obligation when the foreign judgment is entered or only when he obtains a judgment in North Carolina that gives full faith and credit to the foreign decree, the court held that in order to give the Alabama decree the same effect it would have in Alabama, as is required by the full faith and credit clause,<sup>4</sup> the entry of the foreign judg-

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232. Had Powell alleged that plaintiff's use of its CutterBar amounted to a representation that plaintiff was not selling Powell CutterBars and thus purchasers of plaintiff expected to get a Powell-made blade assembly on their harvesters, the element of diversion would have been made out. Without a customer associating the misappropriated values with the complainant (or the nonexistence of other factors indicating that the purchasers would have bought from the complainant but for the misrepresentation, e.g., only two firms) such a claim seeking monetary damages is deficient.

1. 38 N.C. App. 580, 248 S.E.2d 410 (1978).

2. The Alabama court could modify the North Carolina decree to the same extent that a North Carolina court could, and the Alabama court's finding of changed circumstances (regarding health and financial resources of defendant husband) was sufficient under North Carolina law to allow it to modify the decree. *Id.* at 582-83, 248 S.E.2d at 412.

3. *Id.* at 581, 248 S.E.2d at 411.

4. U.S. CONST. art. IV, § 1.

ment must immediately terminate plaintiff's rights under the North Carolina decree.<sup>5</sup>

### B. First Amendment

A federal district court, in *Radford v. Webb*,<sup>6</sup> declared unconstitutional a North Carolina statute prohibiting the use of profane, indecent and threatening language over a telephone.<sup>7</sup> A virtually identical Virginia statute had been declared unconstitutionally overbroad by the United States Court of Appeals for the Fourth Circuit because included in the prohibition was language that was not obscene but was protected by the first amendment.<sup>8</sup> The court of appeals found that the statute could be more narrowly drawn to meet the legitimate state interest in proscribing the use over the telephone of obscene language without infringing constitutionally protected speech.<sup>9</sup> The district court in *Radford* viewed the Virginia and North Carolina statutes as virtually indistinguishable,<sup>10</sup> and found no North Carolina cases construing the language of the statute that restricted its meaning to an allowable prohibition against obscene phone calls.<sup>11</sup> Without such a limitation by judicial decision, the terms "profane, indecent and threatening" could include mere "heat of the moment" threats and words with an offensive connotation that are protected by the first amendment.<sup>12</sup> The statute was thus held to be overbroad and an unconstitutional infringement on

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5. 38 N.C. App. at 583, 248 S.E.2d at 412.

The North Carolina Court of Appeals also considered the effect of the full faith and credit clause in *Sainz v. Sainz*, 36 N.C. App. 744, 245 S.E.2d 372 (1978). Plaintiff wife obtained a specific performance decree in a New York court under an extrajudicial separation agreement. The decree was enforceable by civil contempt proceedings in New York. *Id.* at 745, 245 S.E.2d at 373. The court held that although the specific performance decree was entitled to recognition in North Carolina, the full faith and credit clause did not bind the state to enforce the decree by civil contempt proceedings. Because such proceedings would constitute imprisonment for debt, which is prohibited by N.C. CONST. art. I, § 28, the decree would not be so enforced. *Id.* at 747-48, 245 S.E.2d at 374-75.

6. 446 F. Supp. 608 (W.D.N.C. 1978).

7. The statute provides that it is unlawful "[t]o use in telephonic communications any words or language of a profane, vulgar, lewd, lascivious or indecent character, nature or connotation" and "[t]o use in telephonic communications any words or language threatening to inflict bodily harm to any person." N.C. GEN. STAT. § 14-196(a)(1)(2) (1969).

8. The Virginia statute challenged for overbreadth in *Walker v. Dillard*, 523 F.2d 3 (4th Cir.), cert. denied, 423 U.S. 916 (1975), provided: "If any person shall curse or abuse anyone, or use vulgar, profane, threatening or indecent language over any telephone in this State, he shall be guilty of a misdemeanor . . ." VA. CODE § 18.1-238 (1975) (repealed 1975).

9. *Walker v. Dillard*, 523 F.2d 3, 5-6 (4th Cir.), cert. denied, 423 U.S. 906 (1975).

10. 446 F. Supp. at 610.

11. *Id.* at 611.

12. *Id.* at 610-11.

first amendment freedom of speech.<sup>13</sup> In so holding the district court refused to follow a North Carolina Court of Appeals case, *In re Simmons*,<sup>14</sup> which had held that G.S. 14-196(a)(1)<sup>15</sup> was not unconstitutionally overbroad.<sup>16</sup> The district court's decision not to follow *Simmons* is understandable in light of the inadequate analysis of the statute in *Simmons*.

The court of appeals in *Simmons* failed to analyze the statute according to the accepted test for overbreadth of a statute regulating speech: whether the statute is drawn to prohibit only speech not protected by the first amendment (for example, obscenity).<sup>17</sup> The court reasoned that because the state could prevent intrusion by telephone on individuals' privacy in some situations,<sup>18</sup> it could prohibit the use of language that was clearly "lewd, lascivious and indecent."<sup>19</sup> Although the court was correct that the state can regulate some speech, the conclusion that lewd speech can be prohibited fails to consider whether speech that is lewd and indecent, though morally and socially objectionable, is also protected by the first amendment and therefore not properly subject to regulation. The district court's finding in *Radford* that the statute prohibited such language protected by the first amendment supplied the overbreadth analysis that the North Carolina Court of Appeals had omitted in upholding the statute in *Simmons*.<sup>20</sup>

### C. Fourteenth Amendment: Equal Protection

In *Spencer v. Spencer*,<sup>21</sup> defendant husband claimed that the North Carolina privy examination statute<sup>22</sup> violated the equal protec-

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13. *Id.* at 611.

14. 24 N.C. App. 28, 210 S.E.2d 84 (1974).

15. N.C. GEN. STAT. § 14-196(a)(1) (1969).

16. 446 F. Supp. at 611.

17. *See, e.g.,* Gooding v. Wilson, 405 U.S. 518 (1972) (statute proscribing the use of abusive language in presence of others held unconstitutionally vague).

18. Statutes may, for example, proscribe the use of obscene language, which is not protected by the first amendment. *Id.*

19. 24 N.C. App. at 30-31, 210 S.E.2d at 86.

20. In another first amendment case, a federal district court, in *Hart Book Stores, Inc. v. Edmisten*, 450 F. Supp. 904 (E.D.N.C. 1978), declared N.C. GEN. STAT. § 14-202.11 (Cum. Supp. 1977) unconstitutional. The court held that the statute, which limited the number of adult establishments in a building to one, violated equal protection and infringed plaintiff's first amendment freedom of speech without advancing the state's interest in preventing community decay. 450 F. Supp. at 908. For a thorough discussion of this case, see *Survey of Developments in North Carolina Law, 1977*, 56 N.C.L. REV. 843, 944-46 (1978).

21. 37 N.C. App. 481, 246 S.E.2d 805, *cert. denied*, 296 N.C. 106, 249 S.E.2d 804 (1978).

22. Law of Feb. 12, 1872, ch. 193, § 27, 1871-72 N.C. Pub. Laws 336 (formerly codified as amended at N.C. GEN. STAT. § 52-6 (1976)(repealed 1977).

tion clauses of the United States and North Carolina constitutions.<sup>23</sup> The statute provided that contracts between husband and wife that effected a change in the wife's real estate or income from that real estate were invalid unless the wife was examined by a judicial officer to determine that the contract was not unreasonable or injurious to the wife. The trial court rejected defendant's constitutional challenges,<sup>24</sup> and the court of appeals affirmed.

In defense to an action by plaintiff wife under the terms of a separation agreement, defendant asserted that the statute was unconstitutional because it did not afford men as well as women the protection of the exam.<sup>25</sup> The court of appeals concluded that defendant did not have standing to challenge the constitutionality of the statute because the appropriate remedy upon a finding of unconstitutionality would be elimination of the privy exam altogether and would not affect defendant.<sup>26</sup> The court premised this conclusion on the fact that the privy exam requirement is an impermissible restriction on the right to contract rather than a valuable right of itself.<sup>27</sup> Thus its application should be abrogated entirely rather than extended. Despite denial of standing to defendant, the court undertook an historical and constitutional analysis of the statute and concluded that were the issue properly before it the court's finding would be that the statute was unconstitutional.<sup>28</sup>

#### D. Fourteenth Amendment: Due Process

##### 1. Pursuit of Lawful Occupation

#### In *Duggins v. North Carolina Board of Certified Public Accountant*

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23. 37 N.C. App. at 484, 246 S.E.2d at 807; see U.S. CONST. art. XIV; N.C. CONST. art. I, § 19.

24. 37 N.C. App. at 483, 246 S.E.2d at 807.

25. *Id.* at 486-88, 246 S.E.2d at 809-10.

26. *Id.* at 488-89, 246 S.E.2d at 810. The court also noted that defendant, due to his high level of education and experience would not have benefited from an exam if it were available to him, and therefore defendant had suffered no injury. *Id.* at 489, 246 S.E.2d at 811.

27. *Id.* at 488, 246 S.E.2d at 810.

28. *Id.* at 488-89, 246 S.E.2d at 810. In another equal protection case, the North Carolina Supreme Court, in *State ex rel. Utilities Comm'n v. Edmisten*, 294 N.C. 598, 242 S.E.2d 862 (1978), held that a Utilities Commission order allowing natural gas companies to obtain direct rate increases to cover the costs of gas exploration without bringing general rate cases did not violate equal protection. *Id.* at 611-12, 242 S.E.2d at 810-11. The court said that because the entire public would benefit from increased gas supplies, the rates did not have to be applied only to customers who would benefit directly from the exploration or who were responsible for the shortages. *Id.* For a discussion of the due process claims raised by plaintiff, see notes 55-62 and accompanying text *infra*. For a discussion of the administrative issues raised in this case, see this Survey, *Administrative Law: Regulation of Utilities*.

*Examiners*,<sup>29</sup> the North Carolina Supreme Court upheld against a due process challenge the North Carolina statutory requirement that an applicant for a CPA license must have had two years of experience with a CPA in the "public practice."<sup>30</sup> The statute defines a person engaged in the public practice of accounting as one who holds himself out to the public as an accountant offering to perform any or all of the services ordinarily performed by those who are accountants.<sup>31</sup> Plaintiff Duggins had passed the CPA exam and had worked with a CPA in a law firm, mostly on tax accounting matters, for four years.<sup>32</sup> The Board of Examiners refused to issue a license to Duggins.<sup>33</sup> Because a lawyer dealing with tax matters does not hold himself out to the public as an accountant, performing solely accountant's services, Duggins did not have the requisite experience with an accountant in the "public practice."<sup>34</sup>

Duggins challenged the requirement that the experience be with a CPA in public practice as bearing no rational relationship to the state's objective of ensuring that only capable, qualified, experienced people be certified.<sup>35</sup> He argued that experience with an accountant in a law firm dealing with accounting matters provided the same or equivalent experience and met the state objectives.<sup>36</sup> The supreme court rejected plaintiff's contention, holding instead, as did the Board of Examiners, that work with a CPA in the public practice may expose an accountant to a wider range of experience than work with an accountant in a law firm on more narrowly defined tax matters.<sup>37</sup> Therefore the statute is constitutional since the experience requirement in the statute is rationally related to the state's objective in maintaining the quality of CPA's.<sup>38</sup>

#### The North Carolina statute that prohibits advancements of money

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29. 294 N.C. 120, 240 S.E.2d 406 (1978).

30. N.C. GEN. STAT. § 93-12(5) (Cum. Supp. 1977). The statute also requires that an applicant pass the CPA exam before being licensed.

31. *Id.* § 93-1(5) (1975).

32. 294 N.C. at 123, 240 S.E.2d at 409.

33. *Id.* at 124, 240 S.E.2d at 409.

34. *Id.*

35. *Id.* at 129, 240 S.E.2d at 412-13.

36. *Id.* at 127-28, 240 S.E.2d at 411.

37. *Id.* at 129-30, 240 S.E.2d at 413.

38. The court applied the same finding of a rational relationship between the statutory experience requirement and the state's desire to regulate the quality of CPA's in upholding the statute against Duggins' equal protection claim that the statute unreasonably discriminated between those persons with two years' experience with a CPA in the public practice and those without such experience. *Id.* at 130-33, 240 S.E.2d at 413-14.

to political candidates by a corporation, business, or union<sup>39</sup> was challenged by a public relations firm in *Louchheim, Eng & People, Inc. v. Carson*,<sup>40</sup> the first North Carolina case to interpret the corporate campaign contribution statute. Plaintiff had been hired by defendant candidate for state attorney general to carry on his media campaign and had purchased about \$22,000 worth of advertising.<sup>41</sup> Plaintiff sued to collect the money after defendant had written a bad check for the amount.<sup>42</sup> The North Carolina Court of Appeals agreed with defendant that the \$22,000 was an illegal campaign contribution under G.S. 163-278, which prohibits "any contribution or expenditure . . . in and on behalf of or in opposition to any candidate or political committee in any election or for any political purpose whatsoever,"<sup>43</sup> and so refused to allow plaintiff recovery.<sup>44</sup>

Interpreting the statute as barring all credit transactions, plaintiff challenged the statute as an unreasonable infringement on the right to contract and carry on a lawful occupation.<sup>45</sup> The court in upholding the statute correctly stated that the money that plaintiff spent was clearly an advancement, which is specifically prohibited under the statutory definition of "contribution and expenditure."<sup>46</sup> Plaintiff argued that if its payments for advertising costs were prohibited under the statute, then all credit transactions between business and political candidates would be barred.<sup>47</sup> The court stated that if it construed the statute to prohibit all such credit transactions the statute might indeed

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39. "[I]t shall be unlawful for any corporation, business entity, labor union, professional association or insurance company directly or indirectly:

(1) to make any contribution or expenditure (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) in aid or in behalf of or in opposition to any candidate or political committee in any election or for any political purpose whatsoever . . . ."

N.C. GEN. STAT. § 163-278.19(a)(1976).

40. 35 N.C. App. 299, 241 S.E.2d 401 (1978). For further discussion of this opinion, see this Survey, *Administrative Law: Campaign Finance*.

41. 35 N.C. App. at 301, 241 S.E.2d at 403.

42. *Id.*

43. N.C. GEN. STAT. § 163-278.19(a) (1976).

44. 35 N.C. App. at 304, 241 S.E.2d at 405.

45. *Id.* at 306, 241 S.E.2d at 406. Plaintiff attacked the restriction on the right to engage in business activity as violative of the fourteenth and fifth amendments to the United States Constitution, and the "law of the land" clause of the North Carolina Constitution, which has been interpreted to have the same meaning as the federal due process clause. N.C. CONST. art. I, § 19; see *State v. Collins*, 169 N.C. 323, 324, 84 S.E. 1049, 1050 (1915).

46. 35 N.C. App. at 307, 241 S.E.2d at 406. Contribution and expenditure are defined in N.C. GEN. STAT. § 163-278.6(6), (9) (1976) to include advertisements.

47. 35 N.C. App. at 306, 241 S.E.2d at 406.

be unconstitutional.<sup>48</sup> In the court's view, however, the advancement of money for an advertising campaign was clearly distinguishable from an "ordinary extension of credit to a client for services rendered,"<sup>49</sup> which is not barred by the statute. The court, however, does not provide a basis for making this distinction. Moreover, the language of the statute might well be construed otherwise to cover normal credit transactions. First, the definitions of "contribution" and "expenditure" in the statute include not only advancement, but also "any . . . transfer of funds, loan, payment, gift, pledge or subscription of money or anything of value whatsoever."<sup>50</sup> Additionally, an important policy behind the statute as articulated by the court is the prevention of any activity by a corporation that would "encourage favored treatment by an official once he is elected."<sup>51</sup> Given the expansive inclusiveness of the definition of "expenditure" and the policy against businesses currying political favor, arguably the statute may prohibit any credit transactions with political candidates. Further, the definition of a contribution and expenditure goes on to say that "[t]hese terms include, without limitation, such contributions as labor or personal services."<sup>52</sup> This language combined with a broad reading of the definition of contribution contradicts the court's finding that extensions of credit on personal services are not prohibited by the statute.<sup>53</sup> When the statute is so interpreted to prohibit all credit transactions between business and candidates, an interpretation supported by the language of the statute itself, the restriction on a plaintiff's right to contract and carry on a lawful business is not minimal; rather, in the court's words, this interpretation "might well involve unreasonable intrusions on constitutional rights."<sup>54</sup> Such a prohibition on credit transactions clearly restricts the ability of business to function and therefore may unconstitutionally infringe the right to carry on a lawful occupation.

## 2. Freedom of Contract

In *State ex rel. Utilities Commission v. Edmisten*,<sup>55</sup> the North Carolina Supreme Court considered plaintiffs' claims that an order of the

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48. *Id.* at 306-07, 241 S.E.2d at 406.

49. *Id.* at 305, 241 S.E.2d at 405.

50. N.C. GEN. STAT. §§ 163-278.6(6), (9) (1976).

51. 35 N.C. App. at 304, 241 S.E.2d at 405.

52. N.C. GEN. STAT. § 163-278.6(6) (1976).

53. 35 N.C. App. at 305, 241 S.E.2d at 405.

54. *Id.* at 307, 241 S.E.2d at 406.

55. 294 N.C. 598, 242 S.E.2d 862 (1978).

State Utilities Commission that allowed natural gas companies to obtain direct rate increases to cover costs of natural gas exploration without a general ratemaking hearing was a violation of the due process clause and its state analogue, North Carolina's law of the land clause.<sup>56</sup> The attorney general, in attacking the granting of the rate increases, argued that the rate increases were forced investments that violated customers' freedom of contract.<sup>57</sup> Plaintiff relied on a 1974 North Carolina Supreme Court case, *Bulova Watch Co. v. Brand Distributors, Inc.*,<sup>58</sup> which held that protection of manufacturers of trademarked goods against price cutting and unauthorized use of the trademark was an insufficient benefit to the public to justify the infringement on the freedom to contract that resulted from the non-signer clause of the North Carolina Fair Trade Act.<sup>59</sup> The supreme court in *Bulova*, recognizing that the freedom to contract is a constitutionally protected right that can be infringed only on a showing of the furtherance of a legitimate state interest,<sup>60</sup> believed that the nonsigner clause added little protection for the manufacturer that the trademark laws did not already provide, and so the infringement on nonsigners' freedom to resell at their own prices was unjustifiable.<sup>61</sup> Although the court in *Utilities Commission* agreed with plaintiff that the rate increase did constitute forced investment in gas exploration, it also decided that the public's need to be protected from gas shortages was crucial to the state's economy and individual well being and so, unlike *Bulova*, justified the infringement on the right to contract.<sup>62</sup>

In another contract case, *Mazda Motors of America, Inc. v. Southwestern Motors, Inc.*,<sup>63</sup> the North Carolina Court of Appeals held that

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56. *Id.* at 610, 242 S.E.2d at 870; see note 45 *supra*. The statute was also attacked as violative of the equal protection clause of the United States and North Carolina constitutions.

57. *Id.* at 611, 242 S.E.2d at 870.

58. 285 N.C. 467, 206 S.E.2d 141 (1974).

59. *Id.* at 475, 206 S.E.2d at 146. The nonsigner clause provided that selling a manufacturer's trademark goods at a price below his list price, in violation of a contract provision not to do so, is unfair competition, whether or not the person selling the goods below list price is a party to the contract. Law of March 22, 1937, ch. 350, § 6, 1937 N.C. Pub. Laws 683 (formerly codified at N.C. GEN. STAT. § 66-56 (1975)) (repealed 1975).

60. 285 N.C. at 478, 206 S.E.2d at 149. The court cited *Nebbia v. New York*, 291 U.S. 502 (1934), which held that a state could place a maximum and minimum price on the sale of a commodity (milk) when the economic welfare of the public required it.

61. The additional policy of fostering free competition by prohibiting manufacturers from controlling all resale prices may also have been present in *Bulova*. The fostering of competition in *Bulova* coincided with the protection of a competitor's right to contract, which was the stated basis for the court's decision. 285 N.C. at 478, 206 S.E.2d at 149.

62. 294 N.C. at 611, 242 S.E.2d at 870.

63. 36 N.C. App. 1, 243 S.E.2d 793 (1978), *aff'd in part, rev'd in part*, 296 N.C. 357 (1979).



a state statute requiring motor vehicle manufacturers or distributors to notify the Commissioner of Motor Vehicles before any attempt to revoke a dealer's franchise<sup>64</sup> did not unconstitutionally impair the obligations of contracts.<sup>65</sup> The court approved the state's interest in preventing the harm to the economy and the general public inherent in unilateral contracts of adhesion, which often result from unequal bargaining power between distributors and dealers.<sup>66</sup>

The court of appeals adopted the approach taken by the United States Supreme Court<sup>67</sup> to determine whether the statute unreasonably impaired the obligations of contract. The test begins with a determination whether the statute involves a "disturbance of essential or core expectations arising from the particular type of contract."<sup>68</sup> Those expectations are not disturbed unless the statute so greatly discourages the making of such contracts as to amount to a taking without compensation in violation of due process.<sup>69</sup> Applying this test, the court reasoned that the restrictions imposed by G.S. 20-30(6),<sup>70</sup> requiring only sixty days notice to the Commissioner, did not so discourage franchise dealership contracts as to be a taking (of the financial benefits obtained from such contracts) in violation of due process.<sup>71</sup> The court concluded that the restrictions imposed by the statute, because they did not restrict the right to contract to the extent of an unconstitutional taking, and because they advanced the state interest of protecting the public and dealers from the effects of contracts of adhesion, were reasonable restrictions on the obligation of contract.<sup>72</sup>

### 3. License Revocation

In *In re Harris*,<sup>73</sup> the North Carolina Court of Appeals upheld against a void for vagueness challenge a North Carolina statute that provided for revocation of a driver's license for repeated violations of

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64. N.C. GEN. STAT. § 20-305(6) (1978).

65. 36 N.C. App. at 10, 243 S.E.2d at 800; U.S. CONST. art. I, § 10, cl. 1.

66. 36 N.C. App. at 7, 243 S.E.2d at 798-99.

67. *City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369 (1974) (city ordinance imposing 20% tax on gross receipts from nonresidential parking establishments held valid as not constituting a taking without compensation); *City of El Paso v. Simmons*, 379 U.S. 497 (1965) (statute providing for termination of land sales contracts for nonpayment of interest and limiting reinstatement right of purchaser held valid as advancing state interest in clarifying land titles).

68. 36 N.C. App. at 9-10, 243 S.E.2d at 800.

69. *Id.* at 10, 243 S.E.2d at 800.

70. N.C. GEN. STAT. § 20-305(6) (1978).

71. 36 N.C. App. at 10, 243 S.E. 2d at 800.

72. *Id.*

73. 37 N.C. App. 590, 246 S.E.2d at 532 (1978).

the liquor laws.<sup>74</sup> Petitioner's driver's license had been revoked after his third conviction for driving under the influence of alcohol.<sup>75</sup> He sought reinstatement of his license three years after his last D.U.I. conviction, but the Division of Motor Vehicles refused to reinstate the license because petitioner had been convicted of public drunkenness within those three years.<sup>76</sup> The Division construed the prohibition in G.S. 20-19(e)<sup>77</sup> against reissuance of a license within three years of a liquor law violation to include a conviction for public drunkenness.<sup>78</sup> The trial court held that "liquor laws" as used in G.S. 20-19(e) was unconstitutionally vague and overbroad.<sup>79</sup> The court of appeals reversed holding that the statute was not overbroad because it only prohibited conduct violative of liquor laws, conduct not constitutionally protected.<sup>80</sup>

The court's analysis of petitioner's vagueness argument was cursory at best. After citing *Surplus Store, Inc. v. Hunter*,<sup>81</sup> a North Carolina Supreme Court case, for the rule that a statute is unconstitutionally vague only if "men of common intelligence must necessarily guess at its meaning,"<sup>82</sup> the court summarily held that the term was so clear "that no further discussion is necessary."<sup>83</sup> Nevertheless the court went on to discuss at length the question whether public drunkenness was a violation of the liquor laws, and based on the legislative intent as evidenced by the use of the expansive terms "motor vehicle laws," "liquor laws," and "drug laws" in G.S. 20-19(e), the court held that a conviction for public drunkenness was a violation of a "liquor law."<sup>84</sup>

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74. The statute provides that a license may be revoked because of a third or subsequent conviction for driving under the influence of alcohol or drugs. If such a revocation occurs due to a conviction within five years of a prior conviction, the revocation is permanent. Even if the revocation is permanent, a new license may be issued, if after three years from the date of revocation the licensee has not been convicted of a violation of a motor vehicle law, a drug law, or a liquor law. N.C. GEN. STAT. § 20-19(e) (1978).

75. *Id.* at 591, 246 S.E.2d at 533.

76. *Id.* The misdemeanor of public drunkenness is defined in Law of Feb. 13, 1897, ch. 57, 1897 N.C. Pub. Laws 109 (formerly codified as amended at N.C. GEN. STAT. § 14-335(a) (1969)) (repealed 1978).

77. N.C. GEN. STAT. § 20-19(e) (1978).

78. 37 N.C. App. at 595, 246 S.E.2d at 535.

79. *Id.* at 591, 246 S.E.2d at 533.

80. *Id.* at 593-94, 246 S.E.2d at 534.

81. *Id.* at 593, 246 S.E.2d at 534 (citing 257 N.C. 206, 125 S.E.2d 764 (1962)).

82. *Id.* (quoting 257 N.C. 206, 211, 125 S.E.2d 764, 768 (1962)).

83. *Id.*

84. *Id.* at 594-95, 246 S.E.2d at 534-35.

In another license revocation case, a doctor challenged for vagueness and overbreadth both the state statute under which his medical license was revoked and the order of the Board of Medical Examiners suspending the revocation. *In re Wilkins*, 294 N.C. 528, 242 S.E.2d 829 (1978).

## 4. "Peeping Tom" Statute

The North Carolina statute that makes it a misdemeanor to "peep secretly into any room occupied by a female person,"<sup>85</sup> popularly known as the "Peeping Tom" statute, was attacked as unconstitutionally vague and overbroad and violative of due process in *In re Banks*.<sup>86</sup> The United States Supreme Court in *Wainwright v. Stone*<sup>87</sup> had held that the Florida "crime against nature" statute was not unconstitutionally vague when read against a background of the common law and prior state court decisions giving crime against nature a specific narrow definition.<sup>88</sup> Based on *Wainwright*, the supreme court stated that the words of the statute were ambiguous, so they must be read in light of judicial construction given them in prior cases and in light of legislative intent.<sup>89</sup> The court, relying on *State v. Banks*,<sup>90</sup> which held that "to peep secretly" connoted spying to invade one's privacy, interpreted the terms "peep secretly" to prohibit "the wrongful spying into a room upon a female with the intent of violating the female's legitimate expectation of privacy."<sup>91</sup> The statute therefore was sufficiently definite, when read in light of prior cases, to give defendants fair notice of the prohibited conduct.<sup>92</sup> The overbreadth argument also failed because the statute, under the court's narrowing construction, does not prohibit any legitimate, constitutionally protected conduct, such as an unintentional glance into a window.<sup>93</sup>

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Pursuant to Law of Feb. 3, 1933, ch. 32, 1933 N.C. Sess. Laws 25 (formerly codified at N.C. GEN. STAT. § 90-14 (1975)) (repealed 1975), which provides for revocation of a physician's license for "unprofessional or dishonorable conduct unworthy of, and affecting, the practice of his profession," respondent's license was revoked after he was convicted of preparing a false and fraudulent medical bill and physician's report. 294 N.C. at 530, 242 S.E.2d at 830-31. The Board suspended the revocation on condition that respondent "conduct his practice of medicine in accordance with proper professional and ethical standards." *Id.* at 530-31, 242 S.E.2d at 831. Respondent was later charged by the Board with prescribing highly dangerous drugs to strangers without examining them first, and the Board therefore withdrew the suspension and revoked respondent's license. *Id.* at 532, 242 S.E.2d at 831-32. Stating that the proper test for vagueness is "whether a reasonably intelligent member of the profession would understand that the conduct in question is forbidden," the supreme court concluded that respondent's conduct was clearly unprofessional and unethical; therefore both the statute and the order to the Board were constitutional as applied to respondent. *Id.* at 548-49, 242 S.E.2d at 841.

85. 85 N.C. GEN. STAT. § 14-202 (1969).

86. 295 N.C. 236, 244 S.E.2d 386 (1978).

87. 414 U.S. 21 (1973).

88. *Id.* at 22-23.

89. 295 N.C. at 240-41, 244 S.E.2d at 389.

90. 263 N.C. 784, 140 S.E.2d 318 (1965).

91. 295 N.C. at 242, 244 S.E.2d at 390.

92. *Id.*

93. *Id.* at 243-44, 244 S.E.2d at 391.

The North Carolina Court of Appeals struck down another criminal statute for vagueness in

*E. North Carolina Constitution*

## 1. Coastal Area Management Act

In *Adams v. Department of Natural and Economic Resources*<sup>94</sup> plaintiff claimed that the Coastal Area Management Act of 1974 (CAMA)<sup>95</sup> was a local law and, as such, was prohibited by the North Carolina Constitution, which provides that "[t]he General Assembly shall not enact any local, private, or special act or resolution" relating to certain subjects, including trade, health, sanitation and abatement of nuisances.<sup>96</sup> The Act provides for the Coastal Resources Commission to promulgate guidelines, oversee land use plans adopted by each county in the coastal area, designate special areas of environmental concern and issue special use permits for those areas, with the objective of protecting and preserving the delicate, unique ecosystem of the coastal area.

The Coastal Resources Commission had designated an "interim" area of environmental concern, that limited plaintiff's use of his land.<sup>97</sup> Plaintiff argued that the North Carolina Constitution's prohibition against local laws prohibited statutes that are limited in geographical coverage without any legitimate reason for the limitation.<sup>98</sup> Arguing that the coastal area of North Carolina is no more unique in terms of its need for environmental protection and land use control than is any other area of the state, plaintiff concluded that the statute was a prohibited local law.<sup>99</sup>

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State v. Sanders, 37 N.C. App. 53, 245 S.E.2d 397 (1978). Sanders was convicted under N.C. GEN. STAT. § 14-186 (1969) for occupying a motel room for "immoral purposes." Because § 14-186 had received no limiting construction that defined "immoral purposes" to be illicit sexual intercourse as the state argued, the statute was unconstitutionally vague. 37 N.C. App. at 54-55, 245 S.E.2d at 398.

In another due process case, a federal district court held in *Fowler v. Williamson*, 448 F. Supp. 497 (W.D.N.C. 1978), that a high school student had no property interest in participation in a graduation ceremony. The court, finding no North Carolina law on whether such an interest was a property right, held that because plaintiff was not denied an education or even a diploma, but only participation in a ceremony (due to violation of the school dress code), he was not deprived of property in violation of due process. *Id.* at 502.

94. 295 N.C. 683, 249 S.E.2d 402 (1978).

95. Ch. 1284, 1973 Sess. Laws, 2d Sess. 1974, 463 (codified at N.C. GEN. STAT. § 113A-100 to -128 (1975 & Cum. Supp. 1977)).

96. N.C. CONST. art. II, § 24. Plaintiffs also claimed that the statute violated the U.S. CONST. amend. IV prohibition against unreasonable searches and seizures. 295 N.C. at 705, 249 S.E.2d at 415. For a discussion of plaintiff's claim that the statutory authorization for the promulgation of guidelines by the Coastal Resources Commission was a prohibited delegation of legislative authority, see this Survey, *Administrative Law: Coastal Area Management Act*.

97. 295 N.C. at 703, 249 S.E.2d at 414.

98. *Id.* at 691, 249 S.E.2d at 407.

99. *Id.*

The supreme court disagreed, citing *McIntyre v. Clarkson*,<sup>100</sup> which held that a North Carolina statute that provided for appointment procedure for justices of the peace in twenty-eight North Carolina counties was invalid as local legislation.<sup>101</sup> The court in *McIntyre* stated that a law is "local" if "the persons or things subject to the law are not reasonably different from those excluded."<sup>102</sup> The court in *Adams* reasoned that the coastal counties of North Carolina are sufficiently different from the other counties to warrant special attention.<sup>103</sup>

Justice Copeland in dissent took issue with the majority's finding of a unique need of the coastal area's ecosystem for environmental protection.<sup>104</sup> He saw the Act as designed to regulate land use and not to protect the special attributes of the coastal environment.<sup>105</sup> In arguing that the Act was a prohibited local law because its stated objectives applied to all of North Carolina, Justice Copeland cited language in the proposed 1973 Mountain Area Management Act,<sup>106</sup> which was rejected by the 1973 General Assembly, that urged uniqueness of the state's mountains in much the same language as the CAMA uses in describing the North Carolina coast.<sup>107</sup> Because the state's coast is no more in need of protection than the mountains, the dissent concluded, the Act was unconstitutional local legislation.<sup>108</sup>

In rejecting plaintiff's argument that the classification of the coastal area as distinct from the mountains and piedmont was unreasonable, the court seems merely to assume that the coastal counties have a special need for protection of the environment. The court says that once the class to which the statute applies is found to warrant special attention, the existence of other areas that also could be included is immaterial to the statute's constitutionality.<sup>109</sup> Plaintiff's argument, however, was not that other areas should also be included under the

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100. 254 N.C. 510, 119 S.E.2d 888 (1961).

101. *Id.* at 525, 119 S.E.2d at 899.

102. *Id.* at 518, 119 S.E.2d at 894 (quoting Cloe & Marcus, *Special and Local Legislation*, 24 Ky. L.J. 364 (1935-1936)).

103. 295 N.C. at 691-93, 249 S.E.2d at 407-08.

104. *Id.* at 707-08, 249 S.E.2d at 416-17 (dissenting opinion).

105. *Id.* at 707, 249 S.E.2d at 416.

106. S. 973, N.C. Gen. Assembly, 1973 Sess. (proposed N.C. GEN. STAT. § 113A-137).

107. 295 N.C. at 707-08, 249 S.E.2d at 416-17 (dissenting opinion).

108. *Id.* at 707-09, 249 S.E.2d at 416-17.

109. *Id.* at 693, 249 S.E.2d at 408. "[T]here is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied—that the legislature must be held rigidly to the choice of regulating all or none. . . . It is enough that the present statute strikes at the end where it is felt, and reaches the class of cases where it most frequently occurs." *Id.* (quoting *Silver v. Silver*, 280 U.S. 117, 123-24 (1929)).

Act. Plaintiff's attack was directed at the reasonableness of the Act's classification of the coastal region as an area warranting special attention. A statute may " 'classify conditions, persons, places and things, and classification does not render a statute "local" if the classification is reasonable and based on a rational difference of situation and condition.' " <sup>110</sup> Admittedly the coastal area is distinct from the mountains and piedmont in that the valuable resources in the coastal area are in major respects of a different kind than those in the mountains. <sup>111</sup> The supreme court, however, did not show why the coastal resources, all of which are subject to pressures from increases in population and development, <sup>112</sup> are more in need of protection than the mountain resources. Such a comparison is necessary to provide a convincing basis for classification of the coastal area as unique within the state. Instead, such a comparison might show that the resources of the mountains of North Carolina are as valuable and are subject to the same pressures from development in the area as the coastal area. <sup>113</sup> The resources such as undeveloped land and fresh, unpolluted water, which the CAMA states are to be protected, are present and in need of protection throughout the state; arguably therefore, the CAMA is limited to an area without a rational basis for the limitation and should be declared unconstitutional local legislation.

## 2. Taxation

Taxpayer in *Hughey v. Cloniger* <sup>114</sup> sought to enjoin the use of public funds appropriated by the General Assembly for the use of a school for dyslexic children in Gaston County. <sup>115</sup> The school was operated by a nonprofit corporation. <sup>116</sup> Taxpayer claimed that payments of public revenues to a private corporation, regardless of the ultimate benevolent purpose to which the money is put, is not a public use and violates the North Carolina Constitution. <sup>117</sup>

The court of appeals stated, relying on *Stanley v. Department of*

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110. *Id.* (quoting *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 656, 142 S.E.2d 697, 702 (1969)).

111. *Id.* at 692-93, 707, 249 S.E.2d at 408, 416.

112. *Id.*

113. 295 N.C. at 707-08, 249 S.E.2d at 416-17.

114. 37 N.C. App. 107, 245 S.E.2d 543, *cert. granted*, 295 N.C. 734, 248 S.E.2d 863 (1978).

115. *Id.*, 245 S.E.2d at 544.

116. *Id.* at 108, 245 S.E.2d at 545.

117. *Id.* at 107, 245 S.E.2d at 544; *see* N.C. CONST. art. V, § 2(1) (power of taxation shall be exercised for "public purpose" only).

*Conservation & Development*,<sup>118</sup> which invalidated a North Carolina statute that authorized the creation of county agencies to finance pollution control facilities for private industries by tax exempt bonds,<sup>119</sup> that public use is determined not merely by the benevolent purposes to which the money is put, but also by the means of attaining those purposes.<sup>120</sup> Because some funds were going to the corporation to operate the school and not only to pay the tuition of the children, the monies were not going to a public use.<sup>121</sup> The court upheld the statute under which the funds were appropriated;<sup>122</sup> however, because appropriation was not for a public use, it was not made in accordance with the statute.<sup>123</sup>

EDWARD L. BALL

## V. CRIMINAL LAW

### A. *Post-Conviction Relief*

In *Mullaney v. Wilbur*,<sup>1</sup> the United States Supreme Court held that due process requires the State "to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case."<sup>2</sup> This result invalidated North Carolina's use of the presumptions of unlawfulness and malice arising upon proof by the State of an intentional killing that had effectively shifted the burden of disproving these presumed elements to the defendant.<sup>3</sup> Two years later, in *Hankerson v. North Carolina*,<sup>4</sup> the United

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118. 284 N.C. 15, 199 S.E.2d 641 (1973).

119. *Id.* at 41, 199 S.E.2d at 658.

120. 37 N.C. App. at 112-13, 245 S.E.2d at 547.

121. *Id.*

122. N.C. GEN. STAT. §§ 159-7 to -40 (1976 & Supp. 1977).

123. 37 N.C. App. at 113, 245 S.E.2d at 548.

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1. 421 U.S. 684 (1975).

2. *Id.* at 704.

3. In *State v. Hankerson*, 288 N.C. 632, 220 S.E.2d 575 (1975), *rev'd*, 432 U.S. 233 (1977), the North Carolina Supreme Court ruled that, in light of *Mullaney*, the due process clause of the fourteenth amendment prohibited the use of the state's "long-standing rules in homicide cases that a defendant in order to rebut the presumption of malice must prove to the satisfaction of the jury that he killed in the heat of a sudden passion and to rebut the presumption of unlawfulness, that he killed in self defense." *Id.* at 643, 220 S.E.2d at 584. The court declined, however, to give retroactive effect to *Mullaney*. *Id.*

4. 432 U.S. 233 (1977).

States Supreme Court ruled that the holding in *Mullaney* applied retroactively.<sup>5</sup> The *Hankerson* Court, however, indicated in a footnote that a state may limit the retroactivity of *Mullaney* by the use of the normal state procedural rule that failure to object to an erroneous jury instruction is a waiver of that error.<sup>6</sup> In applying this limit on *Mullaney*'s retroactivity to collateral attacks on convictions, the North Carolina Court of Appeals and the United States District Court for the Eastern District of North Carolina have adopted different interpretations of this footnote.

Petitioner in *State v. Abernathy*<sup>7</sup> applied for post-conviction relief from his 1974 conviction of second degree murder. The trial court found the waiver rule of footnote eight in *Hankerson* inapplicable under North Carolina appellate procedure and ordered a new trial.<sup>8</sup> The North Carolina Court of Appeals reversed, holding that when a defendant could have challenged the jury charge respecting the proof burden on direct appeal and did not, he was not entitled to attack his conviction on that ground in a post-conviction collateral proceeding.<sup>9</sup> The court based its decision on previous holdings that the Post Conviction Hearing Act<sup>10</sup> does not provide a substitute for appeal and is available only for raising matters that factors beyond the defendant's

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5. *Id.* at 240. This decision raised the possibility of the release of numerous convicted murderers from the North Carolina prisons due to improper allocation of the burden of proof at their trials.

6. The Court stated:

Moreover, we are not persuaded that the impact on the administration of justice in those States that utilize the sort of burden-shifting presumptions involved in this case will be as devastating as respondent asserts. If the validity of such burden-shifting presumptions were as well settled in the States that have them as respondent asserts, then it is unlikely that prior to *Mullaney* many defense lawyers made appropriate objections to jury instructions incorporating those presumptions . . . . The North Carolina Supreme Court passed on the validity of the instructions anyway. The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error.

*Id.* at 244 n.8 (citing FED. R. CRIM. P. 30).

7. 36 N.C. App. 527, 244 S.E.2d 696, *cert. denied*, 295 N.C. 552 (1978). The basis of Abernathy's claim was that the trial judge erroneously placed upon him the burden of proving self defense and of disproving malice.

8. *Id.* at 528, 244 S.E.2d at 697. The trial court ruled footnote eight inapplicable because North Carolina does not have the contemporaneous objection rule described by the Supreme Court in the footnote.

9. *Id.* at 531, 244 S.E.2d at 698.

10. *Abernathy* was decided under the old Post-Conviction Hearing Act, Law of Apr. 14, 1951, ch. 1083, § 1, 1951 N.C. Sess. Laws 1085 (formerly codified at N.C. GEN. STAT. §§ 15-217 to -222) (repealed 1977).



control prevented him from claiming earlier.<sup>11</sup>

The decision in *Abernathy* is consistent with the North Carolina Supreme Court's ruling in a group of cases decided after *Hankerson*. In those cases the court held that failure to raise on appeal the error in the trial court's instructions resulted in a waiver of that claim of error.<sup>12</sup> The effect of these cases is that a defendant is foreclosed from both direct and collateral attack on his conviction in the state courts unless he foresaw the *Mullaney* decision and preserved the error on appeal. Relief in federal court may be available, however, in light of the recent decision of the United States District Court for the Eastern District of North Carolina in *Cole v. Stevenson*.<sup>13</sup>

In *Cole*, petitioner sought federal habeas corpus relief from his second degree murder conviction on the ground that the trial judge erroneously placed on him the burden of proving self defense and the absence of malice.<sup>14</sup> The State argued that, according to *Hankerson's* footnote eight, petitioner's procedural default in failing to raise the issue of the trial judge's instructions at any time during the original appeals period barred him from raising that issue on federal habeas corpus.<sup>15</sup> In rejecting this contention the court narrowly construed the reach of footnote eight. The court determined that North Carolina does not require the objection at trial described in footnote eight and held "if petitioner was not obligated to object at trial and a constitutional right (unacknowledged during his first appeals period) was retroactively applied to [his] case," there was no reason to foreclose federal habeas review because such a proceeding is independent of foreclosure

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11. 36 N.C. App. at 531, 244 S.E.2d at 698; see *State v. White*, 274 N.C. 220, 162 S.E.2d 473 (1968); *Branch v. State*, 269 N.C. 642, 153 S.E.2d 343 (1967); *State v. Graves*, 251 N.C. 550, 112 S.E.2d 85 (1960); *State v. Wheeler*, 249 N.C. 187, 105 S.E.2d 615 (1958); *State v. Cruse*, 238 N.C. 53, 76 S.E.2d 320 (1953); *Miller v. State*, 237 N.C. 29, 74 S.E.2d 513 (1953); 4 STRONG'S NORTH CAROLINA INDEX 3d *Criminal Law* § 181, at 911-12 (1976).

12. In *State v. Brower*, 293 N.C. 259, 243 S.E.2d 143 (1977); *State v. Crowder*, 293 N.C. 259, 243 S.E.2d 143 (1977); *State v. Jackson*, 293 N.C. 260, 247 S.E.2d 234 (1977); *State v. May*, 293 N.C. 261, 247 S.E.2d 234 (1977); and *State v. Riddick*, 293 N.C. 261, 247 S.E.2d 234 (1977), the North Carolina Supreme Court in denying rehearing petitions ruled that the defendants had waived their right to claim as error the failure of the trial judge properly to place the burden of proving the absence of self defense or the absence of heat of passion when the defendants did not assign that error on appeal. In two cases, however, petitioners were granted new trials by the court when they had properly raised the error in the instructions in the original appeals from their convictions. *State v. Sparks*, 293 N.C. 262, 248 S.E.2d 339 (1977); *State v. Wetmore*, 293 N.C. 262, 248 S.E.2d 338 (1977).

13. 447 F. Supp. 1268 (E.D.N.C. 1978).

14. *Id.* at 1269.

15. *Id.* at 1272. This was the argument accepted by the North Carolina Court of Appeals in *Abernathy*.

in state courts by state procedural default.<sup>16</sup>

In addition, the court went on to hold that the recent United States Supreme Court decision in *Wainwright v. Sykes*<sup>17</sup> dictated that, even if North Carolina had a contemporaneous objection rule, defendant Cole would not be denied his right to federal habeas corpus review.<sup>18</sup> In *Wainwright*, the United States Supreme Court had held a state procedural default may be an adequate and independent state procedural ground that would bar federal habeas corpus review absent a showing of cause for the default and actual prejudice to petitioner's rights.<sup>19</sup> Applying *Wainwright*, the *Cole* court concluded that this petitioner met the cause-prejudice test. The "cause" element was met because no attorney would have considered objecting to an instruction that had been upheld for over one hundred years. The "prejudice" element was satisfied by defendant having to bear the burden of negating malice and proving he acted in self defense.<sup>20</sup>

In finding *Wainwright* applicable, the district court apparently disregarded a decision by the United States Court of Appeals for the Fourth Circuit in *Frazier v. Weatherholz*<sup>21</sup> rendered less than a month before *Cole*.<sup>22</sup> The court of appeals in *Frazier* held that federal habeas review of a petitioner's *Mullaney* claim was barred by *Wainwright* and *Hankerson's* footnote eight when he failed to comply with Virginia's contemporaneous objection rule.<sup>23</sup> Although the court of appeals did

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16. *Id.*

17. 433 U.S. 72 (1977).

18. 447 F. Supp. at 1272-74.

19. 433 U.S. at 87. Defendant in *Wainwright* had received federal habeas corpus relief from his state conviction because certain inculpatory statements made by him were illegally obtained and used at his trial. The Florida courts had refused to review this alleged error because of defendant's failure to comply with Florida's contemporaneous objection rule. The United States Supreme Court considered the issue in the case to be the adequacy of a state procedural ground to bar federal habeas corpus review. In reversing, the Supreme Court effectively overruled the interpretation of *Fay v. Noia*, 372 U.S. 391 (1963), that would allow federal review of state cases limited only by a showing of a deliberate by-pass or knowing waiver of the state procedural rule. The Supreme Court explicitly left the determination of the precise content of the cause-prejudice test to case by case development. At least one commentator has interpreted this decision and *Hankerson's* footnote eight as barring federal review of a *Mullaney*-based claim when the defendant has failed to comply with a state contemporaneous objection rule with respect to jury instructions. Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 U. PA. L. REV. 473, 508 n.181 (1978).

20. 447 F. Supp. at 1272-74.

21. 572 F.2d 994 (4th Cir. 1978).

22. The decision in *Frazier* was handed down on February 27, 1978, 572 F.2d at 994; the *Cole* decision was rendered on March 14, 1978, 447 F. Supp. at 1268.

23. 572 F.2d at 997-98. Petitioner in *Frazier* had failed to object to the trial judge's instructions on the burden of proof at his murder trial. His *Mullaney*-based petition was denied review by the Virginia state courts on both direct and collateral attack on grounds that he failed to com-

not expressly apply the cause-prejudice test, the implication of the decision is that failure to anticipate the unconstitutionality of the jury instructions is not sufficient cause under *Wainwright* and *Hankerson*.<sup>24</sup> Such a reading would invalidate the alternative holding in *Cole*. Relief in federal courts by state prisoners would then rest on the validity of the *Cole* court's determination that footnote eight is inapplicable because North Carolina does not have a contemporaneous objection rule.<sup>25</sup>

Although *Abernathy* would seem to foreclose relief in state court, leaving recourse only to the federal courts under *Cole*, the recent adoption of a new post-conviction relief procedure in North Carolina<sup>26</sup> provides a basis for state relief and may require that *Abernathy* be limited to actions brought under the old post-conviction relief Act.<sup>27</sup> The new post-trial relief statute, effective July 1, 1978, appears to overrule the holding in previous post-conviction decisions that a change in the law, although retroactive in application, is not a ground for post-conviction

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ply with the Virginia contemporaneous objection rule. Subsequently, a petition for habeas corpus relief was reviewed by a federal district court and relief granted on the basis of the *Mullaney* claim. The court of appeals, in reversing, never reached the merits of the claim, holding review by the federal district court barred by *Hankerson* and *Wainwright*.

24. See Spritzer, *supra* note 19, at 508-09.

25. The absence of a contemporaneous objection rule in North Carolina was admitted by the *Abernathy* court: in reaching its decision the court of appeals noted North Carolina appellate procedure does "not require [that] an objection to [a jury instruction] be made at the time of the trial to preserve the exception." 36 N.C. App. at 531, 244 S.E.2d at 698 (citing N.C.R. APP. P. 10(b)(2)). In *State v. Watson*, 37 N.C. App. 399, 246 S.E.2d 25 (1978), the court of appeals followed *Abernathy* and reversed a trial court's grant of post conviction relief for a *Mullaney* claim. The court acknowledged that North Carolina does not adhere to the precise rule referenced in *Hankerson's* footnote eight, but held the analogous North Carolina rule recognizes the same principle, *i.e.*, a failure to take some affirmative step to preserve the error on appeal results in a waiver. *Id.* at 405, 246 S.E.2d at 28.

The new North Carolina appellate review statute permits review regardless of the absence of an objection or a motion at the trial level, based on the following grounds:

(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.

N.C. GEN. STAT. § 15A-1446(d)(7), (13), (19) (1978).

26. N.C. GEN. STAT. §§ 15A-1411 to -1422 (1978).

27. The old 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), was repealed in 1977 by the new Act.

relief if not raised as error either at trial or on direct appeal.<sup>28</sup> The statute lists several grounds for collateral relief that may be asserted without time limitation. The two relevant to a *Mullaney*-based claim are:

(3) The conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina.

....

(7) There has been a significant change in the law, either substantive or procedural, applied in the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required.<sup>29</sup>

The statute appears further to excuse the waiver of a claim of error for failure to bring it up on direct appeal by allowing the court "in the interest of justice and for good cause shown" to grant a post-conviction motion if meritorious.<sup>30</sup> This discretion in the state court should allow it to find good cause to excuse a waiver by procedural default of a *Mullaney* claim because the defense counsel could not be expected to anticipate the unconstitutionality of the trial judge's instructions. Thus, it appears that the legislature has given the state courts the opportunity to avoid *Abernathy* and to hear *Mullaney*-based claims on collateral attack notwithstanding that the error was not brought up on direct appeal. Such state court review seems particularly reasonable in light of the federal courts' willingness, as in *Cole*, to grant habeas corpus relief if the state refuses to review the *Mullaney* claim.<sup>31</sup>

## B. Kidnapping<sup>32</sup>

In 1975 the North Carolina General Assembly enacted this state's

28. See note 12 and accompanying text *supra*. N.C. GEN. STAT. § 15A-1415(b)(7) (1978) specifically states that a change in the law may be a ground for post-conviction relief.

29. N.C. GEN. STAT. § 15A-1415(b)(3), (7) (1978).

30. *Id.* § 15A-1419(b).

31. See *Reeves v. Reed*, 452 F. Supp. 783 (W.D.N.C. 1978), in which the United States District Court for the Western District of North Carolina granted habeas corpus relief on a *Mullaney*-based claim similar to the one in *Cole*.

32. In a related area the court of appeals, in *State v. Walker*, 35 N.C. App. 182, 241 S.E.2d 89 (1978), held that in the absence of a custody order in favor of the mother, neither the father of a child, nor anyone acting with his consent, can be guilty of child abduction. In this case defendant agreed to help his son abduct the son's two children, who had been living with their mother since the couple was divorced. While carrying out the abduction, the two men discovered that one of the children they had taken was not defendant's grandchild and returned her. Because all the evidence in this case pointed to defendant acting in concert with his son, defendant could not be found guilty of abducting his grandson. See *State v. Burnett*, 142 N.C. 577, 55 S.E. 72 (1906). Further, if defendant agreed to abduct his son's daughter, but abducted the wrong child because of a mistaken belief about the identity of the child he abducted, criminal intent could be negated. Such mistake of fact could negate defendant's criminal intent provided that the mistake under

first statutory definition of kidnapping.<sup>33</sup> The North Carolina Court of Appeals subsequently determined that the statute presented constitutional problems by potentially permitting the conviction of a defendant twice for the same offense.<sup>34</sup> In 1978, the North Carolina Supreme Court rejected two distinct challenges to the statute based primarily on the contention that the statute permitted multiple convictions for the same offense.

In *State v. Fulcher*,<sup>35</sup> the court addressed that portion of G.S. 14-39<sup>36</sup> providing that anyone who unlawfully restrains, confines, or removes another for one of three specified purposes, including facilitating the commission of a felony, commits the crime of kidnapping. Relying on the intent of the legislature in enacting G.S. 14-39, the court construed this provision to require no substantial restraint, confinement or removal to constitute the offense.<sup>37</sup> The court of appeals had proposed that substantiality be required in order to avoid the potential due process and equal protection problems of subjecting a defendant to punishment for two crimes, kidnapping and the underlying felony, when only one had been committed.<sup>38</sup> The supreme court determined that because it is not unconstitutional to convict a defendant for two

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which the defendant was acting was made in good faith and with due care. See *State v. Powell*, 141 N.C. 780, 53 S.E. 515 (1906); *Dominguez v. State*, 90 Tex. Crim. 92, 234 S.W. 79 (1921). Consequently, in such a case, an instruction to the jury on the requisite criminal intent necessary to sustain a finding of guilty of the offense of child abduction is required.

33. 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.

34. See *State v. Gunther*, 38 N.C. App. 279, 248 S.E.2d 97 (1978); *State v. Fulcher*, 34 N.C. App. 233, 237 S.E.2d 909 (1977), *aff'd*, 294 N.C. 503, 243 S.E.2d 338 (1978).

35. 294 N.C. 503, 243 S.E.2d 338 (1978).

36. N.C. GEN. STAT. § 14-39 (Cum. Supp. 1977).

37. 294 N.C. at 522, 243 S.E.2d at 351.

38. 34 N.C. App. 233, 240, 237 S.E.2d 909, 914 (1977), *aff'd*, 294 N.C. 503, 243 S.E.2d 338 (1978).

distinct and separate crimes even if they grow out of the same act or transaction, the statute was not unconstitutional on its face.<sup>39</sup>

Defendant in *Fulcher* forced his way into a motel room occupied by two women, and after making them lie down, he bound their wrists and forced them to have oral sex with him.<sup>40</sup> Defendant was convicted of two counts of crime against nature and two counts of kidnapping.<sup>41</sup> On appeal he challenged G.S. 14-39 as violative of the due process and equal protection clauses of the United States Constitution on the ground that the statute permitted his conviction of two crimes when only one had been committed. By finding 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 applied to one victim while the crime against nature was committed upon the other, the court of appeals found two distinct crimes.<sup>42</sup> Nevertheless, to avoid future constitutional challenges, the court of appeals, relying on prior North Carolina decisions<sup>43</sup> and the Model Penal Code<sup>44</sup> for support, concluded that the statute had to be construed to require substantiality, in terms of time or distance, as an essential element of kidnapping.<sup>45</sup>

The supreme court rejected the court of appeals interpretation on

39. 294 N.C. at 523-25, 243 S.E.2d at 351-52.

40. 34 N.C. App. 233, 234, 237 S.E.2d 909, 910-11 (1977).

41. 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. *Id.* at 235, 237 S.E.2d at 910-11.

42. *Id.* at 240-41, 237 S.E.2d at 914-15; see *Survey of Developments in North Carolina Law, 1977*, 56 N.C.L. REV. 843, 965-70 (1978).

43. See *State v. Roberts*, 286 N.C. 265, 210 S.E.2d 396 (1974); *State v. Dix*, 282 N.C. 490, 193 S.E.2d 897 (1973).

44. MODEL PENAL CODE § 212.1 (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 . . . .

The Model Penal Code is similar to the North Carolina statute, except that it expressly qualifies both "asportation" and "confinement" with "substantial."

45. 34 N.C. App. 233, 239-40, 237 S.E.2d 909, 914 (1977). The court of appeals stated that, in future trials, the judge must instruct that any restraint, confinement or removal must be substantial, and not merely incidental to the commission of another crime. *Id.* at 241, 237 S.E.2d at 915.

the ground that G.S. 14-39 had been enacted to overrule statutorily the prior North Carolina decisions requiring substantiality as an element of kidnapping.<sup>46</sup> In *State v. Dix*,<sup>47</sup> the court had rejected the former rule that any carrying away is sufficient<sup>48</sup> and required more than a mere technical asportation.<sup>49</sup> In *State v. Roberts*,<sup>50</sup> similarly, the court had required a holding of the victim for "some appreciable period of time" and a carrying away "beyond the immediate vicinity."<sup>51</sup> The *Fulcher* court concluded that the legislature's intent in passing G.S. 14-39 was to make "resort to a tape measure or a stop watch unnecessary in determining whether the crime of kidnapping has been committed."<sup>52</sup>

Addressing the double jeopardy problem, the court noted that some restraint is an inherent, inevitable feature of certain felonies.<sup>53</sup> This restraint, in contrast to restraint that is "separate and apart"<sup>54</sup> from the commission of the other felony, cannot be punished as kidnapping.<sup>55</sup> The court acknowledged, however, that two or more punishable offenses may grow out of the same course of action, as when one offense is committed with the intent to commit the other and is

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46. 294 N.C. at 522, 243 S.E.2d at 351.

It is . . . clear that the Legislature rejected our determinations in *State v. Dix* . . . and in *State v. Roberts*, . . . to the effect that, where the State relies upon asportation of the victim to establish a kidnapping, the asportation must be for a substantial distance and where the State relies upon "dominion and control," i.e., "confinement" or "restraint," such must continue "for some appreciable period of time."

*Id.*

47. 282 N.C. 490, 193 S.E.2d 897 (1973).

48. See, e.g., *State v. England*, 278 N.C. 42, 178 S.E.2d 577 (1971). The *Fulcher* court also noted that the legislature rejected its decision in *England* that there must be both detention and asportation. No asportation is required now when there exists the requisite confinement or restraint. 294 N.C. at 522, 243 S.E.2d at 351.

49. 282 N.C. at 501-02, 193 S.E.2d at 904. In *Dix*, the court reversed the kidnapping conviction of a defendant who took a jailer 62 feet through a jail at gunpoint and locked him in a cell. The court held the asportation and detention were only incidental to the primary offense.

50. 286 N.C. 265, 210 S.E.2d 396 (1974).

51. *Id.* at 277, 210 S.E.2d at 404. In *Roberts*, the court reversed the kidnapping conviction of a defendant who had dragged a seven year old girl 80-90 feet.

52. 294 N.C. at 522, 243 S.E.2d at 351.

53. *Id.* at 523, 243 S.E.2d at 351 (suggesting, e.g., forcible rape and armed robbery).

54. *Id.* In *State v. Vert*, 39 N.C. App. 26, 249 S.E.2d 476 (1978), the court of appeals defined when, under *Fulcher*, the crimes are "separate and apart." Adopting the test enunciated in *Blockburger v. United States*, 284 U.S. 299 (1932), the court held that multiple crimes are distinct and separate offenses when one crime has elements in addition to and not included within the other crime. See Note, *Waiver of Double Jeopardy Right, The Impact of Jeffers v. United States*, 14 WAKE FOREST L. REV. 842 (1978). Defendant in *Vert* robbed a store, forced the clerk into a hall, shot her in the hip and tied her hand to a shopping cart. Noting that the kidnapping was unnecessary to the robbery, the court rejected defendant's argument that the restraint was not separate and apart under *Fulcher*. 39 N.C. App. at 30, 249 S.E.2d at 479.

55. 294 N.C. at 523, 243 S.E.2d at 351.

actually followed by the commission of the other.<sup>56</sup> Therefore, the court found no constitutional barrier to convicting a defendant both of kidnapping and of another felony that the kidnapping facilitates, provided the restraint is an act independent of and apart from the other felony.<sup>57</sup> Under the court's construction of G.S. 14-39 in *Fulcher*, that restraint need not be substantial in time.<sup>58</sup> The court thus found no double jeopardy problems in the conviction of defendant on two counts of crimes against nature and on two counts of kidnapping.

In *State v. Williams*,<sup>59</sup> the court was asked to determine whether G.S. 14-39<sup>60</sup> defines a single offense of kidnapping, or as has been widely thought,<sup>61</sup> two grades of the offense. The court construed the statute to create a single offense, defined in subsection (a). Subsection (b) then prescribes a sentence of not less than twenty-five years and not more than life for the offense of kidnapping, and sets forth mitigating factors that, if present, permit a lesser punishment.<sup>62</sup> The court found that this construction permits a conviction for kidnapping, as well as for another felony that negates the presence of mitigating factors, without violating the double jeopardy clause.<sup>63</sup> The court also outlined sentencing procedures to be followed in applying this interpretation of G.S. 14-39.

Defendant in *Williams* abducted a man and woman as they were leaving work. After taking them to a deserted spot, he robbed them, shot the man and raped the woman. He was subsequently convicted of first degree rape, assault with a deadly weapon with intent to inflict serious bodily injury, two counts of armed robbery and two counts of kidnapping.<sup>64</sup> On appeal, defendant argued that the State had obtained the convictions for aggravated kidnapping, carrying the harsher

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56. *Id.* at 523-24, 243 S.E.2d at 351-52 (suggesting, *e.g.*, a breaking and entering with intent to commit larceny, followed by commission of larceny).

57. *Id.* at 524, 243 S.E.2d at 352.

58. *Id.*

59. 295 N.C. 655, 249 S.E.2d 709 (1978).

60. N.C. GEN. STAT. § 14-39 (Cum. Supp. 1977).

61. See note 67 *infra*.

62. 295 N.C. at 664, 249 S.E.2d at 716.

63. *Id.* at 668, 249 S.E.2d at 718.

64. 295 N.C. at 657, 249 S.E.2d at 712. Defendant was sentenced to life imprisonment for the rape, one of the kidnappings and one of the armed robberies, to 40 years for the other armed robbery, and to 20 years for the felonious assault, all to be served consecutively. He also received a life sentence for the other kidnapping to be served concurrently with the first. The court rejected defendant's argument that this sentence, amounting to 300 years (*see* N.C. GEN. STAT. § 14.2 (Cum. Supp. 1977)), constituted cruel and unusual punishment in violation of the eighth and fourteenth Amendments. 295 N.C. at 679-80, 249 S.E.2d at 725.



sentence, by using the facts of the assault and rape, and that the court could not therefore properly enter judgment on the assault and rape charges without punishing him twice for one offense.<sup>65</sup> This contention was based on the premise that G.S. 14-39 creates two offenses of kidnapping—simple and aggravated—with the State required to prove, for a conviction of the latter, not only the restraint, confinement or removal for one of the purposes designated in G.S. 14-39(a), but also, as an element of the aggravated offense, that the victim was either assaulted, seriously injured or not released in a safe place, as provided in G.S. 14-39(b).<sup>66</sup>

In rejecting this construction, the court recognized that "[s]upport for [it] abounds everywhere but in the language of the statute itself."<sup>67</sup>

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65. 295 N.C. at 659-60, 249 S.E.2d at 713. Defendant relied on the principle that when a criminal offense in its entirety is an essential element of another offense a defendant may not be punished for both, based on the constitutional prohibition against double jeopardy. U.S. CONST. amend. V, XIV; N.C. CONST. art. I, § 19. See, e.g., *State v. Williams*, 284 N.C. 67, 199 S.E.2d 409 (1973); *State v. Carroll*, 282 N.C. 326, 193 S.E.2d 85 (1972); *State v. Midyette*, 270 N.C. 229, 154 S.E.2d 66 (1967).

66. 295 N.C. at 663, 249 S.E.2d at 715. Defendant also raised two other double jeopardy arguments. One was that the charges of armed robbery, the felonious assault and the rape were essential elements of kidnapping as defined under § 14-39(a)(2). *Id.* at 659-60, 249 S.E.2d at 713. The court had previously rejected this argument in *State v. Dammons*, 293 N.C. 263, 237 S.E.2d 834 (1977), on grounds that such charges are alleged as the purpose for which a defendant confined or restrained a victim, and not as elements of the offense that the State need prove. 295 N.C. at 660, 249 S.E.2d at 713-14.

Defendant also contended, in an argument new to the court, that the State and the judge had made the assault and the rape elements of kidnapping by treating them as such in the indictment and jury instructions. *Id.* at 661, 249 S.E.2d at 714. The court rejected this contention stating that an "[a]llegation of a matter [that] is not an element of the crime and not necessary to be proved may be treated as surplusage even if the State and the trial judge mistakenly believe the matter to be an essential element." *Id.* at 663, 249 S.E.2d at 715. See also *State v. Stallings*, 267 N.C. 405, 148 S.E.2d 252 (1966). The court distinguished the present situation from that in *State v. Midyette*, 270 N.C. 229, 154 S.E.2d 66 (1967). In that case the court stated: "By the allegations it elects to make in an indictment, the State may make one offense an essential element of another, though it is not inherently so . . ." *Id.* at 233, 154 S.E.2d at 70. The *Williams* court concluded that the *Midyette* language refers only to those situations in which the State elects to prosecute on a legal theory that necessarily includes another offense as an element of the offense being prosecuted, although some other theory may have been available. 295 N.C. at 663, 249 S.E.2d at 715.

67. 295 N.C. at 663, 249 S.E.2d at 715. This construction was adopted by a divided panel in *State v. Gunther*, 38 N.C. App. 279, 248 S.E.2d 97 (1978) (holding that State has burden of proof concerning those factors that would subject a defendant to increased punishment, and that after entering the greater sentence, court may not enter judgment on charge of assault with intent to commit rape that was the same sexual act that provided the basis for the more severe punishment; supreme court reversed, however, 296 N.C. 578, 251 S.E.2d 462 (1979)). See also S. CLARKE, M. CROWELL, J. DRENNAN & D. GILL, NORTH CAROLINA CRIMES ch. 8, at 9-11 (Institute of Government, University of North Carolina at Chapel Hill, 1977); D. GILL & M. CROWELL, ARREST WARRANT FORMS (Institute of Government, University of North Carolina at Chapel Hill, 1978). Although the court has itself used the term "aggravated kidnapping" in prior cases, see, e.g., *State v. Barrow*, 292 N.C. 227, 232 S.E.2d 693 (1977), in *Banks v. State*, 295 N.C. 399, 245 S.E.2d 743 (1978), the court stated without elaboration:

We note in passing that some of our opinions refer to the crime defined in G.S. 14-

Relying on the statutory language, the court determined that subsection (b), rather than creating elements of an aggravated offense, presumes a conviction under subsection (a) and merely prescribes the punishment on conviction.<sup>68</sup> Relying on the purpose of the legislature in enacting subsection (b) to maximize a kidnapper's incentive to return the victim unharmed by offering a reduction in sentence, the court determined that the provision (b) factors are sentence-mitigating in nature rather than sentence-enhancing.<sup>69</sup> The court concluded that when the same or similar evidence tends to show both the absence of these factors and the commission of another crime, as in *Williams*, punishing a defendant for the other crime while not reducing his punishment for the kidnapping does not violate double jeopardy.<sup>70</sup>

The court, in outlining procedures to be followed under its construction of G.S. 14-39, noted that a jury need normally determine only whether a defendant committed the substantive offense as defined in subsection (a).<sup>71</sup> The existence or nonexistence of the mitigating factors in subsection (b) is to be determined by the judge,<sup>72</sup> either from the evidence adduced at trial, or at a post-trial hearing provided by G.S. 15A-1334,<sup>73</sup> or both.<sup>74</sup> The court, relying on the rationale of *Patterson*

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39A as "aggravated kidnapping." This is a misnomer. The proper term for the crime there defined is "kidnapping." Subsection (b) of the statute states the punishment for kidnapping as well as a lesser punishment when certain mitigating circumstances appear.

*Id.* at 406-07, 245 S.E.2d at 749.

68. 295 N.C. at 664, 249 S.E.2d at 716. The court noted that other courts have interpreted similar statutes as creating a single offense. *Id.* at 665, 249 S.E.2d at 716-17; *see, e.g.*, *Smith v. United States*, 360 U.S. 1 (1959); *Pyles v. Boles*, 148 W. Va. 465, 135 S.E.2d 692, *cert. denied*, 379 U.S. 864 (1964). *But see State v. Sewell*, 342 So. 2d 156 (La. 1977).

69. 295 N.C. at 667, 249 S.E.2d at 717-18. The court assumed that the legislature's intent was the same as that of the drafters of the Model Penal Code. *See* MODEL PENAL CODE § 212.1, Comment at 19 (Tent. Draft No. 10, 1960).

70. 295 N.C. at 668, 249 S.E.2d at 718.

71. *Id.* at 669, 249 S.E.2d at 719.

72. *Id.* Because the factors in § 13-49(b) are sentence-reducing only and do not constitute an element of the offense, the court concluded that a defendant is not entitled to a jury determination. *Id.* at 673, 249 S.E.2d at 721.

73. N.C. GEN. STAT. § 15A-1334(b) (1978) provides:

Proceeding at Hearing. The defendant at the hearing may present witnesses and arguments on facts relevant to the sentencing decision and may cross-examine the other party's witnesses. No person other than the defendant, his counsel, the prosecutor, and one making a presentence report may comment to the court on sentencing unless called as a witness by the defendant, the prosecutor, or the court. Formal rules of evidence do not apply at the hearing.

Noting that § 15A-1334(b) makes "formal rules of evidence" inapplicable at this hearing, the court left to a case by case resolution the extent to which the rules may be relaxed and yet stay within the confines of due process. *Williams* does require that the judge make findings of fact in the sentencing hearing. 295 N.C. at 670-71, 249 S.E.2d at 720.

74. As the court indicated, the present case illustrated one circumstance in which the sentencing hearing was not necessary. When the existence of mitigating factors is determined by the jury

v. *New York*,<sup>75</sup> placed on the defendant the burden of satisfying the court by the preponderance of the evidence that the victim was released in a safe place and neither sexually assaulted nor seriously injured.<sup>76</sup>

The court's construction of G.S. 14-39 in *Fulcher* and *Williams* is a new step in the sporadic evolution of kidnapping law in North Carolina.<sup>77</sup> The practical effect of the decisions is to permit the imposition of substantial additional sanctions when commission of a felony is accompanied by an seemingly insignificant movement or detention of the victim.<sup>78</sup> For example, a defendant who in the course of a robbery takes a clerk into the hall and ties her hand to a cart,<sup>79</sup> may after *Fulcher* be convicted for kidnapping as well as for the robbery. After *Williams* such a defendant faces a sentence of twenty-five years to life for the kidnapping alone unless he can satisfy the trial judge of the existence of the mitigating factors set out in subsection (b) that require a sentence of less than twenty-five years.

This present state of kidnapping law creates a potential for grave prosecutorial abuse by permitting in such circumstances a choice of prosecution for kidnapping, for the offense that the kidnapping overlaps, or for both.<sup>80</sup> Although the court in *Fulcher* noted that equal protection is not necessarily violated when a defendant who commits the same acts as another is prosecuted for two crimes while the other is prosecuted for only one, or because sentences are made to run consecutively for one defendant while concurrently for another, the court did recognize that there are serious problems with G.S. 14-39 as presently construed.<sup>81</sup> Rather than attempting to cure these problems through judicial interpretation, however, as other courts have done,<sup>82</sup> the court

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in the course of trying separate criminal charges that have been joined to the kidnapping case, there is no need for a judge to make separate findings. 295 N.C. at 679, 249 S.E.2d at 725.

75. 432 U.S. 197 (1977).

76. *Id.* at 674, 249 S.E.2d at 722. The State may in any case stipulate to the presence of all mitigating factors and thereby avoid determination of the issue. *Id.* at 670, 249 S.E.2d at 719.

77. See Note, *Kidnapping in North Carolina—A Statutory Definition for the Offense*, 12 WAKE FOREST L. REV. 434 (1976).

78. See generally Note, *A Rationale of the Law of Kidnapping*, 53 COLUM. L. REV. 540 (1953).

79. See note 54 *supra*.

80. A caloused [*sic*] concept of kidnapping creates the potential for abusive prosecutions since virtually every false imprisonment, assault, battery, rape, robbery, escape or jail delivery will involve some movement or intentional confinement. When kidnapping, by definition overruns other crimes for which the prescribed punishment is less severe, a prosecutor has the "naked and arbitrary power" to choose the crime for which he will prosecute.

*State v. Dix*, 282 N.C. 490, 501, 193 S.E.2d 897, 903-04 (1973).

81. 294 N.C. at 525-26, 243 S.E.2d at 353.

82. See, e.g., *State v. Buggs*, 219 Kan. 203, 547 P.2d 720 (1976) (noting that legislature had

chose to leave reform to the legislature.<sup>83</sup> The court did suggest that relief might be available for a defendant when, through prosecutorial abuse, his criminal charges arising out of the same incident are "arbitrarily stacked like pancakes," resulting in a disproportionate sentence that violates fundamental fairness. Furthermore, the court invited the legislature to restore substantial asportation as an essential element of kidnapping.<sup>84</sup> Such a change would at least restore a more reasonable definition of kidnapping—one that does not permit the imposition of punishment for kidnapping unless an asportation significantly increases the dangerousness or undesirability of a defendant's conduct.<sup>85</sup>

### C. Rape

The constitutionality of North Carolina's new short-form rape indictment statute<sup>86</sup> was affirmed by the North Carolina Supreme Court in *State v. Lowe*.<sup>87</sup> The statute permits an indictment for first-degree rape without an averment of two essential elements of the crime: that the offense was perpetrated with a deadly weapon or by the infliction of serious harm, and that the defendant's age was greater than sixteen.<sup>88</sup>

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purposely not used "substantial" language of Model Penal Code, court nevertheless held word "facilitate," as used in "facilitate the commission of any felony," to mean more than a technical taking or confining). See also *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).

83. 294 N.C. at 527, 243 S.E.2d at 354; accord, *State v. Morris*, 281 Minn. 119, 160 N.W.2d 715 (1968). See also Comment, *Keeping Kidnapping in Its Place: When Does the Kentucky Exemption Apply?*, 66 Ky. L.J. 448 (1977); Note, *supra* note 77.

84. 294 N.C. at 526-27, 243 S.E.2d at 353.

85. See Note, *supra* note 78, at 556 n.99 (suggesting that if penalties for primary offenses are thought to be inadequate then proper solution is to raise them rather than to superimpose an additional penalty under guise of kidnapping). See also MODEL PENAL CODE § 212.1, Comment at 19 (Tent. Draft No. 10, 1960).

86. N.C. GEN. STAT. § 15-144.1(a) (1978) provides in pertinent part:

In indictments for rape . . . in the body of the indictment, after naming the person accused, the date of the offense, the county in which the offense of rape was allegedly committed, and the averment "with force and arms," as is now usual, it is sufficient in describing rape to allege that the accused person unlawfully, willfully, and feloniously did ravish and carnally know the victim, naming her, by force and against her will and concluding as is now required by law.

The term "short-form" indictment means an indictment that does not require an allegation of all essential elements of the crime.

87. 295 N.C. 596, 247 S.E.2d 878 (1978).

88. The elements of first degree rape, the victim being 12 years of age or older, are: (1) carnal knowledge of a female person, (2) by force, (3) against the will of the victim, (4) by a defendant over the age of 16, (5) who procures the submission or overcomes the resistance of the victim by the use of a deadly weapon or the infliction of serious bodily harm. *State v. Perry*, 291 N.C. 586, 231 S.E.2d 262 (1977); N.C. GEN. STAT. § 14-21 (Cum. Supp. 1977). In *Perry*, the North Carolina Supreme Court held the old form of indictment for rape insufficient to support a conviction for first degree rape because it failed to require an allegation that the defendant was over 16 years of

Defendant in *Lowe* challenged the statute on the ground that an indictment prepared in accordance with the statute does not provide the accused with notice of the offense sufficient to prepare his defense and protect him from double jeopardy.<sup>89</sup> In sustaining the statute, the court held that precisely those interests defendant asserted were not protected by the statute—sufficient notice of the crime to permit preparation of a defense and avoidance of subsequent prosecution for the same crime—are those that an indictment must protect to pass constitutional muster.<sup>90</sup> In finding these requirements met by the rape indictment statute, the court relied on decisions upholding the validity of the state's short-form homicide indictment.<sup>91</sup> This case reaffirms the power of the legislature to enact an indictment statute relieving the State from the common law requirement that an indictment allege every element of the offense charged.

Applying this constitutional standard, the court noted that an indictment prepared according to the new statute identifies the accused, the date, and location of the offense and uses words of "precise legal import" to specify the charged offense.<sup>92</sup> The court further pointed out that a defendant may always ask for a bill of particulars to obtain information in addition to that contained in the indictment in order to clarify the charge and prevent surprise at trial.<sup>93</sup> Because the function of a motion for a bill of particulars is to allow the defense to obtain information regarding the specific occurrences to be investigated at trial,<sup>94</sup> liberal grants of such motions will minimize any adverse effects the *Lowe* decision may have on the preparation of a defense. With the expansion of criminal discovery procedures,<sup>95</sup> *Lowe* emphasizes that

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age and that he used deadly force to commit the crime. The new rape indictment statute was a reaction to this decision and allows the omission of the very elements found necessary in *Perry*.

89. 295 N.C. at 599, 247 S.E.2d at 881.

90. *Id.* at 603, 247 S.E.2d at 883. "In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation . . ." N.C. CONST. art. I, § 23. In addition, the *Lowe* court ruled an indictment must also enable the court to know what judgment to pronounce in case of conviction. 295 N.C. at 603, 247 S.E.2d at 883.

91. 295 N.C. at 600-03, 247 S.E.2d at 881-83; see *State v. Duncan*, 282 N.C. 412, 193 S.E.2d 65 (1972); *State v. Kirksey*, 227 N.C. 445, 42 S.E.2d 613 (1947); *State v. Moore*, 104 N.C. 743, 10 S.E. 183 (1889). The short-form homicide indictment, N.C. GEN. STAT. § 15-144 (1978), allows an indictment for first degree murder without an averment of the essential elements of premeditation and deliberation.

92. 295 N.C. at 604, 247 S.E.2d at 883.

93. *Id.*; see N.C. GEN. STAT. § 15A-925 (1978) (bill of particulars).

94. *State v. Swift*, 290 N.C. 838, 226 S.E.2d 652 (1976); *State v. Spence*, 271 N.C. 23, 155 S.E.2d 802 (1967), *vacated on other grounds per curiam*, 392 U.S. 649 (1968); *State v. Overman*, 269 N.C. 453, 153 S.E.2d 44 (1967); *State v. Seaboard Air Line Ry.*, 149 N.C. 508, 62 S.E. 1088 (1908).

95. See N.C. GEN. STAT. §§ 15A-901 to -919 (1978) (criminal discovery procedure).

the purpose of the indictment is only to give notice to the defendant of the alleged criminal offense.

In *State v. Bailey*,<sup>96</sup> the North Carolina Court of Appeals was presented with the question whether the "force" necessary for the crime of rape is that which reasonably induces fear of serious bodily harm.<sup>97</sup> In *Bailey*, defendant was indicted and convicted of second-degree rape.<sup>98</sup> On appeal from his conviction, defendant argued that the trial judge had erred in failing to instruct the jury that the force necessary to constitute an element of rape must be force that "reasonably induces fear of serious bodily harm."<sup>99</sup> The court of appeals affirmed the conviction, rejecting the contention that the North Carolina Supreme Court had adopted this objective test.<sup>100</sup>

The decision in *Bailey* affirms the rule in North Carolina that there is no objective test with respect to the force involved in a rape. Such a rule comports with the view in the majority of jurisdictions.<sup>101</sup> North Carolina cases indicate "force" is a broadly defined concept and the requisite amount to support a conviction for rape need only be that which is sufficient to overcome the will of the victim.<sup>102</sup> The continuation of this subjective standard by which force is to be measured is proper because a defendant should not escape punishment for rape by reason of his victim's unreasonable fears of violence.<sup>103</sup> To hold otherwise would be to punish the victim for her nonconformity to the standard set by the "reasonable" victim. Moreover, the likelihood of unfair

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96. 36 N.C. App. 728, 245 S.E.2d 97 (1978).

97. *Id.* at 732, 245 S.E.2d at 100.

98. *Id.* at 728-29, 245 S.E.2d at 98.

99. *Id.* at 732, 245 S.E.2d at 100. The basis for defendant's argument was one sentence in *State v. Burns*, 287 N.C. 102, 214 S.E.2d 56, *cert. denied*, 423 U.S. 933 (1975). The contested sentence read, "A threat of serious bodily harm which reasonably induces fear thereof constitutes the requisite force and negates consent." *Id.* at 116, 214 S.E.2d at 65. The authorities cited by the *Burns* court in support fail to mention the word reasonable with respect to the force element. *See State v. Henderson*, 285 N.C. 1, 203 S.E.2d 10 (1974), *death penalty vacated*, 428 U.S. 902 (1976); *State v. Bryant*, 280 N.C. 551, 187 S.E.2d 111, *cert. denied*, 409 U.S. 995 (1972).

100. 36 N.C. App. at 733, 245 S.E.2d at 100.

101. *See* 65 AM. JUR. 2d *Rape* § 4 (1972).

102. *See State v. Armstrong*, 287 N.C. 60, 212 S.E.2d 894 (1975) (fear, fright or coercion may take the place of physical force); *State v. Henderson*, 285 N.C. 1, 203 S.E.2d 10 (1974), *death penalty vacated*, 428 U.S. 902 (1976); *State v. Primes*, 275 N.C. 61, 165 S.E.2d 225 (1969); *State v. Thompson*, 227 N.C. 19, 40 S.E.2d 620 (1946); *State v. Johnson*, 226 N.C. 671, 40 S.E.2d 113 (1946); 11 STRONG'S NORTH CAROLINA INDEX 3d *Rape and Allied Offenses* § 1 (1978) ("The 'force' necessary to constitute the offense need not be actual physical force; constructive force is sufficient, and the female's submission under fear or distress takes the place of actual physical force.").

103. This was the view of the draftsmen of the Model Penal Code provision for rape. MODEL PENAL CODE § 207.4, Comments (Tent. Draft No. 4, 1955).

convictions is not increased by the use of a subjective standard because in most rape trials the jurors will inject some degree of objectivity into their determination of the force element.<sup>104</sup>

#### D. Public Intoxication<sup>105</sup>

In response to the growing concern over the public drunkenness problem and acceptance that alcoholism is the real cause of the large number of drunkenness arrests<sup>106</sup> a proposal of the attorney general intended to deal with public drunks was enacted into law.<sup>107</sup> A new offense of "intoxicated and disruptive in public" is created by the statute,<sup>108</sup> and provision is made for giving assistance to persons intoxicated in public without the necessity of first arresting them.<sup>109</sup>

The new legislation made several fundamental changes in the public drunkenness law.<sup>110</sup> The new offense of intoxicated and disruptive

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104. If the victim's submission seems highly contradictory to that of the ordinary person under the circumstances, the jury will most likely disbelieve the victim's contention that force was involved. See Note, *Recent Statutory Developments in the Definition of Forcible Rape*, 61 VA. L. REV. 1500 (1975).

105. In 1978 the North Carolina General Assembly enacted an amendment to N.C. GEN. STAT. § 20-179(a), effective March 1, 1979, to increase the punishment for driving under the influence of intoxicating liquor, narcotic drugs, or other impairing drugs. Law of June 16, 1978, ch. 1222, 1977 N.C. Sess. Laws, 2d Sess. 1978, at 171. Under this amendment, a first offense remains punishable in the discretion of the court by a fine of not less than \$100 nor more than \$500, by imprisonment for not more than six months, or by both fine and imprisonment. For second and subsequent convictions, however, the judge is required to impose a mandatory sentence of three days, which is not subject to suspension or parole, and to impose a fine. A second conviction is punishable by imprisonment for not less than three days nor more than one year, and a fine not less than \$200 nor more than \$500; a third or subsequent conviction is punishable by imprisonment for not less than three days nor more than two years and a fine of not less than \$500. The jail sentence may, however, be suspended for a second offender if the defendant successfully completes an alcohol or drug rehabilitation program approved by the Department of Human Resources.

The effect of this amendment will not become apparent for some time. The statute contains certain provisions that mitigate its potential severity: no convictions occurring prior to July 1, 1978, are to be considered prior offenses, and to be a prior conviction, the offense must occur within three years of the current offense.

106. Drunkenness arrests in North Carolina have averaged approximately 50,000 per year. For a discussion of the background against which this new legislation was enacted, see Crowell, *The New Law of Public Drunkenness*, AD. J. MEMORANDA, Sept. 1978, at 1.

107. N.C. GEN. STAT. §§ 14-443 to -447, 15A-534(c), 122-58.22, .23, -65.10 to .13 (Interim Supp. 1978).

108. *Id.* § 14-444. Section 14-443(2) defines intoxicated as "the condition of a person whose mental or physical functioning is presently substantially impaired as a result of the use of alcohol." *Id.* § 14-443(2). Section 14-443(3) defines public place as "a place which is open to the public, whether it is publicly or privately owned." *Id.* § 14-443(3).

109. *Id.* § 122-65.11 (Interim Supp. 1978).

110. The General Assembly repealed several drunkenness statutes. The former statutes of public drunkenness, Law of Feb. 13, 1897, ch. 57, 1897 N.C. Pub. Laws 109 (formerly codified as amended at N.C. GEN. STAT. § 14-335); drunk and disorderly, Law of March 9, 1921, ch. 211,

requires the additional element of disruptiveness<sup>111</sup> for the drunk to violate the law; no longer may a person be prosecuted solely for being intoxicated in a public place.<sup>112</sup> The new legislation further provides that alcoholism<sup>113</sup> is to be considered a defense to the charge of drunk and disruptive.<sup>114</sup> Moreover, G.S. 14-145(b) requires that the trial judge consider alcoholism as a defense to the charge even if the defendant does not raise it, and empowers the judge to request additional information in making the determination whether the defendant is suffering from alcoholism.<sup>115</sup>

Another provision changing prior law allows a law enforcement officer, after making the determination that a person to be arrested would benefit from the care of a shelter as provided for in G.S. 122-65.11,<sup>116</sup> to transport and release the person to the facility after issuing him a citation for the offense of drunk and disruptive.<sup>117</sup>

The offense of drunk and disruptive is a misdemeanor punishable by a fine of not more than fifty dollars, or imprisonment of not more than thirty days; a magistrate is not empowered to accept a plea of guilty and enter judgment for this offense.<sup>118</sup> If the defendant is acquitted on the defense of alcoholism, the court must then determine if the defendant is an alcoholic in need of care as defined by G.S. 122-58.22<sup>119</sup> or G.S. 122-58.23.<sup>120</sup> This determination is to be made at a

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1921 N.C. Pub. Laws 503 (formerly codified as amended at N.C. GEN. STAT. § 14-334); detention of public drunks, Law of May 23, 1973, ch. 696, 1973 N.C. Sess. Laws 1038 (formerly codified as amended at N.C. GEN. STAT. § 14-335.1); and the statutory provisions dealing with chronic alcoholics, Law of July 6, 1967, ch. 1256, § 2, 1967 N.C. Sess. Laws 1894 (formerly codified as amended at N.C. GEN. STAT. §§ 122-65.8 to .9) were repealed by the new Act.

111. Disruptive conduct includes interfering with traffic, blocking sidewalks, grabbing, pushing, fighting, cursing, shouting, or begging for money. N.C. GEN. STAT. § 14-444(a) (Interim Supp. 1978).

112. *Id.* § 14-447(a). A person who is intoxicated in a public place and is not disruptive may be assisted as provided by *id.* § 122-65.11. See text accompanying notes 123-33 *infra*.

113. Alcoholism is defined as "the state of a person . . . who habitually lacks self control as to the use of intoxicating liquor, or uses intoxicating liquor to the extent that his health is substantially impaired or endangered or his social or economic function is substantially disrupted." N.C. GEN. STAT. § 14-443(1) (Interim Supp. 1978).

114. *Id.* § 14-445(a).

115. *Id.* § 14-445(b). Application of this provision may raise constitutional questions. If the defendant or his attorney affirmatively refuses the defense and the judge still insists upon it, due process may be abridged or the sixth amendment right to counsel denied. Crowell, *supra* note 106, at 4.

116. N.C. GEN. STAT. § 122-65.11 (Interim Supp. 1978); see text accompanying notes 123-33 *infra*.

117. N.C. GEN. STAT. § 14-447(b) (Interim Supp. 1978).

118. *Id.* § 14-444(b).

119. *Id.* § 122-58.22; see text accompanying note 137 *infra*.

120. N.C. GEN. STAT. § 122-58.23 (Interim Supp. 1978); see text accompanying note 137 *infra*.



district court hearing, which may be held at the time defendant is found not guilty by reason of alcoholism or within a fifteen day period after such finding is made.<sup>121</sup>

The portion of this statute that provides for assistance to an intoxicated person without the necessity of first arresting him is the most significant reform made in existing law. The type of assistance that will be provided by law enforcement officers under G.S. 122-65.11 depends upon the condition of the intoxicated person.<sup>122</sup> If the person is *only* intoxicated, he may be taken home<sup>123</sup> or to the home of anyone willing to accept him;<sup>124</sup> if he is in need of medical care, he will be taken to an appropriate facility or doctor's office;<sup>125</sup> if he is in need of food and shelter, he will be taken to a shelter approved by the Department of Human Resources.<sup>126</sup>

The shelter contemplated by this provision is a "social setting" detoxification center, which would provide the alcoholic with food, shelter, and medical care by referral.<sup>127</sup> Significantly absent from the Act is any provision for funding these facilities. Although many localities have out-patient programs, or in-patient medical detoxification programs in hospitals, there are only six social setting detoxification centers in the state;<sup>128</sup> this is obviously not sufficient to meet the demands of this statute's program. The cost of providing the additional beds necessary to successful implementation of this Act is estimated at over two billion dollars.<sup>129</sup> Obviously, therefore, in many instances there will not be any facility to which to send the people that are to be assisted under the law. In recognition of this possibility, G.S. 122-65.13 does provide that if a person is found intoxicated in public and is in need of food or shelter, but not medical care, the officer may take the person to the city or county jail if there is no place else to take him.<sup>130</sup>

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121. N.C. GEN. STAT. § 14-446 (Interim Supp. 1978).

122. In providing the assistance authorized by this statute, the officer is permitted to use reasonable force to protect himself, the intoxicated person, or others; no officer may be held civilly or criminally liable for actions taken as reasonable measures under the authority of § 122-65.11. *Id.* § 122-65.11(b). *Id.* § 122-65.12 authorizes the city or county to hire additional officers to assist intoxicated persons. Employees hired under this provision are to be trained in first aid and empowered with the authority and duty of a law enforcement officer acting under *id.* § 122-65.11.

123. *Id.* § 122-65.11(a)(1).

124. *Id.* § 122-65.11(a)(2).

125. *Id.* § 122-65.11(a)(4).

126. *Id.* § 122-65.11(a)(3).

127. *See* Crowell, *supra* note 106, at 5.

128. *See id.*

129. *See id.* at 5-6.

130. N.C. GEN. STAT. § 122-65.13 (Interim Supp. 1978). It is likely that jail will be used regu-

If brought to jail, the person may be detained only until he becomes sober or a maximum of twenty-four hours, and he may be released at any time to a relative or any other person willing to accept him.<sup>131</sup>

Once an intoxicated person has been taken to either a medical or a detoxification center, he may be detained until he becomes sober, or for a maximum of twenty-four hours; he can be held longer only if he chooses to remain in the facility voluntarily or if a court order is obtained to detain him.<sup>132</sup> To obtain a court order, a finding that it is probable the person is an alcoholic in need of care must be made by a clerk or magistrate. If this finding is not made, the person must be released; if probable cause is found, the person may be ordered detained for up to ninety-six hours to arrange an appearance before a district court judge for a full hearing to determine if the person is an alcoholic in need of care.<sup>133</sup> A similar hearing before a district court judge may also be held if by reason of alcoholism the person is found not guilty of a charge under G.S. 14-446.<sup>134</sup>

The hearing provided for under G.S. 14-446 or G.S. 122-65.11(d) is a full hearing intended to determine if the alcoholic should be committed for either short-term treatment or long-term residential care. At such a hearing, the alleged alcoholic must be represented by counsel if he so desires and is entitled to confront and cross-examine witnesses against him.<sup>135</sup> If available and if the district judge believes it would be helpful, an alcoholism counselor may be appointed to make a prehearing review of the alcoholic and his condition that will be considered by the judge in making his determination.<sup>136</sup> If the person is found to be an alcoholic in need of care<sup>137</sup> and is ordered to participate in a treatment program,<sup>138</sup> he has the right to appeal and the judge is required to

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larly in rural areas where it would not be economically feasible to build a detoxification center; in all other areas, use of a jail is meant only to be a last resort. Crowell, *supra* note 106, at 6.

131. N.C. GEN. STAT. § 122-65.13 (Interim Supp. 1978).

132. *Id.* § 122-65.11(c).

133. *Id.* § 122-65.11(d).

134. *Id.* §§ 14-446, 122-58.22(b).

135. *Id.* § 122-58.22(d). If the alleged alcoholic is an indigent and does not waive counsel, counsel must be appointed. *Id.*

136. *Id.* § 122-58.22(c).

137. In the context of short-term treatment under *id.* § 122-58.22, a person is an alcoholic if "he habitually lacks self-control as to the use of intoxicating liquor, or uses intoxicating liquor to the extent that his health is substantially impaired or endangered or his social or economic function is substantially disrupted." An alcoholic is in need of care if "his alcoholism is presently causing him to lose control over his own actions to the extent that he regularly has to depend on others to provide food, clothing, shelter, medical or other essential care for him." This definition is applicable to both short-term treatment and long-term residential care. *Id.* § 122-58.23(a)(1).

138. See *id.* § 122-58.22(e)(2).

record facts that support his findings to facilitate the appeal.<sup>139</sup>

Once a person is found to be an alcoholic in need of care, the judge may order short-term commitment under G.S. 122-58.22(e).<sup>140</sup> Under this provision, the judge has the option to suggest that the alcoholic participate voluntarily in an alcohol treatment program or to order mandatory participation for up to thirty days. Under G.S. 122-58.23 the judge may order long-term residential care if certain elements in addition to those required for short-term commitment have been demonstrated at the hearing.<sup>141</sup> For long term residential care to be statutorily permitted, clear and convincing evidence must show that the alcoholic is a person in need of care as defined by G.S. 122-56.22,<sup>142</sup> that he has been given recent opportunities to participate in alcoholism treatment programs, and that he has wilfully refused to participate or cooperate in such programs or has failed to show significant progress toward overcoming his alcoholism. If these factors have been sufficiently demonstrated, the judge may order the alcoholic committed to a residential facility for up to 180 days.<sup>143</sup> G.S. 122-58.23(c) allows for release at any time prior to the end of the court-ordered period of commitment if the director of the facility determines that the person is no longer in need of the care of that facility.<sup>144</sup> If at the end of the period of commitment the director feels that the alcoholic needs further care, he may under the procedure of G.S. 122-58.11<sup>145</sup> request a hearing for an additional commitment.<sup>146</sup>

The final provision of the Act amends the bail statute<sup>147</sup> by adding that a factor to be considered in determining the form of pretrial release is "whether the defendant is intoxicated to such a degree that he would be endangered by being released without supervision."<sup>148</sup> This provision will empower the magistrate to set a very high bail when the defendant is too intoxicated to be responsible for himself or to drive

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139. *Id.* § 122-58.22(d). This provision applies only when the judge elects mandatory participation for the alcoholic as provided by § 122-58.22(e)(2). See Crowell, *supra* note 106, at 10.

140. N.C. GEN. STAT. § 122-58.22(e) (Interim Supp. 1978).

141. *Id.* § 122-58.23. The requirements for the hearing on long-term commitment are the same as for short-term commitment under § 122-58.22(c) & (d), except for the added requirement that at least 48 hours notice of the hearing must be given to the alleged alcoholic and his counsel. *Id.* § 122-58.23(b).

142. See note 137 *supra*.

143. N.C. GEN. STAT. § 122-58.23(a) (Interim Supp. 1978).

144. *Id.* § 122-58.23(c).

145. *Id.* § 122-58.11 (Cum. Supp. 1977).

146. *Id.* § 122-58.23(d) (Interim Supp. 1978).

147. *Id.* §§ 15A-531 to -547 (1978 & Interim Supp. 1978).

148. *Id.* § 15A-534(c) (Interim Supp. 1978).

safely, and then lower the bail a few hours later when he becomes sober.<sup>149</sup>

This legislation is clearly intended to be a comprehensive plan for the rehabilitation of public drunks. The success of the plan is dependent upon the effectiveness of the detoxification centers that are to deal with the alcoholics assisted under this Act. At the present time, there are not enough beds to treat every person arrested or referred under the new statute. If the statute is to be effective in reducing the problem of alcoholism, it will be necessary for more facilities to be built. Until more detoxification facilities can be built, the success of the legislation depends upon the district judges working closely with local officials to ensure that no one directed to a facility is turned away.<sup>150</sup>

### E. Plea Bargaining

Because of the great importance of plea bargaining in the administration of criminal justice in this state,<sup>151</sup> and the paucity of case law development on the subject, the North Carolina Court of Appeals' decision in *Northeast Motor Co. v. North Carolina State Board of Alcoholic Control*, dealing with the scope of the State's obligation to comply with plea bargaining agreements, is particularly significant.<sup>152</sup> Petitioner in *Northeast Motor Co.* was charged by the Board of Alcoholic Control with a violation of the state alcoholic beverage control laws.<sup>153</sup> In connection with the alleged ABC violations, an employee of petitioner was charged with the criminal violation of selling beer to a minor. Pursuant to a plea bargain agreement between the employee and the assistant district attorney, the employee entered a plea of nolo contendere and the State agreed "not to take any further action by way of hearing before any court, board, or agency arising out of this transaction against [the employee or petitioner]."<sup>154</sup> Subsequently, the Board of Alcoholic Control suspended petitioner's ABC permit for fifteen days. Petitioner appealed the decision on the ground the Board of Alcoholic Control was estopped from instituting the proceeding in which petitioner's license was revoked by reason of the plea bargain agree-

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149. See Crowell, *supra* note 106, at 11-12.

150. *Id.* at 12.

151. See *State v. Slade*, 291 N.C. 275, 229 S.E.2d 921 (1976) ("We are aware that 'plea bargaining' has emerged as a major aspect in the administration of criminal justice.").

152. 35 N.C. App. 536, 241 S.E.2d 727 (1978).

153. *Id.* at 536, 241 S.E.2d at 728. The charge was knowingly selling malt beverages to a minor upon licensed premises.

154. *Id.* at 537, 241 S.E.2d at 728.

ment in the criminal action.<sup>155</sup> Relief was denied by the trial court and the court of appeals affirmed on the ground that neither petitioner nor the Board of Alcoholic Control was a party to the plea bargain agreement in the criminal proceeding.<sup>156</sup>

In 1973 the North Carolina General Assembly passed article 58 of the Criminal Procedure Act, which endorsed the plea bargaining process as a means of expediting the criminal process.<sup>157</sup> The decision in *Northeast Motor Co.* recognizes the deficiency of case law development in this area<sup>158</sup> and attempts to define the scope of liability for breach of a plea bargain agreement. The court adopted the rule that a defendant may be granted relief for the breach of agreements induced by both authorized and unauthorized promises by a prosecutor.<sup>159</sup> This scope of liability is in conformity with that adopted by the federal courts<sup>160</sup> and complements the intent of the draftsmen of article 58 to bring the plea bargaining process out of its shroud of secrecy.<sup>161</sup> Although the court's definition of the scope of potential liability was unnecessary to decide the case,<sup>162</sup> it informs the criminal defendant of his rights with respect to plea bargain agreements.<sup>163</sup> Because the result in *Northeast*

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155. *Id.*

156. *Id.* at 539, 241 S.E.2d at 729. The court held that on this ground petitioner did not have standing to enforce the agreement. The court explicitly reserved judgment on the question whether the Board of Alcoholic Control, a state agency, could bind itself by a plea bargain agreement in a criminal proceeding in which it was not a party. *Id.*

157. N.C. GEN. STAT. §§ 15A-1021 to -1027 (1978). The purpose of the plea bargaining statute was to set forth certain procedures to be followed in the plea bargaining process, to allow the defendant to tell the court the truth about plea bargaining arrangements and to eliminate the amount of collateral attacks on convictions based on guilty pleas. The procedure was modeled after the ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURES art. 350 (Tent. Draft No. 5, 1972).

158. There have been very few cases in North Carolina in which the court addressed plea bargaining issues. In *State v. Williams*, 291 N.C. 442, 230 S.E.2d 515 (1976), the supreme court ruled that a defendant is entitled to a continuance as a matter of right under N.C. GEN. STAT. § 15A-1024 (1978) when the trial judge at the time for sentencing determines that a different sentence from that provided in the plea agreement must be imposed. See also *State v. Lewis*, 32 N.C. App. 298, 231 S.E.2d 693 (1977) (interpreting § 15A-1025).

159. 35 N.C. App. at 538-39, 241 S.E.2d at 729-30.

160. In reaching its decision the court relied on *Santobello v. New York*, 404 U.S. 257, 262 (1971) ("where a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promises must be fulfilled"); *Palermo v. Warden*, 545 F.2d 286, 296 (2d Cir. 1976) ("where a defendant pleads guilty because he reasonably relies on promises by the prosecutor which are in fact unfulfillable, he has a right to have those promises fulfilled"); *United States v. Hammerman*, 528 F.2d 326, 331 (4th Cir. 1975) (assurances not within power of prosecutor to make on which defendant relies to plead guilty constitute grounds for relief). See also *Correale v. United States*, 479 F.2d 994 (1st Cir. 1973); *Walter v. Harris*, 460 F.2d 988 (4th Cir. 1972), *cert. denied*, 409 U.S. 1129 (1973).

161. See note 157 *supra*.

162. See note 156 *supra*.

163. It also puts the State on notice to monitor carefully the promises it makes.

*Motor Co.* was one of nonliability, however, it remains for future decisions to outline the remedies available for breach of such agreements.<sup>164</sup>

### F. Narcotics

In *State v. Forney*,<sup>165</sup> the North Carolina Court of Appeals confronted the issue of the extent of dominion and control<sup>166</sup> sufficient to support a charge of sale and delivery of heroin and possession of heroin with the intent to sell and deliver.<sup>167</sup> Two State Bureau of Investigation (SBI) agents told defendant that they were interested in purchasing heroin. Defendant arranged a meeting for this purpose, and brought along another person, who negotiated the sale and handed the agent the drugs for the agreed upon price. Defendant contended that there was, therefore, no evidence tending to show that he had possession of the heroin.<sup>168</sup>

The issue whether dominion and control predicated upon a working relationship of this nature is sufficient to constitute possession had not yet been decided in the North Carolina courts.<sup>169</sup> There is precedent that "an accused has possession . . . within the meaning of the law when he has both the power and intent to control its disposition or use. The requisite power to control may reside in the accused acting

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164. In cases in which the prosecutor promised there would be no further criminal prosecution, something that is in his power to control, specific enforcement of the bargain has been ordered. *See Corrales v. United States*, 479 F.2d 944 (1st Cir. 1973); *United States v. Carter*, 454 F.2d 426 (4th Cir. 1972), *cert. denied*, 417 U.S. 933 (1974); *United States v. Paina*, 294 F. Supp. 742 (D.D.C. 1969). The other alternative, particularly for an unfulfillable promise, would be to allow withdrawal of a guilty plea. *See United States v. Hammerman*, 528 F.2d 326 (4th Cir. 1975).

165. 38 N.C. App. 703, 248 S.E.2d 747 (1978).

166. Dominion and control over a narcotic or dangerous drug is an essential element of the criminal offense of possession. The control incident to possession may be actual or constructive, but it has been held that the narcotic or dangerous drug must be in the immediate and exclusive control of the accused. 28 C.J.S. *Drugs and Narcotics Supp.* § 157 (1974).

167. 38 N.C. App. 706-07, 248 S.E.2d at 749-50. N.C. GEN. STAT. § 90-95(a) (1975) provides:

[I]t is unlawful for any person: (1) To manufacture, sell or deliver or possess with intent to manufacture, sell or deliver, a controlled substance; (2) To create, sell or deliver, or possess with intent to sell or deliver, a counterfeit controlled substance; (3) To possess a controlled substance.

168. 38 N.C. App. at 704-06, 248 S.E.2d at 748-49.

169. In jurisdictions that have considered the issue, the criminality of directing to or recommending a source of supply begins to form as one moves along a continuum from a single, casual naming of another possible source to accompanying another to a meeting with the seller during which the sale takes place. Whether defendant accompanies the buyer to the meeting seems to determine whether defendant's actions will likely be found criminal. *See Annot.*, 42 A.L.R.3d 1072 (1972).

alone or in combination with others."<sup>170</sup> The court could have applied this definition of constructive possession and based its decision on existing interpretations well supported in the case law of a number of jurisdictions including North Carolina.<sup>171</sup> Instead the court chose to base its decision upon cases decided under former section 2(c) of the Narcotic Drugs Import and Export Act.<sup>172</sup> Possession under this statute had been defined to include any working relationship or association with one having physical custody of drugs that enabled delivery to a customer without difficulty.<sup>173</sup>

Applying the reasoning developed in these cases, the *Forney* court held defendant to be in possession of the heroin. Defendant produced the unidentified man on short notice at a place of defendant's choosing; the man arrived with the amount of heroin desired by the agents, apparently with prior knowledge that the SBI agents were the individuals who wished to make the purchase; and the man entered into the price negotiations with people otherwise unknown to him. These facts indicate a close working relationship between defendant and the unidentified man. Based upon this relationship, defendant was found to be in possession of the heroin by exercising dominion and control over the man who physically possessed the drugs.<sup>174</sup>

In *State v. Bethea*,<sup>175</sup> section 1175 of the federal Drug Abuse Office and Treatment Act<sup>176</sup> was construed by the North Carolina Court of Appeals for the first time. This statute was enacted to protect the confidentiality of patient records maintained in connection with any federally funded drug abuse prevention program.<sup>177</sup> In this case, defendant

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170. *State v. Allen*, 279 N.C. 406, 411, 183 S.E.2d 680, 684 (1971) (quoting *State v. Fuqua*, 234 N.C. 168, 170, 66 S.E.2d 667, 668 (1951)).

171. See *State v. Harvey*, 281 N.C. 1, 187 S.E.2d 706 (1972); *State v. Spencer*, 281 N.C. 121, 187 S.E.2d 779 (1972). See generally 28 C.J.S. *Drugs and Narcotics Supp.* § 158 (1974).

172. Act of July 18, 1956, ch. 629, § 105, 70 Stat. 567 (formerly codified at 21 U.S.C. § 174) (repealed 1970). The statute read in pertinent part: "[W]henever . . . the defendant is shown to have or to have had possession of the narcotic drugs, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

173. See, e.g., *United States v. Baratta*, 397 F.2d 215, 224 (2d Cir.), cert. denied, 393 U.S. 939 (1968) (evidence of "working relationship" between defendant and actual possessors of narcotics constitutes dominion and control sufficient to constitute possession); *Cellino v. United States*, 276 F.2d 941 (9th Cir. 1960) (negotiation of sale and receipt of purchase price sufficient dominion and control to constitute possession), cited with approval in *State v. Forney*, 38 N.C. App. 703, 706, 248 S.E.2d 747, 749-50.

174. 38 N.C. App. at 706, 248 S.E.2d at 749-50.

175. 35 N.C. App. 512, 241 S.E.2d 869 (1978).

176. 21 U.S.C. § 1175 (1976).

177. Section 1175 provides for confidentiality of patient records concerning the identity, diagnosis, prognosis, or treatment of any patient maintained in connection with any drug abuse pre-

was charged with possession with intent to sell and deliver, and sale and delivery of a controlled substance, methadone.<sup>178</sup> Defendant argued that because the sale was initiated by an SBI agent using a third-party informant who was an out-patient with defendant at the Durham Drug Rehabilitation Center, the evidence obtained from observation of the sale should be excluded because it was acquired in clear violation of the regulations promulgated under section 1175.<sup>179</sup> The relevant regulation flatly prohibits the enrollment of informants in drug abuse treatment programs.<sup>180</sup>

In rejecting defendant's contention the court relied upon *Armenta v. Superior Court*,<sup>181</sup> a California case that also dealt with an informant under this regulation. After a thorough consideration of the legislative history of this statute, the California court concluded that only confidential records obtained in violation of section 1175 were intended to be subject to exclusion.<sup>182</sup> Relying on this interpretation by the California court, the North Carolina Court of Appeals concluded that defendant's motion to suppress was properly denied even though the letter of the federal regulation was violated, because the evidence obtained by use of the informant did not include the confidential records of defendant.<sup>183</sup>

In reaching this conclusion, North Carolina is in accord with the interpretation of section 1175 and the regulations promulgated under it reached by the few jurisdictions that have considered the issue.<sup>184</sup> The

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vention function conducted, regulated or assisted by the government. Except as authorized by a court order granted under this section, no patient record may be used to initiate or substantiate any criminal charges against a patient or to conduct any investigation of a patient. *Id.*

178. 35 N.C. App. at 513, 241 S.E.2d at 870.

179. *Id.* at 514, 241 S.E.2d at 870-71. The Secretary of Health, Education and Welfare, and the heads of other affected agencies, are given authority, under 21 U.S.C. § 1175(g) (1976), to prescribe regulations to carry out the purposes of § 1175.

180. 42 C.F.R. § 2.19(b)(1) (1977). Section 2.19(a)(2) defines "informant" as a person who, at the request of a law enforcement agency or officer observes persons enrolled in or employed by a program for the purpose of reporting the information his observations reveal to the officer or agency.

181. 61 Cal. App. 3d 584, 132 Cal. Rptr. 586 (1976).

182. *Id.* at 594-96, 132 Cal. Rptr. at 592-93. The California court noted that this interpretation is consistent with the history of 42 C.F.R. § 2.19 (1977), which reveals no intention to make the drug abuse prevention programs criminal sanctuaries.

183. 35 N.C. App. at 516, 241 S.E.2d at 871.

184. Brief for Defendant Appellant at 8-10, *State v. Bethea*, 35 N.C. App. 512, 241 S.E.2d 869 (1978), reveals only two cases decided nationwide construing this statute and regulation. *State v. Traas*, 343 So. 2d 1294 (Fla. Dist. Ct. App. 1977), does not provide much analysis of the issue; *Armenta v. Superior Court*, 61 Cal. App. 3d 584, 132 Cal. Rptr. 586 (1976), was relied upon by the court. The State relied primarily upon *Armenta*, but also mentioned *State v. White*, 169 Conn. 223, 363 A.2d 143 (1975), *cert. denied*, 423 U.S. 1025 (1978).



legislative intent in enacting this statute was clearly to protect the identity of participants in drug abuse prevention programs by statutorily protecting the confidentiality of program records.<sup>185</sup> In promulgating regulations to effectuate this purpose, the Secretary of Health, Education and Welfare concluded that a prohibition on the enrollment of informants in such facilities was necessary to guarantee this confidentiality.<sup>186</sup> The statute was not intended, however, to make these programs sanctuaries for criminal activity.<sup>187</sup> The courts have interpreted the statute in a manner consistent with this legislative intent.<sup>188</sup> Utilizing this approach, the court of appeals found that while the third-party informant could come within the definition of an informant under the regulations, the information obtained by him was not of the type the statute was intended to protect.<sup>189</sup> The information gathered was not a record within the definition set out in section 1175; it was merely information gathered by the third-party in a parking lot and was in no way connected with the medical records of the center itself.<sup>190</sup> Therefore, even if the information was obtained in violation of the regulation, it was not obtained in violation of the statute, and should not be suppressed.<sup>191</sup>

In adopting this reasoning, the court is effectively condoning the violation of a federal regulation. If a motion to suppress evidence wrongfully obtained under the regulations is denied because the evidence so obtained is not a record the statute itself intended to protect, an important remedy for violations of the regulation is removed.<sup>192</sup> In so holding, the court of appeals is clearly subordinating the need for the confidentiality required to operate a successful rehabilitation center to the need to prevent the illegal sale of narcotic drugs.

### G. *Double Jeopardy*

In *State v. Cannon*,<sup>193</sup> defendant entered a plea of guilty to a

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185. See *State v. White*, 159 Conn. 223, 363 A.2d 143 (1975), *cert. denied*, 423 U.S. 1025 (1978).

186. See 42 C.F.R. § 2.19-1 (1977).

187. See *Armenta v. Superior Court*, 61 Cal. App. 3d 584, 593, 132 Cal. Rptr. 586, 596 (1976).

188. See, e.g., *id.*

189. 35 N.C. App. at 515-16, 241 S.E.2d at 871.

190. *Id.* For a discussion of what constitutes a record under the statute, see *State v. White*, 169 Conn. 223, 235-37, 363 A.2d 143, 150-51 (1975), *cert. denied*, 423 U.S. 1025 (1978).

191. 35 N.C. App. at 515-16, 241 S.E.2d at 871. See also *Armenta v. Superior Court*, 61 Cal. App. 3d 584, 132 Cal. Rptr. 586 (1976).

192. See Brief for Defendant Appellant at 9.

193. 38 N.C. App. 322, 248 S.E.2d 65 (1978).

charge of operating a motor vehicle without being licensed under G.S. 20-7.<sup>194</sup> Defendant then moved to dismiss a second case against him stemming from the same occurrence, operating a motor vehicle when his operator's license had been permanently revoked under G.S. 20-28.<sup>195</sup> Defendant contended that the plea of guilty to the first charge precluded the State from proceeding on the second because double jeopardy had attached.<sup>196</sup> The district court agreed with defendant, and the State appealed to the superior court, which found in favor of the State.<sup>197</sup> Defendant then appealed to the court of appeals.

While the prohibition against double jeopardy is not expressly set out in the North Carolina Constitution, it has been applied in this state as a fundamental principle of the common law.<sup>198</sup> One expression of the prohibition is the lesser degree rule, which states that "where the second indictment is for a crime greater in degree than the first, and where both indictments arise out of the same act . . . an acquittal or conviction for the first is a bar to a prosecution for the second."<sup>199</sup> In *Cannon*, the court of appeals found that G.S. 20-7 is not statutorily a lesser included offense of G.S. 20-28 and hence that conviction under both statutes is not barred on this ground.<sup>200</sup>

Another rule implementing the double jeopardy prohibition is that if the two offenses are the same in fact and law, then a defendant may not be prosecuted for both.<sup>201</sup> In making this determination, the "additional facts test" is applied.<sup>202</sup> This rule states that "[a] single act may be an offense against two statutes, and if each statute requires proof of an additional fact, which the other does not, an acquittal or conviction

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194. N.C. GEN. STAT. § 20-7 (1977).

195. *Id.* § 20-28.

196. In the appeal to the court of appeals, defendant conceded that the charges had been properly joined, although objection had been raised on this ground in the district court. N.C. GEN. STAT. § 15A-926(c)(3) (1978) provides that joinder is not applicable when the defendant has pleaded guilty or no contest to the previous charge. In this case, defendant entered a plea of guilty to the first charge.

197. The district court found that the ultimate fact to be determined in each of the cases was whether defendant had in his possession a North Carolina operator's license; operating a motor vehicle without being licensed would therefore be a lesser included offense of § 20-28, so that jeopardy had attached after pleading guilty to the first charge.

198. *State v. Crocker*, 239 N.C. 446, 80 S.E.2d 243 (1954).

199. 38 N.C. App. at 324, 248 S.E.2d at 67 (quoting 15 N.C.L. REV. 53, 55 (1936)); see *State v. Bell*, 205 N.C. 225, 171 S.E. 50 (1933).

200. 38 N.C. App. at 325, 248 S.E.2d at 67. Section 20-7 is intended to apply when the defendant has not been issued a license or has let the license expire, while § 20-28 applies when the defendant has had his license revoked because of successive violations of the law.

201. See *State v. Barefoot*, 241 N.C. 650, 86 S.E.2d 424 (1958).

202. See *State v. Birkhead*, 256 N.C. 494, 124 S.E.2d 838 (1962).

under either statute does not exempt the defendant from prosecution and punishment under the other."<sup>203</sup> The additional facts test is therefore bilateral in its application: to prosecute for both offenses, each offense must have some element not common to the other to make it a separate and distinct offense.<sup>204</sup> The offenses charged in this case cannot pass this test. Failure to have a license is the only element of the G.S. 20-7 offense, yet it is also an element necessary in the G.S. 20-8 offense.<sup>205</sup> Therefore, the court held that the two offenses are the same in fact and in law and the plea of double jeopardy should have been sustained.<sup>206</sup>

*State v. Cox*,<sup>207</sup> another court of appeals decision, also dealt with double jeopardy. Cox was charged with armed robbery<sup>208</sup> and pleaded not guilty. The evidence against him showed only that he drove the three other men involved in the robbery away from the scene of the crime. The trial judge directed a verdict of not guilty at the close of the State's evidence; defendant was then served with a warrant charging him with the offense of accessory after the fact.<sup>209</sup> Defendant moved to dismiss this charge prior to trial on the ground that a trial on accessory charges would violate his double jeopardy protection; this motion, as well as a motion to dismiss on the basis of the joinder statute,<sup>210</sup> was denied.<sup>211</sup> Defendant appealed from a conviction of guilty of accessory after the fact.

In support of his argument that a second trial would offend double jeopardy principles, defendant relied upon *Ashe v. Swenson*,<sup>212</sup> in which the United States Supreme Court held that the principles of collateral estoppel are embodied in the fifth amendment protection against double jeopardy.<sup>213</sup> Collateral estoppel "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

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203. *State v. Stevens*, 114 N.C. 873, 877, 19 S.E. 861, 862 (1894).

204. *State v. Nash*, 86 N.C. 650 (1882).

205. 38 N.C. App. at 326, 248 S.E.2d at 68.

206. *Id.* at 327, 248 S.E.2d at 69.

207. 37 N.C. App. 356, 246 S.E.2d 152, *appeal dismissed, cert. denied*, 295 N.C. 649, 248 S.E.2d 253 (1978).

208. Cox was charged under N.C. GEN. STAT. § 14-87 (Cum. Supp. 1977).

209. *See id.* § 14-7 (1969).

210. *Id.* § 15A-926(c)(2) (1978).

211. 37 N.C. App. at 358-59, 246 S.E.2d at 153.

212. 397 U.S. 436 (1970).

213. *See Survey of Developments in North Carolina Law, 1977*, 56 N.C.L. REV. 843, 977-80 (1978).

in any future lawsuit.”<sup>214</sup> Applying this rationale, the court of appeals found that the directed verdict on armed robbery foreclosed the State from subsequent prosecutions for armed robbery or any lesser included offense; it removed the issue whether the defendant participated as a principal in the armed robbery or whether he aided or abetted in its commission.<sup>215</sup> Accessory after the fact of armed robbery, however, is not a lesser included offense of armed robbery; the crime of accessory after the fact begins after the principal offense has been committed.<sup>216</sup> The directed verdict of not guilty of armed robbery therefore did not decide the question whether defendant had joined the criminal scheme after the robbery was complete and thus the court of appeals affirmed defendant’s conviction.<sup>217</sup>

#### H. Doctrine of Recent Possession

In *State v. Musselwhite*,<sup>218</sup> the North Carolina Court of Appeals dealt with the doctrine of recent possession, the well-established doctrine that possession of stolen property soon after a theft permits an inference that the possessor is the thief, and if there is sufficient evidence that the property was stolen pursuant to a breaking and entering, that the possessor is also guilty of the breaking and entering.<sup>219</sup> In *Musselwhite*, the court refused to extend the doctrine to allow possession of recently stolen goods to be ground for a conviction of aiding and abetting. In this case, defendant and another man were charged with robbery with a firearm; defendant was convicted of aiding and abetting.<sup>220</sup> The only evidence before the jury tended to establish unequivocally that the robbery was committed by the other man. The evidence

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214. 397 U.S. at 443.

215. 37 N.C. App. at 360, 246 S.E.2d at 153-54.

216. See *State v. McIntosh*, 260 N.C. 749, 133 S.E.2d 652 (1963). *McIntosh* held that an acquittal of a charge of accessory after the fact of armed robbery will not support a plea of former jeopardy in a subsequent prosecution of the same defendant for armed robbery, because the two offenses are different in fact and in law.

217. 37 N.C. App. at 360, 246 S.E.2d at 154.

218. 36 N.C. App. 430, 245 S.E.2d 171 (1978).

219. See *State v. Eppeley*, 282 N.C. 249, 192 S.E.2d 471 (1972); *State v. Blackmon*, 6 N.C. App. 66, 169 S.E.2d 472 (1969). The weight to be given this presumption depends upon the circumstances of the particular case. See *State v. Jackson*, 274 N.C. 594, 164 S.E.2d 369 (1968); *State v. Williams*, 219 N.C. 365, 13 S.E.2d 617 (1941). See generally 2 STRONG’S NORTH CAROLINA INDEX 3d *Burglary and Other Unlawful Breakings* § 5.4 (1978); 8 *id.* *Larceny* § 5.

220. One may be convicted of aiding and abetting in the offense of robbery if “he is near enough to render assistance if need be and to encourage the actual perpetration of the felony” or if he provides “a means by which the actual perpetrator may get away from the scene upon completion of the offense.” *State v. Lyles*, 19 N.C. App. 632, 635-36, 199 S.E.2d 699, 701-02, *cert. denied*, 284 N.C. 426, 200 S.E.2d 662 (1973).

against defendant proved only that he and the other man were later found driving in the same van. When the van was stopped, the other man was found to have the stolen money in his possession; a search of the van revealed a gun like the one stolen and another gun like the one used in the robbery so that both men were found to be in possession of stolen goods. The record was thus devoid of any evidence directly connecting defendant to the scene of the crime. The court held that the charge of aiding and abetting could not be submitted to the jury in reliance upon the presumption of theft arising from the possession of recently stolen goods.<sup>221</sup>

This refusal to extend the doctrine of recent possession to allow a finding of guilty of aiding and abetting to be predicated solely upon possession of the stolen goods is reasonable when considered in light of the logic behind the presumption. In the usual case, the presumption is employed when there is no better evidence than possession of the stolen goods to connect the defendant to the crime. The presumption is justified nevertheless because of the certainty that someone committed the theft.<sup>222</sup> Hence, when the State's evidence unequivocally establishes that the larceny was committed by someone else, a critical ingredient of the presumption is destroyed.<sup>223</sup>

### *I. Obtaining Property or Services by False Pretenses*

In *State v. Hines*,<sup>224</sup> the North Carolina Court of Appeals directly addressed for the first time the question whether compensation to the victim precludes conviction of obtaining property or services by false pretenses.<sup>225</sup> The court held that obtaining property "without compen-

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221. 36 N.C. App. at 436, 245 S.E.2d at 175-76.

222. See *State v. Williams*, 219 N.C. 365, 13 S.E.2d 617 (1941).

223. See *State v. Cannon*, 218 N.C. 466, 11 S.E.2d 301 (1940). In *Cannon*, the evidence tended to prove that two men stole cigarettes and sold them to a third man who in turn sold them to defendant. The court held that while the recent possession of stolen property generally raises a presumption that the possessor is the thief, no such presumption can prevail when the State's evidence shows the larceny to have been committed by others and fails to connect the defendant in any way to the felonious taking.

224. 36 N.C. App. 33, 243 S.E.2d 782, *appeal dismissed, cert. denied*, 295 N.C. 262, 245 S.E.2d 779 (1978).

225. N.C. GEN. STAT. § 14-100 (Cum. Supp. 1977) provides in pertinent part:

Obtaining property by false pretenses.—(a) If any person shall knowingly and designedly by means of any kind of false pretense whatsoever, whether the false pretense is of a past or subsisting fact or of a future fulfillment or event, obtain or attempt to obtain from any person within this State any money, goods, property, services, chose in action, or other thing of value . . . , such person shall be guilty of a felony, and shall be imprisoned in the State's prison not less than four months nor more than 10 years, and fined, in the discretion of the court . . . , Provided, further, that it shall be sufficient in any indictment for obtaining or attempting to obtain any such money, goods, property, services, chose in

sation" to the victim is not an element of the crime that the State need allege or prove.<sup>226</sup> The court further held that the requisite intent to defraud might be found even if the victim is adequately compensated in the economic sense, if that compensation is less than originally represented.<sup>227</sup>

Defendant in *Hines* led the prosecuting witness, largely through use of falsified documents, to believe that he was a state employee with authority to contract with her for a state job at a \$10,000 salary and benefits. In fact, defendant was not so employed or authorized, and the secretarial duties subsequently performed by the prosecuting witness under the impression she was starting her new state job were actually for defendant's benefit. Defendant did pay the prosecuting witness \$148 for the time she worked for him until she realized she had been deceived, and he also reimbursed her expenses incurred on a business trip.<sup>228</sup>

After his conviction, defendant contended on appeal that his motion for nonsuit should have been allowed because the services were not obtained without compensation.<sup>229</sup> While recognizing that language in prior decisions suggested that "without compensation" had been recognized as an element,<sup>230</sup> the court determined that the use of

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action, or other thing of value by false pretenses to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the money, goods, property, services, chose in action or other thing of value; and upon the trial of any such indictment, it shall not be necessary to prove either an intent to defraud any particular person or that the person to whom the false pretense was made was the person defrauded, but it shall be sufficient to allege and prove that the party accused made the false pretense charged with an intent to defraud.

Amended § 14-100 also expanded the violation to include an attempt to obtain property by false pretenses. *See* State v. Grier, 35 N.C. App. 119, 239 S.E.2d 870, *cert. denied*, 294 N.C. 442, 241 S.E.2d 844 (1978).

226. 36 N.C. App. at 40, 243 S.E.2d at 786.

227. *Id.* at 42, 243 S.E.2d at 788.

228. *Id.* at 34-35, 243 S.E.2d at 783.

229. *Id.* at 37, 243 S.E.2d at 785.

230. *See, e.g.,* State v. Agnew, 33 N.C. App. 496, 236 S.E.2d 287 (1977), *rev'd on other grounds*, 294 N.C. 382, 241 S.E.2d 684 (1978):

The essential elements which the State must prove to the satisfaction of the jury beyond a reasonable doubt in order to convict one of the crime of false pretense are as follows: . . . "a false representation of a subsisting fact [or of a future fulfillment or event as provided in G.S. 14-100 as amended in 1975], calculated to deceive, and which does deceive, and is intended to deceive, whether the representation be in writing, or in words, or in acts, by which one man obtains value from another, without compensation . . ."

*Id.* at 500-01, 236 S.E.2d at 290 (quoting State v. Davenport, 227 N.C. 475, 495, 42 S.E.2d 686, 700 (1947)). *See also* State v. Wallace, 25 N.C. App. 360, 364, 213 S.E.2d 420, 423, *cert. denied*, 287 N.C. 468, 215 S.E.2d 628 (1975).

these words was merely dictum in those cases.<sup>231</sup> The court traced the "without compensation" phrase to a leading case concerning the offense, *State v. Phifer*,<sup>232</sup> and noted that the issue of the victim's compensation was neither discussed nor before the court in that decision. Further, the "without compensation" element appeared only in those cases immediately following *Phifer* that quoted directly from *Phifer* for a statement of the elements of the offense;<sup>233</sup> cases from that period that cited but did not quote *Phifer* on the elements of the offense did not include the "without compensation" element.<sup>234</sup> From this the court concluded that it had never been intended that failure of the victim to receive any compensation be an element of the crime. Additionally, no statutory provision has ever expressly required there be no compensation,<sup>235</sup> and past convictions have been upheld although some compensation was received.<sup>236</sup>

Defendant in *Hines* also argued that if the compensation paid the victim was adequate in the fair market value sense, there could be no intent to defraud; therefore, the trial court's failure to instruct with regard to the adequacy of compensation was reversible error.<sup>237</sup> In rejecting this argument, the court interpreted prior decisions upholding convictions in which either the victim had received some compensation,<sup>238</sup> or the court had found it unnecessary to investigate the adequacy of the compensation,<sup>239</sup> as aligning North Carolina with the majority view that no actual pecuniary loss to the victim need be shown

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231. 36 N.C. App. at 40, 243 S.E.2d at 786.

232. 65 N.C. 321 (1871).

233. See, e.g., *State v. Mickle*, 94 N.C. 843 (1886); *State v. Hefner*, 84 N.C. 751 (1881).

234. See, e.g., *State v. Matthews*, 91 N.C. 635 (1884); *State v. Dickson*, 88 N.C. 643 (1883); *State v. Eason*, 86 N.C. 674 (1882).

235. 36 N.C. App. at 40, 243 S.E.2d at 786.

236. *Id.*

237. *Id.* Also addressing the element of intent in *State v. Tesenair*, 35 N.C. App. 531, 241 S.E.2d 877 (1978), the court of appeals held that a jury might find the necessary intent to deceive for conviction under § 14-100 quite apart from any intention to repay. In *Tesenair*, defendant purchased paint and supplies on a credit account he established by representing himself as his brother, who had a good credit rating. In refusing defendant's argument that this evidence could show no more than a failure to fulfill a promise to pay at a future date, the court followed what is the generally accepted view that "[w]hen the pretense is false, it is no defense that the defendant expected or intended to repay . . . the victim, should he be able to do so, or to pay before the deception is discovered." 2 WHARTON'S CRIMINAL LAW AND PROCEDURE § 610 (12th ed. 1957).

238. 36 N.C. App. at 40, 243 S.E.2d at 786; see *State v. Wallace*, 25 N.C. App. 360, 213 S.E.2d 420, cert. denied, 287 N.C. 468, 215 S.E.2d 628 (1975); *State v. Banks*, 24 N.C. App. 604, 211 S.E.2d 860 (1975).

239. 36 N.C. App. at 41, 243 S.E.2d at 787; see *State v. Howley*, 220 N.C. 113, 16 S.E.2d 705 (1941).

for the jury to find the requisite intent for conviction.<sup>240</sup> The court defined the essence of G.S. 14-100<sup>241</sup> as the intentional false pretense and not the resulting economic harm to the victim, noting that the criminal law will intervene to protect the interests of the victims when services are obtained by a false representation even though some compensation is paid.<sup>242</sup> Although the victim in *Hines* had suffered an economic harm or prejudice in receiving less than represented, the court's holding that the gravamen of the offense is the intentional misrepresentation suggests that any "ultimate loss to the victim . . . is irrelevant to the purpose of the . . . statute."<sup>243</sup>

### *J. Breaking or Entering<sup>244</sup> and Larceny<sup>245</sup>*

In *State v. Keeter*,<sup>246</sup> the court of appeals considered the question

240. 36 N.C. App. at 41, 243 S.E.2d at 737; *see, e.g.*, *State v. Meeks*, 30 Ariz. 436, 247 P. 1099 (1926); *State v. Moss*, 194 Ark. 524, 108 S.W.2d 782 (1937); *People v. Bartels*, 77 Colo. 498, 238 P. 51 (1925); *State v. Green*, 144 Tex. Crim. 186, 106 S.W.2d 144 (1942); *State v. Sargent*, 2 Wash. 2d 190, 97 P.2d 692 (1940); *State v. Anderson*, 27 Wyo. 345, 196 P. 1047 (1921). *But see* *State v. McGhee*, 97 Ga. 199, 22 S.E. 589 (1895).

241. N.C. GEN. STAT. § 14-100 (Cum. Supp. 1977).

242. 36 N.C. at 42, 243 S.E.2d at 78.

243. *Id.* While many jurisdictions require that for conviction the victim must have been prejudiced in some way, it is unnecessary to show damage under statutes making the false representation itself the offense. *See* 2 WHARTON'S CRIMINAL LAW AND PROCEDURE § 602 (12th ed. 1957).

244. In *State v. Sneed*, 38 N.C. App. 230, 248 S.E.2d 658 (1978), the court of appeals defined "entry" as used in the offenses of breaking or entering and burglary. The court adopted the definition in BLACK'S LAW DICTIONARY 627 (rev. 4th ed. 1968), which defines an entry as "the least entry with the whole or any part of the body, hand, foot, or with any instrument or weapon, introduced for the purpose of committing a felony."

245. In *State v. Schultz*, 294 N.C. 281, 240 S.E.2d 451 (1978), the North Carolina Supreme Court held that bronze cemetery urns are not real property and the theft of such urns is properly the subject of common law larceny. This holding rejected the contention of defendant that the urns should be in the same category of property as tombstones, which are real property and not subject to common law larceny. *See* *State v. Jackson*, 218 N.C. 372, 11 S.E.2d 149 (1940) (tombstones classified as real property because of their permanence and hence cannot be subject of common law larceny).

In *State v. Carswell*, 296 N.C. 101, 249 S.E.2d 427 (1978), the North Carolina Supreme Court was presented with the issue of the sufficiency of a taking and asportation necessary to sustain a conviction of larceny. The court recognized that larceny is "a wrongful taking and carrying away of the personal property of another without his consent, . . . with intent to deprive the owner of his property and appropriate it to the taker's use fraudulently." *State v. Griffin*, 239 N.C. 41, 45, 79 S.E.2d 230, 232 (1953). Hence, larceny embraces both a taking and an asportation element. The asportation element can be satisfied by "a bare removal from the place in which [the thief] found the goods, though the thief does not quite make off with them." 4 W. BLACKSTONE, COMMENTARIES \* 231. The taking requirement is met when the goods are severed from the possession of their owner, *State v. Roper*, 14 N.C. (3 Dev.) 473, 474 (1832), even if the possession and control by the thief is only for an instant. *State v. Jackson*, 65 N.C. 305 (1871). Thus, the act of picking up an air conditioner and laying it on the floor approximately six inches away is a sufficient taking and asportation to put the object briefly under the control of the defendant and to sever it from the owner's possession; defendant can be found guilty of larceny for these actions.

246. 35 N.C. App. 574, 241 S.E.2d 708 (1978).



whether the acceptance of a verdict of guilty of felonious larceny should be precluded when the jury is unable to reach a verdict on the charge of felonious breaking or entering upon which the larceny charge is predicated. Defendant was tried for felonious breaking or entering and felonious larceny. No verdict on the breaking or entering charge was reached; the jury then convicted defendant of felonious larceny.<sup>247</sup>

Defendant appealed this conviction on the ground that it was inconsistent with the rule of *State v. Jones*.<sup>248</sup> In *Jones*, the North Carolina Supreme Court held that when a defendant is tried for breaking or entering and felonious larceny and the jury returns a verdict of not guilty of felonious breaking or entering and guilty of felonious larceny, it is improper for the trial judge to accept the verdict of guilty of felonious larceny unless the jury has been instructed on its duty to fix the value of the stolen property at more than \$200.<sup>249</sup> In *Keeter*, this instruction was not given the jury.

The reason for this rule is that without a conviction of breaking or entering, felonious larceny cannot be found unless the State has proved in the alternative that the value of the property stolen was in excess of \$200. Felony larceny is committed when the State can prove that the value of the stolen property is greater than \$200; that the larceny is from the person or perpetrated pursuant to a breaking or entering; or that an explosive or incendiary device is utilized.<sup>250</sup> Hence, if the jury acquits the defendant on the breaking or entering charge, the charge of felonious larceny cannot be predicated upon a breaking or entering. It therefore is "incumbent upon the State to prove beyond a reasonable doubt that the value of the stolen property was more than \$200; and this being an essential element of the offense, it is incumbent upon the trial judge to so instruct the jury."<sup>251</sup>

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247. *Id.* at 574, 241 S.E.2d at 709.

248. 275 N.C. 432, 168 S.E.2d 380 (1969).

249. Although the judgment of felonious larceny must be vacated in such a case, the verdict will stand and the case will be remanded for entering a sentence consistent with the verdict of guilty of misdemeanor larceny. *Id.* at 439, 168 S.E.2d at 385; *accord*, *State v. Teel*, 20 N.C. App. 398, 201 S.E.2d 733 (1974).

250. N.C. GEN. STAT. § 14-72 (Cum. Supp. 1977).

251. *State v. Cooper*, 256 N.C. 372, 380, 124 S.E.2d 91, 97 (1962). In *Cooper* defendant was convicted solely upon a charge of felonious larceny. The court held that if the State did not prove the value of the property stolen exceeded \$200, defendant was not guilty of a felony. This mandate with respect to instructions on value was clearly extended to cover the situation in which defendant is charged with both breaking or entering and felonious larceny in *State v. Holloway*, 265 N.C. 518, 144 S.E.2d 634 (1965), which held that if the State cannot prove a breaking or

The *Keeter* court extended this rule to the situation in which no verdict is reached on the breaking or entering charge. This is logically consistent with *Jones* since in neither case did the State prove beyond a reasonable doubt that defendant committed a breaking or entering.<sup>252</sup>

PAULA-JEAN HAVENER  
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## VI. CRIMINAL PROCEDURE

### A. Searches and Seizures

#### 1. Vehicle Stops Under the Motor Vehicle Act<sup>1</sup>

In *Keziah v. Bostic*,<sup>2</sup> the United States District Court for the Western District of North Carolina for the first time restricted the power of law enforcement officers to stop motor vehicles pursuant to G.S. 20-183(a)<sup>3</sup> of the Motor Vehicle Act. G.S. 20-183(a) authorizes the discretionary stop of any vehicle on the state highways for a determination of whether it is being operated in violation of any provision of the Motor Vehicle Act.<sup>4</sup> The court in *Keziah* found that prior interpretations of the statute, which allowed officers unlimited discretion in deciding which vehicles to stop, were unconstitutional under the fourth amendment.<sup>5</sup>

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entering, a felony larceny charge must be based upon the property exceeding \$200 in value and the jury must be so instructed.

252. See Defendant Appellant's Brief at 7, *State v. Keeter*, 35 N.C. App. 574, 241 S.E.2d 733 (1978).

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1. N.C. GEN. STAT. ch. 20 (1978).

2. 452 F. Supp. 912 (W.D.N.C. 1978).

3. N.C. GEN. STAT. § 20-183(a) (1978).

4. *Id.* The statute provides in pertinent part:

It shall be the duty of law-enforcement officers of the state and of each county, city, or other municipality to see that the provisions of this Article are enforced . . . , and any such officer shall have the power to arrest on sight or upon warrant any person found violating the provisions of this Article. Such officers within their respective jurisdictions shall have the power to stop any motor vehicle upon the highways of the State for the purpose of determining whether the same is being operated in violation of any of the provisions of this Article.

5. 452 F. Supp. at 915.

The arresting highway patrolman in *Keziah* first observed petitioner Keziah's vehicle turning out of a private drive onto a public highway. The officer watched Keziah in his rear view mirror, then turned his patrol car around to follow petitioner's vehicle. Petitioner drove one hundred and fifty feet down the highway and turned into another private drive. The officer followed him into the driveway and approached him. Petitioner, after refusing to display his driver's license or reveal his name at the officer's request, was told that he was under arrest for failure to display his license. Keziah resisted arrest, fought with the officer, and eventually escaped. The patrolman admitted he had no reason to believe petitioner had broken or was about to break any law, and that petitioner was not driving in any suspicious or unlawful manner. Keziah was later apprehended, convicted of assaulting an officer, and sentenced to a two year prison term.<sup>6</sup>

Keziah appealed his conviction, basing his appeal on the claim that he had been unconstitutionally stopped in the first instance, and thus that the officer had no authority to demand his license or to arrest him for failure to display it. Petitioner contended that he was therefore justified in resisting an illegal arrest.<sup>7</sup> The North Carolina Court of Appeals held the initial stop justified as a routine license check under G.S. 20-183(a) and denied defendant's appeal.<sup>8</sup>

Keziah then sought habeas corpus relief in the federal district court, which disagreed with the court of appeals' interpretation of G.S. 20-183(a) and held the initial stop unconstitutional under the fourth amendment. In the process of reaching its holding the court found there was no doubt that an officer's stop and demand pursuant to G.S. 20-183(a) was a seizure within the meaning of the fourth amendment.<sup>9</sup> The relevant question was whether the seizure in this case was unreasonable and thus a violation of the fourth amendment.<sup>10</sup> Relying on *United States v. Montgomery*,<sup>11</sup> the court held that the license check

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6. *Id.* at 913-14.

7. *Id.*

8. *State v. Keziah*, 24 N.C. App. 298, 300, 210 S.E.2d 436, 437 (1974).

9. 452 F. Supp. at 915. Petitioner's writ of habeas corpus was, however, denied on other grounds. Section 20-183(a) had been previously interpreted to authorize complete discretion on the part of officers; thus the arrest at that time was facially legal. Because the arrest was authorized by a statute arguably legal at the time, there was no right to resist arrest. Petitioner's conviction for assaulting a highway patrolman thus survived although the officer's initial stop and demand was illegal in fact. *Id.* at 916.

10. *Id.* at 914.

11. 561 F.2d 875 (D.C. Cir. 1977). In *Montgomery* police stopped a vehicle they had seen being driven around the neighborhood in order to check defendant's driver's license. They had no reason to believe defendant was breaking any traffic laws. When they found defendant did not

seizures authorized by G.S. 20-183(a) are only reasonable when they are actually routine, systematic stops for the purpose of enforcing the Motor Vehicle Act, or based on articulable suspicion that the Motor Vehicle Act is being violated.<sup>12</sup> When the stop is nominally for the purpose of enforcing the Motor Vehicle Act, but in reality is an excuse for investigating an officer's suspicions that fall short of probable cause to arrest, then the stop is unreasonable.<sup>13</sup> The stop in *Keziah* clearly fell into the latter category.

The court in *Keziah* expressly chose to ignore prior interpretations of G.S. 20-183(a) by the North Carolina Supreme Court<sup>14</sup> and the United States Court of Appeals for the Fourth Circuit.<sup>15</sup> Both courts had declared constitutional the unlimited discretion vested in law enforcement officers to stop vehicles for license checks under G.S. 20-183(a).<sup>16</sup> The North Carolina Supreme Court had previously held that such stops were not seizures under the fourth amendment and thus not subject to any constitutional limits of reasonableness.<sup>17</sup>

The *Keziah* court relied instead on the pioneer decision of the United States Court of Appeals for the District of Columbia Circuit in *United States v. Montgomery*.<sup>18</sup> The *Montgomery* court noted that the

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have his license, the officers checked whether he had been issued a license and discovered an outstanding traffic violation against him. Defendant was arrested and a search incident to his arrest turned up three weapons. The United States Court of Appeals for the District of Columbia Circuit reversed defendant's conviction for carrying concealed weapons, holding the initial stop unconstitutional. *Id.* at 877.

12. 452 F. Supp. at 915. The articulable suspicion justification for stops that intrude less on privacy rights than do arrests was first articulated in *Terry v. Ohio*, 392 U.S. 1 (1968). It has been further applied in cases involving vehicle stops for the purpose of enforcing border patrol acts. See *United States v. Ortiz*, 422 U.S. 891 (1975); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

13. 452 F. Supp. at 915.

14. *State v. Allen*, 282 N.C. 503, 194 S.E.2d 9 (1973). In *Allen*, police observed a parked car in a nonresidential area. Officers saw two men run from a business area, get into a car, and drive away. The officers pursued the car and stopped it to check the licenses of the occupants. During this procedure a bag of stolen money was observed in plain view and seized. The court upheld the constitutionality of § 20-183(a) and upheld defendants' conviction for robbery. *Id.* at 505-08, 194 S.E.2d at 12-13.

15. *United States v. Kelley*, 462 F.2d 372 (4th Cir. 1972). In *Kelley*, law enforcement officers were called to observe a rented truck that had been parked in a public area for some time. They observed defendants get into the truck and drive away without behaving in any suspicious manner. The officers attempted to stop the truck to check defendants' licenses and, after a chase, arrested defendants. A search of the truck uncovered stolen goods, and defendants were convicted of their possession. The original attempt to stop was upheld as constitutional under § 20-183(a).

16. *State v. Allen*, 282 N.C. 503, 511, 194 S.E.2d 9, 15 (1973); *United States v. Kelley*, 462 F.2d 372, 374 (4th Cir. 1972).

17. *State v. Allen*, 282 N.C. 503, 508, 194 S.E.2d 9, 13 (1973).

18. 561 F.2d 875 (D.C. Cir. 1977). Significantly, the court in *Montgomery* expressly criticized the Fourth Circuit opinion in *United States v. Kelley*, 462 F.2d 372 (4th Cir. 1972). 561 F.2d at 884 n.16.

United States Supreme Court has been careful not to rule on the constitutionality of vehicle stops pursuant to the enforcement of motor vehicle acts,<sup>19</sup> but that most lower courts have held that such stops are seizures within the meaning of the fourth amendment.<sup>20</sup> These courts disagree, however, on the standard of fourth amendment reasonableness that should apply to the stops.<sup>21</sup> The *Montgomery* court thus looked for guidance to Supreme Court cases involving vehicle stops for the purpose of ascertaining if illegal aliens are entering the country in violation of the border patrol acts.<sup>22</sup> The Court in these cases developed a two-part test for constitutional reasonableness of border patrol stops. To avoid violating the fourth amendment the stop must be part of a systematic, routine program of vehicle stops,<sup>23</sup> or based on articulable suspicion that the occupants of the vehicle were violating the border patrol acts.<sup>24</sup> Acknowledging the similarity in border patrol and motor vehicle act stops and their identical potential for abuse, the *Montgomery* court applied this two-part test to motor vehicle act stops,<sup>25</sup> despite the Supreme Court's express exclusion of motor vehicle stops from its holdings in the border patrol cases.

By accepting the *Montgomery* application of the two-part test, the *Keziah* court imposes a stricter standard for the application of G.S. 20-183(a) than had previously been required. The *Keziah* ruling will serve

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19. 561 F.2d at 881; *see* *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 n.14 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 883 n.8 (1975); *United States v. Ortiz*, 422 U.S. 891, 897 n.3 (1975).

20. The United States Supreme Court has held in situations other than stops pursuant to motor vehicle acts that the stop of a moving vehicle, even for a brief period, involves a seizure within the meaning of the fourth amendment. *See* *United States v. Brignoni-Ponce*, 422 U.S. 873, 878-82 (1975); *Terry v. Ohio*, 392 U.S. 1, 16-19 (1968).

21. Decisions that disapprove vesting unlimited discretion in officers to single out which vehicles to stop include *State v. Ochoa*, 112 Ariz. 582, 544 P.2d 1097 (1976); *People v. Ingle*, 36 N.Y.2d 413, 330 N.E.2d 39, 369 N.Y.S.2d 67 (1975). Other courts have reserved judgment on discretionary stops. *See* *United States v. Cupps*, 503 F.2d 277, 280 n.7 (6th Cir. 1974); *United States v. De Marco*, 488 F.2d 828, 831 n.6 (2d Cir. 1973). Some courts have upheld selective stops to enforce the motor vehicle laws. *See* *United States v. Croft*, 429 F.2d 884, 886 (10th Cir. 1970); *Palmore v. United States*, 290 A.2d 573 (D.C.), *aff'd on jurisdictional grounds only*, 411 U.S. 389 (1972); *State v. Holmberg*, 194 Neb. 337, 231 N.W.2d 672 (1975); *State v. Gray*, 59 N.J. 563, 285 A.2d 1 (1971).

22. *See* *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (routine systematic stops of vehicles at border patrol checkpoints held constitutionally reasonable); *United States v. Ortiz*, 422 U.S. 891 (1975) (discretionary searches of vehicles going through fixed border patrol checkpoint unconstitutional); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (border patrols may not stop individual vehicle in border area without reasonable basis for suspecting that vehicle being occupied by illegal aliens).

23. The systematic, routine program may consist of stops at fixed checkpoints or a planned system of random stops. *United States v. Montgomery*, 561 F.2d at 883-84.

24. *See* *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975).

25. 561 F.2d at 881.

to curb the abusive use of G.S. 20-183(a) as an investigative tool for law enforcement officers by subjecting each license check stop to constitutional scrutiny under the fourth amendment. The *Keziah* opinion further represents a major step in the recent trend in North Carolina toward placing some limits on G.S. 20-183(a) stops.<sup>26</sup> Earlier decisions had limited the scope of permissible actions by officers after making the stop. *Keziah* for the first time places the stop under fourth amendment scrutiny. In so doing, the court strengthened the privacy rights of individuals when in motor vehicles.<sup>27</sup>

## 2. Execution of a Search Warrant

The North Carolina Court of Appeals in three cases sought to clarify the requirements for legal execution of a search warrant. The first, *State v. Brown*,<sup>28</sup> dealt with the requirement that an officer must give notice of his identity and purpose before entering the premises to execute a search warrant. *State v. Woodard*<sup>29</sup> delineated the circumstances in which officers acting pursuant to a general warrant to search the premises can also search subunits within the premises. Last, in *State v. Long*,<sup>30</sup> the court examined the authority of officers to search persons found on the premises described in the warrant, but who are not named in the warrant.<sup>31</sup>

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26. See *State v. Blackwelder*, 34 N.C. App. 352, 238 S.E.2d 190 (1977). The court in *Blackwelder* placed limits on permissible searches incident to stops under the Motor Vehicle Act. The court held that the power to stop did not include the power to search, and evidence seized under the plain view exception was limited to that evidence in plain view from where the officer had a legal right to be.

The present reach of the *Blackwelder* holding is uncertain after a North Carolina Court of Appeals decision this year. In *State v. Thompson*, 37 N.C. App. 628, 246 S.E.2d 827 (1978), police approached a van parked on a public boat dock to check the identity of the occupants. They had no reason to suspect the occupants were committing or about to commit a crime. In leaning over the passenger seat to get identification from the driver, the officer observed hashish hidden under the dash board in a recessed area. The court upheld the seizure of the hashish under the plain view exception to the search warrant requirement, distinguishing *Blackwelder* by saying the officer had a right to be where he was in this case. Judge Erwin dissented, finding that the initial approach was unlawful and the plain view exception inapplicable. *Id.* at 637-38, 246 S.E.2d at 833-34 (dissenting opinion).

The officer's approach of the vehicle in *Thompson* is exactly the sort of activity the *Keziah* court declared unconstitutional. Approaching the van was a discretionary move by the officers; they had no articulable suspicion that the occupants might be engaged in criminal activity.

27. See Note, *Automobile License Checks and the Fourth Amendment*, 60 VA. L. REV. 666 (1974).

28. 35 N.C. App. 634, 242 S.E.2d 184 (1978).

29. 35 N.C. App. 605, 242 S.E.2d 201 (1978).

30. 37 N.C. App. 662, 246 S.E.2d 846, cert. denied, 295 N.C. 736, 248 S.E.2d 866 (1978).

31. In another case, *State v. Richards*, 294 N.C. 474, 242 S.E.2d 844 (1978), the North Carolina Supreme Court reemphasized its position on when items not particularly described in a search warrant may be seized during a search pursuant to the warrant. The general rule is that items not

G.S. 15A-249<sup>32</sup> requires an officer executing a search warrant to give notice of his identity and purpose before entering the premises. In *State v. Brown* officers were executing a warrant authorizing the search of defendant's residence for marijuana.<sup>33</sup> Knowing that marijuana could easily be destroyed, the officers devised a plan to gain quick entry into defendant's house and prevent destruction of the evidence. A chase was staged in which a sheriff's car, with lights flashing and siren blowing, pursued an unmarked car and stopped in front of defendant's house. When defendant opened his door to view the commotion, an officer dressed in jeans and sandals asked if he could use the phone. When defendant refused the officer pushed his way inside the house and discovered several bags of marijuana.<sup>34</sup>

At trial defendant sought to suppress the evidence obtained in the search on the ground that it was seized in violation of G.S. 15A-249. The trial judge denied defendant's motion to suppress, relying on an exception to the notice of identification and purpose requirement for searches that seek easily destructible evidence.<sup>35</sup> The court of appeals

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particularly described in a warrant cannot be seized while executing that warrant without violating the fourth amendment. *Marron v. United States*, 275 U.S. 192 (1927). An exception to this rule applies when the evidence of criminal activity falls within the plain view of the executing officer during the search and is discovered inadvertently. *Coolidge v. New Hampshire*, 403 U.S. 443, 465-71 (1971). The meaning of "inadvertently" has been the source of considerable controversy. See generally *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 244-46 (1971).

In *Richards*, officers were searching defendant's residence for a murder weapon described in the search warrant. In the course of the search police discovered two other weapons that were admitted into evidence against defendant. The court held that the weapons were inadvertently found in plain view, and admissible as evidence against defendant. In reaching this holding the court interpreted the inadvertence doctrine as excluding evidence only when the officers knew the location of the evidence and intended to seize it. 294 N.C. at 489, 242 S.E.2d at 854-55. The decision was significant in its interpretation of inadvertence; it was the first time the supreme court had defined the term directly; prior cases had merely mentioned without defining the term. See *State v. Riggsbee*, 285 N.C. 708, 713-14, 208 S.E.2d 656, 660-61 (1974). North Carolina commentators have likewise avoided interpreting the doctrine. See, e.g., 1 STANSBURY'S NORTH CAROLINA EVIDENCE § 121a, at 372 (H. Brandis rev. 1973) [hereinafter cited as STANSBURY]. For a discussion of alternative interpretations, see *The Supreme Court, 1970 Term, supra*, at 244-46.

32. N.C. GEN. STAT. § 15A-249 (1978) provides:

The officer executing a search warrant must, before entering the premises, give appropriate notice of his identity and purpose to the person to be searched, or the person in apparent control of the premises to be searched. If it is unclear whether anyone is present at the premises to be searched, he must give the notice in a manner likely to be heard by anyone who is present.

33. 35 N.C. App. at 634, 242 S.E.2d at 185.

34. *Id.* at 634-35, 242 S.E.2d at 185.

35. Judge Lupton found that

the defendant was not prejudiced by this deviation from the requirements of North Carolina General Statute 15A-249 since the reason for complying with the above statute is to show that the officers were not trespassers and that the deviation from lawful conduct was minor, and that the lawfulness of the deviation was somewhat justified by the word received through the confidential informant that the contraband may be destroyed. . . .

reversed and ordered the evidence suppressed. The court refused to authorize an exception to G.S. 15A-249 that would be applicable whenever there was a possibility that the evidence would be destroyed.

The court based its decision solely on an interpretation of G.S. 15A-249 and G.S. 15A-251<sup>36</sup> of the Criminal Procedure Act,<sup>37</sup> admitting that neither federal nor state constitutional standards would require exclusion of the evidence.<sup>38</sup> According to the court, the statutory scheme reveals a design to permit unannounced forcible entries only when giving notice would endanger the life or safety of any person.<sup>39</sup> This accords with the legislative intent that can reasonably be inferred from the history of the statutes in question. In drafting the Criminal Procedure Act, the North Carolina Criminal Code Commission submitted as part of the proposed Act a provision that would have authorized exceptions to the notice and purpose requirement in certain limited situations.<sup>40</sup> One proposed situation was the one in which there was probable cause to believe that giving notice would cause the destruction of evidence and the officers obtained prior judicial authorization to proceed without giving notice.<sup>41</sup> The General Assembly failed

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*Id.* at 636, 242 S.E.2d at 186 (quoting trial court).

36. N.C. GEN. STAT. § 15A-251 (1978), *quoted in note 42 infra*.

37. 35 N.C. App. at 637, 242 S.E.2d at 186-87.

38. *See Ker v. California*, 374 U.S. 23 (1963) (entry held legal when officers acting without a warrant let themselves into defendant's apartment with pass key, identifying themselves only after approaching defendant); *State v. Watson*, 19 N.C. App. 160, 198 S.E.2d 185 (1973) (when officer had reason to believe evidence was being destroyed, he did not need to give notice of his identity and purpose).

39. 35 N.C. App. at 636, 242 S.E.2d at 186.

40. H. 296, N.C. Gen. Assembly, 1973 Sess., *reprinted in* CRIMINAL CODE COMMISSION, LEGISLATIVE PROGRAM AND REPORT TO THE GENERAL ASSEMBLY OF NORTH CAROLINA 19-20 (1973). *See also* Defendant Appellant's Brief at 5-6, *State v. Brown*, 35 N.C. App. 634, 242 S.E.2d 184 (1978).

41. Proposed N.C. GEN. STAT. § 15A-250 provided that:

An officer may execute a search warrant without the prior notice required by G.S. 15A-249 if:

- (1) The officer has probable cause to believe that the notice required by G.S. 15A-249 would endanger the life or safety of any person; or
- (2) An order authorizing execution without notice has been obtained from any judge. The application by an officer for such an order must include a statement of facts establishing probable cause to believe that the notice required by G.S. 15A-249 is likely to endanger the life or safety of any person or . . . is likely to result in the destruction or disposal of items subject to seizure. If the judge finds that there is probable cause to believe that either of these conditions is met, he may issue an order permitting execution of the warrant without notice. The fact that items subject to seizure are easily destructible or disposable does not in itself constitute an independently sufficient basis for concluding that there is probable cause to believe that the giving of notice will result in destruction or disposal . . . .

H. 296, N.C. Gen. Assembly, 1973 Sess., *reprinted in* CRIMINAL CODE COMMISSION, *supra* note 40. Even this proposed statute would have restricted police activity far more than the federal or state



to adopt this provision, and instead granted officers the authority to enter without notice only when there is probable cause to believe that giving notice would endanger the safety or life of any person.<sup>42</sup> The General Assembly's failure to adopt the proposed statute cast uncertainty on the fate of a prior judicially created exception that notice would not be required if it would cause the destruction or disposition of evidence.<sup>43</sup> The court in *State v. Brown* removed all uncertainty, stating that the prior judicial exception was overruled by the Criminal Procedure Act.<sup>44</sup> The court thus established a hard line in North Carolina against "no-knock" entries, which have caused considerable controversy throughout the country.<sup>45</sup>

Considering the fact situation in *Brown*, the court appears to prohibit gaining entry by false notice of identity as well as gaining entry without giving any notice.<sup>46</sup> Courts have, however, declared entries legal in certain situations in which the officers failed to comply fully with the requirements of G.S. 15A-249 when, for example, the door was ajar,<sup>47</sup> or when officers identified themselves but did not state their purpose before forcing entry.<sup>48</sup> The *Brown* holding does not disturb these

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constitutions mandate. Note that the proposed statute would have required a judge to give approval to the unannounced entry. A warrant need only be approved and issued by a magistrate. By requiring a judge the Commission sought to subject such requests to individual scrutiny and to prevent them from becoming a part of standard form warrant applications. Nakell, *Proposed Revisions of North Carolina's Search and Seizure Law*, 52 N.C.L. REV. 277, 344-48 (1973).

42. N.C. GEN. STAT. § 15A-251 (1978) deals with entry by force and provides:

An officer may break and enter any premises or vehicle when necessary to the execution of the warrant if:

- (1) The officer has previously announced his identity and purpose as required by 15A-249 . . . or
- (2) The officer has probable cause to believe that the giving of notice would endanger the life or safety of any person.

43. See Dellinger, *Subchapter II. Law Enforcement and Criminal Investigation*, 10 WAKE FOREST L. REV. 363, 370-73 (1974); Nakell, *supra* note 41.

44. 35 N.C. App. at 637, 242 S.E.2d at 186-87 (overruling *State v. Watson*, 19 N.C. App. 160, 198 S.E.2d 185, *cert. denied*, 284 N.C. 124, 199 S.E.2d 662 (1973) insofar as it is inconsistent with *Brown*).

45. See Nakell, *supra* note 41, at 337-48.

46. Many courts have held that an officer obtaining entry by ruse may not be required to announce his authority and purpose. See *United States v. Beale*, 445 F.2d 977, 978 (5th Cir. 1971), *cert. denied*, 404 U.S. 1026 (1972) (hotel manager knocked on defendant's door and announced only his presence; officers entered and arrested defendant when he opened the door); *United States v. Syler*, 430 F.2d 68, 70 (7th Cir. 1970) (officer called out "gas man" at defendant's door and, when defendant came to the door, pushed his way inside); *Ponce v. Craven*, 409 F.2d 621, 626 (9th Cir. 1969) (hotel manager announced there was a call for woman sharing room with defendant, when woman opened door, officers entered and arrested defendant). These cases suggest that in many jurisdictions giving notice of false identity may satisfy the identity requirement. Any notice, even a false one, is less intrusive than no notice.

47. *State v. Brissenden*, 23 N.C. App. 730, 209 S.E.2d 539 (1974).

48. *State v. Sutton*, 34 N.C. App. 371, 238 S.E.2d 305 (1977).

decisions.

Another problem situation in executing a search warrant may arise once officers have legally gained entry to the premises described in the warrant. At this point they occasionally find that the general structure is divided into several subunits, each under the control of someone other than the owner. In this situation the general rule is that the warrant is valid to search a subunit only if the subunit is particularly described in the warrant.<sup>49</sup> The court of appeals in *State v. Woodard*<sup>50</sup> for the first time established the exceptions to the general rule that should be recognized by North Carolina courts.

In *Woodard*, officers obtained a general warrant to search for stolen clothing in a residence owned by defendant's uncle, and in which defendant rented a room. Prior to conducting the search, the officers read the warrant to the owner and gave him a copy. The officers then proceeded to search the house, including the bedroom in which defendant was asleep on a bed. The police found new clothes in the closet, seized them, and handed defendant's uncle an inventory of the items seized. Defendant shared the room with the owner's son, and both defendant and the son used the closet in which the stolen clothes were found. The police were never notified during the search that defendant rented the room or that the room was not under the owner's control.<sup>51</sup>

Defendant sought to suppress the evidence of the seized clothes at trial on the ground that his room was a subunit of the residence and not particularly described in the search warrant. The trial court denied the motion to suppress. Affirming, the court of appeals held that two exceptions to the rule that a warrant must particularly describe a subunit were applicable in this case.<sup>52</sup> The first applies when the premises searched are not under the exclusive control of the person against whom the seized evidence is sought to be admitted; the second is applicable when the officers do not know or have reason to know the defendant has exclusive control over the subunit.<sup>53</sup>

One question left unanswered by the *Woodard* court is the precise definition of exclusive control. It is clear that when two people have equal rights to use or occupy the premises, either may consent to a

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49. *State v. Mills*, 246 N.C. 237, 98 S.E.2d 329 (1957).

50. 35 N.C. App. 605, 242 S.E.2d 201 (1978).

51. *Id.* at 605-07, 242 S.E.2d at 202-03.

52. *Id.* at 610, 242 S.E.2d at 204-05.

53. *Id.* There is a split of authority on the issue. See Annot., 11 A.L.R.3d 1330 (1967).

search of the premises.<sup>54</sup> It is unclear to what degree one person must have a greater right to use or occupy the premises before exclusive control is said to exist. The *Woodard* court indicated only that exclusive control exists when both persons with an interest in the property recognize that one of them has exclusive control.<sup>55</sup>

The result of the court's holding is that in any situation in which the officers are ignorant of the character of possession of the premises, they may undertake the search without fearing that a warrant particularly describing the premises should be obtained. The court did not delineate the circumstances that would cause it to impose an affirmative duty on the officer to investigate the character of possession of the premises. Unless such a duty is imposed whenever control over the premises is uncertain, officers will be encouraged to prevent any opportunity for learning the character of possession from arising.<sup>56</sup> This result seems inconsistent with the policy in search and seizure cases to give "priority to the rights of the tenant in possession."<sup>57</sup>

Another court of appeals case, *State v. Long*,<sup>58</sup> dealt with the extent to which an officer executing a valid search warrant may search persons who are found on the premises but are not described in the warrant. In *Long*, officers were issued a warrant authorizing the search of a residence, the sergeant and his wife who lived there, and any other military personnel present on the premises.<sup>59</sup> When officers entered to conduct the search they discovered defendant, a civilian, on the premises. Before the search began a limited pat down search was made of everyone present, including defendant. In searching defendant, the officer not only patted defendant's clothing, he also reached inside de-

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54. *State v. Melvin*, 32 N.C. App. 772, 233 S.E.2d 636 (1977).

55. 35 N.C. App. at 608, 242 S.E.2d at 204. This is the basis on which the court distinguished *State v. Mills*, 246 N.C. 237, 98 S.E.2d 329 (1957). In *Mills*, defendant leased a room from the owner of the premises. Defendant shared possession of the room with several others. The court found that lessor and defendant agreed that defendant controlled the premises, thus exclusive control was found.

56. See Brief for Appellant, *State v. Woodard*, 35 N.C. App. 605, 242 S.E.2d 201 (1978).

57. *In re Dwelling of Properties, Inc.*, 24 N.C. App. 17, 22, 210 S.E.2d 73, 76 (1974).

58. 37 N.C. App. 662, 246 S.E.2d 846, cert. denied, 295 N.C. 736, 248 S.E.2d 866 (1978).

59. The warrant in this case was an "Authority to Search and Seize" issued by a commanding officer of a military base. *Id.* at 664, 246 S.E.2d at 848. Defendant challenged the validity of this warrant as not being issued by a neutral magistrate and not being issued upon a written affirmation as required in N.C. GEN. STAT. § 15A-244 (1978). The court found that commanding officers qualify as neutral magistrates for the purpose of determining probable cause. See *United States v. Banks*, 539 F.2d 14 (9th Cir.), cert. denied, 429 U.S. 1024 (1976). In addition, when the search is made of property in the possession or control of a person under the command of the issuing officer, as the sergeant in this case was, the warrant is valid although based on oral application. 37 N.C. App. at 667, 246 S.E.2d at 850. The remainder of the opinion proceeded on the finding that the warrant was valid.

fendant's boot to the foot. While reaching in the boot the officer felt a sharp pointed object which he thought was a knife. He pulled the object out and discovered it was a plastic bag containing a needle, packets of heroin, and other drug related objects. No further search of defendant was made, and he was turned over to county law enforcement officers and convicted of possession with intent to sell.<sup>60</sup>

Defendant contended that the heroin should have been suppressed due to its seizure in violation of G.S. 15A-255<sup>61</sup> and G.S. 15A-256.<sup>62</sup> G.S. 15A-255 provides that an officer executing a search warrant may search for weapons by a patting of the clothing of those on the premises, if he has reason to believe that the safety of any person is in danger.<sup>63</sup> If a search of the premises and persons described in the warrant fails to produce the evidence sought, G.S. 15A-256 permits an officer to then search any person who was present at the time of his entry to the extent necessary to uncover the evidence.<sup>64</sup> Neither of these statutes authorized the search of defendant's boot in *Long*. G.S. 15A-255 expressly limits a weapons search to an external pat down of the clothing. G.S. 15A-256 did not apply because defendant was searched before the search of the premises. The court found, however, that exclusion of the evidence was not required because neither of the statutory violations was "substantial" within the meaning of G.S. 15A-974(2),<sup>65</sup> which provides that evidence must be excluded if obtained in violation of the

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60. 37 N.C. App. at 663-65, 246 S.E.2d at 848-49.

61. N.C. GEN. STAT. § 15A-255 (1978).

62. *Id.* § 15A-256.

63. *Id.* § 15A-255 provides:

An officer executing a warrant directing a search of premises . . . may, if the officer reasonably believes that his safety or the safety of others then present so requires, search for any dangerous weapons by an external patting of the clothing of those present. If in the course of such a frisk he feels an object which he reasonably believes to be a dangerous weapon, he may take possession of the object.

64. *Id.* § 15A-256 provides:

An officer executing a warrant directing a search of premises . . . may detain any person present for such time as is reasonably necessary to execute the warrant. If the search of such premises . . . and of any persons designated as objects of the search in the warrant fails to produce the items named in the warrant, the officer may then search any person present at the time of the officer's entry to the extent reasonably necessary to find property particularly described in the warrant which may be concealed upon the person . . . .

The North Carolina statute is unusual in its limits on the search of persons on the premises. The majority view is that if the search is based on probable cause to search the premises for a type of contraband easily hidden, then complete searches of all individuals on the premises would be authorized. *See, e.g., Samuel v. State*, 222 So. 2d 3 (Fla. 1969); *Willis v. State*, 122 Ga. App. 455, 177 S.E.2d 487 (1970); *State v. Loudermilk*, 208 Kan. 893, 494 P.2d 1174 (1972). *See also United States v. Johnson*, 475 F.2d 977 (D.C. Cir. 1973).

65. N.C. GEN. STAT. § 15A-974(2) (1978).

United States or North Carolina constitutions or in substantial violation of the Criminal Procedure Act.<sup>66</sup>

To determine whether the search violated the United States Constitution, the court turned to the United States Supreme Court decision in *Terry v. Ohio*.<sup>67</sup> In *Terry*, the Court outlined the "stop and frisk" doctrine, stating that an officer who stops a person for questioning is permitted to frisk that person to the extent necessary to discover weapons, provided the officer has reason to believe the person is armed and dangerous.<sup>68</sup> The *Terry* rule is, therefore, not limited to a patting of clothing. The court in *Long* found that the search inside defendant's boot was necessary to discover weapons hidden there, and was therefore reasonable under *Terry* and the fourth amendment.<sup>69</sup> Even though the *Terry* decision dealt only with stop and frisk procedures that by their nature create an exigent situation for an officer, the court in *Long* saw no difficulty in applying the *Terry* holding to a search pursuant to a warrant in which several officers were present. Thus, because the search was in compliance with the fourth amendment, and not in substantial violation of the Criminal Procedure Act, the court set aside the lower court's order suppressing the fruits of the search.<sup>70</sup>

### *B. Limits to an Accused's Miranda Rights*

In two cases North Carolina courts further defined the limits of an accused's rights established by the United States Supreme Court decision in *Miranda v. Arizona*.<sup>71</sup> The protections of the *Miranda* opinion apply only when an accused is in custody and being interrogated.<sup>72</sup> The brief definition of custodial interrogation found in *Miranda* left much room for judicial interpretation.<sup>73</sup> One question left unanswered was the extent to which a law enforcement officer's nonverbal conduct can be defined as interrogation for purposes of the *Miranda* doctrine.

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66. *See id.*

67. 392 U.S. 1 (1968) (frisk of defendant reasonable under fourth amendment because officer had reason to suspect defendant was armed and nothing in his initial encounter with defendant dispelled this suspicion).

68. 37 N.C. App. at 670, 246 S.E.2d at 852. The court appears to be authorizing any search that would constitute a permissible "frisk" under the holding in *Terry*, thus indicating that § 15A-255 will also be expanded in other situations.

69. *See* 37 N.C. App. at 669, 246 S.E.2d at 851.

70. 37 N.C. App. at 671, 246 S.E.2d at 852.

71. 384 U.S. 436 (1966).

72. *See id.* at 445.

73. The *Miranda* opinion states: "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444.

This was the question presented to the North Carolina Supreme Court in *State v. McLean*.<sup>74</sup>

In *McLean*, officers had obtained a warrant for defendant's arrest on a charge of rape. They had recovered a checkbook with defendant's name on it, defendant's driver's license, and a hat from the scene of the rape. The officers found defendant in jail, under arrest for an unrelated offense.<sup>75</sup> Defendant was ushered into an interrogation room at the jail with an officer who had the warrant for defendant's arrest in his pocket. Instead of arresting defendant at that time, the officer placed one of the checks found at the rape scene in plain view of defendant. The officer said nothing. Defendant eventually took hold of the check and admitted it belonged to him.<sup>76</sup> The officer, still without speaking, placed the hat found at the rape scene into defendant's view. Defendant began to act nervous, his hand quivered, and eventually he stated "What's that man?" and "I liked to have been a free man."<sup>77</sup> During the approximately twenty minute episode the officer observed defendant but said nothing. Only after defendant's incriminating statements did the officer read the arrest warrant, arrest defendant, and advise him of his rights as required by *Miranda*.<sup>78</sup>

At trial, defendant sought to bar any testimony relating to his statements or actions during the silent confrontation with the officer, on the ground that the confrontation was an in-custody interrogation and defendant had not been advised of his constitutional rights, in violation of *Miranda*. The trial court denied the motion, finding that defendant's statements were voluntary and not in response to in-custody interrogation.<sup>79</sup>

The North Carolina Supreme Court affirmed, finding that because the officer's behavior was not inquisitional in nature, defendant's statements were voluntary and not elicited by interrogation. In reaching its holding the court noted the considerable disagreement among jurisdictions about what constitutes interrogation.<sup>80</sup> In view of this controversy

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74. 294 N.C. 623, 242 S.E.2d 814 (1978).

75. The unrelated offense was tampering with an automobile. The prosecutor brought out in the cross-examination that defendant was trying to get into a car occupied by a female not known to the defendant. The court upheld the introduction of this evidence for impeachment purposes. *Id.* at 633-34, 242 S.E.2d at 820-21.

76. *Id.* at 626, 242 S.E.2d at 816. Defendant said "This is my check. I wrote this check when I did not know how to write checks. However, the check is good." *Id.*

77. *Id.* at 626, 242 S.E.2d at 816-17.

78. *Id.* at 626-27, 242 S.E.2d at 816-17. See also Defendant Appellant's Brief at 6.

79. 294 N.C. at 627, 242 S.E.2d at 817.

80. Cases in other jurisdictions that allow officers wide leeway before an interrogation is

the court refused to delineate a strict definition of interrogation, but rather decided to leave the issue to case-by-case analysis.<sup>81</sup> The factors the court indicated it will consider include the degree to which the officer's conduct is inquisitional in nature, the degree to which the accused is placed under a compulsion to speak, the degree to which the accused is deprived of his freedom, and the totality of the circumstances.<sup>82</sup> After consideration of these factors, the court held that the confrontation in *McLean* was not an interrogation.

In adopting the case-by-case approach the supreme court appears to destine law enforcement officers to a position of uncertainty in confronting accused persons. Considering the egregious fact situation in *McLean*, however, it is clear that the court will defer to the officer's judgment in most instances. As pointed out by the dissent, it is difficult to say under the facts of this case that the officer did not intend the confrontation to be a tool to elicit information, or that defendant was not placed under mental compulsion to speak.<sup>83</sup> Further, the court in *McLean* assumed without discussion that if the *Miranda* decision was inapplicable, defendant's statements were voluntary and thus admissible.<sup>84</sup> Yet the majority of North Carolina courts holding defendants' statements voluntary, although made before being advised of *Miranda* rights, have dealt with situations involving more spontaneity than found in *McLean*, such as when the defendant voluntarily confronted the officer,<sup>85</sup> or was not yet the target of investigation,<sup>86</sup> or was confronted with evidence against him before probable cause to arrest was

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found include *Rosher v. State*, 319 So. 2d 150 (Fla. Dist. Ct. App. 1975) (confrontation with codefendant held not interrogation); *Combs v. Commonwealth*, 438 S.W.2d 82 (Ky. 1969) (officer may read ballistics report to accused); *Howell v. State*, 5 Md. App. 337, 247 A.2d 291 (1968) (reading defendant a statement made by codefendant found acceptable).

Cases that reveal less hesitancy in finding interrogation include *Brewer v. Williams*, 430 U.S. 387 (1977) (officer's declaratory statements to accused, calculated to elicit an emotional response, held interrogation); *Commonwealth v. Mercier*, 451 Pa. 211, 302 A.2d 337 (1973) (reading statement by codefendant to defendant held interrogation).

81. 294 N.C. at 629, 242 S.E.2d 818. This is the approach used in *United States v. Akin*, 435 F.2d 1011 (5th Cir. 1970); *United States v. Charles*, 371 F. Supp. 204 (E.D.N.Y. 1973).

82. 294 N.C. at 628-30, 242 S.E.2d at 818. These are the factors that appeared to influence the court's decision.

83. *Id.* at 635-37, 242 S.E.2d at 821-22 (Exum, J., dissenting).

84. *Id.* at 629, 242 S.E.2d at 818.

85. *See State v. Bell*, 279 N.C. 173, 181 S.E.2d 461 (1971) (defendant voluntarily went to police headquarters to tell her side of story); *State v. Harrelson*, 265 N.C. 589, 144 S.E.2d 650 (1965) (defendant telephoned police department to say he was driver in hit-and-run accident).

86. *See State v. Pruitt*, 286 N.C. 442, 212 S.E.2d 92 (1975) (officer conducting on the scene investigation of a murder asked defendant some questions; defendant's subsequent answers held voluntary since defendant was not yet under suspicion); *State v. Chappell*, 24 N.C. App. 656, 211 S.E.2d 828 (1975) (also dealing with on the scene investigation).

established.<sup>87</sup> In no case did the officer have an unexecuted arrest warrant in his pocket.<sup>88</sup>

The *McLean* decision is the first in North Carolina to recognize expressly that conduct, even though nonverbal, may be defined as interrogation although no questions as such were asked.<sup>89</sup> This holding is consistent with recent decisions of the United States Supreme Court<sup>90</sup> and several state courts<sup>91</sup> that it is implicit in *Miranda* that interrogation consists of more than a question and answer format. The strength of the *McLean* court's finding is, however, diminished by the facts of the case. Clearly the court will be willing to find an interrogation only under the most egregious circumstances. One is left to wonder how long the officer could have sat in silence before the line into interrogation would have been crossed. The unfortunate result of the court's decision is to reward officers for circumventing the *Miranda* requirements by devising methods to elicit information that fall short of the definition of interrogation.<sup>92</sup>

Once a court decides that evidence was obtained in a method pro-

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87. See *State v. McCloud*, 276 N.C. 518, 173 S.E.2d 753 (1970) (confronted defendant with stolen coins seized from his room; subsequent confession held voluntary); *State v. Hines*, 266 N.C. 1, 145 S.E.2d 363 (1965) (statement by officer to defendant that others had confessed; defendant's subsequent confession held voluntary).

88. In a North Carolina Court of Appeals decision this year, *State v. Morton*, 36 N.C. App. 516, 244 S.E.2d 452 (1978), the court endorsed a liberal view of that degree of voluntariness legally necessary in a statement made after defendant has been advised of his *Miranda* rights. During the investigation of an armed robbery in *Morton*, officers read defendant his *Miranda* rights, then confronted him with three friends who were all crying and begging defendant to confess. Defendant eventually confessed and the court found this confession freely and voluntarily made, without coercive influence.

89. 294 N.C. at 630, 242 S.E.2d at 818. This finding dispels the notion in a previous court of appeals decision that an officer's handing defendant a hat, in an attempt to determine ownership, could not be interrogation because the defendant had not been asked a question. *State v. Burton*, 22 N.C. App. 559, 207 S.E.2d 344, cert. denied, 286 N.C. 212, 209 S.E.2d 316 (1974). In *Burton* the officer handed defendant a cap found at the scene of the crime and defendant accepted it, saying thank you. Defendant's actions and statements were held admissible.

90. See *Brewer v. Williams*, 430 U.S. 387 (1977). In *Brewer* the officer told defendant to think about certain statements the officer was going to make. He then made a speech clearly designed to elicit an emotional response. Although the officer told defendant he should not answer, the Supreme Court held defendant's subsequent statements barred as the result of an interrogation in which defendant had not waived his right to counsel.

91. See *State v. Godfrey*, 131 N.J. Super. 168, 178, 329 A.2d 75, 80 (1974) (confronting defendant with polygraph test results held interrogation); cases cited note 80 *supra*.

92. 294 N.C. at 635-37, 242 S.E.2d at 821-22 (Exum, J., dissenting). The trend in North Carolina courts toward less restriction on law enforcement activity is also evident in cases dealing with the sufficiency of an accused's waiver of his constitutional rights. An example is *State v. Smith*, 294 N.C. 365, 241 S.E.2d 674 (1978), in which the supreme court refused to follow the rule in other jurisdictions that a defendant in custody who is represented by counsel may not waive his constitutional rights in counsel's absence. See also *State v. Johnson*, 35 N.C. App. 729, 242 S.E.2d 517, cert. denied, 295 N.C. 263, 245 S.E.2d 779 (1978) (in absence of conflicting evidence, court may infer waiver of rights from surrounding circumstances).



hibited by the *Miranda* decision, the evidence is not necessarily inadmissible for all purposes, despite dictum in *Miranda* to the contrary.<sup>93</sup> The United States Supreme Court held in *Harris v. New York*<sup>94</sup> that *Miranda*-barred evidence can be introduced for impeachment purposes, provided the evidence satisfies legal standards of trustworthiness.<sup>95</sup> The court of appeals in *State v. Byrd*<sup>96</sup> further clarified the North Carolina position on when the legal standards of trustworthiness are satisfied.

Defendant in *Byrd* was told he was suspected of committing incest, read his *Miranda* rights, and then subjected to an in-custody interrogation. When officers learned that defendant could not read or write, his constitutional rights were explained to him and he signed a written waiver. During the ensuing interrogation defendant made several inculpatory statements.<sup>97</sup> There was some evidence that an officer shouted at defendant during the interrogation and made other threatening gestures.<sup>98</sup> The trial court found that because defendant had limited mental capacity he did not fully understand his right to counsel and had not effectively waived this right. The inculpatory statements were barred as substantive evidence by the trial court, but admitted for purposes of impeachment.<sup>99</sup>

The court of appeals reversed, holding that the statements did not meet the legal standards of trustworthiness as mandated by *Harris*. The court found that the trustworthiness test is satisfied only when the

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93. The Court in *Miranda* stated:

The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner. . . . [S]tatements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial . . . . These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.

384 U.S. at 476-77.

94. 401 U.S. 222 (1971).

95. *Id.* at 224. The court stated: "It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards." See generally Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); Note, 8 WAKE FOREST L. REV. 276 (1972).

96. 35 N.C. App. 42, 240 S.E.2d 494 (1978).

97. When officers asked defendant if he had committed incest, defendant replied, "I guess there is no . . . reason . . . . I do a lot of things I know is wrong . . . . I reckon I will lose everything." *Id.* at 44, 240 S.E.2d at 495.

98. *Id.* at 43, 240 S.E.2d at 495.

99. The trial court's finding that defendant's waiver was not effective to waive his rights to counsel, but did effectively waive his right to remain silent, reflects the lower burden the state must meet to prove an effective waiver of the right to remain silent. The double standard for proving waiver was established in *State v. Swift*, 290 N.C. 383, 226 S.E.2d 652 (1976). See *Survey of Developments in North Carolina Law, 1976*, 55 N.C.L. REV. 895, 992-98 (1977). .

statement was voluntarily made with full understanding of the constitutional rights being waived.<sup>100</sup> In *Byrd* there was conflicting evidence concerning the voluntariness of defendant's statements, but the trial court held the statements admissible for impeachment without a specific determination of their voluntariness. The court of appeals held that when there is conflicting evidence on voluntariness, a judge is required to make a specific determination of voluntariness before the evidence may be admitted for impeachment. The court also stated that even when there is no conflicting evidence on voluntariness, it would still be the better practice for a judge to make a specific finding on voluntariness.<sup>101</sup> The case was remanded for such a determination by the trial judge.

The *Byrd* decision is significant not only for its definition of trustworthiness, but also for its interpretation of prior North Carolina cases. In *State v. Bryant*,<sup>102</sup> the North Carolina Supreme Court found a *Miranda*-barred statement admissible for impeachment purposes without any discussion of its voluntariness. The court's only mention of the issue was a reference to defendant's complaint that the trial court had not specifically found the statements voluntary.<sup>103</sup> The court's lack of discussion led to uncertainty about whether any standard of voluntariness need be met before the statement would be admitted. Although the United States Supreme Court denied a writ of certiorari to hear the *Bryant* case, two justices dissented from the denial in recognition of the uncertainty in the *Bryant* holding.<sup>104</sup> They argued that defendant had put the question of voluntariness in issue, and by not addressing this issue the North Carolina court had gone a step beyond the *Harris* decision to allow the introduction of illegally obtained statements without any requirement of voluntariness.<sup>105</sup>

The court in *Byrd* adopted a restrictive construction of the *Bryant* holding, interpreting *Bryant* as authority for the proposition that when there is no evidence of involuntariness, then the *Miranda*-barred statements are deemed voluntary and no specific determination by the trial

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100. 35 N.C. App. at 45, 240 S.E.2d at 496.

101. *Id.* at 45-46, 240 S.E.2d at 496. This holding is consistent with implications in *Oregon v. Hass*, 420 U.S. 714 (1975).

102. 280 N.C. 551, 187 S.E.2d 111, *cert. denied*, 409 U.S. 995 (1972). The statement in *Bryant* was also *Miranda*-barred due to an ineffective waiver of counsel. *Id.* at 554-55, 187 S.E.2d at 113.

103. *Id.* at 554, 187 S.E.2d at 113.

104. 409 U.S. 995, 996 (1972) (Douglas and Brennan, JJ., dissenting).

105. *Id.* at 996-97.

judge need be made.<sup>106</sup> The *Byrd* court has thus diminished the possible impact of the *Bryant* decision and established that the requirement of voluntariness must be satisfied before a *Miranda*-barred statement can be admitted for impeachment purposes.

### C. Right to Counsel

In *State v. Sanders*,<sup>107</sup> the North Carolina Supreme Court reversed a lower court decision<sup>108</sup> placing on the defendant the burden of raising again the issue of his indigency when he has been found not to be indigent earlier in the same proceeding. The court held that G.S. 15A-942<sup>109</sup> required the trial judge to inquire newly into the indigency of defendant when he appeared at arraignment without counsel after trying twice unsuccessfully to establish his indigency. The court further held that failure to so inquire entitled defendant to a new trial.<sup>110</sup>

In *Sanders*, defendant's first affidavit asserted that he was regularly employed with a weekly salary of \$100, owned a car and a house, and owed \$728. His second petition, filed over a month after the first and over two months before his trial, stated that he had become unemployed, was making payments of \$40 per month on his car, and owed \$500 to \$600 in monthly payments on his home. After the denial of his second petition, defendant twice appeared *pro se* at trials that were declared mistrials for defects in the indictments,<sup>111</sup> and then appeared *pro se* at the arraignment and trial that resulted in his conviction for receipt of stolen goods.<sup>112</sup>

The result in this case turned on the interpretation given G.S. 15A-942, which provides: "If the defendant appears at the arraignment without counsel, the court must inform the defendant of his right to counsel, must accord the defendant opportunity to exercise that right, and must take any action necessary to effectuate that right."<sup>113</sup> The

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106. 35 N.C. App. at 45, 240 S.E.2d at 496.

107. 294 N.C. 337, 240 S.E.2d 788 (1978).

108. 34 N.C. App. 59, 237 S.E.2d 475 (1977), *rev'd*, 294 N.C. 337, 240 S.E.2d 788 (1978).

109. N.C. GEN. STAT. § 15A-942 (1978), *quoted in text* accompanying note 113 *infra*.

110. 294 N.C. at 343, 240 S.E.2d at 791. The court based its decision on *State v. Morris*, 275 N.C. 50, 165 S.E.2d 245 (1968). That case involved interpretation of a statute whose requirements were essentially the same as the statute here in question. 294 N.C. at 345-46, 240 S.E.2d at 792-93.

111. 294 N.C. at 338-39, 240 S.E.2d at 788-89. The first indictment failed to charge defendant with receipt of stolen goods, the crime for which he was to be tried. The second indictment contained a count of receiving stolen goods, but charged the owner of the goods, and not defendant, with that crime. Both mistrials were declared on the court's own motion. *Id.* at 339, 240 S.E.2d at 789.

112. *Id.* at 340, 240 S.E.2d at 789.

113. N.C. GEN. STAT. § 15A-942 (1978).

court of appeals interpreted the statute to mean that, by the time of arraignment, a defendant must have been informed of his right to appointed counsel if indigent and must have had an opportunity to exercise that right;<sup>114</sup> the court thus viewed the provision as merely a fail-safe device to ensure defendant's knowledge of his right. Thus, it determined that failure to comply with the provision when defendant knew of and had attempted to exercise his right was not prejudicial error.<sup>115</sup>

The supreme court, however, interpreted the statute as placing an affirmative duty on the trial judge to inquire into the defendant's indigency "irrespective of any request by defendant"<sup>116</sup> in order to make defendant aware that he could exercise his rights at that point in the proceedings.<sup>117</sup> The court noted that the layman defendant has no way of knowing that the issue of indigency can be redetermined at the time of his arraignment and that when, as in this case, defendant's application for appointed counsel has twice been denied, defendant likely concluded a third application would be useless.<sup>118</sup>

The court found that absence of counsel prejudiced defendant in the presentation of his case because defendant lacked skills and expertise necessary to cross-examine effectively prosecution witnesses, to make objections, and to use jury argument.<sup>119</sup> These factors are likely to appear in every case in which a layman is conducting his own defense, making prejudice almost a foregone conclusion whenever the trial judge has failed to inform defendant of his right to counsel.

The interpretation given G.S. 15A-942 in *Sanders* is a sound one that will serve to ensure compliance with the constitutional requirement<sup>120</sup> that waiver of counsel be knowing and voluntary.<sup>121</sup> Had the interpretation of the court of appeals been accepted, the statutory pro-

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114. 34 N.C. App. 59, 61-62, 237 S.E.2d 475, 476-77.

115. *Id.*

116. 294 N.C. at 344, 240 S.E.2d at 792.

117. *Id.*

118. *Id.*

119. *Id.* at 346-47, 240 S.E.2d at 793-94. The court rejected the State's contention that failure to comply with the statute, if error, was harmless because defendant was not indigent at the time of trial. *Id.* at 344, 240 S.E.2d at 792. The State supported this claim by pointing out that defendant was represented by private counsel on appeal and had been able to post a \$300 appeal bond and a \$5,000 appearance bond after his conviction. 34 N.C. App. 59, 62, 237 S.E.2d 475, 476. The supreme court found these facts to be irrelevant: "That defendant is now represented by counsel and is out under a premium-paid bond discloses only that a nonindigent has expended money in defendant's behalf. It is not proof that defendant himself was not indigent [on the date of his trial]." 294 N.C. at 344, 240 S.E.2d at 792.

120. Arguably, this was the legislative intent in enacting the statute. *See State v. Morris*, 275 N.C. 50, 56-57, 165 S.E.2d 245, 249 (1968).

121. *Miranda v. Arizona*, 384 U.S. 436, 475-76 (1966).

vision would have been meaningless and of no protection to indigent defendants. By its interpretation in *Sanders*, the court has set out a clear standard of the extent of the duty of the State to inform defendant of his right to counsel, which should be simple for trial judges to follow.

#### *D. Effective Assistance of Counsel*

In *United States v. Evans*,<sup>122</sup> the United States Court of Appeals for the Fourth Circuit reversed defendant's conviction of bank robbery and remanded his case for a new trial because of the trial judge's abuse of discretion in denying a motion for continuance on the ground of late appointment of counsel. In reviewing the denial of a continuance the court applied the same criterion it used in *United States v. Gaither*<sup>123</sup>—the actual performance of counsel during trial.<sup>124</sup> In *Evans*, defendant had been found to be ineligible for appointed counsel at arraignment, but apparently had not been informed of his right to reassert his indigency.<sup>125</sup> Five days prior to trial, the prosecutor obtained an ex parte order for increased bail on the ground that defendant was unlikely to appear because he had not prepared a defense; defendant was then jailed. The next day, a Friday, defendant executed a second affidavit of indigency and counsel was immediately appointed. After conferring with defendant over the weekend, counsel moved for a continuance on Monday. The motion was denied and the trial began on Tuesday. Having had insufficient time to prepare the case and interview witnesses, defendant Whitehead's attorney deferred to codefendant's counsel. Because the position of the defendants was antagonistic, this deferral proved damaging to Whitehead's defense and resulted in a failure to provide effective assistance of counsel.<sup>126</sup> The court of appeals held that because the denial of a continuance resulted in impaired performance of counsel at trial,<sup>127</sup> it constituted an abuse of discretion.<sup>128</sup>

This standard will not be an easy one for trial judges to apply be-

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122. 569 F.2d 209 (4th Cir.), *cert. denied*, 435 U.S. 975 (1978).

123. 527 F.2d 456 (4th Cir. 1975), *cert. denied*, 425 U.S. 952 (1976).

124. *Id.* at 457-58.

125. In addition, defendant was warned by the United States Attorney to retain private counsel or prepare to defend himself. 569 F.2d at 211.

126. *Id.*

127. The court seemed to view the question in terms of whether the result of the denial was to deprive defendant of effective assistance of counsel. *Id.*; see *United States v. Gaither*, 527 F.2d at 457-58.

128. The court recognized that denial of a continuance would not have been an abuse of discretion had counsel's difficulties at trial been caused by defendant. 569 F.2d at 211.

cause it will require them to predict or anticipate the effects of a denial on the performance of defense counsel at trial. Although it is by no means a clear standard to use in making the decision, it should serve to impress upon the trial judge the importance and probable effects of his decision whether to grant a continuance. Should he deny that motion, the standard of review employed on appeal will be a constitutional one, that of effective assistance of counsel.<sup>129</sup> By adopting this test as the yardstick for finding an abuse of discretion, the court has reemphasized that defendants have a right to an adequate time to prepare their defense.

### *E. Right to Speedy Trial*

In *State v. McKoy*,<sup>130</sup> the North Carolina Supreme Court, over a strong dissent,<sup>131</sup> reversed a unanimous court of appeals panel<sup>132</sup> and held that a wilful delay by the prosecution in bringing a case to trial, absent any significant prejudice to defendant, was a violation of defendant's right to a speedy trial and required a dismissal of the charges. Defendant in *McKoy* was charged with second degree murder in a shooting death that occurred in October 1974. He was arrested in November of the same year.<sup>133</sup> The grand jury indicted him in February 1975. Trial was initially set for June 2, 1975, but the State was granted a continuance. Defendant's counsel frequently made oral requests of the prosecuting attorney between June 1975 and January 1976 for an early trial date but was told that because defendant was in prison where he belonged there was no need to try him. On January 22, 1976, defendant moved to dismiss for violation of his right to speedy trial. This motion was denied, and the trial judge ordered trial calendared by the May 1976 session.<sup>134</sup> The case was delayed for various reasons until August 9, 1976. At that time, defendant again moved to dismiss, claiming as prejudice the unavailability of a material defense witness. This

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129. The test for effectiveness of counsel is whether the performance was within the range of competence normally expected in criminal trials. *Marzullo v. Maryland*, 561 F.2d 540 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978). The standard was recently applied in a habeas corpus proceeding brought by a North Carolina prisoner although no constitutional violation was found. See *Fuller v. Luther*, 575 F.2d 1098 (4th Cir. 1978).

130. 294 N.C. 134, 240 S.E.2d 383 (1978).

131. *Id.* at 144, 240 S.E.2d at 390 (Moore, J., joined by Sharp, C.J., dissenting).

132. 33 N.C. App. 304, 235 S.E.2d 98 (1977), *rev'd*, 294 N.C. 134, 240 S.E.2d 383 (1978).

133. Upon his arrest, defendant's parole for a prior conviction of involuntary manslaughter was revoked and he was returned to Central Prison where he remained until trial. 294 N.C. at 136, 240 S.E.2d at 386.

134. The case was calendared for April 12, 1976, but was not called because of the unavailability of defense counsel. *Id.* at 137, 240 S.E.2d at 386.

motion was denied, and defendant was tried and convicted of voluntary manslaughter. The court of appeals rejected defendant's claim that the delay caused the loss of the witness and held that, in the absence of prejudice, defendant was entitled to no relief.<sup>135</sup>

In reaching its decision, the supreme court applied the balancing test of *Barker v. Wingo*,<sup>136</sup> which takes into account the following factors: the length of the delay, the cause of the delay, waiver or demand of the right by the defendant, and prejudice to the defendant.<sup>137</sup> The court quickly found the twenty-two month delay sufficient to raise a constitutional issue,<sup>138</sup> and held that the repeated oral requests by defense counsel definitively established lack of waiver.<sup>139</sup>

In evaluating the reason for the delay, the court divided the period into separate parts. It found no unreasonable delay for the periods prior to June 1975 and after April 1976.<sup>140</sup> The ten month intervening delay was established to be due to the wilfull neglect of the prosecution in responding to defense counsel's oral demands.<sup>141</sup> The *McKoy* decision is surprising because the court reversed the conviction in the face of its finding that any prejudice to defendant was minimal. The supreme court agreed with the court of appeals in rejecting defendant's claim of loss of a witness, stating that had she appeared and testified for defendant "it is highly improbable that the testimony . . . would have affected the result."<sup>142</sup> Although the witness loss was the only prejudice claimed by defendant, it is arguable that other types of prejudice resulted.<sup>143</sup> When defendant was arrested for the crime in this case, his parole from a prior manslaughter conviction was revoked and he was returned to prison.<sup>144</sup> The pending charges resulted in his incarceration from the time of his arrest to the date of his trial. Furthermore, defendant was prejudiced by the anxiety caused by the unresolved charges.

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135. See 33 N.C. App. 304, 235 S.E.2d 98 (1977).

136. 407 U.S. 514 (1972).

137. *Id.* at 530.

138. 294 N.C. at 141, 240 S.E.2d at 388.

139. *Id.* at 142, 240 S.E.2d at 389.

140. *Id.* at 141, 240 S.E.2d at 388-89.

141. *Id.* at 141-42, 240 S.E.2d at 389. It is arguable that the court defined wilful neglect as that which "could have been avoided by reasonable effort." *Id.*

142. 294 N.C. at 143, 240 S.E.2d at 389.

143. The United States Supreme Court has recognized three different types of prejudice, each to an interest that the speedy trial right protects: (1) pretrial incarceration, (2) anxiety of an accused over the unresolved charges, and (3) impairment of the defense. *Barker v. Wingo*, 407 U.S. at 532.

144. Defendant claimed that his parole was revoked because of his arrest but did not offer any proof to support his contention. See Defendant Appellant's Brief at 2, Brief for the State at 5.

Even though this prejudice may not be enough, by itself, to require reversal, its use here to augment the basis of the decision would have brought *McKoy* much closer to the long line of North Carolina cases granting relief only upon a showing of prejudice.<sup>145</sup>

The court did not indicate any belief or possibility that defendant might have been innocent of the offense charged. On the contrary, the court doubted that there would have been a different result even had the absent defense witness appeared. Justice Moore, in dissent, echoed the sentiments of the court of appeals panel.<sup>146</sup> "I do not believe sufficient prejudice has been shown to justify the release of this twice-convicted killer."<sup>147</sup> Dismissal of charges in this voluntary manslaughter case, given defendant's prior manslaughter conviction, is an extreme remedy.

Because of the court's sole reliance on the wilful neglect of the prosecution and the extreme nature of the remedy, *McKoy* is best interpreted as a strong reminder to prosecutors of their duty to try defendants within a reasonable time and the possible dire consequences when that duty is not fulfilled.<sup>148</sup>

#### F. *Breathalyzer Test Administration*

The North Carolina Court of Appeals decided two cases in 1978 that required interpretation of different statutory sections dealing with administration of the breathalyzer test. Both cases presented problems of statutory construction and matters of public policy.

In *State v. Jordan*,<sup>149</sup> the court was called upon to give further definition to the term "arresting officer" contained in G.S. 20-139.1(b).<sup>150</sup> The statute prohibits "the arresting officer or officers"<sup>151</sup> from administering a breathalyzer test to a person the officer has arrested on suspicion of driving under the influence of intoxicating li-

145. See, e.g., *State v. Hill*, 287 N.C. 207, 214 S.E.2d 67 (1975); *State v. Brown*, 282 N.C. 117, 191 S.E.2d 659 (1972).

146. 33 N.C. App. 304, 308-09, 235 S.E.2d 98, 100 (1977). The court of appeals found that the unavailability of the witness was insufficient prejudice.

147. 294 N.C. at 146, 240 S.E.2d at 391 (dissenting opinion).

148. *McKoy* could be viewed as an exercise of the court's power of general supervision and control of proceedings in the lower state courts. The existence of this power was first declared in *State v. Crook*, 132 N.C. 1053, 44 S.E. 32 (1903). The United States Court of Appeals for the Fourth Circuit has recognized that prosecutorial misconduct may be proper grounds for use of its general supervisory power. *United States v. Neiswender*, No. 77-1642 (4th Cir., filed Jan. 9, 1979).

149. 35 N.C. App. 652, 242 S.E.2d 192 (1978).

150. N.C. GEN. STAT. § 20-139.1(b) (1978).

151. *Id.*



quor. In *Jordan*, defendant was arrested for driving under the influence by Trooper Banks. After taking a breathalyzer test, which was administered by another officer, defendant secured his release on bail. Approximately twenty minutes later he was arrested by Officer Martin on a similar charge. Defendant was taken to the police station where he took another breathalyzer test. This second test was administered by Banks, the officer who had arrested defendant earlier that evening for driving under the influence.<sup>152</sup>

Based on the second arrest, defendant was convicted of operating a motor vehicle while under the influence. Over defendant's objection that Banks should be considered an "arresting officer" and therefore prohibited from testifying under G.S. 20-139.1(b), Trooper Banks was allowed to testify about results of the breathalyzer test he administered. On appeal defendant argued that, since the purpose of the statute is to ensure fairness and impartiality in administration of the test,<sup>153</sup> the strong possibility that Banks had a preconceived notion that the test would disclose a high alcoholic content was enough to make his administration of the test illegal and to disqualify him from testifying.<sup>154</sup>

The court rejected defendant's argument that the policy of the statute required the exclusion of Banks' testimony. The court stated that the limitation on the arresting officer's ability to administer the test grew out of recognition that the judgment of the officer who arrests the defendant or the judgment of the officer who selects the defendant for arrest might well be in issue at trial.<sup>155</sup> Absent the statutory limitation, an arresting or selecting officer who also administered the test might appear to have an interest in the outcome of the test because its outcome confirms or refutes the soundness of his earlier judgment. Consequently, the court stated that the interest of fairness demands that arresting or selecting officers be prohibited from administering the test. Although the court focused on only two possible relationships that an officer might have to a person who is arrested, it is clear that the court would disqualify any officer from administering the test who was so

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152. 35 N.C. App. at 653, 242 S.E.2d at 193.

153. *State v. Stauffer*, 266 N.C. 358, 359, 145 S.E.2d 917, 918 (1966) ("The purpose of this limitation in the statute is to assure that the test will be fairly and impartially made.").

154. 35 N.C. App. at 653, 242 S.E.2d at 193.

155. The peculiar situation of the officer who selected the defendant for arrest arose in *State v. Stauffer*, 266 N.C. 358, 145 S.E.2d 917 (1966). In that case the officer who administered the test was the person who originally observed and stopped the defendant. Another officer, who had responded to a radio call, made the actual arrest although the first officer remained at the scene of the arrest to assist. The court held that the first officer's assistance made him an "arresting officer" within the meaning of the statute.

causally connected to a particular arrest that his impartiality might be questioned.<sup>156</sup> In *Jordan*, however, it was uncontested that Trooper Banks had absolutely nothing to do with causing defendant's second arrest. The court held that Banks' earlier arrest and opportunity for prior observation of the defendant, which may indeed have led to preconceived notions about what the test would disclose, did not bring him within the disqualification set out in the language or the policy of the statute.

In the other case dealing with aspects of North Carolina's breathalyzer law, *Price v. North Carolina Department of Motor Vehicles*,<sup>157</sup> the court of appeals considered G.S. 20-16.2(a)(4),<sup>158</sup> which states that, upon arrest and a request to submit to a breathalyzer test, the accused "has the right to call an attorney and select a witness to view for him the testing procedures; but that the test shall not be delayed for *this purpose* for a period in excess of thirty minutes from the time he is notified of his rights."<sup>159</sup> The court noted that the statute is ambiguous because it is not clear to which of the two rights contained in the first clause the limitation in the second clause applies.<sup>160</sup>

In *Price*, petitioner was arrested for driving under the influence of intoxicating liquor, taken to the police station and requested to submit to the breathalyzer test. Petitioner telephoned his attorney twice and

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156. The court's conclusion that the statute was enacted to prevent test administration only by officers who were in some way causally connected with the arrest is supported by prior case law. In *State v. Dail*, 25 N.C. App. 552, 214 S.E.2d 219 (1975), the court rejected defendant's claim that an officer who stopped at the scene after defendant's arrest solely to remove defendant's car from the highway and who later administered the test was an "arresting officer." In *State v. Green*, 27 N.C. App. 491, 219 S.E.2d 529 (1975), the court held that an officer who had observed defendant in an inebriated state 40 minutes prior to the time he administered the test to him was not an "arresting officer." In *State v. Stauffer*, 266 N.C. 358, 145 S.E.2d 917 (1966), however, the court's finding that the officer who administered the test was at the scene of the arrest for the purpose of assisting in the arrest was crucial to its determination that the officer *was* an "arresting officer." In *Dail* and *Green*, the officers were not involved in making the arrest, although they had some contact with defendant prior to test administration; in *Stauffer*, the officer who administered the test was the person who actually initiated the arrest procedure.

157. 36 N.C. App. 698, 245 S.E.2d 518, *cert. denied*, 295 N.C. 551, 248 S.E.2d 728 (1978).

158. N.C. GEN. STAT. § 20-16.2(a)(4) (1978).

159. *Id.* (emphasis added).

160. 36 N.C. App. at 701, 245 S.E.2d at 520. The court stated that the statute could be interpreted any of three ways: 1) that the legislature used the wrong language and really meant to say "these purposes"; 2) that the singular phrase "this purpose" was intended to apply to the right to call an attorney; or 3) that the phrase "this purpose" refers to the right to select a witness. *Id.* at 701-02, 245 S.E.2d at 520-21.

This is the first case in which the ambiguity has been at issue. North Carolina courts have never defined which right the second clause limits. The courts, however, have generally assumed that the limitation applies either to the right to "select a witness" or to both rights. *See State v. Buckner*, 34 N.C. App. 447, 238 S.E.2d 635 (1977).

refused to take the test until his attorney arrived at the station. After his attorney arrived, and forty-one minutes after being requested to submit to the test, petitioner indicated his willingness to take the test. The test operator, however, refused to administer it because of the delay. The Division of Motor Vehicles subsequently revoked petitioner's operators license because of his refusal to submit to administration of the test within thirty minutes after being requested to do so.<sup>161</sup> Petitioner challenged the finding that he violated the statute and claimed that his driving privilege was improperly revoked. The court of appeals affirmed the revocation order.

Petitioner advanced two major arguments for the proposition that he did not violate G.S. 20-16.2.<sup>162</sup> Both depended upon a rather strained interpretation of the statute.<sup>163</sup> He first argued that the limiting phrase "this purpose" in the statute refers to the right to "call an attorney" and not to the right to "select a witness." Thus, petitioner asserted that the statute allows a person only thirty minutes to call an attorney, but that one has an undefined amount of reasonable time (in this case at least forty-one minutes) to select a witness and secure his attendance. Petitioner argued that his refusal to take the test before his attorney arrived was not a violation of the statute because he was simply exercising his right to a reasonable time to secure a witness.<sup>164</sup>

In his second argument petitioner asserted a right to a reasonable time to communicate *in person* with counsel before being forced to take the test. Petitioner claimed that, because the statute contains an arbitrary thirty minute time limit on the right to call an attorney, the statute conflicted with and impermissibly restricted his rights under G.S. 15A-501(5),<sup>165</sup> which provides that a person, upon arrest, has a "reasonable time" to "communicate with counsel." Petitioner argued that this lan-

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161. On the day of his arrest, February 28, 1976, petitioner pleaded guilty to the charge of operating a motor vehicle on the highway while under the influence of intoxicating liquor. The Division of Motor Vehicles, acting under the authority of N.C. GEN. STAT. § 20-16.2 (1978), revoked his driving privilege on March 21, 1976. The revocation order was affirmed by the superior court on March 24, 1977.

162. N.C. GEN. STAT. § 20-16.2 (1978).

163. Petitioner also advanced constitutional arguments that were apparently based on the theory that he was entitled to a sixth amendment right to presence of counsel at the administration of the breathalyzer test. Citing *Schmerber v. California*, 384 U.S. 757 (1966), *State v. Syker*, 285 N.C. 202, 203 S.E.2d 849 (1974), and decisions from other states, the court summarily rejected these constitutional arguments. The court stated that "there is no right to the presence of counsel at the administration of breathalyzer tests or other similar tests." 36 N.C. App. at 703, 245 S.E.2d at 522.

164. 36 N.C. App. at 701, 245 S.E.2d at 520.

165. N.C. GEN. STAT. § 15A-501(5) (1978).

guage in G.S. 15A-501(5) overrode the limitation in G.S. 20-16.2 and protected his right to refuse to take the test until he had a reasonable time to communicate in person with counsel.<sup>166</sup>

The court acknowledged the ambiguity in G.S. 20-16.2 and the potential conflict between that statute and G.S. 15A-501(5),<sup>167</sup> but disagreed with petitioner's interpretation of G.S. 20-16.2. The court examined G.S. 20-16.2 in light of public policy and according to traditional rules governing statutory construction, and concluded that the thirty minute limitation referred only to the right to select a witness and secure his attendance at the test administration and *not* to the right to call an attorney.<sup>168</sup> Petitioner, who desired his lawyer to function as a witness, thus violated the statute when he attempted to delay the administration of the test longer than thirty minutes in exercise of his right to select a witness.

The court's interpretation of G.S. 20-16.2 eliminated any possible conflict between that statute and G.S. 15A-501(5). Because the thirty minute time limitation applies only to the right to secure a witness, the court held that the "reasonable time" time limitation contained in G.S. 15A-501(5) applies to the right to call an attorney in G.S. 20-16.2. Because petitioner was allowed to contact his lawyer on the telephone, the court held that he was afforded reasonable time to communicate with counsel and that his right to call an attorney was satisfied. The court rejected petitioner's argument that G.S. 15A-501(5) gave him a right to communicate with counsel *in person* before the test could be administered.<sup>169</sup>

Because petitioner in *Price* did communicate with counsel, the court left open the question of what is a reasonable time for calling an attorney when the accused is seeking to delay administration of the

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166. 36 N.C. App. at 701, 245 S.E.2d at 520.

167. *Id.*

168. The court applied the following rules of statutory construction: 1) a statute imposing a penalty must be strictly construed; and 2) statutes *in pari materia* should be construed together. Strict construction of the statute would apply the singular phrase "this purpose" to the phrase closest to it, the right to "select a witness." Interpreting the statute so that the limitation would apply only to the second right would harmonize statutes *in pari materia* because the time limitation contained in § 15A-501(5), the statute that guarantees the right to communicate with counsel generally, would then apply to the first right to "call an attorney." *Id.* at 702, 245 S.E.2d at 521.

The court insisted that its interpretation of the statute was supported by "common sense and sound public policy." *Id.* at 703, 245 S.E.2d at 521. The court stated that exercise of the right to call an attorney generally requires only a few minutes so that there is no great need for a time limitation on this right. A time limitation on the right to select a witness and secure his attendance was necessary, however, because exercise of this right might entail a lengthy delay that could render the test ineffective.

169. *Id.* at 704, 245 S.E.2d at 522.

breathalyzer test. Given the need for relatively quick administration of the test and recognizing that calling an attorney generally takes only a few minutes, it would seem that very special circumstances would be required before a period of thirty minutes would be deemed unreasonable.

In both *Jordan* and *Price* the court rejected expansive interpretations of rights guaranteed by statute to persons to whom the breathalyzer test is administered. Although neither case presented a very convincing argument for extending protection, it is clear that the court's refusal to expand protections was influenced by the public policy considerations in favor of quick and efficient administration of the breathalyzer test.

### G. Arraignment Rights

In *State v. Davis*,<sup>170</sup> the North Carolina Court of Appeals interpreted G.S. 15A-943(b),<sup>171</sup> a provision of the Speedy Trial Act giving the defendant the right not to be tried within one week of his arraignment. In *Davis*, defendant's trial on drug charges began on the same day as his arraignment. Before trial, defendants<sup>172</sup> moved for a continuance on the ground of inability to locate an essential defense witness. This motion was denied. Defendant did not enter a general objection, nor did he specifically assert his right under the statute. The court held that failure to assert this right resulted in waiver.

The court's decision in *Davis* was foreshadowed by the North Carolina Supreme Court's decision in *State v. Shook*.<sup>173</sup> In that case, the court held that the provision gave defendant a statutory right not to be tried in the week of his arraignment and noted that, like other such rights, it could be waived. Under North Carolina law, a defendant is deemed to waive the benefit of a statutory right by "express consent, failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it."<sup>174</sup> The court of appeals followed this line of reason-

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170. 38 N.C. App. 672, 248 S.E.2d 883 (1978).

171. N.C. GEN. STAT. § 15A-943(b) (1978). The statute provides: "When a defendant pleads not guilty at an arraignment required by subsection (a), he may not be tried without his consent in the week in which he is arraigned." *Id.* § 15A-943(a) provides for scheduling of arraignments in counties where there are 20 or more weeks of trial sessions scheduled for criminal cases in the superior court.

172. *Davis*' trial was consolidated with that of a codefendant who had been arraigned over two months earlier. Thus, only *Davis*' statutory right was in question.

173. 293 N.C. 315, 237 S.E.2d 843 (1977).

174. *State v. Gaiten*, 277 N.C. 236, 239, 176 S.E.2d 778, 781 (1970); see *State v. Young*, 291 N.C. 562, 567, 231 S.E.2d 577, 580 (1977).

ing, focusing on the statutory nature of the right, and held that failure to object specifically on the ground of this provision resulted in waiver.

In finding a waiver in *Davis*, the court ignored the language of G.S. 15A-943(b). The statute provides that a defendant may not be denied his right "without his *consent*."<sup>175</sup> Thus, the question should have been what constitutes "consent." The word should have been interpreted in light of the legislative purpose of the statute, which is to ensure the State and the defendant an adequate time to prepare for trial.<sup>176</sup> It would therefore be reasonable to conclude that any motion for continuance relating to time needed to prepare for trial would be sufficient to manifest nonconsent or nonwaiver. This conclusion is buttressed by the supreme court's holding in *Shook* that the statute is not merely directory, because it "'promotes justice'" and "'affects the public interest.'"<sup>177</sup> In order for the statute to achieve its purpose, an interpretation of consent much narrower and more specific than that given by the court in *Davis* is required.

#### H. Amendment of Indictments

G.S. 15A-923(e)<sup>178</sup> states that "[a] bill of indictment may not be amended."<sup>179</sup> In *State v. Carrington*,<sup>180</sup> the North Carolina Court of Appeals, for the first time, defined the word "amendment" as used in G.S. 15A-923(e) to mean "any change in the indictment which would substantially alter the charge set forth in the indictment."<sup>181</sup> Thus, the court, in effect, rewrote the statute to permit amendment of indictments when the amendment does not substantially alter the original charge. This interpretation appears to be an attempt to harmonize the statute with prior, more liberal North Carolina case law on this subject.

In *Carrington*, defendant was indicted on the charges of accessory after the fact to a murder and armed robbery committed by an alleged codefendant and "one (other) black male, name unknown."<sup>182</sup> The co-

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175. N.C. GEN. STAT. § 15A-943(b) (1978) (emphasis added).

176. *State v. Shook*, 293 N.C. at 318, 237 S.E.2d at 846.

177. *Id.* at 319, 237 S.E.2d at 846 (quoting *Davis v. Board of Educ.*, 186 N.C. 227, 231, 119 S.E. 372, 374 (1923)).

178. N.C. GEN. STAT. § 15A-923(e) (1978).

179. *Id.*

180. 35 N.C. App. 53, 240 S.E.2d 475, *cert. denied*, 294 N.C. 737, 244 S.E.2d 155 (1978).

181. *Id.* at 57, 240 S.E.2d at 478.

182. *Id.* Two indictments were returned: one charging accessory to murder and the other charging accessory to armed robbery. Part of the indictment charging defendant with accessory after the fact of murder read:

The jurors for the State upon their oath present that on or about the 19th day of Febru-

defendant was acquitted on all charges prior to defendant's trial. At defendant's trial his motion to dismiss the indictments on the ground that they charged him with being an accessory to crimes committed by a person who had been acquitted was denied. Instead, the court amended the indictments to excise mention of the alleged codefendant and proceeded to trial on the balance of the indictments, which charged defendant with accessory after the fact to crimes committed by an unknown male. Defendant was found guilty at trial and argued on appeal that the court's action in amending the indictments was error under G.S. 15A-923(e).<sup>183</sup> The court of appeals rejected defendant's argument because it found, under its new definition, that the amendments did not substantially alter the charges set forth in the indictment.<sup>184</sup>

The strictest common law rule prohibited the making of any amendment to an indictment. Some courts held, however, that amendment of an indictment was permissible with the consent of the grand jury that presented it.<sup>185</sup> In North Carolina, the approach that permitted amendment only with grand jury consent seems to have been followed in only one early case.<sup>186</sup> Despite references to this rule in some early twentieth century cases,<sup>187</sup> the modern rule that emerged in North Carolina held that courts had the power to amend indictments as to

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ary, 1976, in Durham County Obie Carrington, Jr. unlawfully and wilfully did feloniously give aid and assistance to (Arthur Junior Parrish and) one (other) black male, name unknown, who had unlawfully, wilfully, and feloniously killed and murdered Otis Jackson Rigsbee, Jr. . . . At the time of the giving of aid and assistance, the defendant knew that (Arthur Junior Parrish and) the aforesaid (other) black male, name unknown, had committed the felony of Murder . . .

*Id.*

183. Defendant argued that the amendments violated his due process rights on three separate but related grounds: 1) that any amendment was error under § 15A-923(e); 2) that the amendments that were made improperly expanded the charges against him; and 3) that the indictments, as amended, were not specific enough to allow him to plead any conviction in bar of future prosecutions. *Id.* at 57-58, 240 S.E.2d at 478. The court rejected defendant's third argument because it found, upon examination of the indictments, that the offenses charged were clear and that a conviction would bar future prosecutions. Defendant's second argument was rejected because the court held that the amendments did not expand the charge and, in fact, made the State's case harder to prove. The court's treatment of the first argument is discussed in the text. The court did not consider whether the solution it adopted raised any due process objections.

184. The amendments did not alter in any way the offenses that were charged; as the court pointed out, the State was still required to prove all the elements of the offenses originally charged.

185. See 41 AM. JUR. 2d *Indictments and Informations* §§ 172, 174 (1968); 42 C.J.S. *Indictments and Informations* § 230 (1944).

186. *State v. Sexton*, 10 N.C. (3 Hawks) 184 (1824).

187. See *State v. Dowd*, 201 N.C. 714, 161 S.E. 205 (1931); *State v. Corpening*, 191 N.C. 751, 133 S.E. 14 (1926). In these cases no amendment was made at trial so the court did not have to pass on the point; the references were made in dictum.

matters of form but not as to matters of substance.<sup>188</sup> While North Carolina courts have not given precise definitions of what constitutes form or substance,<sup>189</sup> the courts have indicated that amendments that change the nature or degree<sup>190</sup> or supply a material element of the offense charged,<sup>191</sup> or amendments that prejudice the defendant's ability to conduct his defense,<sup>192</sup> would be considered inappropriate amendments of substance. Amendments to form have generally involved changes in matters such as the date of an offense that do not have any substantive effect.<sup>193</sup> Despite this definitional problem, the form-substance approach has clearly prevailed in North Carolina courts since at least 1896.<sup>194</sup>

The prohibitory language of G.S. 15A-923(e), which became effective in July 1975, appeared to bring the state of the law in this area to a strict rule that would have prohibited all amendments even with grand jury consent.<sup>195</sup> The *Carrington* court's refusal to enforce the literal meaning of the statute sprang, presumably, from an abhorrence of such a rule and from a desire to maintain the more flexible modern approach.

In construing the mandatory language of the statute in a fashion that would permit amendment of indictments, the *Carrington* court introduced a novel definition of what kind of amendment is permissible.<sup>196</sup> The court did not explicitly refer to the traditional form-

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188. See *State v. Jackson*, 280 N.C. 563, 187 S.E.2d 27 (1972); *State v. Cody*, 119 N.C. 908, 26 S.E. 252 (1896); *State v. Teel*, 24 N.C. App. 385, 210 S.E.2d 517 (1975); *State v. Peele*, 16 N.C. App. 227, 192 S.E.2d 67, cert. denied, 282 N.C. 429, 192 S.E.2d 838 (1972); *State v. Haigler*, 14 N.C. App. 501, 188 S.E.2d 586, cert. denied, 281 N.C. 625, 190 S.E.2d 468 (1972).

189. For a discussion of the problems caused by this distinction, see 41 AM. JUR. 2d *Indictments and Informations* § 181 (1968).

190. *State v. Teel*, 24 N.C. App. 385, 210 S.E.2d 517 (1975) (amendment to indictment disallowed when it changed charge from misdemeanor to felony).

191. *State v. Tarlton*, 208 N.C. 734, 182 S.E. 481 (1935) (indictment amended to add necessary element of wilfully failing to support an illegitimate child held impermissible).

192. See *State v. Haigler*, 14 N.C. App. 501, 188 S.E.2d 586, cert. denied, 281 N.C. 625, 190 S.E.2d 468 (1972), in which the court mentioned this factor in finding that the amendment was one of form.

193. See *State v. Helms*, 26 N.C. App. 601, 216 S.E.2d 494, appeal dismissed, 288 N.C. 354, 218 S.E.2d 407 (1975) (indictment amended to change date of offense); *State v. Haigler*, 14 N.C. App. 501, 188 S.E.2d 586, cert. denied, 281 N.C. 625, 190 S.E.2d 468 (1972) (indictment amended to change description of stolen property from "copper" to "bronze").

194. *State v. Cody*, 119 N.C. 908, 26 S.E. 252 (1896).

195. This was the strictest common law rule. See text accompanying note 186 *supra*. Prior to the enactment of § 15A-923(e), North Carolina had no statute relating to amendment of indictments.

196. The *Carrington* court's definition of a permissible amendment, one which does not "substantially alter the charge," is couched in different language than the prior North Carolina rule, which permitted amendments only in matters of form rather than substance.



substance approach. The opinion, therefore, raises the question whether its use of different language signals a break from the traditional form-substance approach or whether the new definition is meant merely to be a restatement of established law. The more logical view is that the definition presented in *Carrington* is simply this court's way of expressing the form-substance approach.<sup>197</sup> Thus, the *Carrington* decision appears to establish that North Carolina's traditional approach to allowing amendment of indictments survives the prohibitory language of G.S. 15A-923(e).

### I. Presentments

In *State v. Cole*,<sup>198</sup> the North Carolina Supreme Court was faced with the problem of defining when a misdemeanor charge is initiated by presentment for the purpose of deciding whether the superior court has jurisdiction under G.S. 7A-271(a)(2).<sup>199</sup> This question was one of first impression<sup>200</sup> and the court's decision fills a void in the law of superior court jurisdiction. G.S. 7A-271(a) provides limited exceptions to North Carolina's general rule that the district court has exclusive

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197. The manner in which the court presented the new definition does not indicate that the court thought that it was departing from established case law. The definition is offered at the bottom of a paragraph without citations, argument or fanfare. 35 N.C. App. at 58, 240 S.E.2d at 478.

Furthermore, the differences in language do not create a meaningful distinction. Amendments found "substantive," and therefore impermissible under the form-substance approach universally affected or "substantially altered" the charge. See cases cited notes 190 & 191 *supra*. Amendments considered merely matters of form invariably did not affect or "substantially alter" the charge. See cases cited note 193 *supra*. Although it is possible to conceive of an amendment that is one of "substance" but that does not "substantially alter" the charge, it is extremely doubtful that the *Carrington* court intended to draw such a distinction. If a case should arise in which such a distinction might prove crucial, it would seem preferable to utilize the traditional form-substance approach and its established body of case law.

198. 294 N.C. 304, 240 S.E.2d 355 (1978).

199. N.C. GEN. STAT. § 7A-271(a)(2) (1969) provides in pertinent part: "The superior court has exclusive, original jurisdiction over all criminal actions not assigned to the district court division by this article, except that the superior court has jurisdiction to try a misdemeanor: . . . (2) When the charge is initiated by presentment . . . ."

North Carolina's statutory definition of a presentment is as follows:

A presentment is a written accusation by a grand jury, made on its own motion and filed with a superior court, charging a person, or two or more persons jointly, with the commission of one or more criminal offenses. A presentment does not institute criminal proceedings against any person, but the district attorney is obligated to investigate the factual background of every presentment returned in his district and to submit bills of indictment to the grand jury dealing with the subject matter of any presentment when it is appropriate to do so.

*Id.* § 15A-641(c) (1978).

200. The question had been considered only once before in *State v. Wall*, 271 N.C. 675, 157 S.E.2d 363 (1967). The facts of that case, however, did not present as difficult a problem as did the facts in *Cole*. See note 206 *infra*.

original jurisdiction of misdemeanor-grade criminal actions.<sup>201</sup> The statute states that the superior court has original jurisdiction to try a misdemeanor "[w]hen the charge is initiated by presentment."<sup>202</sup>

In *Cole*, the grand jury charged by presentments that defendants "violated the game laws of the State of North Carolina by taking and possessing a bear in Tyrrell County during closed season."<sup>203</sup> On the same day, the indictments upon which defendants were tried were returned. They charged that defendants did unlawfully and wilfully "possess a dead game animal, a bear, which was taken during closed season in Tyrrell County."<sup>204</sup> Defendants were tried in superior court and convicted of the misdemeanor. On appeal defendants argued that the charges against them were not initiated by presentment and that their cases did not fall within any of the other statutory exceptions to the general rule that the district court has exclusive original jurisdiction over misdemeanors. Defendants maintained that the judgment of the superior court was therefore void for lack of original jurisdiction.

In the first appeal of the case, the court of appeals held that the charges were not initiated by presentment and voided the judgments because the superior court lacked original jurisdiction.<sup>205</sup> The court of appeals, without guidance from prior case law concerning when a

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201. The general rule is found at N.C. GEN. STAT. § 7A-272(a) (1969), which provides: "Except as provided in this article, the district court has exclusive, original jurisdiction for the trial of criminal actions, including municipal ordinance violations, below the grade of felony, and the same are hereby declared to be petty misdemeanors."

202. *Id.* § 7A-271(a)(2).

203. 294 N.C. at 305, 240 S.E.2d at 357. The presentments were handed down on April 20, 1976. Defendants had originally been arrested on warrants dated November 16, 1974, which charged offenses similar to those contained in the presentments. At trial in the district court, defendants were found guilty of one count and appealed to the superior court on the ground that the warrant did not charge a crime. The conviction was reversed on this ground on September 15, 1975. On the same day, differently worded warrants that charged the same basic offense were issued. On December 5, 1975, the new warrants were dismissed in the district court for failure to state an offense. Although the State was successful in prosecuting an appeal of this order so that the warrants were resuscitated, the presentment and indictments were returned during the time period of the appeal and legal action on the indictments apparently took precedence. *Id.* at 305-06, 240 S.E.2d at 356-57.

204. *Id.* at 305-06, 240 S.E.2d at 357.

The indictments upon which defendants were tried charged a violation of N.C. GEN. STAT. § 113-103 (1978). That statute provides in part that "[t]he possession, transportation, purchase, or sale of any dead game animals . . . during the closed season in North Carolina . . . shall be unlawful." *Id.* Violation of the statute is a misdemeanor. *Id.* § 113-109.

Although trial was scheduled in district court, the cases were transferred to superior court on motion of the State with the consent of the six defendants.

205. 33 N.C. App. 48, 234 S.E.2d 191 (1977), *rev'd*, 294 N.C. 304, 240 S.E.2d 355 (1978). The court noted that defendants agreed to the State's motion to transfer the case to superior court but held that the agreement could not confer jurisdiction on a court that never properly had it. *Id.* at 51, 234 S.E.2d at 193.

charge is initiated by presentment,<sup>206</sup> adopted a narrow, formal definition of the term. First the court examined both instruments and concluded that the offense charged in the presentment was different from the offense charged in the indictments.<sup>207</sup> The court of appeals then held that, because the actual offenses charged in the instruments were different, the charges upon which the defendants were tried—those in the indictments—were not initiated by presentment.<sup>208</sup>

The North Carolina Supreme Court overruled the court of appeals and held that the superior court did have original jurisdiction because the charges were initiated by presentment.<sup>209</sup> In so doing, the court adopted a less formal definition of when a charge is initiated by presentment. Its approach to the problem proceeded from an analysis of the role that the presentment has played in the criminal justice system. The court stated that the presentment is a device by which the grand jury brings "subject matter"<sup>210</sup> to the attention of the district attorney and is *not* a formal document that initiates criminal proceedings.<sup>211</sup>

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206. Although the supreme court had considered this problem in *State v. Wall*, 271 N.C. 675, 157 S.E.2d 363 (1967), the facts of that case did not fairly raise the real issue discussed in *Cole*. In *Wall*, defendant was arrested on two warrants. Later two indictments, both charging misdemeanors, were returned against him. The grand jury never returned a presentment against defendant. Defendant was originally tried and convicted in superior court and appealed on the ground that the district court had exclusive original jurisdiction. The court stated that the "initiated by presentment" exception to the general rule that the district court has exclusive original jurisdiction over misdemeanors did not apply in *Wall* because no presentment was ever returned and the cases were in fact initiated by the warrants.

207. The court of appeals noted that, while the presentment alleged that defendants violated the law by "taking and possessing a bear . . . during closed season," the indictment charged that defendants violated the law by "possessing a dead game animal . . . in violation of G.S. 113-103." The court stated that the charge in the presentment of "taking and possessing" was not the same as the charge in the indictment of "possessing a dead game animal," upon which defendants were tried. 33 N.C. App. 48, 51, 234 S.E.2d 191, 193 (1977).

208. *Id.*

209. Although the court reversed on this issue, the ultimate holding of the court was in defendant's favor. After disposing of the jurisdiction issue, the court vacated the judgments and quashed the indictments on the ground that the bills of indictment did not charge a crime. 294 N.C. at 310, 240 S.E.2d at 559. The indictment had alleged a violation of N.C. GEN. STAT. § 113-103 (1978), which makes it a misdemeanor to "possess . . . any dead game animals . . . during the closed season." Defendants were arrested possessing a bear on a date that is inside North Carolina's state-wide "open season" on bear. *Id.* § 113-100. Although chapter 103 of the 1973 Session Laws made it unlawful to "take or hunt bear in the County of Tyrrell" during the time of the alleged offense, that law did not make mere possession of a dead bear a crime. Law of March 26, 1973, ch. 103, § 1, 1973 N.C. Sess. Laws 83. The court refused to construe the two statutes in conjunction and held that no actual offense had been charged in the indictments.

210. 294 N.C. at 308, 240 S.E.2d at 358.

211. The court cited both statutory and case law to support its position on the function of the presentment and stated that N.C. GEN. STAT. § 15A-641(c) (1978), *quoted in* note 199 *supra*, supported its less formal view of the presentment's function. 294 N.C. at 308, 240 S.E.2d at 358.

The court further stated that the statute only codified and clarified the holding of the landmark case of *State v. Thomas*, 236 N.C. 454, 73 S.E.2d 283 (1952). That case reviewed the

The court concluded that because it is not the function of the presentment to charge a specific crime or initiate criminal proceedings, a charge in an indictment could be initiated by presentment even though the instruments might charge different offenses.<sup>212</sup> Approaching the word "initiated" in a common-sense manner, the court stated that the charges in the indictment were initiated by presentment because the indictment "dealt with the same factual subject matter"<sup>213</sup> as the presentment. It seems then, that the rule adopted by the court in *Cole* is that a charge in an indictment is initiated by presentment if the presentment addresses the subject matter out of which the charge in the indictment grows.

The supreme court's historical and functional analysis rendered the court of appeals' approach irrelevant. Because the presentment is only intended to be a communication from the grand jury to the prosecutor, it would be too much to expect the presentment and the eventual indictment to contain identical charges. The court of appeals' approach would have rendered the statutory provision granting the superior court jurisdiction when the charge is initiated by presentment meaningless for practical purposes. The supreme court's approach better accords with the true function of the grand jury presentment.

### *J. Joinder of Offenses*

In *State v. Greene*,<sup>214</sup> the North Carolina Supreme Court was faced with the problem of interpreting G.S. 15A-926(a),<sup>215</sup> the section of the 1973 Criminal Procedure Act that deals with joinder of offenses. In contrast to its predecessor statute, which permitted joinder of offenses when the offenses charged were "of the same class of crimes or

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modes of prosecution and concluded that the presentment is "nothing more than an instruction by the grand jury to the public prosecuting attorney for framing a bill of indictment for submission to them." *Id.* at 458, 73 S.E.2d at 286.

212. The court stated that the presentment in *Cole* successfully fulfilled the very role it is assigned to play in our criminal justice system; the grand jury alerted the prosecutor to a problem via a presentment and the prosecutor later returned to the grand jury an indictment that dealt with the same factual subject matter. 274 N.C. at 308-09, 240 S.E.2d at 358.

213. *Id.* at 309, 240 S.E.2d at 358.

214. 294 N.C. 418, 241 S.E.2d 662 (1978).

215. N.C. GEN. STAT. § 15A-926(a) (1978). The statute, which became effective on July 1, 1975, reads:

Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan. Each offense must be stated in a separate count as required by G.S. 15A-924.

offenses,"<sup>216</sup> the new statute provides that offenses can be joined only if they are "based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan."<sup>217</sup>

In *Greene*, defendant was charged in three separate bills of indictment with assault with intent to commit rape against one victim, and rape and kidnapping of a second victim.<sup>218</sup> All three charges were consolidated for trial over defendant's objection that joinder of the charge relating to one victim with the charges relating to the other victim violated G.S. 15A-926(a) and was prejudicial to his defense because it allowed the jury to hear the testimony of both victims.<sup>219</sup> The jury found defendant not guilty of the kidnapping charge but returned verdicts of guilty of assault with intent to commit rape on the other two charges.

On appeal, the supreme court held that the joinder of offenses in *Greene* was proper under the statute and nonprejudicial to defendant. Justice Exum concurred, stating that the offenses were not joinable under the statute but that the erroneous consolidation was harmless error.

The majority held that the joinder of offenses in *Greene* was proper under G.S. 15A-926(a) because the sexual assaults were "parts of a single scheme or plan."<sup>220</sup> That scheme was defendant's effort "within a time span of three hours . . . to satisfy his sexual desires on the afternoon of 3 May 1976."<sup>221</sup> Although the *Greene* court did not state a standard by which one can determine whether the G.S. 15A-926(a) requirement is met, two factors seemed to have been especially

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216. Law of March 6, 1917, ch. 168, 1917 N.C. Pub. Laws 319 (formerly codified as amended at N.C. GEN. STAT. § 15-152) (repealed 1974).

217. N.C. GEN. STAT. § 15A-926(a) (1978).

This is a welcome change. Joinder of unrelated offenses simply because they are of the same class has been heavily criticized. See ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO JOINDER AND SEVERANCE § 2.2(a), at 29 (1968). Because the offenses are distinct, the public gain from joinder for trial of unrelated offenses in terms of trial efficiency is minimal compared to the great possibility of prejudice to defendants in such trials.

218. The State alleged that the first offense occurred around 2:00 p.m. when defendant, posing as a painter, gained admission to the first victim's apartment and unsuccessfully attempted to rape her. The second and third offenses occurred later that afternoon when defendant picked up the second victim, who was hitchhiking on the highway, and drove her to a wooded area and raped her.

219. 294 N.C. at 420, 241 S.E.2d at 663.

Defendant did not contend that it was error to consolidate the two charges growing out of the second incident. Defendant apparently argued that joinder of the first charge with the later two charges was improper because the offenses were not parts of a "single scheme" as required by the statute. *Id.* at 421-22, 241 S.E.2d at 664-65.

220. *Id.* at 422, 241 S.E.2d at 665.

221. *Id.*

important to the court in reaching its determination that a single scheme was present. First, the court stated that, although the new statute does not allow joinder on the basis that the offenses are of the same class, "the nature of the offenses is one of the factors which may properly be considered in determining whether certain acts or transactions constitute 'parts of a single scheme or plan' as those words are used in present G.S. 15A-926(a)."<sup>222</sup> The offenses charged in *Greene* were obviously of the same class.

Second, case law under the old joinder statute recognized that an important factor in determining the propriety of joinder was whether evidence on one charge would be admissible at a separate trial on the other charge.<sup>223</sup> The court stated that in *Greene*, evidence of the offenses committed against one victim was admissible in the case charging offenses against the other victim for the purpose of establishing defendant's identity as the assailant.<sup>224</sup> The court also determined that evidence from one case was admissible in the other for the alternative purpose of establishing "defendant's intent and plan and design to commit the crimes, or, in the language of the statute, to show a 'single scheme or plan.'"<sup>225</sup> The court thus intimated that offenses can be properly joined under G.S. 15A-926(a) if evidence from one case can properly be used in another case under any of the other crimes exceptions to the general rule that prohibits admission of evidence of separate and unrelated offenses at trial.<sup>226</sup> At any rate, it is clear that the court would find the statutorily required single scheme and thus permit joinder whenever similar evidence would be admissible in separate cases under the particular other crimes exceptions that permit introduction of other offenses to prove intent, plan, or design.<sup>227</sup>

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222. *Id.* (quoting *State v. Greene*, 34 N.C. App. 149, 152, 237 S.E.2d 325, 327 (1977), *aff'd*, 294 N.C. 418, 241 S.E.2d 662 (1978)).

223. It was generally held that joinder of offenses was appropriate when "the offenses charged are of the same class and are so connected in time and place that evidence at trial upon one indictment would be competent and admissible on the other." *State v. Taylor*, 289 N.C. 223, 230, 221 S.E.2d 359, 364 (1976). Although it is difficult to determine how much weight the evidence factor alone has played in favor of joinder, it is clear that it has been important.

224. 294 N.C. at 423, 241 S.E.2d at 665.

225. *Id.*

226. The general rule is that evidence of separate and unrelated offenses, "other crimes," is not admissible for the purpose of proving the accused's guilt of a crime. Evidence of "other crimes" is admissible, however, if introduced for other, proper purposes. Some of these proper purposes are to show knowledge, intent, motive, plan or design, or identity. STANSBURY, *supra* note 31, §§ 91-99.

227. The purpose of proving intent and the purpose of proving plan and design are different and are treated separately by the commentators. *See id.* § 92; 2 J. WIGMORE, EVIDENCE § 304 (3d ed. 1940). Evidence that tends to prove plan or design, however, may in some cases show intent.

Justice Exum stated in his concurrence that the offenses were improperly joined in violation of G.S. 15A-926(a) because the two incidents were not part of a single scheme. In his view, a single scheme permitting joinder of offenses does not exist unless similar evidence could be admitted in separate cases under the particular other crimes rule exception that permits introduction of another offense to prove the defendant's *plan* or *design* to commit the crime charged. This standard is to be distinguished from the standard the majority intimated is appropriate. At the very least, the majority approved joinder when evidence that proves *intent*, *plan*, or *design* could be used in different cases. The concurrence would approve joinder only when evidence from one case could be used to prove plan or design in a separate case—a more rigorous standard than that of the majority. Justice Exum stated that in order for joinder to be appropriate, defendant's pattern of conduct must contain more than “‘mere similarity [of act], which suffices for evidencing intent,’” but “‘such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.’”<sup>228</sup> In *Greene* the differences in the *modus operandi* employed by the defendant proved that defendant did not have a single scheme as that phrase is understood in the other crimes exception. Therefore, Exum contended, the statutory criteria for joinder of offenses, the existence of a single scheme, was not present. Justice Exum declared that the majority was in effect disregarding and nullifying the new statutory joinder rule.<sup>229</sup>

On the question of prejudice, the majority first stated the general rule that joinder of offenses should not be permitted, even if allowed by statute, if the defendant would suffer unfairly.<sup>230</sup> In determining whether an accused has been prejudiced by joinder the court stated that the question to be asked is “‘whether the offenses are *so separate in time and place* and *so distinct in circumstances* as to render a consolidation

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228. 294 N.C. at 424, 241 S.E.2d at 666 (concurring opinion) (quoting 2 J. WIGMORE, *supra* note 227).

229. *Id.* at 425, 241 S.E.2d at 666.

230. *Id.* at 421, 241 S.E.2d at 664. Because a motion for severance of offenses is addressed to the discretion of the court, rulings on this matter are not overturned absent abuse of discretion. *State v. Davis*, 289 N.C. 500, 508, 223 S.E.2d 296, 301 (1976). North Carolina courts are not prone to reverse trial court decisions in favor of joinder on the ground of unfair prejudice to the defendant. The situation in North Carolina seems to be similar to the national situation in which “appellate reversal of a trial court's decision not to grant a severance is extremely rare.” ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, *supra* note 217, § 2.2(a), at 30.

unjust and prejudicial to defendant.’ ”<sup>231</sup> The court determined that the record did not disclose such prejudice. Its earlier determination that evidence of one crime would be admissible in a separate trial of the other offense was undoubtedly an important factor in its conclusion that defendant suffered no prejudice.

Justice Exum accepted the majority’s standard for measuring prejudice and agreed that defendant in *Greene* was not unfairly prejudiced by the joinder. He therefore concluded that the erroneous consolidation was harmless error because, although evidence of the other offenses would not have been admissible in separate trials for the purpose of proving the existence of a plan under the other crimes exception, evidence of the other offenses would have been admissible in separate trials for the purposes of proving questions of intent and consent.<sup>232</sup> Because the evidence would have been heard in separate trials, the consolidation did not prejudice defendant.

*Greene* is the first case in which the courts have closely examined the problem of joinder of offenses under G.S. 15A-926(a).<sup>233</sup> The statutory requirement of a “single scheme or plan” seems to imply that joinder is appropriate only when the series of alleged criminal acts are connected in some systematic, planned way. Yet offenses may be introduced to prove intent under the other crimes exception that are related

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231. 294 N.C. at 423, 241 S.E.2d at 665 (quoting *State v. Johnson*, 280 N.C. 700, 704, 187 S.E.2d 98, 101 (1972)). This standard was enunciated in *State v. White*, 256 N.C. 244, 247, 123 S.E.2d 483, 486 (1961).

By statute, the court is required to grant severance of offenses whenever it is necessary for “a fair determination of the defendant’s guilt or innocence of each offense.” N.C. GEN. STAT. § 15A-927(b) (1978).

232. 294 N.C. at 425, 241 S.E.2d at 666 (concurring opinion).

233. This question has been focused on in only three cases, none of which set any interpretative standards. The facts in *Greene* certainly were the most difficult yet presented for determining whether joinder of offenses was appropriate.

In *State v. Creech*, 37 N.C. App. 261, 245 S.E.2d 817, cert. denied, 295 N.C. 554, 248 S.E.2d 731 (1978), charges of rape, kidnapping and crime against nature were consolidated. Evidence showed that defendant picked up the victim on the highway in his car, took her to a remote area, and performed oral sex. The court held that joinder was proper under the statute because the offenses were “a series of acts or transactions . . . connected together.” *Id.* at 263, 245 S.E.2d at 819 (quoting § 15A-926(a)).

In *State v. Irick*, 291 N.C. 480, 231 S.E.2d 833 (1977), two burglary charges and two charges of assault on a law officer with a firearm were consolidated over defendant’s objection that joinder was improper under the statute. Evidence showed that the burglaries occurred within one neighborhood in a two hour time span and that the confrontation with the police took place as defendant was leaving the area. The court stated that the evidence showed a “common plan.” *Id.* at 487-88, 231 S.E.2d at 839.

In *State v. Karbas*, 28 N.C. App. 372, 221 S.E.2d 98, cert. denied, 289 N.C. 618, 223 S.E.2d 394 (1976), the court held that consolidation of a manslaughter charge and a driving under the influence charge, both of which grew out of one automobile accident, was proper under the statute because the offenses were based on the “same transaction.” *Id.* at 374, 221 S.E.2d at 100.



to the alleged offense only because of the general similarity of act, and that are clearly not part of a common purpose or systematic scheme.<sup>234</sup> Therefore, a standard that permits joinder of offenses when an offense could be introduced to prove intent will not ensure that the joined offenses constituted a "single scheme or plan" within the apparent meaning of the statute. The other crimes exception that permits introduction of other offenses to prove plan and design requires that the offenses have features so common that they indicate the existence of a specific pattern or scheme.<sup>235</sup> This standard would better ensure that the joined offenses truly constitute a "single scheme or plan." Justice Exum's approach thus seems more in keeping with the language of the statute than the majority's approach.

Adoption of Justice Exum's interpretation of the statutory requirement would not, however, as the *Greene* case vividly illustrates, require reversals of convictions when joinder was improperly allowed under that strict standard. Justice Exum concluded that the erroneous consolidation in *Greene* was harmless error because evidence on the issues of intent and consent would have been admissible in separate trials. It thus appears that, even under Justice Exum's view, operation of the harmless error rule may protect consolidations made in violation of the statute whenever evidence of the joined offenses could have been properly introduced to prove an issue in a separate trial. If this view prevails it will render the statutory single scheme requirement meaningless in cases such as *Greene*, and make it very difficult for criminal defendants to complain about improper joinder of offenses.

One solution to this problem would be for North Carolina to adopt Rule 472 of the Uniform Rules of Criminal Procedure.<sup>236</sup> This rule generally leaves to the criminal defendant the option to sever the charges against him if he so desires, notwithstanding that the charged offenses are related.<sup>237</sup> Another solution would be for the courts to

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234. 2 J. WIGMORE, *supra* note 227, § 302, at 200. Wigmore states that "the prior doing of other similar acts . . . the mere repetition of instances, and not their system or scheme" is the crucial factor in the admissibility of evidence to prove intent. *Id.*

235. *Id.* § 304. Although the difference between the requirements for introduction of evidence to prove intent and plan or design is one of degree rather than kind, the distinction is a real one. In order to illustrate the distinction Wigmore cites an example in which, in order to prove that *A* committed a fraud on *B*, proof that *A* committed a fraud on *C* is irrelevant. It would be relevant only for the purpose of showing intent once the fraud was admitted by *A*. If it could be shown, however, that the fraud on *B* was one of a class having common features with prior frauds committed by *A*, the prior frauds are relevant for the purpose of proving guilt because they illustrate common scheme or design.

236. See UNIFORM RULES OF CRIMINAL PROCEDURE 472(a).

237. The only limitation on the defendant's right to sever offenses is the court's power to deter-

make more frequent use of their inherent power to refuse to join offenses when consolidation would prejudice the defendant.<sup>238</sup> When the *Greene* court considered this problem, it ignored the statutory standard for measuring prejudice in this area and utilized a measure for prejudice that put far too heavy a burden on the defendant.<sup>239</sup> Many serious problems are created for criminal defendants when offenses are joined,<sup>240</sup> and North Carolina courts should be more responsive to potential joinder problems. The statutory standard for joinder of offenses that Justice Exum proposed in *Greene* should be adopted and the inherent judicial power to refuse potentially prejudicial joinders should be readily used when necessary.

### K. Discovery

The North Carolina Supreme Court decided two appeals based on the prosecution's failure to comply with discovery motions. In *State v. Jones*,<sup>241</sup> the court held that defendant was entitled to a new trial when the prosecutor had withheld material and exculpatory information in response to a voluntary discovery request with which he had otherwise complied. In *State v. Stevens*,<sup>242</sup> the court refused to grant relief, holding that failure of the prosecution pursuant to defendant's discovery motion to disclose oral statements made by defendant to police did not require their exclusion at trial.

In *Jones*, an arson case, the prosecution, in response to a request for voluntary discovery, failed to disclose a laboratory report<sup>243</sup> con-

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mine that severance would defeat the ends of justice because of risk of loss of material evidence. See *id.*

238. See text accompanying notes 232 & 233 *supra*.

239. See text accompanying note 233 *supra*.

240. See generally ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, *supra* note 217; Maguire, *Proposed New Federal Rules of Criminal Procedure*, 23 ORE. L. REV. 56 (1943); Note, *Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure*, 74 YALE L.J. 553 (1965). It has been observed:

[I]f you can pile up a number of charges against a man, it is quite often the case that the jury will convict, where, if they were listening to the evidence on one charge only, they would find it wholly insufficient as to the degree of proof required.

Maguire, *supra*, at 58-59.

Joinder of offenses creates a dilemma for the defendant who wishes to testify in his own behalf regarding some of the joined offenses. In *Cross v. United States*, 335 F.2d 987 (D.C. Cir. 1964), the court encountered such a situation and found sufficient prejudice to require a new trial. In a recent case, *State v. Creech*, 37 N.C. App. 261, 245 S.E.2d 817, *cert. denied*, 295 N.C. 554, 248 S.E.2d 731 (1978), the court rejected defendant's argument that he had been prejudiced in this manner.

241. 296 N.C. 75, 248 S.E.2d 858 (1978).

242. 295 N.C. 21, 243 S.E.2d 771 (1978).

243. The laboratory report indicated that no inflammable accelerants were found in defend-

taining potentially exculpatory information.<sup>244</sup> The prosecutor had agreed to comply and had furnished some material in response, but, apparently through oversight, never informed defendant of the existence of or information contained in the laboratory report. Defendant learned of the report only after his conviction and moved for relief on the ground that material evidence that had been unavailable to him and that could not with due diligence have been discovered by him at trial<sup>245</sup> was now available. The State contended that defendant had not exercised due diligence in discovering the evidence because he had not moved for court-ordered discovery. The court's reasoning in rejecting this contention was sound. A motion to compel discovery may be made only after there has been some indication that the party from whom discovery is sought will not fully comply.<sup>246</sup> In this case, because the prosecutor had agreed to comply and had partially complied, defendant had no reason to know the prosecutor had not fully complied and thus had no grounds for seeking court-ordered discovery.

By emphasizing the reasonableness of defendant's actions in light of the surrounding circumstances, the court's interpretation should produce equitable and reasonable results and will promote use of voluntary discovery. Had the court adopted the State's interpretation, voluntary discovery in criminal prosecutions would become merely a token gesture prior to court-compelled discovery, in order that defendants could protect their statutory rights.

In *Stevens*, the second discovery case decided by the supreme court, the district attorney replied in answer to a request for discovery that he had no oral statement of defendant that he intended to offer in evidence at trial.<sup>247</sup> He actually did possess summaries of defendant's oral statements, but, because they were largely exculpatory, did not in-

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ant's outer clothing. 296 N.C. at 78-79, 248 S.E.2d at 860. The investigating officer testified that he had smelled kerosene on defendant when he arrived at the scene. *Id.* at 76, 248 S.E.2d at 859.

244. The request, in part, was for material discoverable by court order under N.C. GEN. STAT. § 15A-903(e) (1978). 296 N.C. at 79, 248 S.E.2d at 860. This provision provides for discovery of "results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the case, . . . within the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the prosecutor." N.C. GEN. STAT. § 15A-903(e) (1978).

245. This ground is contained in N.C. GEN. STAT. § 15A-1415(b)(6) (1978).

246. There must be no response, or a negative or unsatisfactory one. 296 N.C. at 80, 248 S.E.2d at 861; see N.C. GEN. STAT. § 15A-902(a) (1978).

247. 295 N.C. at 37, 243 S.E.2d at 781. It appeared that this response was purely voluntary on the part of the prosecutor since defendant had not requested this information under N.C. GEN. STAT. § 15A-903(a)(2) (1978). The court found it unnecessary to decide whether the prosecutor's response obviated the need for such a request. 295 N.C. at 37, 243 S.E.2d at 781.

tend to use them in his case. At trial, defendant took the stand and gave testimony that was inconsistent with those prior oral statements. In rebuttal, the district attorney sought to introduce the oral statements and defendant objected. The court overruled the objection, but granted a continuance to allow defense counsel time to examine the statements.<sup>248</sup>

On appeal, defense counsel argued that his client was prejudiced because, had counsel known the substance of the oral statements, he would not have allowed defendant to take the stand.<sup>249</sup> The court summarily rejected this contention, saying that the discovery procedures could not be used to protect perjury.<sup>250</sup> The remedy employed here, a continuance, was sufficient to protect against the introduction of surprise evidence.<sup>251</sup> Of greater importance was the court's discussion of the meaning of G.S. 15A-903(a)(2), the statute providing for discovery of defendant's oral statements "which the State intends to offer in evidence at the trial."<sup>252</sup> Although the court did not seek to define the limits of intent, it did indicate that subjective intent, or intent to use in the case in chief was not the proper interpretation, since this would circumvent the purpose of the statute.<sup>253</sup> The court, instead, preferred to advise the prosecution to comply fully with the legislative intent to permit broad discovery and disclose all material that might be used at trial.<sup>254</sup> While this case gives no definitive ruling on the meaning of G.S. 15A-903(a)(2),<sup>255</sup> it does indicate judicial approval of liberal discovery and gives a practical framework within which both defense and prosecution would be well-advised to work.

### *L. Identification of Defendant*

The North Carolina Court of Appeals in *State v. Connally*<sup>256</sup> interpreted and applied the test of admissibility for unnecessarily suggestive pretrial identification procedures recently enunciated by the United

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248. 295 N.C. at 36, 243 S.E.2d at 780.

249. *Id.* at 37, 243 S.E.2d at 781.

250. *Id.*

251. The court stated that the remedy utilized here would have been proper had there been a motion under N.C. GEN. STAT. § 15A-903(a)(2) (1978). Therefore, it was unnecessary to reach defendant's contention that the district attorney's reply excused the necessity of making the motion. 295 N.C. at 37, 243 S.E.2d at 781.

252. N.C. GEN. STAT. § 15A-903(a)(2) (1978).

253. 295 N.C. at 36-37, 243 S.E.2d at 780-81.

254. *Id.* at 37, 243 S.E.2d at 781.

255. N.C. GEN. STAT. § 15A-903(a)(2) (1978).

256. 36 N.C. App. 43, 243 S.E.2d 788 (1978).

States Supreme Court in *Manson v. Brathwaite*.<sup>257</sup> The *Manson* test evaluates reliability of the suggestive pretrial identification according to the following factors: " 'the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.' " <sup>258</sup> These factors are to be weighed against the "corrupting effect"<sup>259</sup> of the suggestive identification.

In *Connally*, defendant was charged with uttering a forged instrument.<sup>260</sup> He presented an alibi defense, the essence of which was that he had not been in Reidsville, the city where the check was uttered, on the day of the crime.<sup>261</sup> In rebuttal, the State presented Moody, a salesclerk, to testify that defendant had been in his store in Reidsville on that day.<sup>262</sup> Defendant made a prior objection to Moody's identification testimony and moved for a *voir dire* hearing to determine its admissibility.<sup>263</sup> The court denied the motion, refusing to hold *voir dire*, and Moody identified defendant as having been present in his store on that day.<sup>264</sup> On cross-examination, defendant elicited the details of Moody's observations of defendant, both in the store and at the pretrial show-up where he first identified defendant.<sup>265</sup> The court of appeals held that failure to hold *voir dire* was prejudicial error under these circumstances and remanded for a new trial.<sup>266</sup>

In deciding whether the judge's error was prejudicial, the court appeared to use a two-step analysis, incorporating the *Manson* test for admissibility of identification evidence derived from an unnecessarily suggestive pretrial procedure. The court first sought to determine whether the pretrial procedure met the *Manson* standards of reliability.

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257. 432 U.S. 98 (1977). In *Manson*, the suggestiveness of pretrial procedures was already established; the question was what standard should be applied to determine the resulting identification's admissibility.

258. *Id.* at 114 (quoting *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972)).

259. *Id.*

260. He was also charged with breaking and entering, larceny, and forgery of the uttered check. 36 N.C. App. at 44, 243 S.E.2d at 789. The identification issue arose with respect to the uttering charge only.

261. *Id.* at 45, 243 S.E.2d at 790.

262. *Id.*

263. *Id.* at 48, 243 S.E.2d at 792. A *voir dire* hearing upon the competency of a witness to identify the defendant is required any time a defendant makes a timely objection to the testimony and requests that a *voir dire* be held. See *State v. Waddell*, 289 N.C. 19, 220 S.E.2d 293 (1975), modified on other grounds, 428 U.S. 904 (1976).

264. 36 N.C. App. at 48, 243 S.E.2d at 792.

265. *Id.* at 49-50, 243 S.E.2d at 793.

266. *Id.* at 50-51, 243 S.E.2d at 793.

Although it is not clear from the opinion,<sup>267</sup> the court apparently made this inquiry because under the first step of the test, if it finds that the pretrial procedure was reliable, it then will hold that the failure to conduct *voir dire* was harmless error. By definition, *reliable* pretrial identification evidence is not "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."<sup>268</sup> If the pretrial procedure is found to be unreliable, then the court will proceed to decide whether the in-court identification was likely to have been tainted by the pretrial procedure,<sup>269</sup> the test formulated in *Simmons v. United States*.<sup>270</sup>

Under the *Connally* facts, the court found that the show-up confrontation did not meet the *Manson* standards of reliability<sup>271</sup> because Moody observed defendant for only a few minutes in a crowded store, had no reason to pay particular attention to defendant, gave no accurate description of him and the show-up occurred two months after the in-store observation.<sup>272</sup> The court did not rule on the admissibility of Moody's in-court identification,<sup>273</sup> but hinted that its admissibility was doubtful<sup>274</sup> since the standards for determining the admissibility of in-court identification are similar to those for pretrial confrontations.<sup>275</sup>

The decision in *Connally* is unlikely to have a significant impact on the conduct of the trial,<sup>276</sup> and may have only a limited effect in the appellate courts. Without the *Connally* test, the identification issue would be decided under the *Simmons* test by determining whether

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267. The court applied the *Manson* test without articulating a reason, *id.* at 49, 243 S.E.2d at 792, but since the pretrial identification evidence was presented by defendant and not the prosecution, its admissibility was not in issue. Therefore, it is reasonable to conclude that the reliability of the pretrial identification was used as an indicium of the prejudice, or lack thereof, resulting from failure to hold *voir dire* on the admissibility of the in-court identification.

268. *Simmons v. United States*, 390 U.S. 377, 384 (1968). This is the test for determining whether the in-court identification is impermissibly tainted by the suggestive pretrial procedure.

269. *Id.* If the in-court identification is tainted, then failure to hold *voir dire* is prejudicial error; if it is not tainted, the error is harmless.

270. 390 U.S. 377 (1968).

271. The court stated that the initial observation of defendant did not meet the reliability standards of *Manson*, 36 N.C. App. at 50, 243 S.E.2d at 793, but probably intended to refer to the pretrial procedure since that was the concern of *Manson*.

272. *Id.*

273. The court remanded the case for a new trial rather than a *voir dire* because failure to hold the hearing had forced defendant to bring before the jury the pretrial identification and the details of the initial observation. Thus, remand for *voir dire* would not cure the trial error. *Id.*

274. *Id.*

275. See *Simmons v. United States*, 390 U.S. 377 (1968); *Stovall v. Denno*, 388 U.S. 293 (1967).

276. The *Connally* test does not alter the requirements of when a *voir dire* hearing must be held, see note 263 *supra*; it merely formulates a new means to test the effects of the error in failing to hold *voir dire*.

there exists a substantial likelihood that the in-court identification was tainted by the pretrial procedure. Because the two tests involve weighing many of the same factors, cases in which the *Connally* test is dispositive and the older is not will be rare. Thus, the cases in which the *Connally* test will prove to be useful are likely to be few.

### M. Jury Argument

The North Carolina Supreme Court, in *State v. Walters*,<sup>277</sup> held that the right to inform the jury of the statutory punishment for the crimes charged applies to offenses for which there is no mandatory sentence. In *Walters*, defendant was tried for second degree murder. At trial, defense counsel requested and was denied permission to read to the jury the statutory provisions prescribing the punishments for first and second degree murder<sup>278</sup> and for voluntary and involuntary manslaughter.<sup>279</sup> Defendant was convicted of voluntary manslaughter and given a fifteen year sentence. The court held that refusal to allow defense counsel to read the provisions relating to second degree murder and manslaughter was error and that prejudice resulted from the denial with respect to the manslaughter provisions, entitling defendant to a new trial.<sup>280</sup>

North Carolina courts have recognized the right to read punishment provisions<sup>281</sup> in the cases of murder and first degree burglary,<sup>282</sup> both of which offenses carry mandatory punishment provisions. *Walters* is the first case to apply the right to an offense without a mandatory sentence. The manslaughter statute that defendant requested to read provides for a sentence of not less than four months nor more than twenty years for voluntary manslaughter, and for a fine or imprisonment in the discretion of the court for involuntary manslaughter.<sup>283</sup> The judge's refusal to allow this statute to be read resulted in

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277. 294 N.C. 311, 240 S.E.2d 628 (1978).

278. N.C. GEN. STAT. § 14-17 (Cum. Supp. 1977).

279. *Id.* § 14-18 (1969).

280. 294 N.C. at 314, 240 S.E.2d at 630.

281. The right is based on N.C. GEN. STAT. § 84-14 (1975), which allows the whole case—law as well as fact—to be argued to the jury.

282. See, e.g., *State v. Irick*, 291 N.C. 480, 231 S.E.2d 833 (1977); *State v. McMorris*, 290 N.C. 286, 225 S.E.2d 553 (1976).

283. N.C. GEN. STAT. § 14-18 (1969). The manslaughter statute has been modified by case law to limit sentences for involuntary manslaughter to a maximum of 10 years. *State v. Adams*, 266 N.C. 406, 146 S.E.2d 505 (1966) (punishment for involuntary manslaughter as provided by statute held not to be specific); see N.C. GEN. STAT. § 14-2 (Cum. Supp. 1977). The court assumed that the jury may be informed of this case law modification but did not expressly so hold. 294 N.C. at 315, 240 S.E.2d at 631. Because the appeal dealt with the reading of statutory provi-

prejudice to defendant.<sup>284</sup>

The purpose of the right to read sentencing provisions is to impress upon the jury the seriousness of its duty and to encourage it to give the decision its full and careful consideration.<sup>285</sup> The purpose is *not* to allow the jury to reach its verdict on the basis of the punishment for each possible offense; this consideration should be irrelevant to the jury's decision.<sup>286</sup> In light of the right's intended purpose, it would seem that the refusal to inform the jury of the punishment for second degree murder would be just as prejudicial as the refusal of the reading of the manslaughter provision.<sup>287</sup> In *Walters*, the court stated that the judge's error had hampered the defense "in shaping his argument to persuade the jury . . . that defendant should be acquitted on the ground of self-defense or, at most, convicted of involuntary manslaughter only."<sup>288</sup> The court's language does not reflect the presently recognized purpose of the statute, to impress upon the jury the gravity of its duty. Because the court recognized that refusal to allow the jury to be informed of the punishment provisions impairs defendant's jury argument, *Walters* tacitly broadens the purpose of the right and, to some extent, allows defense counsel to use the punishment information to argue the propriety of certain sentences for the conduct charged.

#### N. Prisoners' Rights

In *Bolding v. Holshouser*,<sup>289</sup> a divided panel<sup>290</sup> of the United States Court of Appeals for the Fourth Circuit reversed an earlier dismissal of a section 1983<sup>291</sup> civil rights suit brought by twenty-nine North Carolina prisoners in the United States District Court for the Western Dis-

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sions only, the inclusion of case law in the punishment information should not be assumed to have been definitively established.

284. 294 N.C. at 314, 240 S.E.2d at 630.

285. *Id.* at 314, 240 S.E.2d at 630; *State v. McMorris*, 290 N.C. 286, 288, 225 S.E.2d 553, 554 (1976).

286. *E.g.*, *State v. Watkins*, 283 N.C. 504, 508, 196 S.E.2d 750, 753 (1973); *State v. Rhodes*, 275 N.C. 584, 588, 169 S.E.2d 846, 848 (1969).

287. The question of prejudice arises only when there is a substantial likelihood that, absent the error, a different result would have been obtained. The test employed by the court was whether the evidence of guilt was overwhelming. Under the *Walters* facts, the court found the evidence of guilt not to be overwhelming. 294 N.C. at 315, 240 S.E.2d at 631.

288. *Id.*

289. 575 F.2d 461 (4th Cir.), *cert. denied*, 99 S. Ct. 121 (1978).

290. A subsequent poll of the full court failed to get the necessary votes to rehear the case. In an addendum to the opinion three judges recorded their dissent from the failure to rehear the case *en banc*. *Id.* at 467 (dissenting opinion). Senior Circuit Judge Field also filed an addendum to the opinion in which he expressed complete accord with the panel dissent. *Id.* at 471.

291. 42 U.S.C. § 1983 (1976).



trict of North Carolina.<sup>292</sup> The prisoner petitioners, as individuals and as representatives of a class composed of all North Carolina prisoners, sought a declaratory judgment that certain prison conditions violated their federal and state constitutional rights.<sup>293</sup> The suit also prayed for comprehensive injunctive relief<sup>294</sup> that, if granted, would involve the federal judiciary in the operation of the entire North Carolina prison system. The district court granted defendants' motion under Federal Rule of Civil Procedure 12(b)(6) on the ground that the complaint set forth legal conclusions unsupported by adequate factual allegations. The district court also stated that it would not grant class relief in this or any similar case because it was unwilling "to take under its control and management the prison system [of North Carolina]."<sup>295</sup>

After a short discussion of the concept of notice pleading embodied in the federal rules,<sup>296</sup> the court of appeals held that the majority of the complaint was improperly dismissed because it did contain "factual allegations sufficient to state a cognizable claim."<sup>297</sup> While the court

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292. The opinion of the district court is not reported. The 29 plaintiffs were incarcerated in 13 penal institutions in various locations in North Carolina. Defendants were the Governor of North Carolina and various officials of the North Carolina Department of Corrections.

Because only eight of the plaintiffs were confined in prisons located in the Western District of North Carolina, defendants moved in the district court under FED. R. CIV. P. 12(b)(3) to dismiss on the ground of improper venue. Although the district court did not find it necessary to rule on the motion, the court of appeals stated that the motion should not be granted because of the special venue provision contained in 28 U.S.C. § 1392(a) (1976). 575 F.2d at 467. That provision states that a civil action "not of a local nature, against defendants residing in different districts in the same state, may be brought in any of such districts." 28 U.S.C. § 1392(a) (1976).

293. The complaint charged that defendants' acts and practices amounted to: 1) cruel and unusual punishment in violation of the eighth amendment to the United States Constitution and article I, § 27 of the North Carolina Constitution; 2) denial of access to the courts and access to counsel in violation of the sixth amendment; and 3) denial of due process of law in violation of the fourteenth amendment.

294. Part of the relief sought included requests for the court to: enjoin defendants from accepting new prisoners until minimum constitutional prison standards relating to food, medicine and other matters were met; declare that each prison inmate is entitled to 80 square feet of living space; require defendants to afford prisoners procedural due process with regard to their parole and classification status; appoint a citizens committee to monitor compliance with any order granting relief. 575 F.2d at 463-64.

Suits seeking similar relief have been successful. See *Battle v. Anderson*, 376 F. Supp. 402 (E.D. Okla. 1974), *aff'd*, 564 F.2d 388 (10th Cir. 1978); *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971). See also Comment, *Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform*, 12 HARV. C.R.-C.L.L. REV. 367, 369 n.12 (1977).

295. 575 F.2d at 463.

296. The court restated the pleading requirements of FED. R. CIV. P. 8 and stated that in testing the sufficiency of a complaint in face of a 12(b)(6) motion "we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 575 F.2d at 464 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

297. 575 F.2d at 465. The court appended to the opinion parts of the substantive portions of

noted that the complaint at issue was overbroad<sup>298</sup> and that "delineation and definition of the issues"<sup>299</sup> would be necessary before the trial could commence, it correctly maintained that summary disposition upon the pleadings was inappropriate under the scheme of the federal rules.<sup>300</sup> The case was remanded for further proceedings.

In *Bolding*, the court of appeals joined an increasing number of courts that have rejected the judicially developed hands-off doctrine,<sup>301</sup> a policy under which courts decline to entertain suits brought by prisoners seeking relief that could entail federal court involvement in the operation of state correctional systems.<sup>302</sup> A number of these courts, finding that prison conditions violate prisoners' constitutional rights, have indeed become deeply involved in the operation of state penal systems.<sup>303</sup> This controversial intervention, which has paralleled simi-

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the complaint. The complaint contained five substantive allegations, which charged: 1) overcrowding; 2) interference with prisoners' mail; 3) poor conditions in isolation; 4) denial of procedural due process at administrative hearings; and 5) poor general conditions. *Id.* at 467-68. The court made a detailed examination of the complaint and concluded that all of plaintiffs' allegations except the due process charge were sufficiently factual to state cognizable claims. In the opinion, the court detailed the allegations that did satisfy the rule 12(b)(6) requirement; for instance, in support of the isolation charge plaintiffs alleged that they are "not provided with three wholesome . . . meals a day; . . . are not provided with toilet articles necessary to keep up their own personal hygiene; . . . are not provided with adequate shower opportunities; . . . are not provided with clean and sanitary linen; and . . . are not provided with adequate exercise and recreation time." *Id.* at 465.

298. *Id.*

299. *Id.*

300. The court noted that before a trial could begin, it would be necessary to determine whether a class should be certified, whether to sever claims and try them separately, and whether to transfer claims to other North Carolina districts. The court also mentioned that issues could be narrowed or perhaps eliminated through use of other techniques contained in the federal rules—discovery, requests to admit, motions for more definite statements, and pretrial conference. *Id.* at 465-66.

301. Under this doctrine courts refused to exercise jurisdiction or even to consider the allegations of a complaint when confronted with a petition from a prisoner. This reluctance stemmed from the view that the courts did not have the power or responsibility to supervise the management of prison systems. See generally *Banning v. Looney*, 213 F.2d 771 (10th Cir.), cert. denied, 348 U.S. 859 (1954); *Garcia v. Steele*, 193 F.2d 276 (8th Cir. 1951); Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

302. For a history of the recent decline of this doctrine see Comment, *Cruel But Not So Unusual Punishment: The Role of the Federal Judiciary in State Prison Reform*, 7 CUM. L. REV. 31 (1976); Note, *Decency and Fairness: An Emerging Judicial Role in Prison Reform*, 57 VA. L. REV. 841 (1971).

The principle vehicle for prisoner suits is an action under 42 U.S.C. § 1983 (1976).

303. See, e.g., *Pugh v. Loche*, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), cert. denied, 98 S. Ct. 3144 (1978) (detailed and extensive 11-point plan ordered into effect and human rights committee created to oversee implementation after finding prison conditions violated eighth amendment); *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971), *aff'd on other grounds sub. nom. Hutto v. Finney*, 437 U.S. 678 (1978) (order for extensive changes in trusty system and barrack and isolation condi-

lar judicial intervention in school desegregation<sup>304</sup> and other areas,<sup>305</sup> has raised questions of federalism and separation of powers.<sup>306</sup> Two recent Supreme Court decisions, *Rizzo v. Goode*<sup>307</sup> and *Meachum v. Fanno*,<sup>308</sup> can be read to give some support to advocates of the hands-off doctrine, who contend that federal courts overstep their proper role when they interfere in the administration of state institutions. The specter of substantial involvement of the federal courts in the administration of the North Carolina prison system prompted the district court in *Bolding* to refuse even to consider the possibility of class relief and sparked a vehement dissent in the court of appeals.

The dissenting opinion began by indicating that it was in fundamental philosophical disagreement with the majority's "basic holding."<sup>309</sup> Citing *Rizzo* and the principles of federalism and state sovereignty, the dissent stated that the very theory of the complaint at issue and the "compass of its allegations and prayers"<sup>310</sup> made it unentertainable and illegal.<sup>311</sup> The dissent argued that extensive relief of the type prayed for by plaintiffs was simply beyond the legitimate and proper power of a federal court to grant and therefore that a rule 12(b)(6) dismissal was appropriate.<sup>312</sup>

In contrast, the majority's discussion of this issue began with a re-

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tions upon finding violation of eighth and fourteenth amendments). See also Comment, *supra* note 294.

304. Some federal district courts have become deeply involved in the operation of local school boards when they have perceived the need to vindicate constitutional guarantees. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (affirming district court's extensive desegregation order); *United States v. Missouri*, 515 F.2d 1365 (8th Cir.), cert. denied, 423 U.S. 951 (1975) (affirming district court's order to consolidate school systems).

305. Legislative reapportionment cases also evidence the proclivity of the courts, in remedying constitutional violations, to become involved in matters traditionally thought to be the responsibility of state legislative and executive bodies. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964) (affirming district court's reapportionment order).

306. See, e.g., *Meachum v. Fanno*, 427 U.S. 215 (1976); *Preiser v. Rodriguez*, 411 U.S. 475 (1973).

307. 423 U.S. 362 (1976). In *Rizzo*, the Court reversed a district court's order that mandated substantial changes in the complaint procedures of the Philadelphia Police Department. The Court warned that the principles of federalism militated against broad injunctive orders aimed at executive branches of government "except in the most extraordinary circumstances." *Id.* at 379.

308. 427 U.S. 215 (1976). In *Meachum*, the Court reversed a district court order that voided the transfer, for disciplinary reasons, of inmates from one prison to another because of due process violations in the disciplinary hearings. In the course of finding that the inmates had no constitutionally protected liberty interest, the Court stated that it was not the business of the federal courts to review the "wide spectrum of discretionary actions that traditionally have been the business of prison administrators." *Id.* at 225.

309. 575 F.2d at 468 (Bryan, J., dissenting).

310. *Id.*

311. *Id.*

312. *Id.* at 469.

minder to the district court "of the scope of a proper exercise of its jurisdiction in an appropriate case."<sup>313</sup> The court stated that "class relief requiring sweeping changes in a state prison system may still be mandated when the proof requires such relief."<sup>314</sup> The court specifically concluded that *Rizzo* could not be read to preclude use of broad injunctions to remedy a clear pattern of unconstitutional conduct. This is the correct interpretation of *Rizzo*. The *Rizzo* Court, in reliance upon the district court's own finding that none of the petitioners' constitutional rights had been violated,<sup>315</sup> voided the injunction at issue because the case "presented no occasion for the District Court to grant equitable relief against petitioners."<sup>316</sup> Although *Rizzo* and other cases do caution that a court must find a clear violation of a constitutional right before it may become involved in the operation of a state institution,<sup>317</sup> the *Bolding* court correctly insisted that *Rizzo* and other cases do not cast doubt upon the ability of federal courts to exercise the full range of equitable power when necessary to remedy a constitutional violation.<sup>318</sup>

In examining the allegations contained in the complaint and reversing and remanding the case for further proceedings, the court was careful to refrain from expressing a view on whether plaintiffs could prove any of the facts alleged and, if so, what type of relief, if any, they would be entitled to. The court frankly recognized that there were many troublesome issues to be confronted before the trial could begin.<sup>319</sup> Yet the court vigorously maintained that, because plaintiffs' complaint did contain allegations sufficiently factual to make it immune to dismissal under rule 12(b)(6), plaintiffs should have been

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313. *Id.* at 466.

314. *Id.* This proposition was also maintained by the United States Court of Appeals for the Fifth Circuit in *Newman v. Alabama*, 559 F.2d 283, 288 (5th Cir. 1977).

315. 423 U.S. at 377.

316. *Id.* This makes clear that the holding in *Rizzo* turned on the lack of a constitutional violation.

317. In *Rizzo*, the Court stated that injunctive relief should be granted only in "a clear and plain case," *id.* at 378 (citing *Irwin v. Dixon*, 50 U.S. (9 How.) 10, 33 (1850)) or only in "extraordinary circumstances," *id.* at 379.

318. See *Hite v. Leeke*, 564 F.2d 670, 672 (4th Cir. 1977); *Newman v. Alabama*, 559 F.2d 283, 288 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 3144 (1978). See also Comment, *supra* note 294, at 382-83.

The court specifically stated that it did not consider *Procunier v. Martinez*, 416 U.S. 396 (1974), overruled. In that case the Court stated that "a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Id.* at 405-06.

319. See note 300 *supra*.

given a chance to present their claims and that it was the court's duty to grant any relief ultimately found appropriate on the proof. To the extent that the district court's dismissal was based on its reluctance to undertake this type of case or its unwillingness to grant class relief that might be mandated upon proof of the facts, the dismissal was, it seems, an abdication of judicial responsibility. *Bolding* correctly held that the twenty-nine prisoner plaintiffs are entitled to their day in court.

*O. Prosecutor's Duty to Disclose*

In *Reddy v. Jones*,<sup>320</sup> the United States Court of Appeals for the Fourth Circuit affirmed the district court's conclusion that a state prosecutor who uses witnesses discovered, kept and provided by federal authorities has no duty to inquire about or disclose inducements made to these witnesses for their favorable testimony if that information is requested by defense counsel. Appellants in *Reddy* were three black civil rights activists, popularly known as the Charlotte 3, convicted in North Carolina state court for the unlawful burning of a stable in 1968.<sup>321</sup> The only testimony placing appellants at the barn came from two witnesses who also testified against one of the appellants in a federal trial<sup>322</sup> shortly before the state trial commenced. The witnesses' statements implicating appellants were first made to federal authorities only after the witnesses themselves were arrested in 1970 for violations of the 1968 Gun Control Act. Two years after appellants' convictions in the state trial, independent investigations by news reporters revealed that the witnesses had agreed to testify only after being promised "relocation" money by federal authorities. The amount was not settled upon until after the state trial, when each witness was paid \$4,000, \$1,000 of which was designated as a reward.<sup>323</sup> Although defense attorneys were aware that the witnesses were being held in protective custody by federal authorities and that immunity from prosecution had been arranged, the financial promises were never made known at the trial, despite appellants' formal requests for information about any promises to witnesses and despite cross-examination of the two witnesses concerning inducements for their testimony.<sup>324</sup>

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320. 572 F.2d 979 (4th Cir. 1977), *cert. denied*, 99 S. Ct. 126 (1978).

321. *Id.* at 981.

322. *United States v. Grant*, No. 63-71 (E.D.N.C. 1972), *aff'd*, 471 F.2d 648 (4th Cir.), *cert. denied*, 414 U.S. 868 (1973).

323. 572 F.2d at 986 (Butzner, J., dissenting).

324. *Id.*

After appellants had exhausted their state remedies, they applied to federal district court for a writ of habeas corpus, based on a denial of due process in the state prosecutor's failure to disclose these "relocation payments." A panel of the court of appeals affirmed the denial of the writ, rejecting appellants' reliance on a line of decisions finding nondisclosures by prosecutors to be constitutional error.<sup>325</sup> In *Brady v. Maryland*,<sup>326</sup> the United States Supreme Court held the suppression by the prosecutor of material evidence upon request—the confession of defendant's companion in the same case—violated due process "irrespective of the good faith or bad faith of the prosecution."<sup>327</sup> This principle, based primarily on the need to protect the accused's opportunity for a fair trial, was held to require reversal in *Giglio v. United States*,<sup>328</sup> in which a key witness denied that his testimony had been induced, when in fact the Assistant United States Attorney, unknown to the trial prosecutor, had promised the witness an "understanding of leniency" in exchange for his testimony. Viewing the prosecutor's office as an entity including the assistant district attorney, the Supreme Court reversed the defendant's conviction, finding the prosecutor held to knowledge of the assistant district attorney's promises, regardless of the latter's failure to inform his superiors or associates. In *Boone v. Paderick*,<sup>329</sup> a police department detective promised to use his influence to help a witness avoid prosecution if he cooperated. The defendant's attorney was unable to uncover any bargains in his cross-examination of the witness, and the prosecutor, unaware of the detective's promise, credited the witness with altruistic motives for giving testimony, as in *Giglio*. The district court distinguished *Giglio* on the ground that the promise had come from a police officer who did not have authority, rather than from the prosecutor's office. Judge Craven, writing for the Fourth Circuit panel, reversed, finding no merit in this distinction since "the police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's attorney, were guilty of the nondisclosure."<sup>330</sup>

The *Reddy* court concluded that these decisions "stand for the principle that facts bearing upon the credibility of a witness, which if

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325. *Id.* at 982; see *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963); *Boone v. Paderick*, 541 F.2d 447 (4th Cir. 1976), *cert. denied*, 430 U.S. 959 (1977).

326. 373 U.S. 83 (1963).

327. *Id.* at 87.

328. 405 U.S. 150 (1972).

329. 541 F.2d 447 (4th Cir. 1976).

330. 541 F.2d at 451 (quoting *Barbee v. Walden*, 331 F.2d 842, 846 (4th Cir. 1964)).

not revealed might falsely mislead a jury, must be revealed, whether the knowledge of such facts resides with the police or the prosecutor."<sup>331</sup> This principle did not apply in *Reddy*, according to the court, because despite the timing of the payments and the cooperation between state and federal officials, the payments to the witnesses by federal authorities were for the witnesses' testimony at the federal trial only and the state prosecution had known nothing of them. The court concluded that although the state may be "proper insurers of the veracity of their own investigations, they cannot be called upon to foretell the knowledge of others resting in some foreign sphere."<sup>332</sup> The court alternatively held that if a duty to disclose did exist, failure to do so constituted harmless error.<sup>333</sup>

The *Reddy* opinion, however, offered no justification for treating the state prosecutor and the federal authorities who discovered and provided the State's witnesses as separate entities. By refusing to find an implied agency relationship in *Reddy* similar to the agency principle applied in *Giglio*, an unfortunate "double entities" doctrine was created.<sup>334</sup> For example, federal authorities investigating a violation of

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331. 572 F.2d at 982.

332. *Id.* at 983.

333. *Id.* Also undisclosed at trial were exculpatory statements by one of the witnesses in a pretrial interview with federal authorities and promises by the state prosecutor to terminate the same witness' 25 year probationary sentence on unrelated charges in exchange for his testimony. The court found no duty to disclose the exculpatory statement, or alternatively that failure to do so was harmless error. *Id.* at 984. The state prosecutor's failure to disclose his promise to terminate the witness' probation was similarly held harmless. *Id.* at 984-85.

The court's alternative holding of harmless error was based on the premise that each piece of undisclosed evidence would have been only cumulative to the evidence already before the jury that tended to impeach the witnesses' credibility. *Id.* at 983. As Judge Butzner's dissent noted,

Under the circumstances, this alternative ruling [of harmless error] is difficult to sustain, and quite properly the panel did not rely solely on it . . . . Instead, the panel affirmed on the district judge's "comprehensive opinion," which . . . is primarily based on the theory that non-disclosure did not violate the fourteenth amendment's guarantee of due process.

*Id.* at 986 (dissenting opinion).

The degree of prejudice necessary to create error requiring reversal or a new trial has been a difficult issue underlying all nondisclosure cases. See generally *United States v. Agurs*, 427 U.S. 97 (1976); Comment, *Prosecutor's Duty to Disclose Reconsidered*, 1976 WASH. U.L.Q. 480.

334. In his dissent to the court's refusal to rehear the case en banc, Judge Butzner noted that the court's decision is basically an extension of the silver platter doctrine. 572 F.2d at 987 (dissenting opinion). The silver platter doctrine would allow federal agents to use evidence obtained as a result of an unconstitutional search or seizure by state officers. The United States Supreme Court in *Elkins v. United States*, 364 U.S. 206 (1960), outlawed this practice on the ground that a person's constitutional rights cannot be stripped from him because state and federal agents cooperate in an investigation and later decide to prosecute in one jurisdiction or another. As the Court stated, "To the victim it mattered not whether his constitutional right has been invaded by a federal agent or by a state officer." *Id.* at 215.

the Hobbs Act<sup>335</sup> could build a case by promising to reward an accomplice. The accomplice could then be turned over to state authorities, who could commence a robbery prosecution on the basis of the informer's testimony. The state trial could proceed without disclosure of the promises so long as the state prosecution did not learn of the federal promises. Absent such disclosure, the state prosecution would naturally be stronger than the federal, in which disclosure of the promises would clearly be required by *Giglio*.

The proposition endorsed by the court that undisclosed promises by a state police officer or associate district attorney may deprive a trial of the fairness required by due process, but that similar promises by federal law enforcement agents do not, seems illogical because the potential for false testimony is just as great and a finding of guilt just as unreliable in the latter as in the former cases. Additionally, fair procedures that protect a defendant constitute an end in themselves, for a fair trial is as important to society as the correct result in a particular case.<sup>336</sup> Arguably this reality was ignored in the *Reddy* decision.

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## VII. EVIDENCE

### A. *Hearsay: Declarations Against Penal Interest*

Since 1833, North Carolina courts have excluded as hearsay declarations against penal interest, including third-party extrajudicial confessions to the crime for which a defendant is charged.<sup>1</sup> In the past, North Carolina and the majority of jurisdictions have restricted their declarations against interest exceptions to the hearsay rule to declara-

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335. 18 U.S.C. § 1951 (1976).

336. See generally Comment, *supra* note 333.

1. State v. Madden, 292 N.C. 114, 232 S.E.2d 656 (1977); State v. English, 201 N.C. 295, 159 S.E. 318 (1931); State v. May, 15 N.C. 280, 4 Dev. 328 (1833).



tions against pecuniary or proprietary interests.<sup>2</sup> In *State v. Haywood*,<sup>3</sup> however, Chief Justice Sharp reevaluated case law excluding declarations against penal interest in view of the emerging trend toward admission of such evidence<sup>4</sup> and concluded that declarations against penal interest are admissible, subject to certain conditions designed to preclude false confessions.<sup>5</sup>

In *Haywood*, three defendants indicted for assault with a deadly weapon with intent to kill and inflicting serious injury,<sup>6</sup> and for robbery

2. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 277 (2d ed. 1972) [hereinafter cited as MCCORMICK]; 1 D. STANSBURY'S NORTH CAROLINA EVIDENCE § 147 (H. Brandis rev. 1973) [hereinafter cited as STANSBURY].

3. 295 N.C. 709, 249 S.E.2d 429 (1978).

4. See generally Note, *Declarations Against Penal Interest: Standards of Admissibility Under an Emerging Majority Rule*, 56 BOSTON U.L. REV. 148 (1976). The Note writer observed that seven states (California, Kansas, Nevada, New Jersey, New Mexico, Utah and Wisconsin) and two possessions (Canal Zone and Virgin Islands) have enacted statutes recognizing the admissibility of declarations against penal interest. Fourteen states (Arizona, Hawaii, Idaho, Illinois, Maryland, Minnesota, Missouri, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, Texas and Virginia) have judicially adopted the hearsay rule exception for declarations against penal interest. *Id.* at 149 n.5. In addition, Arkansas and Maine have enacted statutes recognizing this exception, ARK. STAT. ANN. § 28-1001, Rule 804(b)(3) (Supp. 1976); ME. R. EV. 804(b)(3) (1975), and Tennessee has judicially extended the hearsay exception, *Breeden v. Independent Fire Ins. Co.*, 237 Tenn. 769, 530 S.W.2d 769 (1975).

Mr. Justice Holmes, dissenting in *Donnelly v. United States*, 228 U.S. 243, 277-78 (1913), succinctly stated the criticism against restricting the declaration against interest exception to declarations against economic interest:

The rules of evidence in the main are based on experience, logic and common sense, less hampered by history than some parts of the substantive law. . . . [N]o other statement is so much against interest as a confession of murder, it is far more calculated to convince than dying declarations, which would be let in to hang a man . . . .

Other criticism of the traditional restriction to economic interests asserts that statements against penal interests generally are no less trustworthy than those exposing the declarant to potential financial losses. See, e.g., *People v. Spriggs*, 60 Cal. 2d 868, 389 P.2d 377, 36 Cal. Rptr. 841 (1964); *People v. Edwards*, 396 Mich. 551, 242 N.W.2d 739 (1976); *Hines v. Commonwealth*, 136 Va. 728, 117 S.E. 843 (1923); Powers, *The North Carolina Hearsay Rule and the Uniform Rules of Evidence*, 34 N.C.L. REV. 171, 197-98 (1956).

Perhaps the most common argument in support of admitting declarations against penal interest is that such statements are no less reliable than those against economic interests. "The desire to avoid criminal liability is as strong as the desire to protect economic interests. It is the determination that the declaration exposes the declarant to a penalty that gives such statements sufficient reliability, not the particular interest that is jeopardized." Note, *supra*, at 152. Moreover, criminal liability often includes pecuniary liability, *id.* at 156 n.46, as in the case of a driver who admits carelessness, exposing himself to both manslaughter charges and a wrongful death claim. Wigmore has advocated extending the hearsay exception to include declarations against penal interest because the traditional rule is an "arbitrary" and "barbarous doctrine." 5 J. WIGMORE, EVIDENCE § 1477 (J. Chadbourne rev. 1974).

5. 295 N.C. at 730, 249 S.E.2d at 442. The *Haywood* decision applies only to third-party confessions offered by the defense to exculpate a criminal defendant. The court was silent about whether such declarations could be used in civil cases or in criminal trials when offered by the prosecution.

6. See N.C. GEN. STAT. § 14-32(a) (Cum. Supp. 1977).

with firearms,<sup>7</sup> contended that a confession by a fourth defendant (declarant), even though inadmissible against declarant because of a *Miranda* warning violation, should be admitted to exculpate the other defendants because it was a declaration against declarant's penal interest.<sup>8</sup> Declarant's confession was that he and the other defendants came to North Carolina together and that they stopped at the store where "[declarant] went in to rob the store but [the prosecuting witness] put up such a fight that I shot him . . . ."<sup>9</sup> The supreme court held that although it would adopt a hearsay exception for declarations against penal interest, the trial court's exclusion of this evidence was not prejudicial to defendants and was in accord with traditional evidentiary rules excluding declarations against penal interest when certain conditions precedent to their admissibility are not present. The court observed that the statement was entirely consistent with the prosecution's theory that "all the defendants were engaged in a joint enterprise, aiding and abetting each other," and affirmed the convictions.<sup>10</sup>

While the North Carolina Supreme Court chose to recognize a hearsay exception for declarations against penal interest in *Haywood*, the declaration offered in *Haywood* could not exonerate the proponents because it failed to meet the court's threshold criteria for admitting such declarations.<sup>11</sup> The admissibility of declarations against penal interest depends on the trial judge's preliminary finding that such statements reach a certain threshold of trustworthiness.<sup>12</sup> The threshold criteria enumerated in *Haywood*, which expand the traditional requirements for admitting declarations against pecuniary and proprietary interests,<sup>13</sup> are as follows: The declarant must be unavailable as a witness,

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7. See *id.* § 14-87.

8. 295 N.C. at 721, 249 S.E.2d at 436.

9. *Id.* at 716, 249 S.E.2d at 434. Defendant's confession stated:

I came to Clinton from D.C. with James and Linda Watkins, John Brown and Ronald Covington. We stopped at Jackson's Red & White in Clinton. I went in to rob the store but Mr. Jackson put up such a fight that I shot him and ran out of the store. Paul Haywood, 5936 East Capitol Street, Northeast, Washington, D.C. Witness, Lieutenant J.H. Goodwin.

*Id.*

10. *Id.* at 721, 249 S.E.2d at 436-37.

11. *Id.* at 730, 249 S.E.2d at 442.

12. *Id.*

13. The traditional requirements for admission of a declaration against pecuniary or proprietary interest are stated in 1 STANSBURY, *supra* note 2, at 493-95, as follows:

(1) The declarant must be dead, or for some other reason, unavailable as a witness. (2) The fact stated must have been against the declarant's interest when made, and he must have been conscious that it was so. (3) The declarant must have had competent knowledge of the fact declared. (4) There must have been no probable motive for the declarant to falsify. (5) The interest must be a pecuniary or proprietary (as distinguished from a

have appreciated at the time his confession was made that it had the potential of actually endangering his personal liberty, have had the opportunity to have committed the crime, have had no probable motive to fabricate a confession; the declaration must be a voluntary confession to the crime for which the defendant is on trial and must be inconsistent with the defendant's guilt; and the circumstances surrounding the crime and the declaration must corroborate the confession and must indicate its probable reliability.<sup>14</sup>

The formulation of the declarations against interest exception to the hearsay rule approved by the *Haywood* court is essentially a cautious version of the rule laid down by the United States Supreme Court in *Chambers v. Mississippi*.<sup>15</sup> In approving the admission of declara-

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penal) one, and it is on this ground that the defendant in a criminal case is not permitted to show the confession of another person.

14. 295 N.C. at 730, 249 S.E.2d at 442. The exact requirements for the admission of declarations against penal interests stated by the court are:

(1) The declarant must be dead; beyond the jurisdiction of the court and the reach of its process; suffering from infirmities of body or mind which preclude his appearance as a witness either by personal presence or by deposition; or exempt by ruling of the court from testifying on the ground of self-incrimination. As a further condition of admissibility, in an appropriate case, the party offering the declaration must show that he has made a good-faith effort to secure the attendance of the declarant.

(2) The declaration must be an admission that the declarant committed the crime for which defendant is on trial, and the admission must be inconsistent with the guilt of the defendant.

(3) The declaration must have had the potential of actually jeopardizing the personal liberty of the declarant at the time it was made and he must have understood the damaging potential of his statement.

(4) The declarant must have been in a position to have committed the crime to which he purportedly confessed.

(5) The declaration must have been voluntary.

(6) There must have been no probable motive for the declarant to falsify at the time he made the incriminating statement.

(7) The facts and circumstances surrounding the commission of the crime and the making of the declaration must corroborate the declaration and indicate the probability of trustworthiness.

*Id.*

15. 410 U.S. 284 (1973). In *Chambers*, defendant was charged with murder and sought to exculpate himself by offering testimony of witnesses to an extrajudicial confession. Declarant was called as a witness, but renounced his earlier confessions. The Mississippi voucher rule precluded impeachment of one's own witness and the other witnesses were prevented from testifying because the hearsay exception did not extend to penal interests. *Id.* at 285-94. In finding that defendant's fourteenth amendment due process right to present evidence necessary to ensure a fair trial was denied by the exclusion of the confessions, the Court relied heavily on the spontaneity of the confessions and the strong corroborative evidence as indicia of trustworthiness. *Id.* at 300-03. Although *Chambers* did not establish minimum standards for the admissibility of confessions to crime, see generally MCCORMICK, *supra* note 2, § 278 (Supp. 1978), North Carolina's evidentiary requirements enumerated in *Haywood* track the criteria relied upon in *Chambers*. In deciding *Haywood*, the court noted that no constitutional issue was raised, as in *Chambers*, and observed that the holding in *Chambers* was limited because under the facts presented due process demanded admission of the confessions. It seems clear, however, that North Carolina's formulation

tions against penal interest, the *Chambers* Court attributed much of the reliability of proffered extrajudicial confessions to the circumstantial evidence surrounding the making of the statements. Evidence of the surrounding circumstances can enhance the probability that the confessions were actually made and that their contents were not falsified to exculpate the defendant in the trial. Although the *Chambers* rule's corroboration requirement has been criticized<sup>16</sup> and rejected by a small minority of jurisdictions,<sup>17</sup> it is imposed by the majority of jurisdictions admitting extrajudicial confessions<sup>18</sup> and by the federal courts<sup>19</sup> to diminish the risk of fraudulent confessions exculpating the criminal defendant.<sup>20</sup>

Conditioning the admission of declarations against penal interest on a preliminary determination by the trial court of corroborating facts and circumstances surrounding the commission of the crime and the making of the declaration raises a question regarding the appropriate provinces of the judge and the jury. Arguably, the threshold level of reliability has been met if the declaration has the potential of actually jeopardizing the declarant's penal interest at the time it was made, and the declarant understood this potential and voluntarily made the statement without a probable motive to lie. No greater indicia of trustworthiness is demanded for statements against economic interest.<sup>21</sup> The traditional suspicions about procured confessions appear insufficiently substantiated to justify such disparate requirements for the admission of statements against penal and economic interests.<sup>22</sup> Additionally, that declarant was in a position to have committed the crime to which she or he confessed could be presumed, subject to the introduction of contrary evidence by the State. Corroborating circumstances arguably affect the weight of the evidence rather than its admissibility and

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of the declaration against penal interest exception was designed to protect defendants' rights to due process.

16. See Note, *supra* note 4, at 173-78 (contending that corroborating evidence should be weighed by jury in considering credibility).

17. See, e.g., *People v. Spriggs*, 60 Cal. 2d 868, 389 P.2d 377, 36 Cal. Rptr. 841 (1964); *People v. Edwards*, 396 Mich. 551, 242 N.W.2d 739 (1976).

18. See, e.g., *State v. Larsen*, 91 Idaho 42, 415 P.2d 685 (1966); *Hines v. Commonwealth*, 136 Va. 728, 117 S.E. 843 (1923).

19. FED. R. EVID. 804(b)(3). Prior to the effective date of Federal Rule 804(b)(3), a corroboration requirement was approved in *United States v. Goodlow*, 500 F.2d 954 (8th Cir. 1974).

20. Aside from the fraudulent procurement of confessions problem, it is not uncommon for a number of persons to "confess" to highly publicized or spectacular crimes.

21. Compare note 13 *supra* (requirements for declarations against economic interest) with note 14 *supra* (requirements for declarations against penal interest).

22. See 5 J. WIGMORE, *supra* note 4 (discounting fear of procured confessions as "the ancient rusty weapon" preventing justified use of exculpations as well as fraudulent use of confessions).

should be considered by the jury.<sup>23</sup>

### B. Hearsay: Dying Declarations

In *State v. Stevens*,<sup>24</sup> the North Carolina Supreme Court ended any speculation that the admissibility requirements for the dying declaration exception to the hearsay rule were made more restrictive by the 1973 codification in G.S. 8-51.1<sup>25</sup> of the common law rule.<sup>26</sup> Before enactment of section 8-51.1, dying declarations were admissible in homicide and wrongful death actions<sup>27</sup> provided the declarant was "in actual danger of death" at the time of the statement, had "full apprehension of his danger," did actually die,<sup>28</sup> and would have been compe-

23. Compare the stringent admission requirements for a declaration against penal interest outlined in *Haywood* with the relatively lenient requirements for an admission implied by silence in *State v. Fewell*, 38 N.C. App. 592, 248 S.E.2d 351 (1978). Generally, if a statement that would naturally be denied if untrue is made in the presence of a person able to hear, understand and respond, his silence or failure to deny it justifies receiving the statement as an admission implied by silence. McCORMICK, *supra* note 2, § 270. In *Fewell*, a statement accusing defendant of murder was admitted although the witness testified defendant acted "like he was going crazy or something, in some kind of a daze." 38 N.C. App. at 593, 248 S.E.2d at 352 (emphasis added). The court of appeals concluded the statement was properly admitted without mentioning the questionable ability of defendant to hear, understand or respond, and without citing any evidence in support of his mental competence at the time of the accusation. *Id.* at 595-96, 248 S.E.2d at 353.

Indeed, there is no evidence in *Fewell* conflicting with the witness' observation that the accused was in "a daze." See also J. WIGMORE, *supra* note 4, § 1072 ("[I]f on the circumstances it appears that the party was in fact physically disabled from answering, his silence of course signifies nothing, and the statement is inadmissible.") The opinion does not indicate whether the trial judge initially determined the competence of defendant and left the question of his ability to understand to the jury. Such an allocation of judge and jury functions is prescribed in *State v. Guffey*, 261 N.C. 322, 325, 134 S.E.2d 619, 622 (1964).

24. 295 N.C. 21, 243 S.E.2d 771 (1978); accord, *State v. Penn*, 36 N.C. App. 482, 244 S.E.2d 702 (1978) (follows *Stevens*).

25. N.C. GEN. STAT. § 8-51.1 (Cum. Supp. 1977) provides:

The dying declarations of a deceased person regarding the cause or circumstances of his death shall be admissible in evidence in all civil and criminal trials and other proceedings before courts, administrative agencies and other tribunals to the same extent and for the same purposes that they might have been admissible had the deceased survived and been sworn as a witness in the proceedings, subject to proof that:

(1) At the time of the making of such declaration the deceased was conscious of approaching death and believed there was no hope of recovery;

(2) Such declaration was voluntarily made.

*Id.* (emphasis added).

26. 1 STANSBURY, *supra* note 2, § 146, at 488 n.17 (Supp. 1976).

27. *Id.* § 146.

28. In *State v. Robinson*, 35 N.C. App. 617, 242 S.E.2d 197 (1978), the court of appeals would have been faced with an interesting question under the dying declaration exception had the accused not opened the door to testimony concerning statements made by his assault victim and then failed to object promptly to the hearsay accusations. The court noted that at the time the declarant identified defendant as her assailant, the victim was in actual danger of death and had full apprehension of her danger. This hearsay exception, however, requires that death actually ensue, 1 STANSBURY, *supra* note 2, § 146; the victim in *Robinson* suffered irreversible brain damage and will probably remain in a coma for the rest of her life.

tent to testify if living.<sup>29</sup> Section 8-51.1 varies the "full apprehension" formulation of the common law rule to require preliminary proof that the declarant "was conscious of approaching death and believed there was no hope of recovery."<sup>30</sup>

In two 1976 cases,<sup>31</sup> the North Carolina Supreme Court observed that the "no hope of recovery" language in section 8-51.1 might be more limiting than existing case law, but declined to reach a conclusion on the matter. During the 1977 fall term, before *Stevens* was decided, the court expressly stated that the statute restricted the former common law exception "since the court must find, in addition to an apprehension of death with death in fact ensuing, that the deceased believed there was no hope of recovery."<sup>32</sup>

After reviewing the explanatory statements in the cases prior to enactment of the statute,<sup>33</sup> the *Stevens* court reaffirmed the case law and concluded the statutory terminology did not change those requirements.<sup>34</sup> Whether the test is stated as "no hope of recovery" or "full apprehension" of the "actual danger of death," it is the declarant's belief in the imminence of death that is thought to assure the trustworthiness of a dying declaration.<sup>35</sup>

### C. *Privileged Communications: Waiver*

An inflexible application of the concept of waiver of the attorney-

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It seems that requiring actual death rather than legitimate unavailability adds nothing to the trustworthiness of the statement or the need for its admission. Since the statute is not limited to homicide prosecutions, an absolute requirement of death is arbitrary. In extending the exception's application to all civil and criminal actions, the legislature must have acted out of belief in the reliability of such statements rather than belief in the necessity of ending secret murders. See 1 STANSBURY, *supra*. Obviously, the subsequent fate of the victim cannot be determinative of the trustworthiness of a statement made in the face of imminent death.

29. State v. Jordan, 216 N.C. 356, 362, 5 S.E.2d 156, 159 (1939).

30. N.C. GEN. STAT. § 8-51.1 (Cum. Supp. 1977), *quoted in* note 25 *supra*.

31. State v. Cousin, 291 N.C. 413, 419-20, 230 S.E.2d 518, 522 (1976); State v. Bowden, 290 N.C. 702, 712, 228 S.E.2d 414, 421 (1976).

32. State v. Lester, 294 N.C. 220, 226, 240 S.E.2d 391, 397 (1978).

33. State v. Jordan, 216 N.C. 356, 363, 5 S.E.2d 156, 160 (1939) (declarant must have had "full apprehension of his danger" of death); State v. Dalton, 206 N.C. 507, 513, 174 S.E. 422, 426 (1934) ("It is not necessary that the declarant should be in the very act of dying; it is enough if he be under the apprehension of impending dissolution."); State v. Tate, 161 N.C. 280, 282, 76 S.E. 713, 714 (1912) (it is enough if declarant "believed he was going to die").

34. 295 N.C. at 29, 243 S.E.2d at 776; *accord*, State v. Penn, 36 N.C. App. 482, 244 S.E.2d 702 (1978).

35. 5 J. WIGMORE, *supra* note 4, § 1440 ("The essential idea is that the belief should be a positive and absolute one, not limited by doubts or reserves; so that no room is left for the operation of worldly motives . . .").

client privilege led to harsh results for defendant in *State v. Tate*,<sup>36</sup> a recent murder and felonious assault prosecution. According to the assault victims' testimony, defendant said he was going to kill them because his lawyer wrote to him and told him that he would receive a ten year sentence for an earlier shooting into the victims' apartment.<sup>37</sup> The State called defendant's former attorney as a witness and elicited testimony merely that the attorney had written a letter to defendant three days before the crimes alleged in *Tate*.<sup>38</sup> To rebut his former attorney's testimony, defendant sought to establish on cross-examination that although the attorney wrote a letter to him, it contained no statement that defendant would receive ten years for the earlier offense.<sup>39</sup> The trial judge, however, ruled out of the jury's presence that such testimony would constitute a waiver of the attorney-client privilege with regard to the contents of the entire letter.<sup>40</sup> Defendant decided not to cross-examine his former attorney after receiving this ruling.

On appeal the North Carolina Supreme Court approved the trial judge's ruling, rejecting defendant's argument that he should be allowed to show that the letter did not contain the alleged statement without waiving his privilege in respect of the entire contents of the letter.<sup>41</sup> As the *Tate* court noted, it is established law that the substance, but not the existence, of attorney-client communications is privileged from disclosure.<sup>42</sup> Thus, it was proper to allow the attorney to testify that he had written the letter to defendant three days before the assault and murder. It is also settled law that a client who offers an attorney's testimony regarding the substance of a communication waives the privilege with regard to the entire communication on the matter.<sup>43</sup> The concept of waiver stems from the reasoning that when a

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36. 294 N.C. 189, 239 S.E.2d 821 (1978). For a discussion of waiver of attorney-client privilege, see generally C. McCORMICK, *supra* note 2, § 93; 1 STANSBURY, *supra* note 2, § 62; 8 J. WIGMORE, *supra* note 4, § 2327.

37. 294 N.C. at 192, 239 S.E.2d at 824.

38. *Id.*

39. *Id.* at 193, 239 S.E.2d at 824. Tate's former lawyer testified in the absence of the jury that the letter did not contain the statement in question.

40. *Id.* at 193, 239 S.E.2d at 824-25.

41. *Id.* at 194, 239 S.E.2d at 825. Justice Exum dissented, stating that he believed it was error to permit the attorney's acknowledgement of the letter without also allowing defendant to establish what the letter did not contain. *Id.* at 200, 239 S.E.2d at 828-29 (dissenting opinion).

42. See generally C. McCORMICK, *supra* note 2, §§ 87-93; 1 STANSBURY, *supra* note 2, § 621; 8 J. WIGMORE, *supra* note 4, § 2309.

43. *Hayes v. Ricard*, 244 N.C. 313, 93 S.E.2d 540 (1956); *State v. Artis*, 227 N.C. 371, 42 S.E.2d 409 (1947); *Jones v. Marble Co.*, 137 N.C. 237, 49 S.E. 94 (1904); McCORMICK, *supra* note 2, § 93; 1 STANSBURY, *supra* note 2, § 62; 8 J. WIGMORE, *supra* note 4, § 2327, at 636.

client's action "touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not."<sup>44</sup> Further examination of the policy underlying the attorney-client privilege suggests, in addition, that waiver is designed to prevent a client from using the privilege as a sword as well as a shield.<sup>45</sup> Thus, a client may not use partial disclosure when it is advantageous to her or his case to do so, while withholding the damaging information that remains.

The North Carolina cases cited as authority for the waiver concept by the supreme court may be distinguished from *Tate* on their facts. The client in each of the cited cases initiated the testimony regarding the privileged information by testifying himself or by calling the attorney as a witness.<sup>46</sup> Arguably, the clients in the earlier cases engaged in the deliberate, offensive use of testimony contemplated by the waiver rule, whereas *Tate* reacted defensively in proffering testimony about what the letter did not contain. The policy of the waiver rule would not be undermined if defendant *Tate* had been allowed to dispel the incriminating inference arising from the State's direct examination of his attorney. Defendant sought not to wield the privilege offensively but sought only to preserve the utility of his attorney-client privilege. Under these unusual facts, *Tate*'s silence and reliance on the privilege of nondisclosure might have appeared to the jury to be his acknowledgement and acquiescence in the damaging implications of the attorney's testimony concerning the letter.

#### *D. Character: Impeachment by Prior Acts of Misconduct*

On cross-examination, counsel may question any witness concerning specific acts of prior misconduct that tend to discredit the witness.<sup>47</sup> While most jurisdictions limit such cross-examination to acts of misconduct that are related to the credibility of the witness,<sup>48</sup> North Carolina courts allow the cross-examiner to bring forth any disparaging facts tending to discredit the testimony of the witness even though those

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44. 8 J. WIGMORE, *supra* note 4, § 2327.

45. *Id.*

46. See cases cited note 43 *supra*.

47. 1 STANSBUR', *supra* note 2, §§ 42, 111, at 120-21, 340-42. See also MCCORMICK, *supra* note 2, § 42; 3A J. WIGMORE, *supra* note 4, §§ 981-987.

48. MCCORMICK, *supra* note 2, at § 42. Under FED. R. EVID. 608(b) specific instances of conduct of a witness may be inquired into on cross-examination only if probative of truthfulness. For further discussion of this rule, see Annot., 36 A.L.R. FED. 564 (1978).



facts are only tangentially related to the witness' credibility.<sup>49</sup> There are, however, several limitations on the state's liberal rule regarding character impeachment: (1) The trial judge has discretionary authority to limit the cross-examiner's scope of inquiry;<sup>50</sup> (2) the witness may not be asked whether he has been accused, arrested or indicted for an unrelated criminal offense;<sup>51</sup> (3) the cross-examiner is bound by the answer of the witness and may not offer extrinsic evidence in contradiction;<sup>52</sup> and (4) the questions must be asked in good faith.<sup>53</sup>

In *State v. Ross*,<sup>54</sup> defendant was tried and convicted of possession with intent to sell, and of sale and delivery of a controlled substance, methylenedioxy amphetamine (MDA). The State's case rested entirely on the testimony of an undercover police officer who testified that he purchased MDA from Ross at Ross' home on February 2, 1975. De-

49. 1 STANSBURY, *supra* note 2, at § 111; see *State v. Parrish*, 25 N.C. App. 466, 213 S.E.2d 354 (1975) (proper to ask defendant, on trial for driving without license and registration and resisting arrest, whether he had shot a man several years earlier); *State v. McGuinn*, 6 N.C. App. 554, 170 S.E.2d 616 (1969) (in prosecution for murder district attorney allowed to bring out on cross-examination that defendant and his wife had several children before their marriage); *State v. Caldwell*, 25 N.C. App. 269, 212 S.E.2d 669 (1975) (defendant, charged with breaking and entering and larceny, properly questioned about presence of his fiancée in his house at 2:50 a.m. when officers conducted search of premises).

50. 1 STANSBURY, *supra* note 2, § 111, at 341-42; see, e.g., *State v. Williams*, 279 N.C. 663, 675, 185 S.E.2d 174, 181 (1971).

51. *State v. Williams*, 279 N.C. 663, 672, 185 S.E.2d 174, 180 (1971). In a comprehensive opinion by Chief Justice Bobbit the *Williams* court overruled *State v. Maslin* 195 N.C. 537, 143 S.E. 3 (1928), and announced the following rule:

We now hold that, *for purposes of impeachment*, a witness, including the defendant in a criminal case, may *not* be cross-examined as to whether he has been *indicted* or is *under indictment* for a criminal offense other than that for which he is then on trial . . . . In respect of this point, we overrule *State v. Maslin* . . . and decisions in accord with *Maslin*, on the basic ground that an indictment cannot rightly be considered more than an unproved accusation.

*A fortiori*, we hold that, *for purposes of impeachment*, a witness, including the defendant in a criminal case, may *not* be cross-examined as to whether he has been *accused*, either informally or by affidavit on which a warrant is issued, of a criminal offense unrelated to the case on trial, nor cross-examined as to whether he has been *arrested* for such unrelated criminal offense.

279 N.C. at 672, 185 S.E.2d at 180 (emphasis by court). See generally Annot., 20 A.L.R.2d 1421 (1951).

52. 1 STANSBURY, *supra* note 2, §§ 48, 111, at 138-39, 342; see, e.g., *State v. Cross*, 284 N.C. 174, 200 S.E.2d 27 (1973).

53. 1 STANSBURY, *supra* note 2, at 341. Compare *State v. Hampton*, 294 N.C. 242, 239 S.E.2d 835 (1978) (first degree murder; prosecutor's questions concerning defendant's prior act of breaking and entering and robbery were asked in good faith) with *State v. Phillips*, 240 N.C. 516, 82 S.E.2d 762 (1954) (solicitor's insinuating questioning concerning collateral acts of misconduct was based on supposed fact for which there was no evidence and therefore denied defendant a fair trial).

54. 295 N.C. 488, 246 S.E.2d 780 (1978). The North Carolina Supreme Court granted defendant's petition for discretionary review of the court of appeals holding that there was no error in defendant's trial. 35 N.C. App. 98, 239 S.E.2d 843 (1978).

defendant's evidence tended to show that he was away from his home the night of the alleged purchase.<sup>55</sup> At trial, the district attorney was permitted to conduct an extensive cross-examination of Ross regarding illegal drugs found in defendant's home during an earlier, unrelated search that had been declared unlawful by the district court.<sup>56</sup> On appeal the North Carolina Supreme Court focused on defendant's claim that cross-examination concerning articles seized during the prior unlawful search violated the fourth amendment exclusionary rule. The majority opinion concluded that the exclusionary rule did not apply because Ross failed to show that the prior search was declared unlawful for constitutional reasons.<sup>57</sup> In a strong dissent, however, three members of the court questioned the propriety of the cross-examination permitted by the trial court.<sup>58</sup>

Justice Exum, writing for the dissenters, identified three possible grounds for holding the cross-examination objectionable. First, he argued that defendant was guilty of "misconduct" only if he knowingly possessed the drugs found in his house during the prior unlawful search.<sup>59</sup> The evidence showed that Ross shared a large house with several other people and was not present when the illegal search was

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55. 295 N.C. at 489, 246 S.E.2d at 782. The State's evidence showed that undercover agent R.T. Guerette went to defendant's home in Charlotte on the night of February 27, 1975 and made a previously arranged purchase from Ross of two plastic bags of MDA for \$65. *Id.*

56. *Id.* at 489-90, 246 S.E.2d at 782.

57. *Id.* at 490-92, 246 S.E.2d at 782-84. Defendant cited *Agnello v. United States*, 269 U.S. 20 (1925), and *Walder v. United States*, 347 U.S. 62 (1954), in support of his constitutional argument. In *Agnello*, the United States Supreme Court held questions concerning evidence unconstitutionally seized improper when defendant did not testify concerning the evidence on direct examination and denied knowledge of its existence on cross-examination. 269 U.S. at 35. The *Agnello* rule was refined in *Walder*. The *Walder* Court held that facts pertaining to illegally seized narcotics may be brought out on cross-examination to attack the credibility of a defendant who asserted on direct examination that he had never possessed narcotics. 347 U.S. at 64-65. Defendant in *Ross* argued that the *Agnello-Walder* exclusionary rule was made applicable to the states by *Mapp v. Ohio*, 367 U.S. 643 (1961), and should have been applied on the ground that defendant made no reference to the possession of drugs on direct examination. The *Ross* court, citing several articles and subsequent United States Supreme Court decisions, questioned the continued efficacy of the exclusionary rule and then refused to decide the issue because the record of the trial did not show that the search was declared unlawful for constitutional reasons. 295 N.C. at 491-92, 246 S.E.2d at 783-84. The supreme court hinted, however, that the exclusionary rule would apply when there was a "substantial violation" of the statutory search and seizure procedures set forth in N.C. GEN. STAT. § 15A-974 (Cum. Supp. 1978). 295 N.C. at 492, 246 S.E.2d at 784.

The *Ross* court also addressed defendant's claim that cross-examination of a criminal defendant for impeachment purposes based on prior unrelated convictions and acts of misconduct should be declared unconstitutional. Citing numerous decisions rejecting this argument by both the North Carolina and United States Supreme Courts, the *Ross* majority also rejected this argument. 295 N.C. at 492-93, 246 S.E.2d at 784-85.

58. 295 N.C. at 494-99, 246 S.E.2d at 785-88 (Exum, Lake, J.J., and Sharp, C.J., dissenting).

59. *Id.* at 497-98, 246 S.E.2d at 787 (dissenting opinion).

conducted.<sup>60</sup> There was no proof that the drugs confiscated during the search were actually the property of defendant Ross.

Second, Justice Exum pointed out that the drug charges used to impeach defendant's testimony were dismissed by the district court.<sup>61</sup> He questioned whether the supreme court "has carried this impeachment rule so far as to permit cross-examination about past criminal conduct for which a defendant has been tried and acquitted,"<sup>62</sup> citing *State v. Sharratt*<sup>63</sup> for the proposition that this may not be done in controlled substance cases.<sup>64</sup> Examination of the *Sharratt* record shows, however, that the witness was asked whether she had been arrested and indicted, not whether she actually possessed the drugs that were the basis of the indictment.<sup>65</sup> Moreover, several North Carolina appellate decisions do indeed permit a witness to be impeached by a prior act of misconduct even though the witness was acquitted or the charges against the witness were dismissed.<sup>66</sup> For instance, in *State v. Parrish*,<sup>67</sup> no error was found when defendant was asked on cross-examination whether he had killed a man several years earlier even though the prosecutor apparently was aware that defendant had been acquitted of the charge.<sup>68</sup>

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60. *Id.* at 494, 246 S.E.2d at 785. Defendant Ross testified that he owned a four bedroom, single family dwelling in which he rented several rooms to help make mortgage payments. Ross' testimony also showed that his job required him to be away from home much of the time. Justice Exum pointed out in a footnote that the presence of the drugs in defendant's house would be evidence of knowing possession, but that defendant was *not* on trial for the earlier possessions even though the district attorney's cross-examination apparently turned the proceeding "into a mini-trial on the question of defendant's guilt of the collateral misconduct." *Id.* at 498 n.1, 246 S.E.2d at 787 n.1.

61. *Id.* at 494, 246 S.E.2d at 785.

62. *Id.* at 499, 246 S.E.2d at 787.

63. 29 N.C. App. 199, 223 S.E.2d 906, *cert. denied*, 290 N.C. 554, 226 S.E.2d 512 (1976).

64. 295 N.C. at 499, 246 S.E.2d at 787 (dissenting opinion).

65. See Record at 47-49, *State v. Sharratt*, 29 N.C. App. 199, 223 S.E.2d 906 (1976). From reading the court of appeals' opinion in *Sharratt*, the exact form of the question asked the witness on cross-examination is not clear. The *Sharratt* decision noted that the drug charges against the witness had been dismissed at the time of the trial, but stated the general rule that a witness may not be cross-examined "regarding an indictment or other accusation of crime, as distinguished from a conviction." 29 N.C. App. at 203, 223 S.E.2d at 908. This ambiguity in the exact form of the cross-examination may account for the *Ross* dissenters' misinterpretation of *Sharratt*.

66. See *State v. Calloway*, 268 N.C. 359, 150 S.E.2d 517 (1966); *State v. Parrish*, 25 N.C. App. 466, 213 S.E.2d 354 (1975).

67. 25 N.C. App. 466, 213 S.E.2d 354 (1975), *discussed in* note 74 *infra*.

68. See Brief for State at 4. Compare *State v. Parrish*, 25 N.C. App. 466, 213 S.E.2d 354 (1975) with *State v. Calloway*, 268 N.C. 359, 150 S.E.2d 517 (1966) (defendant in *Calloway*, on trial for purse snatching, admitted on cross-examination that he had been tried and convicted in nine prior cases of purse snatching; trial court was in error in sustaining solicitor's objection to defendant's attempt to explain that he had obtained a new trial in each case and had on retrial either been acquitted or prosecution had been abandoned).

For an example of a different approach taken by other jurisdictions, see *People v. Sanza*, 37

The third and by far the most forceful argument made by the dissent in *Ross* was that the cross-examination was not conducted in good faith.<sup>69</sup> The district attorney engaged in detailed questioning concerning specific drugs seized during the prior search that were allegedly the property of defendant Ross. To each inquiry defendant answered that he was not at home on the occasion in question and therefore was unable to admit or deny what might have been found in the house.<sup>70</sup> In *State v. Williams*,<sup>71</sup> the North Carolina Supreme Court made it clear that questions concerning a witness' prior misconduct must "relate to matters *within the knowledge of the witness* . . . ."<sup>72</sup> The prosecutor in *Ross* obviously was aware that Ross lacked the knowledge necessary to answer the very detailed questions put to him on cross-examination.

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A.D.2d 632, 323 N.Y.S.2d 632 (1971) (cross-examination concerning prior acts of misconduct for which witness had been acquitted is *a fortiori* in bad faith).

69. 295 N.C. at 498, 246 S.E.2d at 787 (Exum, J., dissenting).

70. *Id.* at 496-97, 286 S.E.2d at 786-87. The following is a sample of the district attorney's cross-examination in *Ross*:

Q. I'll ask you, sir, if on the third day of January, 1975, if found in your room, pursuant to a search warrant, was 15.67 grams of a green vegetable material, that material being marijuana?

MR. WHITFIELD: OBJECTION as to that question.

COURT: OVERRULED.

DEFENDANT'S EXCEPTION #26.

Q. Was it found in your room, sir?

OBJECTION.

OVERRULED.

DEFENDANT'S EXCEPTION #27.

A. I don't know. To my knowledge, it couldn't have been.

Q. I'll ask you, sir, if on the third day of January, 1975, if found in your room was a zipped-locked bag containing a mottled orange tablet, that tablet analyzed as containing phencyclidine, otherwise known as PCP?

MR. WHITFIELD: OBJECTION.

COURT: OVERRULED.

DEFENDANT'S EXCEPTION #28.

A. No, sir.

Q. Is what you're telling this jury, sir, that you deny it being found there because you don't have any knowledge of it? Is that what you're saying?

OBJECTION: OVERRULED.

DEFENDANT'S EXCEPTION #29.

A. Yes, sir.

Q. So you really have no basis for the denial on what you have stated in this courtroom. Is that right?

OBJECTION: OVERRULED.

DEFENDANT'S EXCEPTION #30.

A. Just the same thing I have said. I wasn't there so I don't know whether it was found in my room or not.

*Id.* (quoting Record at 114-15).

71. 279 N.C. 663, 185 S.E.2d 174 (1974).

72. *Id.* at 675, 185 S.E.2d at 181 (emphasis by court). For a complete statement of the *Williams* holding, see note 6 *supra*.

The only basis for the cross-examiner's insinuating interrogation was that the illegal drugs were found in a house occupied by defendant and several other people. Because the State's entire case rested on the undercover police officer's testimony that he had made a drug purchase from Ross, the dissenting justices in *Ross* were able to argue persuasively that the State convicted defendant "by trying him, in effect, for certain alleged past offenses of which he had been accused and acquitted."<sup>73</sup>

Although no new guideline for determining permissible cross-examination referring to prior acts of misconduct was suggested by the *Ross* dissent, it would seem to accord with fundamental fairness to define "good faith" in a manner that would assure the exclusion of questions concerning past acts of misconduct when the cross-examiner has little or no evidence that the witness, in fact, committed wrongful or criminal acts.<sup>74</sup> In *Watkins v. Foster*<sup>75</sup> the United States Court of Appeals for the Fourth Circuit, affirming the district court's grant of

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73. 295 N.C. at 494, 246 S.E.2d at 785 (Exum, J., dissenting); see note 60 *supra*. In *State v. Phillips*, 240 N.C. 516, 82 S.E.2d 762 (1954), defendant was on trial for obtaining and conspiring to obtain money by false pretenses. The solicitor engaged in a lengthy and highly suggestive cross-examination of defendant, referring to seventeen separate instances of misconduct that had allegedly taken place over a period of several years. The court held that the questions were based on supposed facts of which there was no evidence and granted defendant a new trial. Justice Exum argued that the questions in *Ross* were even more vicious than the ones in *Phillips*. 295 N.C. at 499, 246 S.E.2d at 788 (dissenting opinion). Compare *State v. Phillips*, 240 N.C. 516, 82 S.E.2d 762 (1954), with *State v. Black*, 283 N.C. 344, 196 S.E.2d 225 (1973) (*Phillips* distinguished).

74. Even though the witness was acquitted of a prior charge, however, a good faith inquiry into the act of misconduct should not necessarily be barred. For example, in *State v. Parrish*, 25 N.C. App. 466, 213 S.E.2d 354 (1975), defendant was asked on cross-examination if he had previously killed a man, even though he had been acquitted of the crime. Defendant readily admitted the prior act and on redirect was able to explain the circumstances surrounding the event. The cross-examiner's objective, good faith belief that the witness committed the act should be determinative. A mechanical definition of "good faith" is impractical and should be left to a case by case determination. For example, in *State v. Alford*, 289 N.C. 372, 222 S.E.2d 222 (1976), defendant, on trial for first degree murder, was not prejudiced when the district attorney asked on cross-examination if he had stolen two guns found in his apartment. There was evidence that the guns had been stolen from a hardware store close to defendant's apartment. In a situation such as the one presented by *Ross*, however, in which the cross-examiner has only minimal proof that the act of misconduct was committed by the witness, allowing the questioner to suggest the witness' guilt through detailed cross-examination is not justifiable.

75. 570 F.2d 501 (4th Cir. 1978), affirming 423 F. Supp. 53 (W.D.N.C. 1976). After a prior conviction was overturned and the case was remanded, *State v. Foster*, 282 N.C. 189, 192 S.E.2d 320 (1972), defendant Foster was retried and convicted in February of 1973. The conviction was appealed on several grounds, including improper cross-examination, and the supreme court affirmed. Two justices dissented, arguing that defendant was improperly cross-examined concerning alleged prior acts of misconduct. 284 N.C. 259, 278-84, 200 S.E.2d 782, 796-99 (1973) (Sharpe, J., and Bobbitt, C.J. dissenting). In August 1975 Foster had filed a *pro se* petition for a writ of habeas corpus in the United States District Court for the Western District of North Carolina. Counsel was appointed for defendant and a new petition filed. The district court concluded that reference to six prior acts of misconduct on cross-examination should not have been allowed. Therefore, the writ of habeas corpus was granted and Foster's conviction overturned. *Foster v.*

habeas corpus relief from a North Carolina conviction, seems to have reached just such a result. Defendant Foster was arrested and subsequently indicted for eight separate incidents of burglary and house-breaking.<sup>76</sup> The State elected to proceed on only one charge, and relied solely on a photographic enlargement of a fingerprint matching Foster's found on a flower pot in one of the burglarized homes.<sup>77</sup> "Foster's entire defense rested on his credibility."<sup>78</sup> The defense offered no explanation for the fingerprint but pointed out that defendant was a long-time resident of the area with no prior criminal record and offered the testimony of Foster's wife who stated that the defendant was home in bed when the burglary took place.<sup>79</sup> During cross-examination, the district attorney, without referring to the pending indictments, asked defendant detailed questions concerning six of the prior burglaries.<sup>80</sup> Shortly after defendant's conviction all other indictments were dismissed for lack of sufficient evidence.<sup>81</sup>

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Watkins, 423 F. Supp. 53 (W.D.N.C. 1976). The state appealed the ruling, leading to the *Watkins* opinion by the United States Court of Appeals for the Fourth Circuit.

76. 570 F.2d at 503.

77. *Id.* at 502. The burglary victims were unable to identify Foster and the stolen items were not recovered. *Id.* at 506.

78. *Id.* at 506.

79. *Id.* at 504.

80. *Id.* The following excerpt from the transcript of Foster's cross-examination illustrates the suggestive nature of the questioning:

Q. I will ask you if you didn't break in the residence of James Sinclair at 312 Center Street on October 11, 1971, by going into the front door and reaching up and unscrewing with your fingers a light-bulb in the ceiling?

MR. HICKS: Objection.

COURT: Overruled.

DEFENDANT'S EXCEPTION NO. 24.

Q. Did you or did you not?

A. What you mean "did I"? No, I didn't.

Q. I will ask you if you didn't break into the residence of Lonnie Bell Wallace at 217 South Turner Street? How far is South Turner Street from there on Center Street?

MR. HICKS: Objection.

A. I couldn't tell you.

Q. I will ask you if you didn't break into Lonnie Bell Wallace's house on February 20, 1971, between 6:30 and 11:00 o'clock and by breaking out the center glass window in the front door?

MR. HICKS: Objection.

COURT: Overruled.

DEFENDANT'S EXCEPTION #25.

A. Sure didn't.

*Id.* (quoting Record at 74-77).

81. At the time of Foster's cross-examination one of the six indictments had already been dismissed. *Id.* at 505. Apparently the North Carolina Supreme Court was not aware of this when they affirmed Foster's conviction. In his dissenting opinion, Chief Justice Bobbitt stated that "the record shows that defendant is under indictment for each of the six criminal offenses to which the cross-examiner's questions relate . . ." State v. Foster, 284 N.C. 259, 283, 200 S.E.2d 782, 799

The *Watkins* court, pointing out that the State only had minimal evidence that Foster committed the prior burglaries, held that the cross-examination was not conducted in good faith.<sup>82</sup> Even though defendant had answered each of the questions in the negative, the insinuating nature of the inquiry undoubtedly left an indelible mark on the minds of the jurors.<sup>83</sup> The court of appeals used language similar to that of the dissent in *Ross* when it concluded that defendant Foster "was tried not only on the evidence, but also on the detailed 'facts' recounted in the prosecutor's questions . . . ."<sup>84</sup> The *Watkins* court did note, however, that had the State presented overwhelming independent evidence of defendant's guilt the error would have been harmless.<sup>85</sup> The only factor distinguishing *Watkins* from *Ross* is that the defendant in *Watkins* was under indictment for the prior acts of misconduct, whereas the defendant in *Ross* had been acquitted of the

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(1973) (dissenting opinion). It is doubtful that knowledge of the dismissed indictment would have changed the view of the majority, which ruled summarily that the cross-examination was proper. *Id.* at 275, 200 S.E.2d at 794.

82. 570 F.2d at 505-06. Although not referring specifically to the good faith issue, the dissenting justices in *State v. Foster*, reached an identical conclusion after reviewing the same record. Chief Justice Bobbitt focused on the problem created by allowing this type of cross-examination:

Under the circumstances, the asking of these six questions by the State's counsel was highly prejudicial to defendant in that it tended to destroy by inference and suspicion the otherwise unimpeached evidence as to his alibi and as to his good character. The asking of these questions gave the impression that the State's counsel had knowledge of evidential facts sufficient to support these insinuations. The record tends to negate rather than to support the view that he had such knowledge.

284 N.C. 259, 283-84, 200 S.E.2d 782, 799 (dissenting opinion).

83. "Foster's denial of the prosecutor's insinuations should have left his credibility intact but in actuality could not erase the blemish on his character which had been left in each juror's mind." 570 F.2d at 506.

84. *Id.* at 507.

85. *Id.* at 506 n.6.

In *State v. Thompson*, 37 N.C. App. 651, 247 S.E.2d 235 (1978), defendant was tried and convicted of armed robbery. Several persons observed the robbery and were able positively to identify defendant. On appeal Thompson, citing *Watkins*, argued that the trial court erred in permitting the State to impeach him by asking about other robberies for which he was under indictment. The North Carolina Court of Appeals rejected this argument, pointing out that "the State's case against Foster consisted solely of fingerprint evidence; the evidence against defendant Thompson is not nearly so sparse." *Id.* at 660, 247 S.E.2d at 240.

Judge Widener, dissenting in *Watkins*, pointed out that the majority seemed to reach its determination of bad faith because the indictments on which the cross-examination was premised were dismissed for lack of sufficient evidence. He concluded that, henceforth, impeachment by prior acts of misconduct will only be permissible in the Fourth Circuit when the cross-examiner possesses evidence sufficient to prove the prior acts beyond a reasonable doubt. 570 F.2d at 507-08 (dissenting opinion). While this argument may be technically correct, it should not, as Widener suggests, unduly limit the ability of the cross-examiner to impeach the witness. For example, in *Watkins* the State based its entire case on one fingerprint of defendant found in the home of a burglary victim. If the State had possessed a similar quantum of proof in connection with any of the indictments that were later dismissed, the majority view would apparently have found such evidence sufficient to permit good faith cross-examination.

misconduct. In both cases the cross-examination presumably had a detrimental effect on the defendant's credibility. The *Watkins* court took the sounder course in prohibiting impeachment by prior acts of misconduct for which there was only a minimal factual basis.

### E. Refreshing Recollection

As a general rule, a witness who is unable to recall a fact about which he or she is questioned may refer to a writing to refresh his recollection, provided that the writing is made available to opposing counsel for inspection.<sup>86</sup> A witness who refreshes his memory before trial need not produce in court the writing used for that purpose.<sup>87</sup> In *State v. McQueen*,<sup>88</sup> the supreme court held that a witness' testimony concerning her present recollection of past events was not rendered incompetent when her memory was refreshed prior to trial by hypnosis.<sup>89</sup> Although *McQueen* is a case of first impression in North Carolina, the court's decision is in accord with decisions from other jurisdictions.<sup>90</sup>

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86. See 1 STANSBURY, *supra* note 2, § 32. A writing is not the only instrument that may be used to refresh memory. In *State v. Peacock*, 236 N.C. 137, 139, 72 S.E.2d 612, 615, the supreme court, discussing the witness' use of memoranda to refresh memory while testifying, quoted with approval the following passage from *Jewett v. United States*, 15 F.2d 955, 956 (9th Cir. 1926):

[I]t is quite immaterial by what means the memory is quickened; it may be a song, or a face, or a newspaper item, or a writing of some character. It is sufficient that by some mental operation, however mysterious, the memory is stimulated to recall the event, for when so set in motion it functions quite independently of the actuating cause.

The evidence, of course, consists of the witness' testimony, not the document used to refresh recollection. *State v. Greenlee*, 22 N.C. App. 489, 206 S.E.2d 753, *appeal dismissed*, 285 N.C. 761, 209 S.E.2d 285, *cert. denied*, 286 N.C. 339, 210 S.E.2d 59 (1974), *cert. denied*, 421 U.S. 969 (1975). The document may, however, be introduced into evidence by the adverse party or may be used as an aid in cross-examining the refreshed witness. See 1 STANSBURY, *supra* note 2, § 32. See generally MCCORMICK, *supra* note 2, § 9.

87. See, e.g., *Star Mfg. Co. v. Atlantic Coast Line R.R.*, 222 N.C. 330, 23 S.E.2d 32 (1942).

88. 295 N.C. 96, 244 S.E.2d 414 (1978).

89. *Id.* at 119, 244 S.E.2d at 427. The opinion, however, expressly limited hypnosis to use as an aid in refreshing recollection prior to trial. The court noted that the witness was not under hypnosis during trial, that no question was raised about the admissibility of pretrial statements made under hypnosis, and that the State did not attempt to introduce testimony of the hypnotist concerning statements made by the witness while in a hypnotic trance. Accordingly, the court expressed no opinion on these issues. *Id.* at 119, 122, 244 S.E.2d at 427, 429. In dictum, the *McQueen* court also approved of the use of psychiatric or other medical treatment as a device for refreshing memory. *Id.* at 120, 244 S.E.2d at 428.

Courts in other jurisdictions have refused to admit pretrial statements made under hypnosis, see, e.g., *State v. Harris*, 241 Or. 224, 405 P.2d 492 (1965), and have held that a hypnotist may not testify concerning what his subject said while under hypnosis, see, e.g., *State v. Pierce*, 263 S.C. 23, 207 S.E.2d 414 (1974).

90. The *McQueen* court cited with approval the four leading cases in this area. 295 N.C. at 120-21, 244 S.E.2d at 428-29 (citing *Kline v. Ford Motor Co.*, 523 F.2d 1067 (9th Cir. 1975); *Wyller v. Fairchild Hiller Corp.*, 503 F.2d 506 (9th Cir. 1974); *Harding v. State*, 5 Md. App. 230, 246 A.2d 302 (1968); *State v. Jorgensen*, 8 Or. App. 1, 492 P.2d 312 (1971)).



In *McQueen*, witness Kiser and defendant McQueen were involved in a double murder in June 1972.<sup>91</sup> In August 1972 Kiser voluntarily surrendered and, in exchange for a grant of prosecutorial immunity, gave a statement to police implicating McQueen.<sup>92</sup> In September 1977, several weeks before defendant was brought to trial in North Carolina, Kiser asked to be hypnotized to aid her memory of the events surrounding the murders.<sup>93</sup> Kiser's testimony at trial, based on her memory as revived by the hypnosis, was inconsistent with the statement she gave to police two months after the crime was committed, and was more prejudicial to defendant.<sup>94</sup> McQueen's counsel argued that Kiser's testimony was based on post-hypnotic suggestion rather than on her present memory of past events, and that Kiser's testimony should have been entirely excluded.<sup>95</sup> The *McQueen* court rejected this argument, citing several cases that have held that a witness whose memory has been refreshed by hypnosis is able to testify from present recollection of past events.<sup>96</sup>

In legal effect, the use of hypnosis to revive memory is no different from the use of more conventional means, such as by reading a document.<sup>97</sup> As the *McQueen* court correctly noted, that a person was hypnotized prior to trial should bear upon that person's credibility, which is a factual determination for the jury to make in most cases, but should not bear upon the witness' competence to testify, which is a legal determination for the judge to make.<sup>98</sup> McCormick refers to the hypnotized person as "ultrasuggestible,"<sup>99</sup> and warns that the use of any item to

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91. 295 N.C. at 99, 244 S.E.2d at 416.

92. *Id.* at 101, 244 S.E.2d at 417.

93. *Id.*

94. In her statement to the police in August 1972, Kiser stated that McQueen committed the murders inside the victim's home while Kiser was outside the house. After Kiser's memory was refreshed with the aid of hypnosis, she testified at trial that she was actually present and that she saw McQueen commit the murders. *See* Record at 65-67; Brief for Defendant at 24-25.

95. Brief for Defendant at 28.

96. 295 N.C. at 120-21, 244 S.E.2d at 428-29 (citing *Kline v. Ford Motor Co.*, 523 F.2d 1067 (9th Cir. 1975); *Wyller v. Fairchild Hiller Corp.*, 503 F.2d 506 (9th Cir. 1974); *Harding v. State*, 5 Md. App. 230, 246 A.2d 302 (1968); *State v. Jorgensen*, 8 Or. App. 1, 492 P.2d 312 (1971)). In *Harding v. State*, a detailed opinion explaining the theory behind hypnotic suggestion, the Court of Special Appeals of Maryland pointed out that modern medical science has recognized that hypnosis can be helpful in restoring memory of past events. 5 Md. App. at —, 246 A.2d at 311-12.

97. The United States Court of Appeals for the Ninth Circuit, in *Kline v. Ford Motor Co.*, 523 F.2d 1067 (9th Cir. 1975), noted that "[a]lthough the device by which recollection was refreshed is unusual, in legal effect [the] situation is not different from that of a witness who claims that his recollection of an event that he could not earlier remember was revived when he thereafter read a particular document." *Id.* at 1069-70.

98. 295 N.C. at 119, 244 S.E.2d at 427.

99. MCCORMICK, *supra* note 2, § 208, at 510.

refresh memory creates a very real danger that the witness "will 'remember' something that never happened."<sup>100</sup> The basic safeguards against abuse in this area, which include the trial judge's power to exclude testimony when he determines that memory was not actually refreshed,<sup>101</sup> and the adverse party's right to cross-examine the witness,<sup>102</sup> should provide adequate protection when hypnosis is used to refresh recollection.

### F. Jury Arguments

An attorney, in presenting his case to the jury, has the right to argue every aspect of the case supported by evidence in the record, including the reasonable inferences that can be drawn from that evidence.<sup>103</sup> He may also argue the applicable legal principles involved in the case.<sup>104</sup> Counsel may not, however, "travel outside the record" and inject into [the] argument" his personal views and beliefs.<sup>105</sup> In *Currituck Grain Inc. v. Powell*,<sup>106</sup> the North Carolina Court of Appeals, making a logical extension of this rule, held that it was error for the trial court to allow an attorney to personally vouch for the credibility of

100. *Id.* § 9, at 16-19.

101. *See* State v. Collins, 22 N.C. App. 590, 207 S.E.2d 278, cert. denied, 285 N.C. 760, 209 S.E.2d 284 (1974) (witness may testify from refreshed memory "iff, after reading the document, he is able to remember the events . . . ." *Id.* at 595, 207 S.E.2d at 281 (emphasis added)). Even where the witness' memory is not revived, the document itself may be read to the jury and introduced as evidence if the requirements of "past recollection recorded" are met. *See* McCORMICK, *supra* note 2, § 9, at 299-303; 1 STANSBURY, *supra* note 2, § 33.

102. STANSBURY, *supra* note 2, § 32, at 87. A question left unanswered by the *McQueen* opinion is whether the availability of the hypnotist for cross-examination is a prerequisite to the admission of testimony by a witness whose memory has been refreshed by hypnosis. The court pointed out that defendant had access to a tape recording of the entire hypnosis procedure and that the hypnotist was available to testify, though he was not called by either party. 295 N.C. at 120, 244 S.E.2d at 428. In each of the cases cited by the *McQueen* court in support of its decision, *see* note 52 *supra*, the hypnotist testified concerning the procedure. In *Wyller v. Fairchild Hiller Corp.*, 503 F.2d 506 (9th Cir. 1974), the court stated that the adverse part was entitled to challenge the reliability of the hypnosis procedure through cross-examination of the hypnotist. *Id.* at 509-10.

103. *See, e.g.*, *Crutcher v. Noel*, 284 N.C. 568, 201 S.E.2d 855 (1974); *Lamborn & Co. v. Hollingsworth & Hatch*, 195 N.C. 350, 142 S.E. 19 (1928). In *State v. McKenna*, 289 N.C. 668, 224 S.E.2d 537 (1976), the supreme court pointed out that the scope of argument to the jury is within the sound discretion of the trial judge. His ruling will only be disturbed when there is prejudicial error. *Id.* at 687, 224 S.E.2d at 550. Also, in *State v. Alford*, 289 N.C. 372, 222 S.E.2d 222 (1976), the court noted that wide latitude should be given counsel in arguing his case to the jury. *Id.* at 384, 222 S.E.2d at 230.

104. N.C. GEN. STAT. § 84-14 (1975); *see, e.g.*, *State v. McMorris*, 290 N.C. 286, 225 S.E.2d 553 (1976) (court emphasized that law argued must be applicable to facts of case).

105. *Cuthrell v. Greene*, 229 N.C. 475, 50 S.E.2d 525 (1948).

106. 38 N.C. App. 7, 246 S.E.2d 853 (1978).

his witness during closing argument.<sup>107</sup>

In a case of first impression,<sup>108</sup> the *Currituck Grain* court held that counsel's reference to his acquaintance with plaintiff's witness was, in effect, testimony by the attorney about the witness' credibility.<sup>109</sup> Referring to attacks made on the memory and truthfulness of the witness during the trial,<sup>110</sup> plaintiff's counsel, over defendant's objection, stated: "[Plaintiff's witness] is a man of honesty and integrity and he is not going to . . . commit perjury from the witness stand under oath. I have known him for a long time and I know he is not a person who is able to do that."<sup>111</sup>

As courts in numerous other jurisdictions have pointed out, to permit such conduct allows the attorney to bolster the credibility of the witness through unsworn testimony that is not subject to cross-examination.<sup>112</sup> Additionally, when the trial judge overrules an objection and permits counsel to argue facts outside the evidence presented in the case, the judge, in effect, highlights the error by putting his stamp of approval on the argument.<sup>113</sup> The *Currituck Grain* court properly recognized the great potential for prejudice when an attorney is allowed to vouch for the credibility of his witness in his closing argument.

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107. Plaintiff's counsel's improper closing statement regarding his client's veracity coupled with plaintiff's witness' expression of an opinion on the ultimate issue in the case, see text accompanying notes 114-131 *infra*, resulted in the *Currituck Grain* court ordering a new trial for defendant. *Id.* at 12, 246 S.E.2d at 856.

108. In *State v. Monk*, 291 N.C. 37, 229 S.E.2d 163 (1976), the North Carolina Supreme Court faced a somewhat similar problem but did not directly rule on the issue. The district attorney in *Monk* stated that he had known the State's witness for 15 years and further implied that he personally felt the witness was telling the truth. The *Monk* court noted its disapproval of the argument but found no prejudicial error and did not elaborate on the issue.

109. 38 N.C. App. at 12, 246 S.E.2d at 856. In light of the general rule that counsel may refer to any evidence contained in the record during his closing argument, he should also be able to comment on the credibility of a witness if his remarks are based on evidence introduced in the case. See *State v. Gauger*, 200 Kan. 515, 438 P.2d 455 (1968).

110. The North Carolina Supreme Court has held that counsel, by making improper remarks to the jury, may invite retaliatory argument by opposing counsel. *State v. McCall*, 289 N.C. 512, 223 S.E.2d 303 (1976). In *McCall*, defense counsel vehemently attacked the credibility of several of the State's witnesses, referring to one of them as a liar. The district attorney responded with an abrasive attack on defendant's counsel and also made several general comments concerning the good character of the State's witnesses. The supreme court found no error, holding that the remarks of the defense counsel opened the door for the district attorney's argument. The attack on plaintiff's witness in *Currituck Grain* took place during cross-examination rather than defense counsel's closing argument. 38 N.C. App. at 12, 246 S.E.2d at 856.

111. 38 N.C. App. at 11, 246 S.E.2d at 856. The attorney also stated that the witness was known throughout the county for his honesty and integrity and referred to his election to the Currituck County School Board. *Id.*

112. See Annot., 81 A.L.R.2d 1240 (1962); 75 AM. JUR. 2d *Trial* §§ 305, 306 (1974).

113. See *Crutcher v. Noel*, 284 N.C. 568, 201 S.E.2d 855 (1974).

### G. Opinion

In *Currituck Grain Inc. v. Powell*,<sup>114</sup> the North Carolina Court of Appeals also restated the rule that a witness should not be allowed to express an opinion on the ultimate issue in the case.<sup>115</sup> This evidentiary principle has been severely criticized over the past thirty-five years<sup>116</sup> and has been abandoned by many state courts.<sup>117</sup> As Professor Brandis suggests, the rule "has produced only confusion and unpredictability, and [should] be completely revised or definitely repudiated by the Court."<sup>118</sup>

The traditional justification for the rule is that the witness would be invading the province of the jury if allowed to express an opinion on the exact question at issue.<sup>119</sup> Courts adhering to the rule are concerned that the members of the jury will substitute the opinion of the witness for their own. It is often difficult to determine, however, whether the opinion expressed actually goes to the ultimate issue in the case.<sup>120</sup> Also, the many recognized exceptions to the rule have tended to make its application even more confusing.<sup>121</sup> Moreover, abolition of

114. 38 N.C. App. 7, 246 S.E.2d 853 (1978).

115. *Id.* at 11, 246 S.E.2d at 856. This rule is generally assumed to apply to expert as well as lay opinions. Application of the rule may be relaxed, however, when expert testimony is involved. See 1 STANSBURY, *supra* note 2, § 126, at 393 n.33.

116. See MCCORMICK, *supra* note 2, § 12, at 27. McCormick points out that the trend began with the Iowa Supreme Court's decision in *Grismore v. Consolidated Prods. Co.*, 232 Iowa 328, 5 N.W.2d 646 (1942). The *Grismore* court held that, as long as the matter at issue is one in which opinion testimony is proper, the witness' opinion should be admitted "even though it passes upon a controlling fact, or the ultimate fact which the jury must determine." *Id.* at 344, 5 N.W.2d at 655-56.

117. See MCCORMICK, *supra* note 2, § 12, at 27. McCormick indicates that a majority of state courts have discarded the rule in the area of expert testimony and that at least a few courts have allowed ultimate issue opinion by lay witnesses. *Id.* Under FED. R. EVID. 704, an opinion, otherwise admissible, "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

118. 1 STANSBURY, *supra* note 2, § 126, at 393. For a discussion of early North Carolina cases illustrating the problems created by the rule, see Note, 16 N.C.L. REV. 180 (1938). See also 7 WIGMORE, *supra* note 4, §§ 1920, 1921 (referring to rule as empty rhetoric).

119. See, e.g., *Starkey Paint Co. v. Springfield Life Ins. Co.*, 24 N.C. App. 507, 211 S.E.2d 498 (1975) (in action on insurance policy in which defendant insurer denied coverage, contending that death was by suicide, trial court erred in admitting testimony by witness who testified that, upon seeing insured's body, he stated "he has committed suicide").

120. E.g., *State v. Atkinson*, 278 N.C. 168, 179 S.E.2d 410 (1971) (ultimate issue was whether victim had been raped; State's pathologist allowed to express his opinion that victim had been penetrated and that injuries could have been caused by a male organ); *Triad Constructors, Inc. v. Morris*, 25 N.C. App. 647, 214 S.E.2d 209 (1975) (in counterclaim action for breach of contract in which defendant alleged that plaintiff failed to properly elevate floor of building, defendant's expert witness was allowed to testify that elevation of floor by 5 3/4 inches would have prevented drainage problems).

121. 1 STANSBURY, *supra* note 2, §§ 126-129, at 134, 198-99. Stansbury points out that exceptions to the rule are recognized when the following questions are at issue: (1) mental capacity or

the rule would not, as some decisions suggest, open the door to opinions that merely tell the jury how to decide the case.<sup>122</sup> The guidelines applicable to the admission of opinion evidence in general would provide adequate safeguards. First, opinion testimony on any issue is inadmissible when the witness can relate the facts in a manner that the jury can understand or the jury is as well-qualified as the witness to draw a conclusion from the facts.<sup>123</sup> A witness' opinion in either situation is clearly of no help to the jury in deciding the case.<sup>124</sup> Second, opinions on questions of law are always excluded.<sup>125</sup> Even courts permitting opinion on the ultimate issue prohibit questions that call for the witness to give a legal opinion.<sup>126</sup> Finally, the basis for a witness' opinion is always subject to attack during cross-examination.<sup>127</sup>

In *Currituck Grain*, the ultimate issue was whether defendant came within the Uniform Commercial Code's (UCC) definition of "merchant."<sup>128</sup> A merchant is defined in the UCC as one who has knowledge or skill peculiar to the transaction in question.<sup>129</sup> On direct examination plaintiff's chief witness was allowed to testify over objection that, in his opinion, defendant had the special knowledge and skill

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condition; (2) habits of temperance or intemperance; (3) solvency or insolvency; (4) identity; (5) handwriting; and (6) value. *Id.* § 126, at 395. Also, numerous cases have avoided the issue by treating the witness' testimony as a shorthand statement of fact rather than an opinion. *See, e.g.,* Tarkington v. Rock Hill Printing & Finishing Co., 230 N.C. 354, 53 S.E.2d 269 (1949) (testimony of witness characterized as shorthand statement of fact rather than opinion and therefore did not invade province of jury); Morris v. Lambeth, 203 N.C. 695, 166 S.E. 790 (1932) (plaintiff alleged property damage caused by negligent construction of dam; defendant's witness allowed to state that, in his opinion, dam broke due to some "manner of explosion").

122. *See, e.g.,* Ponder v. Cobb, 257 N.C. 281, 126 S.E.2d 67 (1962).

123. If either condition is absent, the opinion should be admitted. The reference in the second condition to a witness with knowledge superior to the jury refers to testimony by an expert. 1 STANSBURY, *supra* note 2, § 124, at 388-89; *see, e.g.,* Davis v. Cahoon, 11 N.C. App. 395, 181 S.E.2d 229 (1971).

124. *See* 1 STANSBURY, *supra* note 2, § 123, at 386. The advisory committee note to FED. R. EVID. 704, *discussed in* note 117 *supra*, points out that opinions that merely tell the jury what result to reach should be excluded under FED. R. EVID. 403 as evidence that wastes time.

125. *See, e.g.,* State v. Sawyer, 26 N.C. App. 728, 217 S.E.2d 116, *cert. denied*, 288 N.C. 395, 218 S.E.2d 469 (1975) (court properly excluded question put to policeman on cross-examination concerning his duty under law at issue); Brooks & Brooks, Ltd. v. Easton's Culligan Water Conditioning, 28 N.C. App. 143, 220 S.E.2d 147 (1975) (question concerning whether offer was "amended" held not to require expression of legal opinion).

126. *See* McCORMICK, *supra* note 2, § 12, at 28-29. McCormick points out that when the issue is one's capacity to make a will "a court taking the view that there may be opinion upon an ultimate issue would approve a question, 'Did X have mental capacity sufficient to understand the nature and effect of his will?' but would frown on the question, 'Did X have sufficient mental capacity to make a will?'" *Id.* § 12, at 29.

127. *See* 1 STANSBURY, *supra* note 2, § 35, at 103-08.

128. 38 N.C. App. at 8-9, 246 S.E.2d at 855.

129. N.C. GEN. STAT. § 25-2-104(1) (1965).

necessary to sell corn and soybean "futures."<sup>130</sup> At no time was the witness asked if he believed defendant was a "merchant" when the transaction in question took place.<sup>131</sup> Nevertheless, the court held that the form of the questions<sup>132</sup> called for the witness to answer the very legal question at issue in the case. This seems to be a very questionable result, especially in light of defendant's opportunity to expose any weakness in the basis for plaintiff's witness' opinion on cross-examination. The North Carolina courts should examine the experience of jurisdictions that have abandoned the rule prohibiting "ultimate issue" opinion. Application of the basic principles regarding opinion evidence would appear to provide adequate assurance that the province of the jury is not infringed by such evidence.

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130. *Id.* at 10-11, 246 S.E.2d at 855.

131. Defendant objected to the following questions:

Q. And did he hold himself out as having knowledge by his occupation as a farmer that he knew what he was talking about when he was negotiating the sale with you?

MR. TRIMPI: OBJECTION.

THE COURT: OVERRULED.

WITNESS: I certainly felt like he knew what he was talking about.

BY MR. BRUMSEY:

Q. Was his conversation with you in your opinion knowledgeable?

MR. TRIMPI: OBJECTION.

THE COURT: OVERRULED.

WITNESS: Yes.

*Id.* at 10-11, 246 S.E.2d at 855 (quoting Record at 24 ).

132. *Id.* at 11, 246 S.E.2d at 855-56.

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VIII. FAMILY LAW<sup>1</sup>

## A. Child Custody and Support

## 1. Termination of Parental Rights

The court of appeals in *In re Dinsmore*<sup>2</sup> denied the Guilford County Department of Social Services' request to terminate respondent's parental rights over her child, even though respondent never initiated plans for the return of the child during the three years the child was in custody of the department,<sup>3</sup> or responded affirmatively to attempts by the department to effect the child's return during that time.<sup>4</sup> In reaching its decision, the court ignored the best interests of the child<sup>5</sup> and narrowly construed former G.S. 7A-288(1) and (3),<sup>6</sup> the statutory

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1. Two 1978 cases that are treated elsewhere involved significant family law issues. Important conflict of laws issues were resolved by the court of appeals in *Vincent v. Vincent*, 38 N.C. App. 50, 248 S.E.2d 410 (1978). The *Vincent* court held that a sister state that has personal jurisdiction over both spouses in a divorce action may terminate a prior North Carolina alimony decree, and that a sister state may, regardless of whether it has personal jurisdiction over both parties, modify a prior North Carolina alimony decree to the same extent that a North Carolina court may do so. The court further established that the obligation to make alimony payments decreed by a North Carolina court, but properly terminated by a sister state, is extinguished at the time the foreign decree terminating the payments is entered. For a discussion of *Vincent*, see this Survey, *Constitutional Law: Full Faith and Credit*.

The supreme court in *Gardner v. Gardner*, 294 N.C. 172, 240 S.E.2d 399 (1978), considered the important procedural question of the applicability of the compulsory counterclaim provisions of N.C.R. Civ. P. 13(a) to divorce actions. The court held that rule 13(a) applies in divorce actions as it does in other civil actions, but that a claim arising out of a marital dispute that forms the basis of an action filed by one spouse can be prosecuted after final judgment has been entered in that spouse's prior action and is not barred by rule 13(a) so long as proceedings in the second spouse's claim were not instituted during the pendency of the other spouse's action. For an extensive discussion of *Gardner*, see Note, *New Rules for an Old Game, North Carolina Compulsory Counterclaim Provision Applies in Divorce Actions*, 57 N.C.L. REV. 439 (1979).

2. 36 N.C. App. 720, 245 S.E.2d 386 (1978).

3. The child had been in custody of the Department of Social Services since December 27, 1973. The action by the department to terminate the parents' rights to the child was instituted November 19, 1976. *Id.* at 721, 245 S.E.2d at 386.

4. Since respondent's child has been in custody of the department, the department has tried unsuccessfully to help respondent overcome her chronic alcoholism and has counseled respondent on the actions she must take to regain custody of the child. Against the advice of the department, respondent continues to live with a man who prevents her child from visiting her. *Id.* at 721-23, 245 S.E.2d at 386-88.

5. The court never discussed whether termination of respondent's parental rights would be in the best interest of the child, even though the "best interest" standard guides courts in custody disputes and adoption proceedings. See N.C. GEN. STAT. § 50-13.2(a) (Supp. 1977); *id.* § 48-1(3) (1976).

6. These provisions provided:

Termination of parental rights.—In cases where the court has adjudicated a child to be neglected or dependent, the court shall have authority to enter an order which terminates the parental rights with respect to such child if the court finds any one of the following:

- (1) That the parent has abandoned the child for six consecutive months prior to the special hearing in which termination of parental rights is considered or that

provisions governing termination of parental rights under which the case arose. The court equated abandonment under former G.S. 7A-288(1), which was a condition for termination of parental rights, to wilful abandonment under G.S. 48-2,<sup>7</sup> which governs adoption of abandoned children, and applied the same criminal wilfulness standard<sup>8</sup> used in interpreting G.S. 48-2 to both G.S. 7A-288(1) and (3). Applying these circumscribed definitions of abandon and wilful, the court found that respondent had neither abandoned her child under G.S. 7A-288(1) nor wilfully failed to contribute adequate financial support to her child under G.S. 7A-288(3).<sup>9</sup>

Although discussion of the merits of the *Dinsmore* decision has been mooted by the replacement of former G.S. 7A-288 with G.S. chapter 7A, article 24B—Termination of Parental Rights,<sup>10</sup> this decision is instructive in that it reveals an unwillingness by the court of

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a child is an abandoned child as defined by Chapter 48 of the General Statutes entitled "Adoption of Minors."

- (3) That the parent has willfully failed to contribute adequate financial support to a child placed in the custody of an agency . . . for a period of six months . . .

Law of June 19, 1969, ch. 911, § 2, 1969 N.C. Sess. Laws 1047 (formerly codified at N.C. GEN. STAT. § 7A-288 (1969)). This section was repealed in 1977 and replaced by N.C. GEN. STAT. §§ 7A-289.22 to .34 (Cum. Supp. 1977), effective October 1, 1977. Because the action in *Dinsmore* was instituted prior to October 1, 1977, the case was decided under former § 7A-288.

7. N.C. GEN. STAT. § 48-2. Section 48-2(3a) provides that "an abandoned child shall be any child who has been willfully abandoned at least six consecutive months immediately preceding institution of an action or proceeding to declare the child to be an abandoned child." *Id.* § 48-2(3a).

Section 48-2(3b), which is similar to former § 7A-288(3), *quoted in* note 6 *supra*, provides that an abandoned child is "a child who has been placed in the care of a child-caring institution or foster home, and whose parent . . . has failed substantially and continuously for a period of more than six months to maintain contact with such child, and has willfully failed for such period to contribute adequate support to such child." The court must also find that diligent but unsuccessful efforts have been made on the part of the institution or a child placing agency to encourage the parent to strengthen the parental or custodial relationship to the child. *Id.* § 48-2(3b).

8. The criminal wilfulness test is taken from *State v. Whitener*, 93 N.C. 590, 592 (1885), in which the Supreme Court of North Carolina held that:

The word wilful, used in a statute creating a criminal offense, means something more than an intention to do a thing. It implies the doing the act purposely and deliberately, indicating a purpose to do it, without authority—careless whether he has the right or not—in violation of law, and it is this which makes the criminal intent, without which one can not be brought within the meaning of a criminal statute.

*In re Hoose*, 243 N.C. 589, 91 S.E.2d 555 (1956), read this definition of wilfulness into § 48-2. *In re Maynor*, 38 N.C. App. 724, 248 S.E.2d 875 (1978), is a good example of the application of this criminal wilfulness standard to § 48-2. The court in *Maynor* held that petitioner's son, who had been placed in the custody of the social services department by petitioner's wife, had not been abandoned according to the requirements of § 48-2(3a) or (3b), because petitioner was unaware of his wife's actions and did not intentionally refrain from supporting his son but was prevented from doing so by his incarceration.

9. 36 N.C. App. at 725-27, 245 S.E.2d at 388-89.

10. N.C. GEN. STAT. ch. 7A, art. 24B (Cum. Supp. 1977).



appeals to terminate parental rights despite indications that the best interest of the child would be served by termination. The case further suggests possible unintended interpretations of the current statutes dealing with termination of parental rights. Because this decision was the first to interpret former G.S. 7A-288(1) and (3), the court, rather than relying upon the definitions in the adoption statute,<sup>11</sup> could have adopted more flexible definitions of "abandonment" and "willful refusal to provide adequate support" to achieve a desirable result from the standpoint of the child's welfare. The court's refusal to terminate respondent's parental rights leaves the child in an uncertain state, incapable of being permanently placed in a new home through adoption<sup>12</sup> and unable to return to respondent's custody because of respondent's behavior.<sup>13</sup>

The new provision, G.S. 7A-289.32, would, on its face, dictate a different result in *Dinsmore*.<sup>14</sup> The current provisions give the court the ability to decide disputes involving parental rights on the basis of the best interest of the child and vest the court with broad discretionary power in reaching its decision whether to terminate parental rights.<sup>15</sup>

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11. See notes 7 & 8 *supra*.

12. Consent of the parent is required for adoption unless the parent's rights to the child have been judicially terminated or the court finds that the child has been abandoned as defined in § 48-2. N.C. GEN. STAT. § 48-5 (Cum. Supp. 1977).

13. See note 4 *supra*.

14. N.C. GEN. STAT. § 7A-289.32 (Cum. Supp. 1977) provides six grounds for terminating parental rights:

(1) The parent has without cause failed to establish or maintain concern or responsibility as to the child's welfare.

(2) The parent has physically abused or neglected the child . . . .

(3) The parent has willfully left the child in foster care for more than two consecutive years without showing to the satisfaction of court that substantial progress has been made within two years in correcting those conditions which led to the removal of the child for neglect, or without showing positive response within two years to the diligent efforts of a county department of social services . . . to encourage the parent to strengthen the parental relationship to the child or to make and follow through with constructive planning for the future of the child.

(4) The child has been placed in the custody of a county department of social services . . . and the parent, for a continuous period of six months next preceding the filing of the petition, has failed to pay a reasonable portion of the cost of care for the child.

(5) One parent has been awarded custody . . . and the other parent whose parental rights are sought to be terminated has for a period of one year or more . . . willfully failed without justification to pay for the care, support, and education of the child, as required by said decree or custody agreement.

(6) (deals with the father of children born out of wedlock)

If *Dinsmore* had been decided under these provisions, respondent's parental rights could arguably have been terminated on the basis of § 7A-289.32(1), (3) or (4).

15. Section 7A-289.22(3) specifically states that the interest of the child is paramount in deciding disputes involving termination of parental rights. *Id.* § 7A-289.22(3).

No provision of G.S. 7A-289.32,<sup>16</sup> which lists six grounds for terminating parental rights, requires that the child be abandoned before parental rights can be terminated, and the term "willful" is deleted from the new counterpart to former G.S. 7A-288(3), which provided for termination upon wilfull failure to support.<sup>17</sup> Nevertheless, it is possible that the terms "without cause" in G.S. 7A-289.32(1), which provides for termination when the parent has without cause failed to act responsibly for the child's welfare, and "willfully left" in G.S. 7A-289.32(3),<sup>18</sup> which provides for termination when the parent has wilfully left the child under foster care for over two consecutive years, could be interpreted in the same manner as former G.S. 7A-288(1) and (3) were interpreted in *Dinsmore*. This interpretation would frustrate the legislative intent of the current provisions;<sup>19</sup> but, considering the court's approach in *Dinsmore*, such an interpretation is not unlikely.

## 2. Child Custody

Potential conflict between the statutory mandate to award custody to the person or agency that will best promote the interest and welfare of the child,<sup>20</sup> and the strong presumption that the natural parent may not be deprived of custody except upon "convincing proof" of some "extraordinary fact or circumstance,"<sup>21</sup> was definitively resolved by the court of appeals in *In re Kowalzek*.<sup>22</sup> The child in the *Kowalzek* case, whose natural mother was alive, had been in the custody of another couple for three years.<sup>23</sup> Although the natural parent was not deprived of custody because of insufficient findings of fact by the lower court

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16. *Id.* § 7A-289.32, quoted in note 14 *supra*.

17. *Id.* § 7A-289.32(4); see notes 6 & 14 *supra*.

18. N.C. GEN. STAT. § 7A-289.32(1), (3) (Cum. Supp. 1977), quoted in note 14 *supra*.

19. Article 24B is to be liberally construed to promote the best interests of the child. *Id.* § 7A-289.22(3).

20. *Id.* § 50-13.2(a).

21. *Thomas v. Pickard*, 18 N.C. App. 1, 4, 195 S.E.2d 339, 342 (1973). This language describing the conditions under which a parent may be deprived of custody is typical. The supreme court similarly stated in *Spitzer v. Lewark*, 259 N.C. 50, 53-54, 129 S.E.2d 620, 623 (1963), that the parent's natural and legal right to custody may not "lightly be denied or interfered with" except for the "most substantial and sufficient reasons."

22. 37 N.C. App. 364, 246 S.E.2d 45, cert. denied, 295 N.C. 734, 248 S.E.2d 863 (1978).

23. Petitioner (the mother) left her husband and infant son, Jeffrey, on December 1, 1974, and returned to her former home in Minnesota. Jeffrey lived with his father until February 28, 1975, when his father was killed in an automobile accident. Petitioner was aware of her husband's death but did not attempt to locate her son. Legal custody of Jeffrey was awarded to the Lee County Department of Social Services, and physical custody of Jeffrey was awarded to Mrs. Liendo and her sister in March 1975. Jeffrey had been living with the Liendos since that time. *Id.* at 365-66, 246 S.E.2d at 45-46.

concerning her fitness as guardian,<sup>24</sup> the *Kowalzek* court explicitly held that the natural parent does not have to be found unfit to be deprived of custody.<sup>25</sup> The statutory directive, therefore, outweighs the presumption favoring the natural parent. Although fitness of the parent is of greatest importance in determining what course of action will best promote the interests of the child, it is not conclusive.<sup>26</sup> This decision was implicit in prior case law<sup>27</sup> and is consistent with the court's repeated emphasis on the best interests of the child as the "polar star"<sup>28</sup> in custody disputes.

In keeping with the North Carolina court's treatment of visitation rights as a form of custody,<sup>29</sup> the supreme court in *Clark v. Clark*<sup>30</sup> expressly stated that "[v]isitation privileges are but a lesser degree of custody"<sup>31</sup> and held that the term "custody" as used in G.S. 50-13.7<sup>32</sup> includes visitation rights.<sup>33</sup> Consequently, modification of an award of

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24. *Id.* at 369-70, 246 S.E.2d at 48.

25. *Id.* at 368, 246 S.E.2d at 47.

26. The question whether the court *must* award custody to a third person if the natural parent is found unfit remains open. It is possible that the best interest of the child would require that the child remain in the custody of an unfit parent. *Cf.* N.C. GEN. STAT. §§ 7A-289.31(a), (b) (Cum. Supp. 1977) (finding one or more grounds for terminating parental rights does not require termination of parent's rights unless in best interests of the child to do so).

27. North Carolina courts have consistently held that a parent's natural right to custody is not absolute, and that while a parent is ordinarily entitled to custody as against all other persons, custody may be judicially denied for substantial reasons. *E.g., In re Stancil*, 10 N.C. App. 545, 179 S.E.2d 844 (1971). *See also In re Bowen*, 7 N.C. App. 236, 172 S.E.2d 62 (1970). In discussing who between the mother and father should be awarded custody of their child, the court in *Bowen* stated, "We do not understand the law in this jurisdiction to be . . . that a change in custody may not be ordered absent a finding that the person having custody under a prior order has become unfit or is no longer able or suited to retain custody." *Id.* at 241-42, 172 S.E.2d at 65.

While a specific finding that the natural parent was unfit has been made in almost every North Carolina case in which the natural parent was deprived of custody, *e.g., In re Hughes*, 254 N.C. 434, 119 S.E.2d 189 (1961), the court of appeals in *In re Morrison*, 6 N.C. App. 47, 169 S.E.2d 228 (1969), awarded custody to the paternal grandparents without an express finding that the mother was unfit.

28. *E.g., Ridenhour v. Ridenhour*, 225 N.C. 508, 514, 35 S.E.2d 617, 620 (1945).

29. *See, e.g., Montgomery v. Montgomery*, 32 N.C. App. 154, 231 S.E.2d 26 (1977) (award of visitation rights, analogous to award of custody, should contain findings of fact that support conclusion that party is fit person to visit child and that such visitation rights are in best interests of child); *In re Stancil*, 10 N.C. App. 545, 179 S.E.2d 844 (1971) (award of visitation rights, like award of custody, is exercise of judicial function).

30. 294 N.C. 554, 243 S.E.2d 129 (1978).

31. *Id.* at 575-76, 243 S.E.2d at 142.

32. N.C. GEN. STAT. § 50-13.7 (1976) provides:

(a) An order of a court of this State for custody or support, or both, of a minor child may be modified at any time, upon . . . a showing of changed circumstances . . . .

(b) When an order for custody or support, or both, of a minor child has been entered by a court of another state, a court of this State may, . . . upon a showing of changed circumstances, enter a new order . . . which modifies or supersedes such order for custody or support.

33. 294 N.C. at 576, 243 S.E.2d at 142.

visitation rights, as in modification of custody awards, requires a showing of changed circumstances.<sup>34</sup> The court in *Clark* made it clear that this requirement of a showing of changed circumstances before a visitation award can be modified is absolute. Reversing the court of appeals, the court held that a court must "determine whether changed circumstances affecting the welfare of the child" justify modification of a visitation award even when the parties have agreed that the court may change their visitation privileges without such a showing.<sup>35</sup>

### 3. Child Support

The supreme court in *Elmwood v. Elmwood*<sup>36</sup> clarified the types of military payments that are subject to garnishment under G.S. 110-136<sup>37</sup> to enforce child support obligations.<sup>38</sup> Defendant-garnishee in *Elmwood* was a retired regular officer of the Marine Corps<sup>39</sup> and received military retirement and disability payments.<sup>40</sup> The court held that defendant's retirement pay was subject to garnishment under G.S. 110-136 but that his disability pay was not.<sup>41</sup> Controlling federal law requires that this distinction be drawn between the two types of payments defendant received. Pursuant to 42 U.S.C. § 659, only monies received from the United States as "remuneration for employment" are subject to garnishment in accordance with applicable state law.<sup>42</sup> While the

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34. N.C. GEN. STAT. § 50-13.7(a) (1976), *quoted in note 32 supra*.

35. 294 N.C. at 575, 243 S.E.2d at 141.

36. 295 N.C. 168, 244 S.E.2d 668 (1978).

37. N.C. GEN. STAT. § 110-136 (1978 & Interim Supp. 1978). Section 110-136(a) provides:

Notwithstanding any other provision of the law, in any case in which a responsible parent is under a court order or has entered into a written agreement . . . to provide child support, a judge . . . may enter an order of garnishment whereby no more than 25 percent (25%) of the responsible parent's monthly disposable earnings shall be garnished for the support of his minor child.

*Id.* § 110-136(a) (Interim Supp. 1978).

38. For a similar analysis of the types of military payments that are subject to garnishment for alimony, see *Watson v. Watson*, 424 F. Supp. 866 (E.D.N.C. 1976).

39. There is a significant difference between retired regular officers and retired reserve officers. A retired regular officer of the military services is subject to recall to active duty under certain circumstances and remains subject to the Uniform Code of Military Justice, neither of which is true of retired reserve officers. *Hostinsky v. United States*, 292 F.2d 508, 510 (Ct. Cl. 1961). This distinction is determinative of whether military retirement pay is garnishable. See text accompanying notes 41-43 *infra*.

40. 295 N.C. at 170, 244 S.E.2d at 669-70.

41. *Id.* at 180-81, 244 S.E.2d at 676. The court, however, made no finding on whether defendant was actually disabled in support of designation of part of his retirement pay as disability pay.

42. 42 U.S.C. § 659 (1976) states:

Notwithstanding any other provision of law . . . moneys (the entitlement to which is based upon the remuneration for employment) due from, or payable by, the United

retirement pay of retired reserve officers is considered akin to a pension for past services, retirement pay of retired regular officers is considered current compensation for present services.<sup>43</sup> True military disability payments obviously have no relationship to performance of services and, therefore, cannot be garnished. Although federal law determines the type of payments received from the United States that can be garnished, state law determines the extent to which the appropriate payments can be garnished. G.S. 110-136 restricts the extent to which defendant's retirement pay may be garnished for child support to twenty-five percent of his monthly disposable retirement income.<sup>44</sup>

A novel question concerning the ability of one party to pay the attorneys' fees of the other party in a child support action was presented to the court of appeals in *Wyatt v. Wyatt*.<sup>45</sup> Plaintiff father in *Wyatt* claimed the trial court erred in considering his present wife's income in determining his ability to pay the attorneys' fees of his former wife incurred in an action brought by the former wife for support of a child by the former marriage.<sup>46</sup> Apparently relying on the broad discretion bestowed upon North Carolina courts by G.S. 50-13.6<sup>47</sup> to determine an award of reasonable attorneys' fees in a child custody or support action,<sup>48</sup> the court of appeals held that the income of plaintiff's present wife was a proper factor to consider in assessing his financial circumstances and ability to pay the former wife's counsel fees.<sup>49</sup> The court reasoned that consideration of plaintiff's present wife's income was justified because plaintiff's present wife was a member of his household, shared in the responsibility for supporting the household, and was the mother of all three children living in the household.<sup>50</sup> Nevertheless, the *Wyatt* decision should not be read to imply that consideration of a second spouse's income is generally appropriate in

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States . . . to any individual including members of the armed services, shall be subject, in like manner and to the same extent as if the United States were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

43. 23 Comp. Gen. 284, 286 (1943).

44. N.C. GEN. STAT. § 110-136(a) (Interim Supp. 1978), *quoted in note 37 supra*.

45. 35 N.C. App. 650, 242 S.E.2d 180 (1978).

46. *Id.* at 651, 242 S.E.2d at 181.

47. N.C. GEN. STAT. § 50-13.6 (1976) specifically authorizes an award of reasonable attorneys' fees in an action for child support or custody or a modification of an existing order for child support or custody.

48. *See* *Kearns v. Kearns*, 6 N.C. App. 319, 170 S.E.2d 132 (1969). The court in *Wyatt* cites no authority to support its holding.

49. 35 N.C. App. at 651-52, 242 S.E.2d at 181-82.

50. *Id.*

determining financial ability under G.S. 50-13.6. In *Wyatt*, plaintiff himself introduced evidence of his present wife's income;<sup>51</sup> under similar circumstances in *Wyche v. Wyche*,<sup>52</sup> plaintiff father did not introduce evidence of his second wife's income and the court made no inquiries about her income.<sup>53</sup>

## B. Divorce and Alimony

### 1. Relation with Separation Agreement

Several recent decisions<sup>54</sup> have dispelled much of the lingering confusion over the nature and incidents of the relationship between a separation agreement and a divorce decree. A divorce decree may merely approve the separation agreement of the parties or the separation agreement may be incorporated and adopted into the divorce decree.<sup>55</sup> The power of the court to modify support payments set forth in the separation agreement and the types of remedies available to enforce the provisions of the agreement depend upon whether the separation agreement is adopted or only approved by the court.<sup>56</sup> The supreme court in *Levitch v. Levitch*<sup>57</sup> further described how to make the critical distinction between court adoption and court approval of a separation agreement.

The separation agreement in *Levitch* had been incorporated by reference into a divorce decree, but not specifically adopted by the court as its own order. Plaintiff wife sought to enforce the support provisions of the agreement through the court's contempt power.<sup>58</sup> Be-

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51. *Id.* at 652, 242 S.E.2d at 182.

52. 29 N.C. App. 685, 225 S.E.2d 626, *cert. denied*, 290 N.C. 668, 228 S.E.2d 459 (1976).

53. Plaintiff's "new family" was mentioned in *Wyche, id.* at 687, 225 S.E.2d at 628, but no specific reference was made to his present wife. Plaintiff's affidavit of financial standing, which listed his income and expenses, did not include any income from his present wife. Record at 28-31.

54. *Levitch v. Levitch*, 294 N.C. 437, 241 S.E.2d 506 (1978); *Britt v. Britt*, 36 N.C. App. 705, 245 S.E.2d 381 (1978); *White v. White*, 37 N.C. App. 471, 246 S.E.2d 591 (1978). For a discussion of *Britt* and *White*, see text accompanying notes 106-19 *infra*.

55. In the former case, "the court merely approves or sanctions the payments which the husband has agreed to make for the wife's support and sets them out in a judgment against him. Such a judgment constitutes nothing more than a contract between the parties made with the approval of the court." In the latter case, however, "the court adopts the agreement of the parties as its own determination of their respective rights and obligations and orders the husband to pay the specified amounts as alimony." *Bunn v. Bunn*, 262 N.C. 67, 69, 136 S.E.2d 240, 242 (1964).

56. Unlike separation agreements that have been adopted by a court, separation agreements that have merely been *approved* by a court may not be modified by the court upon a showing of changed circumstances and are not enforceable by contempt. *Id.*

57. 294 N.C. 437, 241 S.E.2d 506 (1978).

58. *Id.* at 438, 241 S.E.2d at 507.

cause only those agreements that have been adopted by the court can be enforced through the court's contempt power,<sup>59</sup> determination of whether these provisions were enforceable by contempt necessarily involved a finding of whether the trial court adopted the agreement as its own adjudication of the rights of the parties or merely approved the agreement. The trial court specifically ordered that the agreement be incorporated by reference into the divorce decree but did not order defendant husband to make the support payments specified therein.<sup>60</sup> The court in *Levitch* was thus presented with the question whether a specific court order that the supporting spouse make the support payments set out in a separation agreement is necessary for court adoption of the agreement. Reversing the court of appeals, the supreme court held that an order to incorporate a separation agreement into a divorce decree does not require a specific order to comply with the support provisions of the agreement to give the agreement the force of a judicial decree and, thereby, render it enforceable through the contempt power of the court.<sup>61</sup>

Prior case law was silent on the precise issue addressed by the *Levitch* court, but suggested that a court order to make the payments agreed upon in a separation agreement was required for court adoption of the agreement.<sup>62</sup> In *Bunn v. Bunn*,<sup>63</sup> the landmark case defining the differences between court approval and court adoption of a separation agreement, the supreme court stated that in consent judgments that endow the separation agreement with the force of a judicial decree "the court adopts the agreement of the parties as its own determination of their respective rights and obligations *and* orders the husband to pay the specified amounts as alimony."<sup>64</sup> Subsequent cases reinforced the idea that a court order to make support payments was a prerequisite to court adoption of the agreement. In explaining the two types of consent judgments described in *Bunn*, the supreme court in *Mitchell v. Mitchell*<sup>65</sup> stated, "When . . . a court . . . *orders* the husband to make specified payments to his wife for her support, his wilful failure to comply with the court's judgment will subject him to attachment for con-

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59. See note 56 *supra*.

60. 294 N.C. at 439, 241 S.E.2d at 507.

61. *Id.* at 440, 241 S.E.2d at 508.

62. *E.g.*, *Mitchell v. Mitchell*, 270 N.C. 253, 154 S.E.2d 71 (1967); *Bunn v. Bunn*, 262 N.C. 136, 136 S.E.2d 240 (1964).

63. 262 N.C. 67, 136 S.E.2d 240 (1964).

64. *Id.* at 69, 136 S.E.2d at 242 (emphasis added).

65. 270 N.C. 253, 154 S.E.2d 71 (1967).

tempt. . . . This is true . . . 'because the judgment requires the payment.'"<sup>66</sup> The *Levitch* decision makes it clear, however, that a divorce decree can require compliance with support payments set forth in a separation agreement through court adoption of the agreement without specifically ordering that the support payments be made.

Because the *Levitch* court looked to the trial court's intent in ordering incorporation of the agreement to determine whether the agreement had the effect of a judicial decree,<sup>67</sup> this decision should be read with a measure of caution and should not be interpreted to mean that an order of incorporation without a specific order to comply with the support provisions of the agreement automatically converts the separation agreement into a judicial decree. A court may not always intend that the separation agreement be adopted by the court when the provisions of the agreement are incorporated into a divorce decree but are not expressly made the subject of the court's own order.<sup>68</sup> In addition, the divorce judgment may be a consent judgment,<sup>69</sup> in which case the intent of the parties, not that of the court, controls in determining the effect of the judgment.<sup>70</sup> Thus, had the *Levitch* judgment been a consent judgment,<sup>71</sup> language contained in the agreement stating that the agreement was not to be merged in a divorce decree,<sup>72</sup> could properly have been given more weight in interpreting the effect of the decree than was given it in *Levitch*.

## 2. Divorce from Bed and Board

In *Triplett v. Triplett*,<sup>73</sup> a case of first impression, the court of appeals considered whether one spouse may pursue an action for divorce from bed and board<sup>74</sup> and alimony while both spouses are staying together in the same house. Defendant husband in *Triplett* had moved

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66. *Id.* at 256, 154 S.E.2d at 73 (quoting *Sessions v. Sessions*, 178 Minn. 79, 80, 226 N.W. 701, 701 (1929) (per curiam)) (emphasis added).

67. 294 N.C. at 439, 241 S.E.2d at 507-08.

68. See *Williford v. Williford*, 10 N.C. App. 451, 179 S.E.2d 113, cert. denied, 278 N.C. 301, 180 S.E.2d 177 (1971). The court in *Williford* held that incorporation of the support provisions of a separation agreement into a divorce decree without a specific order to either party to comply with the incorporated provisions was not sufficient to establish court adoption of the agreement.

69. Divorce decrees based on separation for the statutory period are typically consent judgments. See, e.g., *Bunn v. Bunn*, 262 N.C. 67, 136 S.E.2d 240 (1964).

70. *Yount v. Lowe*, 288 N.C. 90, 215 S.E.2d 563 (1975); 46 AM. JUR. *Judgments* § 73 (1969).

71. 294 N.C. at 439, 241 S.E.2d at 507-08.

72. The separation agreement in *Levitch* contained a proviso that it should survive a divorce decree but not be merged therein. *Id.* at 439, 241 S.E.2d at 507.

73. 38 N.C. App. 364, 248 S.E.2d 69 (1978).

74. N.C. GEN. STAT. § 50-7 (1976) provides:



out of the marital abode prior to plaintiff's initiation of the divorce and alimony action, but he occasionally stayed with plaintiff for several days at a time and was staying with plaintiff during the hearing in the action.<sup>75</sup> Plaintiff sought a divorce from bed and board and alimony on the basis of defendant's wilful failure to provide her with support<sup>76</sup> and his excessive use of alcohol.<sup>77</sup> With little discussion of the issue presented, the court held that spouses do not have to be living apart to prosecute an action for divorce from bed and board.<sup>78</sup>

The *Triplett* holding is stated too briefly because living apart is obviously a condition for divorce from bed and board on the statutory grounds of abandonment or maliciously turning the other spouse out of doors. Nevertheless, the decision promotes a desirable policy of refusing to find condonation, through continued cohabitation by the parties, of continuing marital offenses such as cruelty and habitual drunkenness.<sup>79</sup> This decision should be read with caution, however. Facts of the case reveal that plaintiff and defendant had indeed separated; they were not living together when the action was initiated, and defendant was only staying at plaintiff's residence temporarily during the hearing.

### 3. Changed Circumstances

The court of appeals in *Stallings v. Stallings*<sup>80</sup> considered whether post-divorce sexual misconduct of a dependent ex-spouse can constitute changed circumstances, thereby justifying modification of a per-

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The court may grant divorces from bed and board on application of the party injured . . . in the following cases:

- (1) If either party abandons his or her family.
- (2) Maliciously turns the other out of doors.
- (3) By cruel or barbarous treatment endangers the life of the other.
- (4) Offers such indignities to the person of the other as to render his or her condition intolerable and life burdensome.
- (5) Becomes an excessive user of alcohol or drugs so as to render the condition of the other spouse intolerable and the life of that spouse burdensome.

75. 38 N.C. App. at 365-66, 248 S.E.2d at 71.

76. This claim is presumably an allegation of constructive abandonment. Several decisions involving plaintiffs seeking alimony without divorce on the basis of abandonment have held plaintiff's allegations that defendant wilfully refused to provide plaintiff with adequate support sufficient to state a claim for alimony without divorce on the ground of constructive abandonment. See, e.g., *Brady v. Brady*, 273 N.C. 299, 160 S.E.2d 13 (1968). No decision, however, has granted a divorce from bed and board on the ground of constructive abandonment.

77. Abandonment and habitual drunkenness are grounds for divorce from bed and board under N.C. GEN. STAT. § 50-7(1), (5) (1976) as well as for alimony without divorce under *id.* § 50-16.2(4), (9).

78. 38 N.C. App. at 366, 248 S.E.2d at 71.

79. See generally 1 R. LEE, NORTH CAROLINA FAMILY LAW § 83 (1963 & Supp. 1976).

80. 36 N.C. App. 643, 244 S.E.2d 494, cert. denied, 295 N.C. 648, 248 S.E.2d 249 (1978).

manent alimony award.<sup>81</sup> Defendant payor in *Stallings* claimed that his former wife's occasional post-divorce fornication was a changed circumstance requiring termination or reduction in his alimony payments to her.<sup>82</sup> Taking a strict statutory approach, the court concluded that post-divorce sexual misconduct does not provide a basis for modification or termination of an alimony award because the term "changed circumstance" as used in G.S. 50-16.9(a)<sup>83</sup> refers only to financial needs and abilities of the former spouses. The court further noted that post-divorce sexual misconduct is not included as a ground for termination of alimony under G.S. 50-16.9(b),<sup>84</sup> which provides that alimony shall terminate upon the payee's remarriage.<sup>85</sup>

### C. Separation Agreements

In *Murphy v. Murphy*,<sup>86</sup> the North Carolina Supreme Court, for the first time, squarely addressed the question "whether a husband and wife who, after having executed a separation agreement and established separate abodes, continue to engage in sexual intercourse from time to time thereby rescind the [separation] agreement."<sup>87</sup> Reversing the court of appeals,<sup>88</sup> the supreme court in *Murphy* held that sexual

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81. An alimony award may be modified upon a showing of changed circumstances pursuant to N.C. GEN. STAT. § 50-16.9(a) (1976).

82. 36 N.C. App. at 643-44, 244 S.E.2d at 495.

83. N.C. GEN. STAT. § 50-16.9(a) (1976).

84. *Id.* § 50-16.9(b).

85. 36 N.C. App. at 644-45, 244 S.E.2d at 495.

86. 295 N.C. 390, 245 S.E.2d 693 (1978).

87. *Id.* at 394, 245 S.E.2d at 696.

The North Carolina Supreme Court had previously held that a resumption of the conjugal relationship between husband and wife, after a separation agreement has been duly executed, rescinds the agreement. *State v. Gossett*, 203 N.C. 641, 166 S.E. 754 (1932); *Smith v. King*, 107 N.C. 273, 12 S.E. 57 (1890) (per curiam). Similarly, the supreme court has consistently held that a separation agreement between husband and wife is terminated, insofar as it remains executory, upon their reconciliation and resumption of marital cohabitation. *E.g., In re Estate of Adamee*, 291 N.C. 386, 230 S.E.2d 541 (1976). The supreme court, however, has never defined the terms "resumption of the conjugal relationship," "reconciliation" or "resumption of marital cohabitation," and their meaning is not clear from the context of the cases. *Gossett* equated "conjugal relationship" with sexual intercourse; the case held that a deed of separation is invalid if after its execution the husband continues to visit his wife from time to time and upon each visit they engage in sexual intercourse. 203 N.C. at 642-44, 166 S.E. at 754-55. In *Smith*, the phrase "resumption of the conjugal relationship" described the wife's actions in moving back into the marital abode and residing there with her husband as man and wife for 12 months. 107 N.C. at 6, 12 S.E. at 57. "Resumption of marital cohabitation" in *Adamee* also described the situation in which the husband and wife move back into the marital abode and live as they did before the separation and execution of a separation agreement. 291 N.C. at 393, 230 S.E.2d at 546. No supreme court case, prior to *Murphy*, had discussed what is the minimally sufficient conduct by a husband and wife that constitutes a reconciliation, and, therefore, an abrogation of the separation agreement.

88. 34 N.C. App. 677, 239 S.E.2d 597 (1977), *rev'd*, 295 N.C. 390, 245 S.E.2d 693 (1978).

intercourse between husband and wife after the execution of a separation agreement rescinds the agreement regardless of whether their sexual encounters are "casual," "isolated," or otherwise"<sup>89</sup> and irrespective of any intent, or lack thereof, by the parties to renew their marital relationship.<sup>90</sup> The court in *Murphy* held the separation agreement executed by plaintiff and defendant invalid solely because of the parties' intermittent<sup>91</sup> post-separation sexual intercourse.

This decision is supported neither by reason nor by precedent. It directly conflicts with a desirable policy of preserving marriages by encouraging reconciliation attempts between separated spouses who have made a separation agreement, it is a much narrower holding than the facts of the case demanded,<sup>92</sup> and it inexplicably rejects case law developed by the court of appeals.<sup>93</sup>

The decision in *Murphy* is based almost exclusively<sup>94</sup> on *State v.*

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89. 295 N.C. at 397, 245 S.E.2d at 698.

90. *Id.* at 395, 245 S.E.2d at 697.

91. Plaintiff's and defendant's testimony on the exact number of times they engaged in sexual intercourse after executing a separation agreement conflicted, but both admitted to having done so at least six times. Defendant wife estimated the number at more than two dozen. *Id.* at 393-94, 245 S.E.2d at 695-96.

92. The facts in *Murphy* indicated frequent visits between plaintiff and defendant, occasionally coupled with sexual activity. There was conflicting evidence about whether the parties intended to reconcile their differences and begin living together again as husband and wife. 295 N.C. at 392-93, 245 S.E.2d at 695-96.

93. *Murphy* impliedly overruled *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), and *Newton v. Williams*, 25 N.C. App. 527, 214 S.E.2d 285 (1975), both of which held that a reconciliation between husband and wife sufficient to rescind a separation agreement requires a mutual intent to resume cohabitation in a normal relationship of husband and wife and that sexual intercourse alone does not abrogate the agreement. These cases are in accord with the overwhelming majority of jurisdictions that have considered the question. 1 A. LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS § 8 (1964 & Supp. 1978). "The usual judicial approach is to be circumspect in finding that reconciliation [necessitating rescission of the agreement] has occurred." Wadlington, *Sexual Relations After Separation or Divorce: The New Morality and the Old and New Divorce Laws*, 63 VA. L. REV. 249, 261-62 (1977).

94. The court also cited the Lindey treatise and several cases from other jurisdictions in support of its conclusion. 295 N.C. at 397, 245 S.E.2d at 698 (citing 1 A. LINDEY, *supra* note 93, § 8, at 13; *Weeks v. Weeks*, 143 Fla. 686, 197 So. 393 (1940); *Wolff v. Wolff*, 134 N.J. Eq. 8, 34 A.2d 150 (1943); *Ahrens v. Ahrens*, 67 Okla. 147, 169 P. 486 (1917)). These cites, however, do not support the *Murphy* decision; the statement taken from Lindey is quoted out of context and the cases are either not on point or have been limited by later decisions in their respective jurisdictions.

The court in *Murphy* cited Lindey in support of its statement that severance of marital relations by a separation agreement and continued sexual intercourse are "essentially antagonistic and irreconcilable notions." 295 N.C. at 397, 245 S.E.2d at 698 (quoting 1 A. LINDEY, *supra* note 93, § 8 at 13). Lindey, however, unequivocally states that "[a]brogation [of a separation agreement] . . . is a matter of intention; it does not arise automatically as a matter of law." 1 A. LINDEY, *supra* note 93, § 8, at 14.

*Weeks v. Weeks*, 143 Fla. 686, 197 So. 393 (1940), was a case cited by the court that was later limited. *Weeks* held that plaintiff's and defendant's resumption of the marital relationship in

*Gossett*.<sup>95</sup> This reliance is misplaced, however, because *Gossett* is easily distinguished from *Murphy* on its facts. *Gossett*, a prosecution for criminal abandonment and nonsupport, was decided at a time when separation agreements were not favored by North Carolina courts<sup>96</sup> and presented a compelling factual situation for rescission of the separation agreement. As a defense to prosecution, defendant pleaded a separation agreement in which his wife relinquished any interest she might have in his property. Evidence in the case clearly indicated that defendant's wife had no independent counsel when she signed the agreement, that she did not understand the provisions of the separation agreement and that she was rendered destitute by the terms of the agreement.<sup>97</sup> The court in *Gossett* upheld defendant's conviction, finding the separation agreement had been invalidated due to defendant's post-separation sexual intercourse with his wife every time he visited her.<sup>98</sup>

In *Murphy*, on the other hand, the separation agreement was drawn up entirely by defendant wife's attorney, defendant was fully aware of the extent of plaintiff's assets, and defendant was adequately provided for by the terms of the agreement.<sup>99</sup> Furthermore, there was

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travelling together as man and wife on several occasions after separation abrogated their separation agreement. Subsequently, in *Busot v. Busot*, 338 So. 2d 1332, 1334 (Fla. Dist. Ct. App. 1976) (dictum), the Florida Court of Appeals stated that the facts in *Weeks* showed a true reconciliation between spouses while the facts in *Busot* (sexual intercourse between the parties an undisclosed number of times coupled with unsuccessful attempts at reconciliation) did not. The court in *Busot* explained the distinction, stating, "[o]bviously, reconciliation requires an intention of the parties to reconcile and this requires more than some occasional post-separation sexual experiences." *Id.* at 1334-35.

*Wolff v. Wolff*, 134 N.J. Eq. 8, 34 A.2d 150 (1943), held a separation agreement raised by the husband as a defense to his wife's separate maintenance suit invalid for a number of reasons: the agreement was grossly unfair to plaintiff wife who had no independent counsel when the separation agreement was executed, and the agreement was void as against public policy because it facilitated divorce. In enumerating the laws of the separation agreement, the court stated without discussion that the parties' continued normal cohabitation following execution of the separation agreement, as though the agreement had never been made, effectively put an end to it. *Id.* at 141, 34 A.2d at 156 (dictum). Nothing in the opinion indicates what the court meant by "normal" cohabitation.

In *Ahrens v. Ahrens*, 67 Okla. 147, 169 P. 486 (1917), plaintiff and defendant resumed living together for a period of 10 days after execution of a separation agreement. *Id.* at 148, 169 P. at 487. Therefore, the issue in the case was not whether there was sufficient contact between husband and wife *short of actually living together* to rescind a separation agreement.

95. 203 N.C. 641, 166 S.E. 754 (1932).

96. The court's hostility to separation agreements was openly acknowledged. *Id.* at 643, 166 S.E. at 754.

97. *Id.* at 642, 166 S.E. at 754.

98. *Id.* at 643-44, 166 S.E. at 755.

99. Record at 50-51, 72-79, 85-86, 94, *Murphy v. Murphy*, 34 N.C. App. 677, 239 S.E.2d 597 (1977). By the terms of the agreement defendant wife was to receive a lump-sum alimony award of \$12,000, all the household and kitchen furniture, a 1968 Oldsmobile, and a house trailer and lot

no pervading fear in *Murphy*, as in *Gossett*, of separation agreements being used by husbands as a means to escape the financial responsibilities of marriage while remaining free to enjoy the benefits of marriage by continuing to engage in sexual intercourse with their estranged wives.<sup>100</sup>

The holding in *Murphy* becomes even more surprising when considered in light of prior North Carolina Supreme Court decisions that imply that post-separation sexual activity between spouses who have no intention of resuming a marital relationship does not interrupt the statutory separation period and, thereby, bar a divorce based on separation under G.S. 50-5(4)<sup>101</sup> or 50-6.<sup>102</sup> In both *Young v. Young*<sup>103</sup> and *In re Estate of Adamee*<sup>104</sup> the supreme court held that separation under G.S. § 50-5(4) or G.S. § 50-6 "means cessation of cohabitation, and cohabitation means living together as man and wife, though not necessarily implying sexual relations. Cohabitation includes other marital responsibilities and duties [aside from sex]."<sup>105</sup>

The *Murphy* decision is unsound for the reasons discussed above and, accordingly, should be strictly limited to its facts. In light of the circumstances of the case, the words "isolated" and "casual," held in *Murphy* to describe sexual relations sufficient to rescind a separation agreement, can perhaps be construed to mean "from time to time" or "intermittent."

The court of appeals, in two recent cases, clarified the relationship between provisions in a separation agreement pertaining to support

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at Topsail Beach, North Carolina. Evidence indicated that plaintiff owned a substantial interest in Murphy Mills, Incorporated and Murphy Farm Company; each company's assets were valued at greater than \$100,000. The provisions of the separation agreement, however, must be considered in light of the strong evidence indicating that defendant committed adultery. Adultery is a complete bar to alimony in North Carolina. N.C. GEN. STAT. § 50-16.6(a) (1976).

100. 203 N.C. at 644, 166 S.E. at 755.

101. N.C. GEN. STAT. § 50-5(4) (1976) provides that a marriage may be dissolved by divorce on application of the injured party if the husband and wife have lived separate and apart for one year.

102. *Id.* § 50-6 (Interim Supp. 1978) provides that a marriage may be dissolved by divorce on application of either party if the husband and wife have lived separate and apart for one year.

103. 225 N.C. 340, 34 S.E.2d 154 (1945).

104. 291 N.C. 386, 230 S.E.2d 541 (1976).

105. 225 N.C. at 344, 34 S.E.2d at 157 (citations omitted); 291 N.C. at 391-92, 230 S.E.2d at 546. Consistent with this definition of separation is *Tuttle v. Tuttle*, 36 N.C. App. 635, 244 S.E.2d 446 (1978), in which the court of appeals held that the statutory separation period was not interrupted by mere social contact between the parties without any cohabitation in the sense of living together as man and wife or intent to resume the marital relationship. Defendant in *Tuttle* stayed in plaintiff's home one night over the Christmas holidays for the purpose of visiting her children and did not have sexual relations with plaintiff.

and those pertaining to a property settlement. In *Britt v. Britt*,<sup>106</sup> the court of appeals erased any doubt about the separability of support and property settlement provisions in a separation agreement that has been adopted by the court. In *White v. White*,<sup>107</sup> the court indicated factors relevant to the determination of whether these provisions are separable.

Although it had previously been held by implication<sup>108</sup> and stated in dictum<sup>109</sup> that provisions in a separation agreement for the division of property rights and for support payments may be included as separable provisions that remain separable upon adoption of the agreement by the court, *Britt* was the first decision to hold expressly that such property settlement and support provisions are separable. The separation agreement in *Britt* expressly stated that the support provisions were independent from any agreement for division of property and should not for any purpose be considered "to be a part of or merged in

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106. 36 N.C. App. 705, 245 S.E.2d 381 (1978).

107. 37 N.C. App. 471, 246 S.E.2d 591 (1978).

108. In *Seaborn v. Seaborn*, 32 N.C. App. 556, 233 S.E.2d 67 (1977), the issue before the court was whether a consent judgment could be modified to permit greater support payments upon a showing of changed circumstances. By provision one of the consent judgment, plaintiff husband agreed to pay \$150 per month to defendant wife until she died or remarried. By provisions two and three of the consent judgment, plaintiff deeded his interest in one piece of real property owned jointly by them to defendant, and defendant deeded her interest in another piece of real property owned jointly by them to plaintiff. *Id.* at 556-57, 233 S.E.2d at 68. The agreement, therefore, contained both provisions for support and property division. In holding that the support provision was modifiable the court necessarily held that the support provision and the property settlement in the consent judgment were separable. The court cited *Bunn v. Bunn*, 262 N.C. 67, 136 S.E.2d 240 (1964), in support of its conclusion that the support provision and property settlement provision of the consent judgment were separable. *Id.* at 558, 233 S.E.2d at 69.

109. Both *Holsomback v. Holsomback*, 273 N.C. 728, 732, 161 S.E.2d 99, 102-03 (1968), and *Bunn v. Bunn*, 262 N.C. 67, 70, 136 S.E.2d 240, 243 (1964), contain dictum stating that provisions for support and property division may be included in a consent judgment as separable provisions. The *Bunn* court stated:

[A]n agreement for the division of property rights and an order for the 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. However, if the support provision and the division of property constitute a reciprocal consideration so that the entire agreement would be destroyed by a modification of the support provision, they are not separable and may not be changed without the consent of both parties.

*Id.* at 70, 136 S.E.2d 243 (citations omitted).

Similarly, the court in *Holsomback* stated:

In the consent judgment which Judge May purported to set aside, the parties agreed upon a division of their property and upon the amount of alimony which defendant should pay plaintiff until her death or remarriage. This judgment was . . . a decree of the court. The order with reference to the payment of future installments of alimony was, therefore, subject to modification by the court in the event of changed conditions. The agreed division of property, a separable provision, however, was beyond the power of the judge to modify without the consent of both parties.

273 N.C. at 732, 161 S.E.2d at 102-03 (citations omitted).

or integrated with a property settlement of the parties."<sup>110</sup> The court did not discuss the relevance of any other aspects of the agreement to its finding that the provisions were separable, but considered this language in the separation agreement determinative of whether the provisions were separable.<sup>111</sup>

In contrast, the court of appeals in *White* enumerated several factors considered by courts in other jurisdictions<sup>112</sup> to be relevant to a determination of the severability of support and property settlement provisions in a separation agreement. Factors relevant to a finding that the provisions are severable include the wife's claim for alimony in the divorce action,<sup>113</sup> a provision in the agreement that the support payments would terminate in the event of the wife's remarriage,<sup>114</sup> lack of evidence that the amount of the support payments was based on the value of any property given as consideration for the payments,<sup>115</sup> and language in the agreement itself indicating that the agreement was not a final settlement of rights and duties of the parties with respect to both property and support.<sup>116</sup> Finding that the support payments in *White* had every indicia of alimony and no evidence that the support payments and the provisions for a property settlement were interrelated,<sup>117</sup> the *White* court concluded that the payments denominated as "permanent alimony" in the divorce action consent judgment were precisely that, and, therefore, severable.<sup>118</sup>

None of the factors enumerated by the court in *White* is determinative, however. The court expressly stated that each case involving the issue of separability of support and property settlement provisions must be decided upon its own facts.<sup>119</sup>

Other 1978 cases involving disputes over separation agreements

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110. 36 N.C. App. at 711, 245 S.E.2d at 385.

111. *Id.*

112. The court examined cases from New Mexico, Montana and California. 37 N.C. App. at 476-77, 246 S.E.2d at 594-95.

113. *Movius v. Movius*, 163 Mont. 463, 517 P.2d 884 (1976).

114. *Id.*

115. *Scanlon v. Scanlon*, 60 N.M. 43, 287 P.2d 238 (1955). *But see* *Washington v. Washington*, 512 P.2d 1300 (Mont. 1973) (provisions for support and property division held nonseparable because one party assumed preexisting liabilities against part of the property as partial consideration for support payments).

116. California courts in particular emphasize the wording of the agreement. *See, e.g., DiMarco v. DiMarco*, 60 Cal. 2d 387, 385 P.2d 2, 33 Cal. Rptr. 610 (1963).

117. By the terms of the agreement, defendant was to pay plaintiff \$100 per week until she remarried or died and \$1,000 in a lump sum as well as convey his half interest in their home to plaintiff. 37 N.C. App. at 472-73, 246 S.E.2d at 593.

118. *Id.* at 477-78, 246 S.E.2d at 595.

119. *Id.* at 477, 246 S.E.2d at 595.

were resolved by the court of appeals by applying principles of contract law.<sup>120</sup> Stressing contract rules of interpretation, the term "single" used in separation agreements<sup>121</sup> was determined as a matter of law to mean "unmarried" in *Hall v. Hall*.<sup>122</sup> Defendant's argument that "single" was ambiguous and was intended to mean "alone"<sup>123</sup> was rejected in favor of a common sense interpretation of the word.

In *Stanback v. Stanback*,<sup>124</sup> the court of appeals held that the measure of damages for breach of a separation agreement was the same as for any other contract. Plaintiff and defendant in *Stanback* agreed that defendant husband would pay plaintiff's attorneys' fees. In a subsequent amendment to this agreement, plaintiff agreed to pay her own attorneys' fees in exchange for increased support payments and defendant's promise to pay any federal or state income tax plaintiff incurred by not being able to deduct the attorneys' fees in determining her tax liability. Plaintiff was unable to deduct \$28,500 of the attorneys' fees, and defendant did not pay this deficiency as he had promised.<sup>125</sup> Plaintiff's claims for both consequential and punitive damages for defendant's breach were dismissed for insufficiency.<sup>126</sup> The claim for consequential damages for mental anguish was dismissed because the tax arrangement was commercial as opposed to personal in nature.<sup>127</sup> The claim for punitive damages was not allowed because the tax provi-

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120. Separation agreements between husband and wife are generally construed in accordance with rules and provisions applicable to contracts in general. *Bowles v. Bowles*, 237 N.C. 462, 75 S.E.2d 413 (1953).

121. The term "single" as used in separation agreements had never been interpreted by the court of appeals before. A similar issue was raised in *Riddle v. Riddle*, 32 N.C. App. 83, 230 S.E.2d 809 (1977), however. The separation agreement in *Riddle* provided that the husband was to pay his wife \$600 per month until she either died or remarried. Plaintiff began living with another man, and defendant ceased making the agreed upon payments. The court held that plaintiff's cohabitation with another man to whom she was not married did not furnish a defense to plaintiff's duty to support defendant pursuant to the agreement.

122. 35 N.C. App. 664, 242 S.E.2d 170, *cert. denied*, 295 N.C. 260, 245 S.E.2d 777 (1978).

123. By the terms of the agreement, defendant was obligated to pay plaintiff \$300 per month as long as she remained single. Defendant argued that plaintiff was no longer "single" because she was living with another man. *Id.* at 664, 242 S.E.2d at 171-72.

124. 37 N.C. App. 324, 246 S.E.2d 74, *cert. granted*, 295 N.C. 649, 248 S.E.2d 253 (1978) (No. 44 PC).

125. *Id.* at 325, 246 S.E.2d at 76.

126. *Id.* at 327-31, 246 S.E.2d at 77-80.

127. A personal contract is one in which "the contractual duty or obligation is so coupled with matters of mental concern or solicitude, or with the sensibilities of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering" such as a contract of marriage or a contract to inter a body in specified manner. *Lamm v. Shingleton*, 231 N.C. 10, 14, 55 S.E.2d 810, 813 (1949). Compensatory damages for mental anguish may be recoverable for breach of personal, but not commercial, contracts. *Id.*



sion was commercial and because plaintiff failed to allege any separate identifiable tortious conduct sufficient to justify such an award.

Consistent with the North Carolina courts' refusal to enforce extra-judicial separation agreements through the contempt power of the court,<sup>128</sup> the court of appeals, in *Sainz v. Sainz*<sup>129</sup> and *Moore v. Moore*,<sup>130</sup> held that a separation agreement that has not been adopted in a court order may not be enforced by specific performance. This prohibition against enforcement of extra-judicial separation agreements by a decree of specific performance is absolute; it applies when arrearages in support payments provided for in the separation agreement have been reduced to judgment<sup>131</sup> as well as when plaintiff has obtained a foreign decree of specific performance to enforce such an agreement.<sup>132</sup> Reasoning that plaintiffs in *Sainz* and *Moore* sought specific performance decrees to compel defendants to comply with extra-judicial separation agreements under threat of being jailed for contempt,<sup>133</sup> the court refused to order specific performance of the agreements.<sup>134</sup>

Even though plaintiff in *Sainz* had a New York judgment ordering specific performance of the agreement, this judgment was not given effect by the North Carolina court because of the policy and law of North Carolina that contractual rights may not be enforced by civil contempt proceedings.<sup>135</sup> This holding does not violate the full faith and credit clause of the United States Constitution. That clause re-

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128. See, e.g., *Stanley v. Stanley*, 226 N.C. 129, 37 S.E.2d 118 (1946).

129. 36 N.C. App. 744, 245 S.E.2d 372 (1978).

130. 38 N.C. App. 700, 248 S.E.2d 761 (1978), *rev'd* 297 N.C. 14, — S.E.2d — (1979).

131. Plaintiff in *Moore* sought specific performance of an extra-judicial separation agreement after a judgment obtained against defendant for arrearages in payments set forth in the agreement proved worthless. *Id.* at 700, 248 S.E.2d at 761. The dissent in *Moore* would grant plaintiff the remedy of specific performance of the agreement under those circumstances in which plaintiff's remedy at law—judgment for the accrued payments—has proven inadequate. *Id.* at 702-03, 248 S.E.2d at 762-63 (Webb, J., dissenting).

132. Plaintiff in *Sainz* asked the North Carolina court to give effect to a New York judgment ordering defendant to specifically perform the separation agreement. 36 N.C. App. at 745, 245 S.E.2d at 373.

133. 36 N.C. App. at 746-47, 245 S.E.2d at 374; 38 N.C. App. at 701, 248 S.E.2d at 761.

134. A similar situation confronted the court of appeals in *Riddle v. Riddle*, 32 N.C. App. 83, 230 S.E.2d 809 (1977). Injunctive relief sought by plaintiff to compel her ex-husband to make the support payments agreed upon in their extra-judicial separation agreement was denied because the effect of an injunction would be to compel defendant to make the support payments under threat of enforcement by contempt proceedings.

135. N.C. CONST. art. I, § 28 prohibits imprisonment for debts. Separation agreements that have not been incorporated into a court decree and ordered by the court are nothing more than civil contracts and cannot be enforced by contempt proceedings, the gist of which is wilful disobedience to a court order. See *Stanley v. Stanley*, 226 N.C. 129, 37 S.E.2d 118 (1946).

quires that foreign judgments be recognized by courts of sister states, but does not require recognition of the specified method of enforcement.<sup>136</sup>

The North Carolina Supreme Court, however, reversed the decision of the court of appeals in *Moore* and held that, for the first time in North Carolina, a separation agreement that has not been incorporated in a divorce decree may be enforced by an order of specific performance.<sup>137</sup> Although the court distinguished earlier North Carolina decisions holding that contempt orders may not be invoked to enforce a separation agreement not made a part of a divorce decree,<sup>138</sup> it did not address the question whether a civil contempt proceeding would be available to force compliance with a decree of specific performance used to enforce an extra-judicial separation agreement. Without the threat of a court's contempt power, however, an order of specific performance would be of little benefit to a financially dependent former spouse.

SABRA J. FAIRES

## IX. PROPERTY<sup>1</sup>

### A. *Mortgages, Deeds of Trust and Statutory Liens*

#### The North Carolina Court of Appeals in *In re Deed of Trust of*

136. The methods by which a judgment of another state is enforced are determined by the local law of the forum. *Sistare v. Sistare*, 218 U.S. 1, 26 (1909). See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 99 (1971).

137. 297 N.C. 14, 252 S.E.2d 735 (1979).

138. *Id.* at 16, 252 S.E.2d at 737 (distinguishing *Stanley v. Stanley*, 226 N.C. 129, 37 S.E.2d 118 (1946); *Brown v. Brown*, 224 N.C. 556, 31 S.E.2d 529 (1944)).

1. The court of appeals decided cases of interest in the areas of vendor-purchaser and cemeteries in 1978. In an action for specific performance of a contract to convey a house with abatement of the purchase price, the court in *Nugent v. Beckham*, 37 N.C. App. 557, 246 S.E.2d 541 (1978), held that there was not an absolute right to interest on the purchase price for vendors in such an action. The court refused to award interest because defendant vendors would have received an amount in excess of that awarded to plaintiff purchasers for rents and profits and thus would have realized a net gain from their refusal to convey the land. In another vendor-purchaser case, *Passmore v. Woodard*, 37 N.C. App. 535, 246 S.E.2d 795 (1978), the court determined that plaintiff was entitled to receive sums paid pursuant to an option agreement to purchase land from defendants when defendants were unable to deliver clear title to the property. The court further held that plaintiff could recover the \$5000 he spent for improvements on the land but only to the extent that plaintiff could show that the improvements enhanced the value of the land.

In *Singletary v. McCormick*, 36 N.C. App. 597, 244 S.E.2d 731 (1978), the court of appeals

*Watts*<sup>2</sup> limited the jurisdiction of a superior court judge in a hearing de novo under G.S. 45-21.16(d)<sup>3</sup> to determine a creditor's right to foreclosure under a power of sale. The superior court in *Watts*, citing equitable reasons, had reversed the finding of the clerk that a creditor was entitled to foreclosure.<sup>4</sup> The court of appeals held that in the hearing on the right to foreclosure required by G.S. 45-21.16(d) the clerk of superior court is limited to the four findings specified in the statute and that in a hearing de novo on appeal the superior court is similarly limited and may not invoke its equitable jurisdiction.<sup>5</sup>

The court of appeals found first that G.S. 45-21.16 was the legislative response to the due process requirements laid down in *Turner v. Blackburn*.<sup>6</sup> It then concluded that those requirements were met by

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interpreted for the first time the statute authorizing removal and relocation of graves, N.C. GEN. STAT. § 65-13(a)(2) (1975). Under the statute a church may remove graves "in order to erect a new church . . . [or] in order to expand or enlarge an existing church facility . . ." The court read "in order to" to signify "as the means to" and held that a church could remove graves for the purpose of relocating a street on the grave-site so that the area of the existing street could be used for the construction of a new church building.

2. 38 N.C. App. 90, 247 S.E.2d 427 (1978).

3. N.C. GEN. STAT. § 45-21.16(d) (Supp. 1977), discussed in note 5 *infra*.

4. 38 N.C. App. at 91-92, 247 S.E.2d at 427-28. North Carolina recognizes two types of foreclosure: foreclosure by action or judicial sale in which the court may order a sale; and the power of sale foreclosure in which the authority to foreclose arises from a power of sale granted in the mortgage or deed of trust. The power of sale foreclosure is preferred by most creditors because it is quicker, simpler and less expensive. See generally J. WEBSTER, REAL ESTATE LAW IN NORTH CAROLINA §§ 248-254 (1971 & Supp. 1977).

5. 38 N.C. App. at 94, 247 S.E.2d at 429. In addition to complying with the provisions of the mortgage or deed of trust, a creditor foreclosing under a power of sale must comply with the minimum statutory requirements, designed to protect the debtor, specified in N.C. GEN. STAT. §§ 45-4 to -21.45 (1976 & Supp. 1977). See J. WEBSTER, *supra* note 4, § 252, at 307. N.C. GEN. STAT. § 45-21.16 (Supp. 1977) requires that, in a power of sale foreclosure, notice of hearing be sent to the debtor and any record owner of the real estate on which the lien is held and that a hearing be conducted to determine the creditor's right to foreclosure. Subsection (d) of that statute provides in part:

The hearing . . . shall be held before the clerk of court in the county where the land . . . is situated. Upon such hearing, the clerk shall consider the evidence of the parties. . . . If the clerk finds the existence of (i) valid debt . . . , (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled to such under subsection (b), then the clerk shall authorize the mortgagee or trustee to proceed under the instrument, and the mortgagee or trustee can give notice of and conduct a sale pursuant to the provisions of this Article. The act of the clerk in so finding or refusing to so find is a judicial act and may be appealed to the judge of the district or superior court having jurisdiction at any time within 10 days after said act. Appeals from said act of the clerk shall be heard de novo.

N.C. GEN. STAT. § 45-21.16(d) (Supp. 1977). Whether or not the debtor appears at this hearing the creditor must present affirmative evidence sufficient for the clerk to make the findings required. See Note, *Real Property—Changes in North Carolina's Foreclosure Law*, 54 N.C.L. REV. 903, 917 (1976).

6. 389 F. Supp. 1250 (W.D.N.C. 1975). *Turner* held the former North Carolina procedure for foreclosure under power of sale, Law of Apr. 1, 1948, ch. 720, 1949 N.C. Sess. Laws 788, unconstitutional as applied. 389 F. Supp. at 1261. Finding state action in the extensive participa-

less than a full hearing and found instead that the "notice and hearing required by G.S. 45-21.16 were designed to enable the mortgagor to utilize the injunctive relief already available in G.S. 45-21.34."<sup>7</sup> While recognizing that a superior court judge has general equitable jurisdiction,<sup>8</sup> the court stated that it may be invoked only in a "proper proceeding," which was, in this context, an action to enjoin a foreclosure sale under G.S. 45-21.34.<sup>9</sup>

Although the court correctly found that the legislative purpose was to meet the standards enunciated in *Turner*, it misinterpreted the constitutional requirements that must be met in achieving that purpose. The court's analysis is faulty because of a failure to perceive that the *Turner* decision was only a part of the application of due process requirements to debtor-creditor procedures that began with the United States Supreme Court decisions in *Sniadach v. Family Finance Corp.*<sup>10</sup> and *Fuentes v. Shevin*,<sup>11</sup> and because of a misreading of *Turner* itself. The implication of *Watts* is that due process may be satisfied in power of sale foreclosures by providing the debtor with notice and a partial

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tion of the clerk in the procedure, the *Turner* court found that the procedure did not comport with due process because it made no provision for personal notice to the debtor or for a prior hearing. 389 F. Supp. at 1254-58. The court further found that the power of sale contained in a deed of trust did not effectively waive the debtor's rights. *Id.* at 1260-61. It therefore ruled that future foreclosures would be unlawful unless there was either a "knowing, voluntary, and intelligent waiver" or both "adequate and timely notice" and "opportunity for a hearing." *Id.* at 1261. See generally Note, *supra* note 5. The *Turner* decision led to the passage of substantial amendments to the foreclosure statutes a few months later. *Id.* at 916; Law of June 6, 1975, ch. 492, 1975 N.C. Sess. Laws 509 (codified as amended at N.C. GEN. STAT. §§ 45-21.9, .16, .16A, .17, .21, .29, .30, .33, .45 (1976 & Supp. 1977)). For a discussion of the changes that these amendments made in the North Carolina procedure, see J. WEBSTER, *supra* note 4, § 252 (Supp. 1977).

7. 38 N.C. App. at 94, 247 S.E.2d at 429. N.C. GEN. STAT. § 45-21.34 (1976) provides in part:

Any owner of real estate . . . may apply to a judge of the superior court, prior to the confirmation of any sale of such real estate by a mortgagee . . . , to enjoin such sale or the confirmation thereof, upon the ground that the amount bid or price offered therefor is inadequate and inequitable and will result in irreparable damage to the owner . . . , or upon any other legal or equitable ground which the court may deem sufficient.

For a discussion of the interpretation and application of this statute, see note 13 and accompanying text *infra*.

8. This jurisdiction is derived from the general grant of judicial power to the General Court of Justice found in N.C. CONST. art. IV, § 1.

9. 38 N.C. App. at 94, 247 S.E.2d at 429.

10. 395 U.S. 337 (1969).

11. 407 U.S. 67 (1972). In *Fuentes* the Supreme Court held unconstitutional the Pennsylvania and Florida replevin statutes that permitted a secured creditor to seize the goods of a defaulting debtor pending a full hearing on the merits. *Id.* at 96. *Fuentes* and *Sniadach* established the proposition that before a debtor may be deprived of his property by a creditor he must be given notice and a prior opportunity to be heard. See *id.*; 395 U.S. at 343 (Harlan, J., concurring). While the "nature and form of such prior hearings" might be "open to many potential variations," *Fuentes* required that the hearing "provide a real test." 407 U.S. at 96-97.

hearing because he may then avail himself of injunctive relief to block the foreclosure.<sup>12</sup> *Fuentes*, however, permitted a partial hearing at an early stage only on the condition that a full hearing on the merits be provided later.<sup>13</sup> The injunctive relief available under G.S. 45-21.34, on the other hand, does not afford the debtor such a hearing because, as interpreted by the courts, it only permits an action after the foreclosure sale and it provides relief only on a showing that the sale price was inadequate coupled with some other inequity.<sup>14</sup> Thus, as a result of *Watts*, although a debtor may have a valid equitable defense sufficient to bar foreclosure, he cannot utilize it until the foreclosure sale has become a *fait accompli* and then only if the price bid can be proven inadequate. This can only be regarded as the unconstitutional denial of a forum to the debtor.

The *Turner* court recognized these shortcomings in requiring that the mortgagor "be given an opportunity for a hearing *before* he is deprived of any significant property interest"<sup>15</sup> and in specifying that at this hearing "the mortgagor must of course be afforded the opportunity to rebut and defend the charges."<sup>16</sup> Clearly, the restricted hearing

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12. See note 7 and accompanying text *supra*. It has even been argued that notice alone may meet the requirements of due process in a foreclosure under power of sale. See Comment, *Power of Sale Foreclosure After Fuentes*, 40 U. CHI. L. REV. 206, 220-22 (1972).

13. See 407 U.S. at 82.

14. The conclusion that an injunction may be granted only after the sale has occurred may be inferred from the nature of the proof required to entitle a party to relief. In *Woltz v. Asheville Safe Deposit Co.*, 206 N.C. 239, 173 S.E. 587 (1934), the court held that Law of Apr. 18, 1933, ch. 275, § 1, 1933 N.C. Pub. Laws 401 (codified as amended at N.C. GEN. STAT. § 45-21.34 (1976)) gave a superior court judge the power to enjoin a *previous* sale or confirmation thereof only when the price bid was shown to be inadequate. The court noted that "[t]he statute is remedial only." 206 N.C. at 242, 173 S.E.2d at 589. Later decisions added the requirement that the party seeking an injunction show some other "irregularity," as well as inadequacy of price. *Certain-Teed Prods. Corp. v. Sanders*, 264 N.C. 234, 246, 141 S.E.2d 329, 337 (1965); *Foust v. Gate City Sav. & Loan Ass'n*, 233 N.C. 35, 37, 62 S.E.2d 521, 523 (1950). Obviously, a party seeking an injunction cannot show that the price bid at the sale was inadequate until that sale has been conducted. Further, in *Sanders* the court held that when the statute required that the action be commenced "prior to confirmation" it referred to the confirmation required by the clerk in the event of an upset bid and not to the consummation of a sale generally. 264 N.C. at 244, 141 S.E.2d at 336. Because N.C. GEN. STAT. § 45-21.27 (1976) requires that an upset bid be filed within 10 days after the sale and because no confirmation would be required after that time, the implication to be drawn from *Sanders* is that a party seeking injunction of the foreclosure must wait until the sale is held, and then has only 10 days to commence his action if no upset bid is made.

15. 389 F. Supp. at 1259 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)). The *Turner* court further stated:

The extraordinary injunctive relief available under § 45-21.34 does not suffice [as a hearing] because (1) the burden of proof is clearly on the mortgagor; (2) he most likely must show irreparable damage, as by inadequacy of the bid; and (3) a condition precedent to relief is a bond providing for full indemnification.

*Id.* at 1259.

16. *Id.*

required by the court of appeals is not the one contemplated by *Turner*. Therefore, while the *Watts* court's restriction of defenses in a hearing pursuant to G.S. 45-21.16 might be considered a victory for quick, efficient foreclosure,<sup>17</sup> it will probably not withstand constitutional scrutiny.

In *In re Deed of Trust of Simon*,<sup>18</sup> the court of appeals was again called upon to construe the scope and application of G.S. 45-21.16, this time in relation to the statute's appellate bond requirement.<sup>19</sup> The debtor in *Simon* appealed an adverse judgment of the clerk in a foreclosure proceeding, first to the superior court and then to the court of appeals. Upon each appeal the debtor was required to post a bond "to protect the petitioner from *any probable loss by reason of delay in the foreclosure.*"<sup>20</sup> At the conclusion of all appeals in favor of the creditor a hearing was held in the superior court on the creditor's motion for determination of damages and costs resulting from the delay in foreclosure.<sup>21</sup> The trial court determined that the creditor was entitled to damages far in excess of the total amount of the bonds, as measured primarily by interest on the indebtedness, and the debtor appealed.<sup>22</sup>

Employing an analogy to cases involving injunction bonds, the court of appeals held that when a party elects to proceed on the appellate bond his damages are limited to the amount of the bond.<sup>23</sup> Turn-

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17. The court of appeals further grounded its construction of the statute on the conclusion that to permit a full hearing under § 45-21.16(d) would make the power of sale foreclosure as costly and time-consuming as the foreclosure by action it was designed to avoid. 38 N.C. App. at 94, 247 S.E.2d at 429. As the late Professor Webster emphatically observed, however, with the decision in *Turner* and the General Assembly's consequent amendment of the foreclosure statutes, "every foreclosure, even under power of sale, is in effect a 'judicial foreclosure.'" J. WEBSTER, *supra* note 4, § 252, at 63 (Supp. 1977) (footnote omitted). The *Turner* court considered even the former North Carolina procedure to involve so much "detailed statutory authority" that it became nothing more than "a streamlined version of a judicial sale." 389 F. Supp. at 1258. Manifestly, the conclusion to be drawn from cases such as *Fuentes* and *Turner* is that when the state becomes involved in streamlined procedures for creditors to reclaim secured property the streamlining cannot come at the expense of debtors' due process rights.

18. 36 N.C. App. 51, 243 S.E.2d 163 (1978).

19. N.C. GEN. STAT. § 45-21.16(d) (Supp. 1977), provides in part:

If an appeal is taken from the clerk's findings, the appealing party shall post a bond with sufficient surety as the clerk deems adequate to protect the opposing party from any probable loss by reason of appeal; and upon posting of the bond the clerk shall stay the foreclosure pending appeal.

20. 36 N.C. App. at 52-53, 243 S.E.2d at 164 (quoting order of superior court).

21. *Id.* at 53-55, 243 S.E.2d at 164-65.

22. *Id.* at 55, 243 S.E.2d at 165-66.

23. *Id.* at 56, 243 S.E.2d at 166 (citing Local 755, IBEW v. Country Club East, Inc., 283 N.C. 1, 194 S.E.2d 848 (1973); *Shute v. Shute*, 180 N.C. 386, 104 S.E. 764 (1920)). The court noted that in such cases

a person wrongfully restrained could elect either (1) to recover only the amount of the

ing to the question of interest as a measure of damages, the court first determined that the bond specified in G.S. 45-21.16(d) applied only to an appeal from the clerk to the district or superior court and that in any further appeal the general appeal bond provision for real property actions, G.S. 1-292, would continue to apply.<sup>24</sup> The court then concluded that because of the broad language used in describing the bond required by G.S. 45-21.16(d) interest on the indebtedness would be an appropriate measure of damages.<sup>25</sup>

The *Simon* decision is commendable for several reasons. First, the extension to appellate bonds of the rule limiting recovery of damages to the amount of the bond clarifies the law in this area and is long overdue.<sup>26</sup> Second, confining application of the bond provided for in G.S. 45-21.16(d) to appeals from the clerk is also a much needed clarification. Finally, the court's expansive interpretation of the interests protected by that bond should permit a more accurate reflection of a creditor's actual damages than previously provided by other bonds in this area.<sup>27</sup>

The court of appeals erred, however, in its conclusion that interest on the indebtedness would be an appropriate measure of damages in all cases in which the bond required by G.S. 45-21.16(d) is sued upon. Previously, in cases involving suits upon the bond required for the enjoining of a foreclosure under G.S. 45-21.34, interest had been permitted as a measure of damages only on a showing that the value of the

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bond for the damages he has suffered simply by petitioning the trial court in that action for recovery or (2) to forego his action on the bond and bring an independent tort suit for malicious prosecution.

*Id.* at 56, 243 S.E.2d at 166. North Carolina permits a tort action for malicious civil action only on a showing of "special damages beyond those normally incident to a civil proceeding." Byrd, *Malicious Prosecution in North Carolina*, 47 N.C.L. REV. 285, 308 (1969). Presumably a similar tort action would be permitted for abuse of appellate process with similar requirements of proof.

24. 36 N.C. App. at 56-57, 243 S.E.2d at 166-67. N.C. GEN. STAT. § 1-292 (1969) provides that in appeals from the trial courts involving real property a bond is required to cover "waste" and "the value of the use and occupation of the property."

The *Simon* court reasoned that because the legislature in enacting § 45-21.16 was only concerned with making the North Carolina foreclosure procedure comport with due process, *see* note 6 and accompanying text *supra*, it could not have been interested in "the more traditional and constitutionally permissible procedures for appeal from the district court or the superior court to the Court of Appeals." 36 N.C. App. at 57, 243 S.E.2d at 166-67.

25. 36 N.C. App. at 57-58, 243 S.E.2d at 167.

26. Although it is in keeping with the general law on the subject, *see* 5B C.J.S. *Appeal & Error* § 2064 (1958), this is apparently the first North Carolina decision applying the rule to appellate bonds.

27. Compare N.C. GEN. STAT. § 45-21.16(d) (Supp. 1977) ("any probable loss by reason of delay in the foreclosure"), with *id.* § 1-292 (1969) ("waste" and "the value of the use and occupation of the property"), and *id.* § 45-21.34 (1976) ("costs, depreciation, interest, and other damages").

land, prior to the date of an injunction, was insufficient to pay the indebtedness and accrued interest.<sup>28</sup> The obvious reason for this distinction was that, unless the value of the land was insufficient to meet the debt prior to the injunction, the creditor would presumably be compensated for the delay, either by the sale price at foreclosure, or by damages measured by depreciation during the period of injunction.<sup>29</sup> Because of the similarity of damages arising from a delay in foreclosure caused by an injunction and those arising from a delay caused by an appeal, the effect of the decision in *Simon* will be to give the creditor, in some cases, double compensation, first in damages awarded on the bond and again in the price bid at the foreclosure sale.

In *Ross Realty Co. v. First Citizen's Bank & Trust Co.*<sup>30</sup> the North Carolina Supreme Court tightened the restrictions under G.S. 45-21.38 on a vendor's recovery on a purchase money mortgage or deed of trust.<sup>31</sup> A vendee in default of a purchase money deed of trust offered to return the deed to the vendor.<sup>32</sup> The vendor refused the deed and proceeded to sue on the promissory note.<sup>33</sup> The court of appeals, applying a literal construction of the statute, held that although G.S. 45-21.38 prohibits a deficiency judgment after foreclosure, it does not bar a suit on the note prior to foreclosure.<sup>34</sup>

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28. See, e.g., *First Nat'l Bank v. Hicks*, 207 N.C. 157, 176 S.E. 249 (1934) (permitting interest on the value of the land); *Gruber v. Ewbanks*, 199 N.C. 335, 154 S.E. 318 (1930) (permitting interest on the indebtedness).

29. See *Gruber v. Ewbanks*, 199 N.C. 335, 339, 154 S.E. 318, 321 (1930).

30. 296 N.C. 366, 250 S.E.2d 271 (1979), *rev'g*, 37 N.C. App. 33, 245 S.E.2d 404 (1978).

31. N.C. GEN. STAT. § 45-21.38 (1976) provides in pertinent part:

In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust . . . to secure to the seller the payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: Provided, said evidence of indebtedness shows upon the face that it is for balance of purchase money for real estate . . . .

In further action relating to § 45-21.38, the court of appeals held in *Armel Management Corp. v. Stanhagen*, 35 N.C. App. 571, 241 S.E.2d 713 (1978), that the statute was not applicable when the vendee purchased a leasehold interest from the vendor and executed a note for the purchase price secured by a deed of trust conveying other property previously purchased from the vendor. The court found that a deed of trust is a purchase money deed of trust only if it embraces the property purchased in the same transaction. *Id.* at 573, 241 S.E.2d at 714-15; see *Dobias v. White*, 239 N.C. 409, 412, 80 S.E.2d 23, 26 (1954).

32. 37 N.C. App. at 33, 245 S.E.2d at 405.

33. *Id.*

34. *Id.* at 35, 245 S.E.2d at 406. Finding no North Carolina decisions on point, the court based its decision on the construction given a similar statute by an Oregon court. *Id.* (citing *Page v. Ford*, 65 Or. 450, 131 P. 1013 (1913) (construing Law of Feb. 24, 1903, 1903 Or. Laws 252 (current version at OR. REV. STAT. § 88.070 (1977))).

The issue whether § 45-21.38 applies to a suit on the promissory note prior to foreclosure was



The supreme court reversed and held that the statute has the effect of limiting the vendor solely to his remedy in foreclosure.<sup>35</sup> The court rejected a literal construction of the statute and looked instead to the intent of the legislature for guidance in its interpretation of the statute.<sup>36</sup> The court found that the "manifest intention of the legislature was to limit the creditor to the property conveyed when the note and mortgage or deed of trust are executed to the seller of real estate."<sup>37</sup> As a further reason for adopting a broad construction of the statute, the court pointed to the "anomalous situation" the court of appeals acknowledged to be the result of its interpretation of the statute, and concluded that the legislature could not have intended such circumvention.<sup>38</sup>

The supreme court's decision is open to attack on a number of grounds. First, while the court purported to follow the legislative intent, its perception of that intention was drawn almost solely from a law review article written nearly thirty years after enactment of the statute.<sup>39</sup> The analysis in that article, in turn, was primarily conjecture based on the historical context in which the statute was enacted.<sup>40</sup> Sec-

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previously presented to the court of appeals in *Gambill v. Barr*, 32 N.C. App. 597, 232 S.E.2d 870 (1977), but was avoided when the court held that the statute did not apply because the deed of trust did not show on its face that it was for the purchase price. Further, it has been held that the statute does not apply when the purchase money deed of trust is a junior lien and the first deed of trust is foreclosed. *Brown v. Kirkpatrick*, 217 N.C. 486, 8 S.E.2d 601 (1940). An Oregon court in construing an analogous statute, however, held that when the vendor, as the holder of a junior lien, participated in the foreclosure proceeding on the first mortgage and received a share of the overplus in discharge of its indebtedness, the statute did apply. *Ward v. Beem Corp.*, 249 Or. 204, 437 P.2d 483 (1968) (construing OR. REV. STAT. § 88.070 (1977)).

35. 296 N.C. at 370, 250 S.E.2d at 273.

36. *Id.*; *accord*, *State v. Hart*, 287 N.C. 76, 213 S.E.2d 291 (1975); *Underwood v. Howland*, 274 N.C. 473, 164 S.E.2d 2 (1968).

The court of appeals, on the other hand, had found its construction of the statute limited by the "literal terms of the statute." 37 N.C. App. at 34, 245 S.E.2d at 406; *accord*, *State v. Camp*, 286 N.C. 148, 209 S.E.2d 754 (1974).

37. 296 N.C. at 370, 250 S.E.2d at 273; *see note 39 and accompanying text infra*.

38. *Id.* at 373, 250 S.E.2d at 275. The court of appeals recognized that, as a result of its decision, a vendor might evade the statute by suing on the note and then having this judgment executed upon the subject property or by simply proceeding to foreclose after suit on the note. 37 N.C. App. at 35, 245 S.E.2d at 406. The Oregon courts seek to avoid such circumvention of their statute, at least in part, by imputing a waiver of the vendor's right to foreclosure when he has previously sued on the note. *See Ward v. Beem Corp.*, 249 Or. 204, 437 P.2d 483 (1968); *Wright v. Wimberly*, 79 Or. 626, 156 P. 257 (1916). Although the adoption of this waiver by the North Carolina courts has been suggested, Note, 35 N.C.L. Rev. 492, 495-96 (1957), the court of appeals in *Ross Realty Co.* chose not to do so. 37 N.C. App. at 35-36, 245 S.E.2d at 406.

39. *See* 296 N.C. at 370-71, 250 S.E.2d at 273-74 (quoting Currie & Lieberman, *Purchase-Money Mortgage and State Lines: A Study in Conflict-of-Laws Method*, 1960 DUKE L.J. 1, 11-12, 23-24).

40. *See* Currie & Lieberman, *supra* note 39, at 11-16. The authors acknowledged that there was no conventional legislative history concerning the statute. *Id.* at 11. They viewed Law of

ond, while the supreme court criticized the "anomalous situation" created by the decision below, it failed to recognize a far greater anomaly arising from its own decision. Under a contract of purchase and sale the parties are mutually bound to a bilateral contract,<sup>41</sup> but, as a result of the court's decision, when the contract is merged into the deed and deed of trust, the transaction is converted into a unilateral contract with the vendee having the option to withdraw at any time. Finally, while G.S. 45-21.38 may have been justified by the oppressed condition of the vendee resulting from the speculative nature of the Depression land market, there seems little reason for its existence, much less for an expansion of its scope, today.<sup>42</sup> While the supreme court's decision in *Ross Realty Co.* has only served to make a bad rule worse, perhaps it will prompt repeal of this dated statute.

In *Frank H. Connor Co. v. Spanish Inns Charlotte, Ltd.*,<sup>43</sup> the supreme court updated the statutory definition of the "labor" necessary to establish a mechanics' lien under G.S. 44A-8,<sup>44</sup> and interpreted the accrual statute, G.S. 44A-10,<sup>45</sup> that applies to such liens. A contractor perfected his claim of lien on a construction site and brought an action to enforce it.<sup>46</sup> The trial court held that because the contractor's clear-

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Feb. 6, 1933, ch. 36, 1933 N.C. Pub. Laws 28 (codified as amended at N.C. GEN. STAT. § 45-21.38 (1976)), which was passed at the height of the Depression in 1933, as being motivated primarily by a desire to protect the overburdened mortgagor of that time from the inequities produced by a forced sale at depressed prices. Currie & Lieberman, *supra* note 39, at 13-14. They further argued, however, that the statute was intended to be a "permanent change in the law" inasmuch as it is, unlike much of the other legislation passed at the time, prospective and preventive, rather than retroactive and therapeutic. *Id.* at 15-16. Currie and Lieberman believed the legislature did not expressly extend the coverage of the statute to suits on the personal obligation or to land contracts because legislatures "are not always astute to close all loopholes." *Id.* at 23-24. Yet it seems that after 45 years, some session of the General Assembly would have been astute enough to close the loopholes if they were, in fact, regarded as such. A comparison of those states having statutes preventing a deficiency judgment on a purchase money mortgage or deed of trust reveals that the California statute was amended in 1935 to also cover contracts of sale, Law of July 16, 1935, ch. 680, 1935 Cal. Stats. 1868 (current version at CAL. CIV. PROC. CODE § 580b (West 1976)); the Montana, North Carolina, and Oregon statutes make no mention of land contracts, *see* MONT. REV. CODES ANN. § 93-6008 (1964); N.C. GEN. STAT. § 45-21.38 (1976); OR. REV. STAT. § 88.070 (1977); and the South Dakota statutes expressly provide that they do not cover land contracts, *see* S.D. COMPILED LAWS ANN. §§ 44-8-20, -23 (1967).

41. *See* J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 144 (2d ed. 1975).

42. While it may be argued that the vendor gets an unfair advantage through retaining the down payment, foreclosing on the property, and seeking a deficiency judgment, it must be remembered that the vendee also benefits by the lower interest rates that are usually obtainable on a purchase money mortgage or deed of trust. Moreover, the purchase money mortgage or deed of trust often provides an alternative means of financing at a time when conventional loans are unavailable.

43. 294 N.C. 661, 242 S.E.2d 785 (1978).

44. N.C. GEN. STAT. § 44A-8 (1976).

45. *Id.* § 44A-10.

46. 294 N.C. at 664, 242 S.E.2d at 787. N.C. GEN. STAT. § 44A-8 (1976) provides that "[a]ny

ing, surveying and staking of building lines on the site antedated the recording of a construction loan deed of trust on the same property, the mechanics' lien should be given priority.<sup>47</sup> The lender appealed, contending that the work done by the contractor prior to the recordation of its deed of trust did not constitute the "labor" required to establish a lien under former G.S. 44A-8 and that the lien did not accrue until the "commencement of building."<sup>48</sup>

The supreme court, in rejecting a definition of "labor" as "manual, unskilled work of an inferior and toilsome nature,"<sup>49</sup> noted that the word had not been construed in over sixty years and concluded that "labor" should, therefore, be broadened to include modern skilled workers.<sup>50</sup> Such a definition, it held, brought clearing and staking of building lines within the meaning of "labor" as used in G.S. 44A-8.<sup>51</sup> The court further found that G.S. 44A-10 was unique among the fifty

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person who performs or furnishes labor or professional design or surveying services or furnishes materials pursuant to a contract . . . with the owner of real property" may establish a lien on that property for the payment of his debts. His lien may be perfected by filing a claim of lien with the clerk of court in the county in which the land is situated within "120 days after the last furnishing of labor or materials at the site," *id.* §§ 44A-11, -12 (1976 & Supp. 1977), and may be enforced by instituting suit within "180 days after the last furnishing of labor or materials at the site," *id.* §§ 44A-11, -13 (1976 & Supp. 1977). The lien then relates back to and takes effect "from the time of the first furnishing of labor or materials at the site," *id.* § 44A-10 (1976), and takes priority over all liens taking effect after that date, *id.* § 44A-14 (1976). See generally Humphrey, *Position, Priorities and Protection of Parties and Statutory Liens*, in NORTH CAROLINA BAR ASSOCIATION FOUNDATION INSTITUTE ON TROUBLED REAL ESTATE VENTURES AND NEW USE AND OWNERSHIP CONCEPTS, at IV-1 (1975); Urban & Miles, *Mechanics' Liens for the Development of Real Property: Recent Developments in Perfection, Enforcement, and Priority*, 12 WAKE FOREST L. REV. 283 (1976).

47. 294 N.C. at 665, 242 S.E.2d at 788.

48. *Id.* at 668, 242 S.E.2d at 789, 791.

49. *Id.* at 668, 242 S.E.2d at 790. The definition proposed by the lender is apparently a distillation of the court's comments about the word in *Stephens v. Hicks*, 156 N.C. 239, 72 S.E. 313 (1911).

50. 294 N.C. at 670, 242 S.E.2d at 90-91.

In further action in 1978 relating to the construction of § 44A-8, the court of appeals in *Raleigh Paint & Wallpaper Co. v. Peacock & Assocs., Inc.*, 38 N.C. App. 144, 247 S.E.2d 728 (1978), *cert. denied*, 296 N.C. 415 (1979), held that a materialman was not required to show that he actually delivered the materials to the site to establish a lien within the meaning of § 44A-8. While recognizing that the contrary interpretation had been suggested by the authors of two recent articles on the subject, see Humphrey, *supra* note 46, at IV-11; Urban & Miles, *supra* note 46, at 287, and that such an interpretation was consistent with the statutory language, the court found that it would not advance the intent of the statutory scheme, which is to provide notice of potential liens to third parties, to impose such a requirement. 38 N.C. App. at 147-48, 247 S.E.2d at 731.

51. 294 N.C. at 671, 242 S.E.2d at 791. This decision was made under § 44A-8 as it read prior to the 1975 amendment, which added the words "professional design or surveying service." See Law of June 23, 1975, ch. 715, § 2, 1975 N.C. Sess. Laws 940 (codified at N.C. GEN. STAT. § 44A-8 (1976)). The court, however, rejected the lender's argument that this amendment indicated that the activities under consideration were not included within the meaning of "labor" under the former law. The court found instead that the amendment was intended as a clarification of, rather than an addition to, the former statute. 294 N.C. at 669, 242 S.E.2d at 790.

states in dating the accrual of a mechanics' lien not from the "commencement of building," but rather from the "first furnishing of labor or materials at the site."<sup>52</sup> Nevertheless, it held that the statute implicitly requires a "visible commencement of the improvement" and that "partial clearing of the site and the staking of the outlines of the building" were sufficient to meet this requirement.<sup>53</sup>

The court's broadening of the definition of "labor" is a significant and belated reform in light of the numerous changes that have occurred in the construction industry since the word was last defined.<sup>54</sup> Although it is not even implicitly required by the statutory language, the court's addition of the "visible commencement" requirement under G.S. 44A-10 is in keeping with the "intent of the draftsmen that persons interested in the subject lot . . . should be able to examine the property and ascertain the extent to which it [is] possibly encumbered."<sup>55</sup> The decision preserves this opportunity to discover the existence of potential liens on property, while increasing the protection available to a contractor through the use of a mechanics' lien.

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52. 294 N.C. at 671, 242 S.E.2d at 791 (quoting N.C. GEN. STAT. § 44A-10 (1976)); see cases cited in Annot., 1 A.L.R.3d 822 (1965).

53. 294 N.C. at 671-72, 242 S.E.2d at 791-92; see *Urban & Miles*, *supra* note 46, at 321.

54. The subject was apparently last discussed in *Stephens v. Hicks*, 156 N.C. 239, 72 S.E. 313 (1911).

55. *Urban & Miles*, *supra* note 46, at 321. In 1978 the court of appeals in *Miller v. Lemon Tree Inn, Inc.*, 39 N.C. App. 133, 249 S.E.2d 836 (1978), held that acceptance of a note maturing beyond the period for perfecting a mechanics' lien and secured by a deed of trust on the same property subject to the lien constitutes a waiver of that lien. *Id.* at 140, 249 S.E.2d at 840-41. Although an earlier North Carolina decision had implied that acceptance of a note maturing beyond the period for perfecting the lien constituted a waiver of that lien, see *Raeferd Lumber Co. v. Rockfish Trading Co.*, 163 N.C. 314, 318, 79 S.E. 627, 629 (1913), the court noted a split among the jurisdictions on the effect of taking a note secured by a deed of trust on the identical property subject to the lien, 39 N.C. App. at 138, 249 S.E.2d at 839-40 (citing 57 C.J.S. *Mechanics' Liens* § 227(b) (1948)). It chose to adopt the prevailing view that the intent of the parties is the determinative factor, and held that the taking of a deed of trust upon the same property necessarily shows the parties' intent to waive the lien. *Id.* at 138-39, 249 S.E.2d at 840; *accord*, *Barrows v. Baughman*, 9 Mich. 213 (1861); *Gorman v. Sagner*, 22 Mo. 137 (1855); *Charles K. Spaulding Logging Co. v. Ryckman*, 139 Or. 230, 6 P.2d 25 (1932). The court did not decide the question whether there is a waiver when the contractor takes security in addition to that provided by the mechanics' lien. 39 N.C. App. at 140, 249 S.E.2d at 840. This decision permits

[o]ne who finds a deed of trust in the obligor's chain of title covering the identical property as would be subject to a materialmen's lien . . . to rely on that as settlement of the obligation when it is recorded prior to perfection of the lien and the maturity date of the note extends beyond the period of perfection.

*Id.* at 141, 249 S.E.2d at 840.

*B. Covenants*<sup>56</sup>

In *Beech Mountain Property Owners' Association v. Current*,<sup>57</sup> the North Carolina Court of Appeals confronted the issue whether a property owners' association may enforce a covenant to pay assessments to that body when no covenant provides for enforcement by the association. Plaintiff property owners' association (POA) instituted actions against defendant owners within the subdivision to collect dues and assessments owed it for the maintenance of subdivision facilities and roads.<sup>58</sup> The POA contended, in reliance on *Neponsit Property Owners' Association v. Emigrant Industrial Savings Bank*,<sup>59</sup> that covenants in all deeds conveying lots within the subdivision that provided for the formation of a property owners' association, the payment of assessments to that body, and enforcement by the property owners "jointly or severally" implicitly gave the POA the right to enforce the covenants as an agent of the owners.<sup>60</sup>

The court of appeals distinguished *Neponsit* on the ground that in that case the covenant "expressly conferred a right of action on the grantor's 'assigns,' which expressly included the property owners' association."<sup>61</sup> The court further held that because the POA owned no property within the subdivision it could not claim the benefit of the covenant giving "the owners of lots" a right of enforcement.<sup>62</sup> The

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56. In 1978 the North Carolina Court of Appeals held in *Board of Transp. v. Turner*, 37 N.C. App. 14, 245 S.E.2d 223 (1978), that a reservation by the grantor of the right to negotiate with the Board of Transportation concerning a right of way, and of the right to the proceeds resulting from any such condemnation for a period of 10 years, did not constitute a restraint on alienation. Finding this reservation distinguishable from one involving the proceeds of a voluntary sale, the court ruled that it did not restrict the full and free transfer of the property. *Id.* at 17, 245 S.E.2d at 225; accord, *In re Mazzone*, 281 N.Y. 139, 22 N.E.2d 315 (1939). See generally J. WEBSTER, *supra* note 4, § 346, at 445-46; Note, *Real Property—Direct Restraints on Alienation*, 48 N.C.L. REV. 173 (1969).

57. 35 N.C. App. 135, 240 S.E.2d 503 (1978).

58. *Id.* at 135-36, 240 S.E.2d at 505.

59. 278 N.Y. 248, 15 N.E.2d 793 (1938).

60. 35 N.C. App. at 138, 240 S.E.2d at 506.

61. *Id.* at 139, 240, S.E.2d at 507. The fallacy of this distinction is discussed in note 64 and accompanying text *infra*.

62. *Id.*, 240 S.E.2d at 507. The North Carolina courts have long held that when a developer sells lots and imposes common restrictions on use "pursuant to a general plan of development or improvement, such restrictions may be enforced by any grantee against any other grantee, either on the theory that there is a mutuality of covenant and consideration, or on the ground that mutual negative equitable easements are created." *Sedberry v. Parsons*, 232 N.C. 707, 710-11, 62 S.E.2d 88, 90 (1950) (quoting 26 C.J.S. *Deeds* § 167 (1956)). See *Tull v. Doctors Bldg., Inc.*, 255 N.C. 23, 120 S.E.2d 817 (1961); *Higdon v. Jaffa*, 231 N.C. 242, 56 S.E.2d 661 (1949); *Myers Park Homes Co. v. Falls*, 184 N.C. 426, 115 S.E. 184 (1922); *Shipton v. Barfield*, 23 N.C. App. 58, 208 S.E.2d 210, cert. denied, 286 N.C. 212, 209 S.E.2d 316 (1974). Even in the absence of a uniform plan of development, a covenant may be enforced by other property owners as third-party benefi-

court concluded with the assumption that "if the grantor had intended to authorize the plaintiff to enforce the provisions as an agent of the property owners, it would have expressed such intent."<sup>63</sup>

The apparent holding of the court in *Current*, that a property owners' association may enforce a covenant to pay assessments only if the developer expressly so provides, threatens the effectiveness of many land development schemes in North Carolina,<sup>64</sup> and disregards the development of the law concerning the enforcement of covenants. *Neponsit*, the seminal case in this area, concluded that a property owners' association has the right to enforce a covenant to pay assessments, not as an assignee of the grantor, but as an agent of the property owners. This conclusion was based on the implicit character of a property owners' association as an organization created to advance the common interests of the property owners and not on an express provision by the grantor.<sup>65</sup> As the court in *Neponsit* noted,

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ciaries if "the grantor intended to create a negative easement benefiting all the property" and if this intent is reflected in an express provision conferring on other property owners the right to enforce the restrictions. *Lamica v. Gerdes*, 270 N.C. 85, 88, 153 S.E.2d 814, 816 (1967). The courts have, however, required that for a covenant to be enforceable it must benefit a "dominant tenement;" when the party seeking to enforce the covenant owns no land that might be benefited by the covenant, the courts have refused to impose the restriction. *Steagall v. Housing Auth.*, 278 N.C. 95, 178 S.E.2d 824 (1971). See also *Sleepy Creek Club, Inc. v. Lawrence*, 29 N.C. App. 547, 225 S.E.2d 167, cert. denied, 290 N.C. 659, 228 S.E.2d 455 (1976).

63. 35 N.C. App. at 139, 240 S.E.2d at 507. It would seem, however, that, if the grantor had intended that the covenants be enforceable by the lot owners, the principles of agency, and not the express intent of the grantor, would determine whether those covenants might also be enforced by an agent of the lot owners. See note 64 and accompanying text *infra*.

64. Dean Cribbet notes: "The contemporary subdivision with its detailed set of covenants, to be enforced by a Property Owners' Association rather than by individual owners, has become a part of every community." J. CRIBBET, *supra* note 41, at 360 (emphasis added). Further, it has been argued that policing of covenants by a property owners' association is preferable to enforcement by individual owners because enforcement costs may then be equitably and uniformly shared by those benefiting from the covenants. See Ellickson, *Alternative to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 717 (1973).

65. Although the *Neponsit* court did find the assignment of enforcement rights to the property owners' association of some significance, it noted that the property owners' association had "not succeeded to the ownership of any property of the grantor," but instead was "created solely to act as the assignee of the benefit of the covenant," and had "no interest of its own in the enforcement of the covenant." 278 N.Y. at 260, 15 N.E.2d at 797. Therefore, the court did not base the property owners' association's right of enforcement upon the express assignment of those rights by the grantor, rather, the requisite privity of estate existed because the property owners' association had been formed to act and was acting as the "agent or representative of the Neponsit property owners." *Id.* at 261-62, 15 N.E.2d at 797-98. The court in *Current* found that the POA could not draw upon the property interests of the lot owners in establishing privity of estate because the POA "is a corporation and, as such, must be viewed as an entity distinct from its individual members." 35 N.C. App. at 139, 240 S.E.2d at 507. See also *Troy Lumber Co. v. Hunt*, 251 N.C. 624, 112 S.E.2d 132 (1960). The court in *Neponsit*, on the other hand, while not ignoring the corporate form of the property owners' association, looked behind that form to recognize the association as an agent of the owners. 278 N.Y. at 262, 15 N.E.2d at 798. While the court of appeals in *Current* found that the express provision for enforcement by the property owners' asso-

[o]nly blind adherence to an ancient formula devised to meet entirely different conditions could constrain the court to hold that a corporation formed as a medium for the enjoyment of common rights of property owners . . . has no cause of action in equity to enforce the covenant upon which such common rights depend.<sup>66</sup>

With its decision in *Raintree Corp. v. Rowe*,<sup>67</sup> the court of appeals cast doubt on its earlier decision in *Current* and further confused the North Carolina law on enforcement of covenants. An assignee of the original subdivision developer brought suit to collect unpaid maintenance assessments and country club dues from defendant property owners.<sup>68</sup> The trial court dismissed the action, holding that the property owners' association (POA) and the country club, as the real parties in interest, were the only ones entitled to enforce these claims.<sup>69</sup>

The court of appeals held that because the covenant establishing the maintenance assessment, as well as the bylaws of the POA, required that the assessment be paid to the POA, the covenant was intended to benefit the POA. Plaintiff, therefore, was not the proper party to enforce a claim for the assessment.<sup>70</sup> Turning to the claim for country club dues, the court stated that the real party in interest was the party who had a substantive legal right to enforce the claim.<sup>71</sup> The court first found that the covenant created an "affirmative duty" to pay a collateral sum of money that did not "touch and concern" the land. The covenant did not, therefore, run with the land so as to be enforceable by anyone other than the original parties to the promise.<sup>72</sup> Having held

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ciation made the *Neponsit* deeds "a model of clarity in comparison with the provisions in the Beech Mountain deeds," 35 N.C. App. at 139, 240 S.E.2d at 507, it would seem that the intention that the POA enforce the covenant to pay assessments as an agent of and for the benefit of the owners is no less implicit in the covenants viewed as a whole.

66. 278 N.Y. at 262, 15 N.E.2d at 798.

67. 38 N.C. App. 664, 248 S.E.2d 904 (1978).

68. *Id.* at 665, 248 S.E.2d at 906. All lots in the subdivision were conveyed subject to restrictive covenants, which in pertinent part provided:

(1) property owners have rights of enjoyment in common areas, (2) each owner and each subsequent owner covenants to pay assessments for maintenance of common areas and other purposes by accepting a deed, (3) every owner is a mandatory member of Raintree Country Club and must pay club dues, (4) unpaid maintenance assessments and unpaid club dues subject the owner's lot to a lien.

*Id.* at 665-66, 248 S.E.2d at 906.

69. *Id.* at 666, 248 S.E.2d at 906. See N.C.R. Civ. P. 17.

70. 38 N.C. App. at 668, 248 S.E.2d at 907.

71. *Id.*; see *Reliance Ins. Co. v. Walker*, 33 N.C. App. 15, 19, 234 S.E.2d at 206, 209 (1977).

72. 38 N.C. App. at 669-71, 248 S.E.2d at 907-09. The traditional requirements that must be met for a covenant to run with the land, and thus be enforceable by those other than the original parties to the promise, are: (1) form, (2) intention of the parties, (3) a promise that "touches and concerns" the land, and (4) privity of estate. See C. CLARK, *REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND"* 94 (2d ed. 1947). The requirement of intent can most easily

the covenant to be a personal one, the court of appeals concluded that such covenants are not assignable and plaintiff, as an assignee of the original grantor, could not enforce the covenant to pay country club dues.<sup>73</sup>

The court's decision can be criticized for several reasons. First, while it is unquestioned that a property owners' association may enforce a covenant to pay assessments,<sup>74</sup> it does not follow that an assignee of the original developer may not also enforce the promise. Having succeeded to the estate of the original grantor, an assignee is generally held to be entitled to enforce the covenants that the grantor

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be met by a statement to the effect that "these covenants shall run with the land." J. CRIBBET, *supra* note 41, at 354; see *Lamica v. Gerdes*, 270 N.C. 85, 88, 153 S.E.2d 814, 816 (1967). In the absence of an express provision, the requisite intent may be inferred in North Carolina from a "general plan of development." J. WEBSTER, *supra* note 4, § 346, at 438. The developer in *Raintree Corp.* took the former course. See 38 N.C. App. at 669, 248 S.E.2d at 908. Even if intent is established, however, the covenant will not run with the land unless the two remaining requirements are met. See J. CRIBBET, *supra* note 41, at 354.

The court in *Raintree Corp.* adopted a restrictive test of the "touch and concern" requirement; the covenant "must respect the thing granted or devised, and . . . the act covenanted to be done or omitted, must concern the lands or estate conveyed." 38 N.C. App. at 670, 247 S.E.2d at 438 (quoting *Nesbit v. Nesbit*, 1 N.C. 490, 495 (1801)). This test, adopted from a decision rendered about the turn of the nineteenth century, says little and should be rejected. A more workable test, proposed by Professor Bigelow, measures the effect of the covenant upon the legal relations of the parties in their status as owners of the land in question, and not merely as members of the community generally. Under this test if the value of the parties' respective legal interests in the property affected by the covenants is increased or decreased by the promise, the covenant "touches and concerns" the land. See Bigelow, *The Content of Covenants in Leases*, 12 MICH. L. REV. 639, 645-46 (1914). This test "has the merit of realism" and "is based on the effect of the covenant rather than on technical distinctions." *Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 278 N.Y. at 257, 15 N.E.2d at 796. *Contra*, Berger, *A Policy Analysis of Promises Respecting the Use of Land*, 55 MINN. L. REV. 167, 211 (1970). While the court in *Raintree Corp.* seems to require that under the *Nesbit* test a physical nexus exist between the benefit to be derived from the promise to pay country club dues and the promisor's land, see 38 N.C. App. at 670, 247 S.E.2d at 438, it could easily have found under the modern "legal relations" test that the promise touched and concerned the land.

Although the court in *Raintree Corp.* did not reach the question, it is clear that the assignee of the original grantor could have established privity of estate. Although this test has been defined in several ways, Clark has pointed out that it is valid only in the "sense of succession to the state of a party to the covenant." C. CLARK, *supra* at 131-37. Further, it is the rule in North Carolina that "[a]s between the original parties to the covenants and those owning title by *mesne* conveyances from them, restrictive covenants are enforceable irrespective of any general scheme of development." J. Webster, *supra* note 4, § 346, at 438; see *Starmount Co. v. Greensboro Memorial Park, Inc.*, 233 N.C. 613, 65 S.E.2d 134 (1951).

73. 38 N.C. at 671, 248 S.E.2d at 909; see *McCotter v. Barnes*, 247 N.C. 480, 486, 101 S.E.2d 330, 335 (1958); *Maples v. Horton*, 239 N.C. 394, 399, 80 S.E.2d 38, 42 (1954).

74. See *Merrionette Manor Homes Improvement Ass'n v. Heda*, 11 Ill. App. 2d 186, 136 N.E.2d 556 (1956); *Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938). But see *Beech Mountain Property Owners' Ass'n v. Current*, 35 N.C. App. 135, 241 S.E.2d 182 (1978). It is not clear whether this case remains a valid precedent after the holding in *Raintree Corp.*



received from his grantees.<sup>75</sup> Further, the assignee of the original developer, as the owner of lots still to be sold, should be entitled to enforce common covenants against other lot owners.<sup>76</sup> Finally, under a more liberal reading of the "touch and concern" requirement,<sup>77</sup> covenants to pay assessments and dues have been enforced as covenants running with the land.<sup>78</sup>

Although *Current* and *Raintree Corp.* reflect the North Carolina courts' traditional view that "[c]ovenants and agreements restricting the free use of property are strictly construed against limitations upon such use"<sup>79</sup> in light of society's acceptance of the restrictive covenant as "an essential tool in private land use control,"<sup>80</sup> the time has come to revise this conservative attitude.<sup>81</sup> At their best the two decisions represent a muddying of the waters concerning enforcement of restrictive covenants. At their worst they appear to be a concerted effort to preserve eighteenth century property concepts that can only serve to inhibit private development in North Carolina.

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75. See J. WEBSTER, *supra* note 4, § 346, at 437-38; *accord*, *Snowmass American Corp. v. Schoenheit*, 524 P.2d 645 (Colo. App. 1974).

76. See *Sheets v. Dillon*, 221 N.C. 426, 431, 20 S.E.2d 344, 347-48 (1942).

77. For a discussion of the "legal relations" test, see note 72 *supra*.

78. See *Merrionette Manor Homes Improvement Ass'n v. Heda*, 11 Ill. App. 186, 136 N.E.2d 556 (1956); *Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938).

The inference to be drawn from the court of appeals' divergent treatment in *Raintree Corp.* of a covenant to pay a maintenance assessment and one to pay country club dues is that the former is sufficiently related to the ownership of land in a subdivision to permit enforcement by a stranger to the covenant, while the latter lacks the physical nexus and thus should only be enforceable as a personal covenant. A covenant to pay country club dues, however, does undoubtedly enhance the value of lots in a subdivision by assuring prospective buyers and other lot owners that funds for the maintenance of country club facilities will be forthcoming. Moreover, while such a charge reduces the value of the homeowner's interest in his lot, this reduction should be offset by the benefit that inures to the homeowner from the common promise of other grantees within the subdivision that they will pay their country club dues. Thus, it is apparent that the covenant to pay country club dues does meet the "legal relations" test of a promise that "touches and concerns" the land and should be enforceable by those who receive some benefit from the promise, *i.e.*, the developer, the country club and other lot owners. Although the *Raintree Corp.* court believed that it would be unfair to impose a charge for country club facilities upon a homeowner who might never use them, 38 N.C. App. at 670, 248 S.E.2d at 908, it would seem that a homeowner, in purchasing a lot with record notice of the covenant, impliedly consents to payment of the dues notwithstanding his nonuse of the facilities.

79. *Long v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235, 239 (1967) (quoting 20 AM. JUR. 2d *Covenants, Conditions and Restrictions* § 187 (1965)); *accord*, *Starmount Co. v. Greensboro Memorial Park, Inc.*, 233 N.C. 613, 65 S.E.2d 134 (1951); *Edney v. Powers*, 224 N.C. 441, 31 S.E.2d 372 (1944). Even this view, however, is tempered by the statement that "[t]he strict rule of construction as to restrictions should not be applied in such a way as to defeat the plain and obvious purposes of a restriction." *Long v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235, 239 (1967) (quoting 20 AM. JUR. 2d, *Covenants, Conditions and Restrictions* § 187 (1965)).

80. J. CRIBBET, *supra* note 41, at 360.

81. See *Dunham, Promises Respecting the Use of Land*, 8 J.L. ECON. 133, 162-65 (1965).

In *Mills v. HTL Enterprises, Inc.*,<sup>82</sup> the court of appeals stiffened the requirements for terminating a restrictive covenant. Plaintiff lot owners brought suit to enforce a covenant restricting all lots in a subdivision to residential use against defendant lot owner who intended to use its lot as a parking area for an adjacent retail fried chicken outlet.<sup>83</sup> The lot in question was located at the corner of a major commercial thoroughfare and a residential street running through the subdivision, and marked the southern boundary of the covenanted area. It had previously served for a number of years as a parking lot for a plumbing company and a candle shop, this use being acquiesced in by the adjoining lot owners.<sup>84</sup> The trial court found that, because of the fundamental, radical and substantial changes that the neighborhood had undergone since the imposition of the covenant, the covenant no longer served its purpose in relation to the lot in question, but rather rendered the lot virtually useless and worthless. The court concluded, therefore, that the covenant should be removed.<sup>85</sup>

The court of appeals reversed and held that "the encroachment of business and changes due thereto, in order to undo the force and vitality of the restrictions, must take place *within* the covenanted area."<sup>86</sup> The court further held that the parking previously allowed on the lot was not "significant enough to undo the force and validity of the restrictions . . . or to constitute a waiver or an estoppel of plaintiffs' right to enforce the covenants."<sup>87</sup>

The decision in *Mills* represents a stiffening of conditions necessary to terminate an outmoded restriction. Although the North Carolina courts have generally refused to find that changes occurring outside the restricted area are sufficient to warrant a removal of the restriction,<sup>88</sup> when there have been "changed conditions within the covenanted area, acquiesced in by the owners to such an extent as to

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82. 36 N.C. App. 410, 244 S.E.2d 469, *cert. denied*, 295 N.C. 551, 248 S.E.2d 727 (1978).

83. *Id.* at 410-11, 244 S.E.2d at 470.

84. 36 N.C. App. at 411-15, 244 S.E.2d at 470-72.

85. *Id.* at 415-16, 244 S.E.2d at 472-73. At the time the restrictions were imposed, 37 years earlier, the area was a residential one lying just inside the Charlotte city limits, but at the time of suit the surrounding neighborhood had become largely commercial. *Id.* at 413-15, 244 S.E.2d at 471-72.

86. *Id.* at 419-20, 244 S.E.2d at 475 (quoting *Brenizer v. Stephens*, 220 N.C. 395, 399, 17 S.E.2d 471, 473 (1941)).

87. 36 N.C. App. at 417-18, 244 S.E.2d at 473-74.

88. *See, e.g.*, *Tull v. Doctor's Bldg., Inc.*, 255 N.C. 23, 120 S.E.2d 817 (1961); *Brenizer v. Stephens*, 220 N.C. 395, 17 S.E.2d 471 (1941). *Contra*, *Mullenberg v. Blevins*, 242 N.C. 271, 87 S.E.2d 493 (1955); *Elrod v. Phillips*, 214 N.C. 472, 199 S.E. 722 (1938).

constitute a waiver or abandonment' ”<sup>89</sup> the courts have usually removed the restriction.<sup>90</sup> The change in *Mills* occurred not only in the surrounding area but extended to the lot in question as well. Further, in previous cases finding an absence of waiver, the use acquiesced in by the adjoining owners was far more in keeping with the residential character of their neighborhoods.<sup>91</sup> While lot owners may understandably wish to preserve a buffer zone between their homes and commercial development, they should not be allowed to do so at the expense of one who purchases in reasonable reliance on their apparent acquiescence in such development. In view of the decision in *Mills*, those who purchase a lot or tract for commercial use should carefully check the chain of title for possible restrictions and disregard any former use of the property.<sup>92</sup>

### C. *Disputed Ownership*<sup>93</sup>

#### The North Carolina Court of Appeals in *Garrison v. Blake-*

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89. *Tull v. Doctor's Bldg., Inc.*, 255 N.C. 23, 40, 120 S.E.2d 817, 829 (1961) (quoting *Vernon v. R.J. Reynolds Realty Co.*, 226 N.C. 55, 61, 36 S.E.2d 710, 712 (1946)).

90. *Shuford v. Asheville Oil Co.*, 243 N.C. 636, 91 S.E.2d 903 (1956); *Bengel v. Barnes*, 231 N.C. 667, 58 S.E.2d 371 (1950).

91. *See Tull v. Doctor's Bldg., Inc.*, 255 N.C. 23, 120 S.E.2d 817 (1961) (parking lot for doctor's office); *Van Poole v. Messer*, 25 N.C. App. 203, 212 S.E.2d 548 (1975) (single house trailer); *Sterling Cotton Mills, Inc., v. Vaughan*, 24 N.C. App. 696, 212 S.E.2d 199 (1975) (concession stand in home).

The *Mills* court feared that the removal of restrictions on border lots would subject the lots next inside to the same process until “the restrictions throughout the tract” became “nugatory through a gradual infiltration of the spreading change.” 36 N.C. App. at 419, 244 S.E.2d at 474 (quoting *Tull v. Doctor's Bldg., Inc.*, 255 N.C. at 40, 120 S.E.2d at 829). Even under a more liberal rule, however, such a process could easily be avoided if the lot owners would refuse to permit any further nonresidential use of the lots within the subdivision.

92. A further development in the law as it relates to residential restrictions was *Harris & Gurganus, Inc. v. Williams*, 37 N.C. App. 585, 246 S.E.2d 791 (1978), a case of first impression in which the court of appeals held that a covenant to build a house within a specified time or reconvey was valid if enforced within a reasonable time after the failure to build. Although the court found scant authority for its position, *id.* at 587, 246 S.E.2d at 793-94, a promise to reconvey has been held valid, *Felton v. Grier*, 109 Ga. 320, 35 S.E. 175 (1900), and a number of cases have found a covenant to build enforceable, *see, e.g., Sayles v. Hall*, 210 Mass. 281, 96 N.E. 712 (1911); *Baumert v. Malkin*, 235 N.Y. 115, 139 N.E. 210 (1923). While such covenants are generally considered a form of residential restriction, *Annot.*, 32 A.L.R.2d 1209 (1953), in light of the fact that they are only enforceable by the grantor, a direct restriction to residential use would appear to be more effective.

93. In 1978 the North Carolina Court of Appeals held in *Wadsworth v. Georgia-Pacific Corp.*, 38 N.C. App. 1, 247 S.E.2d 25 (1978), that parol evidence is competent to prove the location of a disputed boundary line, even though neither party attempted to first locate the boundary line from calls in the deeds. This is apparently the first North Carolina decision permitting use of parol evidence absent a showing that the deeds are insufficient to locate the boundary. For cases not permitting parol evidence in this situation, *see Taylor v. Meadows*, 175 N.C. 373, 95 S.E. 662 (1918); *Wiggins v. Rogers*, 175 N.C. 67, 94 S.E. 685 (1917); *Kirkpatrick v. McCracken*, 161 N.C. 198, 76 S.E. 821 (1912). The court apparently based its holding on the distinction that neither party offered a deed in evidence. 38 N.C. App. at 5, 247 S.E.2d at 27.

Further, the court of appeals in *North Carolina Nat'l Bank v. Evans*, 35 N.C. App. 322, 241

ney<sup>94</sup> examined the requirement of proving a seal to validate a deed. Petitioners appealed a trial court determination in favor of respondents' claim to ownership of a parcel of land involved in a partition proceeding, alleging that a deed in respondents' chain was void for lack of a seal.<sup>95</sup>

Although the court of appeals recognized that "the reason for the use of a seal—the authentication of the grantor—has long since been completely eliminated in this State," it concluded that, in the absence of a legislative abrogation of this requirement, a seal remains essential to the validity of a deed in North Carolina.<sup>96</sup> The deed in *Garrison* ended with this handwritten statement: "In token where of I do hereto this thirteenth day of February 1917 fix my sign and seal."<sup>97</sup> The grantor's signature appeared immediately below this statement and opposite the word "Sign."<sup>98</sup> The court noted that the word "Sign" could include the words "Sign and Seal" appearing above it because "any mark or scrawl may be a seal if proved to be a seal."<sup>99</sup> It held, nevertheless, that while the trial court might conclude as a matter of law that the word "Sign" constituted a seal, there remained a question of fact about whether the grantor placed it there, or adopted it as his seal if placed there by someone else.<sup>100</sup>

Because most seals are now printed rather than handwritten, the decision in *Garrison* raises the specter of numerous challenges to the

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S.E.2d 379 (1978), held that a conveyance was not "voluntary" so as to constitute a fraudulent conveyance when there was any legal consideration, and that adequacy of consideration was irrelevant when there was no allegation of fraud on the part of the grantor. The dissent argued persuasively that although consideration may be "adequate" to support the deed as between the parties, it may still be fraudulent in respect of creditors. *Id.* at 327, 241 S.E.2d at 382 (dissenting opinion). The decision is apparently contrary to prior North Carolina holdings. *See, e.g.,* L & M Gas Co. v. Leggett, 273 N.C. 547, 161 S.E.2d 23 (1968).

An additional development in 1978 was the holding of the United States Court of Appeals for the Fourth Circuit in *King v. United States*, 585 F.2d 1213 (4th Cir. 1978), that, in resolving an issue of untimeliness in an action to quiet title under 28 U.S.C. § 2409a (1976), the same rules that govern the establishment of title by adverse possession under North Carolina law shall apply in determining whether a party knew or should have known of the defendant's claim.

94. 37 N.C. App. 73, 246 S.E.2d 144, *cert. denied*, 295 N.C. 646, 248 S.E.2d 251 (1978).

95. *Id.* at 78, 246 S.E.2d at 147.

96. *Id.* at 79, 246 S.E.2d at 148; *see Williams v. Board of Educ.*, 284 N.C. 588, 201 S.E.2d 889 (1974); *Williams v. Turner*, 208 N.C. 202, 179 S.E. 806 (1935); *Patterson v. Galliher*, 122 N.C. 511, 29 S.E. 773 (1898).

97. 37 N.C. App. at 80, 246 S.E.2d at 148.

98. *Id.*

99. *Id.* at 81, 246 S.E.2d at 149. Professor Webster criticized the efficacy of the rule requiring a seal for this very reason. *See J. WEBSTER, supra* note 4, § 170, at 198-99 n.184.

100. 37 N.C. App. at 81, 246 S.E.2d at 149; *see Williams v. Turner*, 208 N.C. 202, 179 S.E. 806 (1935); *Pickens v. Rymer*, 90 N.C. 282 (1884); *Yarborough v. Monday*, 14 N.C. 420 (1832).

validity of deeds with the consequent difficulty of proving that the grantor adopted the seal.<sup>101</sup> This apprehension should be allayed, however, by the *Garrison* court's further reaffirmation of the rule that when the deed is a form deed and the printed word "seal" appears in parentheses opposite the grantor's signature, there is a presumption that the grantor intended to adopt the seal.<sup>102</sup> Because most conveyances today are made by form deed, the decision will probably affect few cases. It is significant, however, as a reflection of the problems created by adherence to the rule requiring a seal for a valid deed. Many states have abolished the rule,<sup>103</sup> and the General Assembly should heed the counsel of the bar and the courts and lay the rule to rest in North Carolina.

In *Faucette v. Griffin*<sup>104</sup> plaintiff brought an action to quiet title, claiming superior title from a common source.<sup>105</sup> Defendant contended that one of the conveyances in plaintiff's chain of title had been made by a married woman during coverture without the assent of her husband, and, therefore, was invalid under the constitutional provisions then in effect.<sup>106</sup> Plaintiff countered that the deed was validated by G.S. 39-7.1,<sup>107</sup> which purports to validate all conveyances made prior to 1965 by a married woman of her separate property without the joinder of her husband.<sup>108</sup>

The court of appeals reversed the judgment in favor of plaintiff because she had failed to fit her chain of title to the description in the deed from the common source.<sup>109</sup> The court indicated, however, that, were the question presented to it in a proper case, it would invalidate G.S. 39-7.1 because "[a] void contract cannot be validated by a subsequent act, and the Legislature has no power to pass acts affecting vested rights."<sup>110</sup>

The decision in *Faucette* demonstrates a trend on the part of the

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101. See UNITED TITLE INSURANCE COMPANY BULLETIN, OCT. 16, 1978 (copy available from United Title Insurance Co., P.O. Box 1920, Raleigh, N.C. 27602).

102. 37 N.C. App. at 84, 246 S.E.2d at 150; see McGowan v. Beach, 242 N.C. 73, 86 S.E.2d 763 (1955).

103. See J. WEBSTER, *supra* note 4, § 170, at 198-99 n.184.

104. 35 N.C. App. 7, 239 S.E.2d 712, cert. denied, 294 N.C. 736, 244 S.E.2d 154 (1978).

105. *Id.* at 7-9, 239 S.E.2d at 712-13; see Mobley v. Griffin, 104 N.C. 112, 10 S.E. 142 (1889).

106. 35 N.C. App. at 11, 239 S.E.2d at 714; see Buford v. Mochy, 224 N.C. 235, 29 S.E.2d 729 (1944).

107. N.C. GEN. STAT. § 39-7.1 (1976).

108. 35 N.C. App. at 11-12, 239 S.E.2d at 714-15.

109. 35 N.C. App. at 10-11, 239 S.E.2d at 714; see Allen v. Conservative Hunting Club, 14 N.C. App. 697, 700, 189 S.E.2d 532, 534 (1972).

110. 35 N.C. App. at 12, 239 S.E.2d at 715 (quoting Mansour v. Rabil, 277 N.C. 364, 376, 177 S.E.2d 849, 857 (1970)).

North Carolina courts to invalidate curative acts that affect vested rights.<sup>111</sup> Although curative acts are a laudable attempt on the part of the legislature to remove the technicalities that often create problems of merchantability of title,<sup>112</sup> the decision in *Faucette* casts doubt on the constitutionality of such measures and reliance on them should be avoided.<sup>113</sup>

In *Meachem v. Boyce*,<sup>114</sup> the court of appeals required the joinder in a partition proceeding of those parties who might claim an interest in the land by virtue of an unasserted right of estoppel by deed. The subject property in *Meachem* had formerly been held by the parties as tenants by the entirety, but that estate was converted to a tenancy in common upon the divorce of the parties.<sup>115</sup> During the marriage, the petitioning former wife had, without the joinder of her husband, executed a deed of trust on the property and attempted to convey it to a third party.<sup>116</sup> The trial court, nevertheless, ordered a sale of the property and partition of the proceeds between the former spouses.<sup>117</sup> Respondent former husband appealed, contending that the parties to the wife's two purported conveyances during the marriage should have been joined in the action.<sup>118</sup> The court of appeals held that these parties were necessary parties to a partition proceeding<sup>119</sup> because while their unasserted rights to an interest in the property by virtue of estoppel by deed would be terminated by a sale to a purchaser for value,<sup>120</sup>

111. *Mansour v. Rabil*, 277 N.C. 364, 177 S.E.2d 849 (1970) invalidated N.C. GEN. STAT. § 39-13.1(b) (1976), purporting to validate all deeds executed prior to February 7, 1945 by married women who had not been privately examined. See also *Booth v. Hairston*, 193 N.C. 278, 136 S.E. 879 (1927).

112. See, e.g., N.C. GEN. STAT. §§ 47-47 to -108.17 (1976 & Supp. 1977).

113. A notable exception to this statement is the Real Property Marketable Title Act, N.C. GEN. STAT. §§ 47B-1 to -9 (1976). The constitutionality of this Act is apparently assured by § 47B-4, which permits those having extinguishable claims to re-record them. See Note, *Property Law—North Carolina's Marketable Title Act—Will the Exceptions Swallow the Rule?*, 52 N.C.L. REV. 211, 220 (1973).

114. 35 N.C. App. 506, 241 S.E.2d 880 (1978).

115. See J. WEBSTER, *supra* note 4, § 116.

116. 35 N.C. App. at 507, 241 S.E.2d at 881. In North Carolina an attempted conveyance by either spouse, acting alone, of entirety property is invalid. It is converted, however, under the case law, into a contract to convey and upon the termination of the marriage relation by divorce or the death of the other spouse, the third party may assert principles of estoppel by deed against the spouse who attempted to convey and attempt to enforce the contract. See *Harrell v. Powell*, 251 N.C. 636, 112 S.E.2d 81 (1960). See also *Cruthis v. Steele*, 259 N.C. 701, 131 S.E.2d 344 (1963).

117. 35 N.C. App. at 508, 241 S.E.2d at 881.

118. *Id.*, 241 S.E.2d at 882.

119. *Id.* at 511, 241 S.E.2d at 883. "Necessary parties are those persons who have rights which must be ascertained and settled before the rights of the parties to the suit can be determined." *Equitable Life Assurance Soc'y v. Basnight*, 234 N.C. 347, 352, 67 S.E.2d 390, 395 (1951).

120. See *Builders' Sash & Door Co. v. Joyner*, 182 N.C. 518, 109 S.E. 259 (1921).

the mere presence of such rights might have an adverse effect on the sale price.<sup>121</sup>

The court in *Meachem* looked beyond legal distinctions to achieve an equitable result. Although it realized that an unasserted right to estoppel by deed would be extinguished by the partition sale, it also recognized that such an interest might, in the eyes of a purchaser, constitute a potential cloud on title and, therefore, lower the price bid. The *Meachem* decision should serve to avoid the prejudice to an innocent spouse that might result from the illegal acts of the other spouse in attempting to convey their joint interest in entirety property.

#### D. Eminent Domain<sup>122</sup>

In *Berta v. Highway Commission*,<sup>123</sup> the North Carolina Court of Appeals for the first time addressed the question when title vests in the Board of Transportation under G.S. 136-111,<sup>124</sup> the inverse condemnation<sup>125</sup> provision, for the purpose of allocating the condemnation award between the original owner of the land and his grantee. Plaintiff Berta brought an inverse condemnation action under G.S. 136-111 in which he alleged that defendant's construction of Interstate Highway 26 had caused severe water, silt, and gravel run-off onto his land.<sup>126</sup> Three years later plaintiff conveyed a portion of this land to appellant grantees who subsequently sought to intervene to claim damages for injury to their parcel.<sup>127</sup> The lower court denied the motion to intervene, and the court of appeals affirmed, finding that appellants had not lost a compensable interest in the property.<sup>128</sup>

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121. 35 N.C. App. at 511-12, 241 S.E.2d at 883-84.

122. In *Board of Transp. v. Jones*, 38 N.C. App. 337, 248 S.E.2d 108 (1978), the court of appeals found that the trial court erred in failing to instruct the jury that they were to consider both general and special benefits to the portion of the tract not taken when determining the amount of damages for a partial taking under N.C. GEN. STAT. § 136-112(1) (1974).

123. 36 N.C. App. 749, 245 S.E.2d 409 (1978).

124. N.C. GEN. STAT. § 136-111 (1974). The statute provides in part: "Any person whose land or compensable interest therein has been taken by an intentional or unintentional act or omission of the Board of Transportation and no complaint and declaration of taking has been filed by said Board of Transportation [may make a claim for compensation]."

125. The legal doctrine indicated by the term, "inverse condemnation," is well established in this jurisdiction. Where private property is *taken* for a public purpose by a municipality or other agency having the power of eminent domain under circumstances such that no procedure provided by statute affords an applicable or adequate remedy, the owner, in the exercise of his constitutional rights, may maintain *an action* to obtain just compensation therefor.

*City of Charlotte v. Spratt*, 263 N.C. 656, 663, 140 S.E.2d 341, 346 (1965) (emphasis in original).

126. 36 N.C. App. at 750-51, 245 S.E.2d at 410.

127. *Id.*

128. *Id.* at 751, 754, 245 S.E.2d at 410, 412.

Appellants' argument turned on the difference in the language of G.S. 136-111<sup>129</sup> and G.S. 136-104<sup>130</sup> the condemnation provision. When the Board of Transportation institutes a condemnation action under G.S. 136-104, title vests in the Board upon satisfaction of the statutory requirements.<sup>131</sup> G.S. 136-111, however, does not contain a similar provision on vesting of title. Therefore, appellants claimed that under G.S. 136-111 title could not vest in the Board until final judgment and payment of compensation and that because they had intervened before final judgment, they were deprived of a compensable interest.<sup>132</sup>

The court of appeals, however, adopted the interpretation of the statute advanced by defendant: when an owner brings an action under G.S. 136-111 for inverse condemnation, the taking has already occurred.<sup>133</sup> The court found this view to be consistent with the language of the statute that speaks of land or an interest that "has been taken" although no complaint and declaration of taking "has been filed" by the Board of Transportation.<sup>134</sup> Therefore, because the land was "taken" before plaintiff transferred the tract to appellants, injury was inflicted upon plaintiff alone; appellants took the land subject to the already present damage.<sup>135</sup> This interpretation of the statute accords with the accepted rule that the right to a condemnation award belongs to the vendor and does not inure to the benefit of the vendee when the land is sold after the taking.<sup>136</sup>

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129. Quoted in note 124 *supra*.

130. N.C. GEN. STAT. § 136-104 (1974); see 36 N.C. App. at 752-53, 245 S.E.2d at 411.

131. N.C. GEN. STAT. § 136-104 (1974) pertinent provides in part:

Upon the filing of the complaint and the declaration of taking and deposit in court, . . . of the amount of the estimated compensation stated in the declaration, title to said land or such other interest therein specified . . . together with the right to immediate possession hereof shall vest in the Board of Transportation . . . .

132. 36 N.C. App. at 752-53, 245 S.E.2d at 411.

133. *Id.* at 753, 245 S.E.2d at 411.

134. *Id.*

135. *Id.* at 754, 245 S.E.2d at 411-12.

136. The rationale for the rule is that any "condemnee owner is only entitled to be indemnified to the extent that he has *lost* by the taking." J. WEBSTER, *supra* note 4, § 360, at 485 (emphasis in original). Here appellants had not "lost" anything because the taking occurred before the land was conveyed to them.

The rule is stated in 2 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 5.21, at 48-52 (rev. 3d ed. 1978):

If a parcel of land is sold after a portion of it has been taken (or after it has been injuriously affected by the construction of some authorized public work), the right to compensation, constitutional or statutory, does not run with the land but remains a personal claim in the hands of the vendor, unless it has been assigned by special assignment or by a provision in the deed. It is immaterial that the question of compensation is deferred. Conversely, if the land is sold after condemnation proceedings have been instituted, but



The result is well founded both in terms of statutory construction and in terms of fairness to the parties. Indeed, as defendant argued, there would be no basis for an inverse condemnation action under G.S. 136-111 unless a prior taking had occurred. Any damages arising from that taking properly should go to the owner at the time, and not to any subsequent grantee. Failure to follow the rule articulated by the court would cause an undeserved loss to the original owner and an undeserved gain to the vendee.<sup>137</sup>

In *Board of Transportation v. Martin*,<sup>138</sup> the North Carolina Supreme Court in a case of first impression confronted the question whether there is unity of ownership for the purpose of considering two parcels of land as a unit in the determination of a condemnation award when one parcel is owned jointly by two individuals and the other is owned by a corporation whose sole shareholder is one of the individuals. A portion of a parcel jointly owned by defendant and his wife was condemned; the other parcel at issue was contiguous to this and was owned by a shopping center corporation of which the defendant husband was the sole shareholder.<sup>139</sup> Prior to the taking by plaintiff, defendants had decided to expand the shopping center onto the parcel owned by them as individuals.<sup>140</sup> Initial preparations for the expansion were made.<sup>141</sup> The trial court held that the two parcels comprised a unity for damages purposes, but the supreme court found no unity of ownership, vacated the judgment and remanded.<sup>142</sup>

The supreme court invoked the three requirements for unity of lands in eminent domain proceedings stated in *Barnes v. North Carolina State Highway Commission*:<sup>143</sup> "unity of ownership, physical unity and

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before the *punctum temporis* of the taking, the purchaser, and not the vendor, is entitled to the compensation unless the right to receive [*sic*], the compensation is expressly reserved by the vendor, or the vendee has waived his rights in favor of the vendor.

The court also held that appellants did not make a timely motion to intervene in the action because they did not intervene at the initial hearing but waited instead to intervene at the damages hearing. 36 N.C. App. at 754-55, 245 S.E.2d at 412. See generally N.C.R. Civ. P. 24.

137. See *Brooks Inv. Co. v. City of Bloomington*, 305 Minn. 305, 315, 232 N.W.2d 911, 918 (1975).

138. 296 N.C. 20, 249 S.E.2d 390 (1978).

139. *Id.* at 21-22, 249 S.E.2d at 392. Defendants incorporated the shopping center in order to facilitate financing of the venture. At the time of the taking, the shopping center corporation was involved in Chapter X bankruptcy proceedings. *Id.* at 22, 24, 249 S.E.2d at 392-93.

140. *Id.* at 23, 249 S.E.2d at 393.

141. Defendants had introduced water and utility services and had had a large area graded. *Id.*

142. *Id.* at 24, 30, 249 S.E.2d at 394, 397.

143. 250 N.C. 378, 109 S.E.2d 219 (1959).

unity of use.”<sup>144</sup> The *Barnes* court defined unity of ownership as ownership “by the same party or parties.”<sup>145</sup> The problem thus faced by the court was whether an individual and a corporation could constitute the “same party” to satisfy the *Barnes* test. Defendants argued that this unity did exist because the land owned by the corporation was in substance the same as the land owned by them as individuals, despite the different legal form of ownership.<sup>146</sup> The court, however, rejected the views of the New York<sup>147</sup> and New Jersey<sup>148</sup> authorities cited by defendants and accepted instead those advanced by plaintiff based on *Sams v. Redevelopment Authority*<sup>149</sup> and *Jonas v. State*.<sup>150</sup> In those two cases Pennsylvania and Wisconsin courts refused to disregard the corporate entity in order to benefit the individuals who were shareholders who wanted to establish unity of ownership to increase condemnation damages.<sup>151</sup> Because the corporate entity has a separate legal existence

144. *Id.* at 384, 109 S.E.2d at 224-25. An owner attempts to establish that one or more parcels of land should be treated as a single tract in order to receive greater condemnation damages. See generally 4A P. NICHOLS, *supra* note 136, § 14.31[1]-[2] (rev. 3d ed. 1978); Annot., 95 A.L.R.2d 887 (1964). See also UNIFORM EMINENT DOMAIN CODE § 1007 which states:

For the purpose of determining compensation under this Article, all parcels of real property, whether contiguous or noncontiguous, that are in *substantially identical ownership* and are being used, or are reasonably suitable and available for use in the reasonably foreseeable future, for their highest and best use as an integrated economic unit, shall be treated as if the entire property constitutes a single parcel.

*Id.* at 97 (emphasis added).

145. 250 N.C. at 384, 109 S.E.2d at 225; cf. 4A P. NICHOLS, *supra* note 136, § 14.31[2], at 416 (“It is, of course, essential to constitute a single parcel that it be owned in its entirety by one owner or one set of owners.”).

146. 296 N.C. at 28, 249 S.E.2d at 396.

147. See *Erly Realty Dev., Inc. v. State*, 43 App. Div. 2d 301, 351 N.Y.S.2d 457 (1974), *appeal denied*, 34 N.Y.2d 515, 357 N.Y.S.2d 1025 (1974).

[T]he award of such [severance] damages has been sustained where, given contiguity and unity of use, close control of one ownership entity by the other is tantamount to actual ownership. . . . There was proof that the respective stock holdings of the individual claimants in the corporation were in exactly the same proportion as the undivided interest of each in the real estate of the individuals. Together, the individual claimants owned all the shares of the corporation.

*Id.* at 305, 351 N.Y.S.2d at 461-62 (citations omitted).

148. See *Housing Auth. v. Norfolk Realty Co.*, 71 N.J. 314, 364 A.2d 1052 (1976). The New Jersey court looked to “the unity of beneficial ownership of the whole.” *Id.* at 325, 364 A.2d at 1058.

149. 431 Pa. 240, 244 A.2d 779 (1968).

150. 19 Wis. 2d 638, 121 N.W.2d 235 (1963).

151. “It is difficult to conceive that a unity of use can exist when there are two separate and distinct legal entities operating each parcel of land. . . . Where there are two separate users (completely different entities) of the parcels involved, the use of both cannot be said to be so inseparable as to make them a unit for purposes of damages in a condemnation proceeding.”

*Sams v. Redevelopment Auth.*, 431 Pa. at 243-44, 244 A.2d at 781 (holding that two parcels could not be considered a unit when one was owned by individuals as partnership and the other owned by corporation of which partners were sole shareholders).

from that of its shareholder owners,<sup>152</sup> the court determined that the choice of a corporate legal form was binding on defendants and precluded a finding of unity of ownership when the only reason to pierce the corporate veil would be to allow defendants an economic benefit.<sup>153</sup>

The *Martin* situation forced the court to choose between two conflicting policies. The first is that the corporation's status as a legal entity will not be disregarded absent a showing of good cause to pierce the corporate veil.<sup>154</sup> The second is that businessmen should be able to take advantage of various methods of asset ownership for economic and tax reasons without the risk of losing full damages in a condemnation taking.<sup>155</sup> By adopting a formalistic test that "a parcel of land owned by an individual and an adjacent parcel of land owned by a corporation of which that individual is the sole or principal shareholder cannot be treated as a unified tract for the purpose of assessing condemnation damages,"<sup>156</sup> the court asserted its belief in the preeminence of the first policy.

The North Carolina Court of Appeals in *Board of Transportation v. Charlotte Park & Recreation Commission*<sup>157</sup> dealt for the first time with a question of apportionment of a condemnation award between the holder of a fee simple subject to a condition subsequent and the holder of the right of re-entry or power of termination. The court affirmed the lower court decision that the owner of the possessory fee was entitled to the full award because there was no showing that the owner of the fee intended to renounce the limited use required by the deed.<sup>158</sup>

The property at issue was conveyed by the Diocese of North Caro-

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"In the present case, those who created the corporation in order to enjoy advantages flowing from its existence as a separate entity are asking that such existence be disregarded where it works a disadvantage to them. We do not consider it good policy to do so." *Jonas v. State*, 19 Wis. 2d at 644, 121 N.W.2d at 239 (holding that two parcels could not be considered a unit when one was owned by individuals and the other owned by a corporation of which one of individuals was principal shareholder).

152. See *Troy Lumber Co. v. Hunt*, 251 N.C. 624, 627, 112 S.E.2d 132, 134 (1960); 18 AM. JUR. 2d *Corporations* § 13 (1965).

153. 296 N.C. at 28, 249 S.E.2d at 395-96.

154. 1 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41, at 166 (rev. perm. ed. 1974).

155. *Housing Auth. v. Norfolk Realty Co.*, 71 N.J. 314, 324, 364 A.2d 1052, 1057 (1976).

156. 296 N.C. at 28, 249 S.E.2d at 396. See W. FLETCHER, *supra* note 154, § 41.2, at 180.

The court noted two additional problems with finding a unity of lands in *Martin*: title to the corporation's property was vested in the trustee in bankruptcy and there was no unity of use since one parcel was undeveloped and the other was used for a shopping center. 296 N.C. at 29-30, 249 S.E.2d at 396-97.

157. 38 N.C. App. 708, 248 S.E.2d 909 (1978), *cert. denied, appeal dismissed*, 296 N.C. 583 (1979).

158. *Id.* at 712, 248 S.E.2d at 912.

lina of the Protestant Episcopal Church (Diocese) to the Commission on the condition that it be used "for playground purposes" and that if the park were ever discontinued, the Commission had to offer to resell it to the Diocese for the original consideration.<sup>159</sup> The City of Charlotte initiated plans to condemn part of the property for street relocation; until that time the Commission had always maintained a park on the land.<sup>160</sup> The court first established that the Commission and the City were separate entities so that the City's decision to condemn did not trigger the condition of the deed and require the Commission to offer the property to the Diocese.<sup>161</sup> The Diocese then claimed that it was entitled to a portion of the award nevertheless and contended that the court should follow the decision of the Minnesota Supreme Court in *State v. Independent School District No. 31*.<sup>162</sup> In that case the court held that the owner of a possibility of reverter is always entitled to at least nominal damages when condemnation of the fee occurs and that substantial damages will accrue to the grantor in cases in which the fair market value of the restricted use in the deed is less than the fair market value of the highest practicable use.<sup>163</sup> The court of appeals, however, refused to adopt the Minnesota rule, and instead accepted the

159. *Id.* at 709, 248 S.E.2d at 910. The court did not analyze this conveyance but merely stated that it was a fee simple subject to a condition subsequent. This characterization would appear correct because the termination of the estate was not to occur automatically but rather the grantee was to tender an offer to purchase to the grantor. See J. WEBSTER, *supra* note 4, § 37, at 51-52.

160. 38 N.C. App. at 709, 248 S.E.2d at 910.

161. *Id.* at 710, 248 S.E.2d at 911. The Diocese contended that the City and Commission were substantively identical entities so that the City's decision to condemn the park for a street could be attributed to the Commission; thus, the Commission would violate the restrictive use of the deed and would entitle the Diocese to re-enter. *Id.*

A taking by eminent domain of a fee simple defeasible "does not . . . cause a reversion of the title to the grantor." *City of Charlotte v. Charlotte Park & Rec. Comm'n*, 278 N.C. 26, 32, 178 S.E.2d 601, 605 (1971). See 2 P. NICHOLS, *supra* note 136, § 5.221[1], at 73.

162. 266 Minn. 85, 123 N.W.2d 121 (1963), *cited in* 38 N.C. App. at 711, 248 S.E.2d at 912.

163. *Id.* at 95-97, 123 N.W.2d at 129. The court stated the measure of damages as follows:

If this value [value when used as provided in the conveyance of the fee simple determinable] is *equal to or greater than* the market value of the realty if used for other practicable purposes, the owner of the fee simple determinable is entitled to the full amount of the award less some nominal amount—1 percent of the sum awarded, for example—to be allocated to the owner of the possibility of reverter. If the value so fixed, in cases where abandonment of the use is imminent or where the realty would have a greater market value if devoted to some other practicable purpose, is *less* than the totality of the value, the owner of the possibility of reverter shall be entitled to a proportion of the condemnation award expressed by a fraction the denominator of which is the market value of the realty when devoted to its best practicable use and the numerator of which is the difference between such value and the value of the realty applied to the use to which it is restricted by the terms of the deed for such period of time as such use is reasonably to be anticipated.

*Id.* at 97, 123 N.W.2d at 130 (emphasis in original).

majority view that if the occurrence of the condition upon which the defeasible fee will terminate or which will trigger the re-entry rights of the grantor is not probable or imminent at the time of the institution of the eminent domain action, the entire award will go to the owner of the possessory fee simple defeasible.<sup>164</sup>

The court failed to delineate its reasons for adopting the majority rule. Its focus on the grantee's lack of intention to abandon the restricted use would suggest that the basis for its conclusion was a belief that the possibility of reverter or right of re-entry was too remote to be of consequence for damages purposes.<sup>165</sup> Although the Minnesota rule allowing nominal damages to all owners of a possibility of reverter or right of re-entry on condemnation affords those interests a possibly desirable recognition, the portion of the rule providing for substantial damages in appropriate cases would create additional confusion and difficulty in eminent domain proceedings that the court of appeals has avoided by selecting the majority view.

### E. Zoning<sup>166</sup>

#### The North Carolina Supreme Court in *George v. Town of*

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164. 38 N.C. App. at 711-12, 248 S.E.2d at 912. The rule is stated in RESTATEMENT OF PROPERTY § 53, Comment b (1936):

If, viewed from the time of the commencement of an eminent domain proceeding, and not taking into account any changes in the use of the land sought to be condemned which may result as a consequence of such proceeding, the event upon which a possessory estate in fee simple defeasible is to end is an event the occurrence of which, within a reasonably short period of time, is not probable, then the damages for a taking thereof by an eminent domain proceeding are ascertained as though the estate were a possessory estate in fee simple absolute and the entire amount thereof is awarded to the owner of the estate in fee simple defeasible. Under these circumstances the future interest has no ascertainable value.

See 2 P. NICHOLS, *supra* note 136, § 5.221[1] at 71-72; 27 AM. JUR. 2d *Eminent Domain* § 251 (1966).

In dictum the supreme court stated the general rule with approval in *City of Charlotte v. Charlotte Park & Rec. Comm'n*. The claimants of the possibility of reverter in *City of Charlotte* either did not answer or else transferred their interests to the possessor of the fee interest so that there was no dispute about title to the damages. 278 N.C. at 33, 178 S.E.2d at 606.

165. 38 N.C. App. at 710, 712, 248 S.E.2d at 911-12. See also Annot., 81 A.L.R.2d 568, 571 (1962).

166. In *Capps v. City of Raleigh*, 35 N.C. App. 290, 241 S.E.2d 527 (1978), the court of appeals held that in an action by residents to challenge a zoning ordinance brought five years and nine months after adoption of the ordinance and after defendants had spent large sums for development of the area, defendants could assert a laches defense although plaintiffs had only constructive and not actual notice of the public hearing on the zoning change.

The court of appeals in *City of Winston-Salem v. Hoots Concrete Co.*, 37 N.C. App. 186, 245 S.E.2d 536, *cert. denied*, 295 N.C. 645, 248 S.E.2d 249 (1978), held that if, in a suit by the city to enjoin defendant's operation of a concrete mixing business in a certain zone, a city zoning officer, pursuant to the authority of the city code, had approved defendant's business as a permitted use in that zone, the city could not raise the established defense that a municipality cannot be estopped

*Edenton*<sup>167</sup> decided a zoning issue of first impression concerning a provision in a city zoning ordinance prohibiting reconsideration within a six-month period of an application for rezoning of a tract. The court held that the action of the Town Council of Edenton in permitting a zoning change that it had previously refused during the preceding six months was in violation of the town zoning ordinance and therefore void.<sup>168</sup>

The controlling provision of the Edenton zoning ordinance, section 14-8, stated:

When the Town Board shall have denied any application for the change of any zoning district, it shall not thereafter accept any other application for the same change of zoning amendment affecting the same property, or any portion thereof, until the expiration of six (6) months from the date of such previous denial.<sup>169</sup>

Plaintiffs brought a declaratory judgment action to challenge a rezoning decision made by the Edenton Town Council allegedly in violation of this provision.<sup>170</sup> The owners of the property applied for rezoning of the tract from residential-agricultural ("R-20") to highway-commercial ("CH") on March 14, 1975.<sup>171</sup> The Town Council denied the request on May 13.<sup>172</sup> On July 8, 1975, the Council resolved to hold a public hearing on August 12 to reconsider rezoning the tract as the owners had requested in March.<sup>173</sup> On its own motion the Council decided at the August 12, 1975 meeting to rezone the tract to "CH" in accordance with the owners' original application.<sup>174</sup> At the same meeting, the Town Council adopted the "New Ordinance," a revised zoning ordinance for the town.<sup>175</sup> The New Ordinance contained the same section 14-8 governing successive applications for rezoning that had appeared in the "Old Ordinance."<sup>176</sup> Defendants argued that the rezoning change was made "as part of the adoption of" the New Ordinance so

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to enforce its own zoning laws because the officer was acting with proper authority and not in violation of the ordinance.

167. 294 N.C. 679, 242 S.E.2d 877 (1978).

168. *Id.* at 687, 242 S.E.2d at 882.

169. *Id.* at 683, 242 S.E.2d at 880.

170. *Id.* at 680, 242 S.E.2d at 878. Plaintiffs were residents of Chowan County and were within the town's zoning jurisdiction. *Id.*

171. *Id.* at 681, 242 S.E.2d at 878.

172. *Id.*

173. *Id.* at 682, 242 S.E.2d at 879. The owners applied to have the property rezoned to "CS" (shopping center) a different use, on June 12, 1975. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

that section 14-8 would not be applicable.<sup>177</sup> Plaintiffs claimed, however, that the change was made after the New Ordinance was adopted and that section 14-8 therefore prohibited it.<sup>178</sup> Concluding that the timing of the Council's decision to rezone as related to the adoption of the New Ordinance was irrelevant, the supreme court found that the Council had violated the time restriction of section 14-8.<sup>179</sup>

The court determined that the Council's July 8 action was in effect "its own petition or application for an amendment"<sup>180</sup> and that section 14-8 extended to amendments proposed by the Town Council as well as to those proposed by property owners.<sup>181</sup> Looking at similar cases from various jurisdictions, the court perceived a determination to enforce such time limitations in order to prevent "circumventions of zoning provisions" such as occurred in this case.<sup>182</sup> The policy reason for literal compliance with limitations on reapplication clauses is to protect residents who live in the area subject to rezoning from "the burden of having to protest and defend against a series of repetitious applications." <sup>183</sup> Finding that section 14-8 was intended to serve this protective role, the court ruled that the Council's action did not comply with the ordinance's purpose or procedure and therefore could not stand.<sup>184</sup>

The court's application of section 14-8's procedural requirements to strike down the conduct of the Edenton Town Council ensured the efficacy of the protective function of the ordinance. If the court had held that the council's decision to rezone was not subject to section 14-8, it would have rendered the ordinance open to easy circumvention. The court's strict reading of the provision, therefore, affirmed the significance of such restrictions in zoning ordinances in safeguarding the interests of property owners.

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177. *Id.*

178. *Id.*

179. *Id.* at 683, 242 S.E.2d at 879.

180. *Id.* at 684, 242 S.E.2d at 880. Section 14-1 of the ordinance provided that "the Town Council, the Planning Board, any department or agency of the Town, or the owner or renter of any property within the zoning jurisdiction of the Town of Edenton" could petition for a zoning amendment. *Id.* at 683, 242 S.E.2d at 880.

181. *Id.* at 685, 242 S.E.2d at 881.

182. *Id.* See *Newman v. Smith*, 217 Ga. 465, 123 S.E.2d 305 (1961) (finding that board's action in granting requested rezoning was void when second application by owner was made within 12 months of denial of first); *Tyrie v. Baltimore County*, 215 Md. 135, 137 A.2d 156 (1957) (finding that grant of special exception was void when reclassification of same property had been denied within the 18-month period established by ordinance); *Annot.*, 52 A.L.R.3d 494, 509 (1973).

183. *Stephens v. Montgomery County Council*, 248 Md. 256, 258, 235 A.2d 701, 702 (1967), *quoted with approval in George v. Town of Edenton*, 294 N.C. at 686, 242 S.E.2d at 882 (1978).

184. 294 N.C. at 686-87, 242 S.E.2d at 882.

### F. Landlord-Tenant

In *Dixon v. Rivers*,<sup>185</sup> the North Carolina Court of Appeals for the first time confronted the question of the validity of covenants for perpetual renewal in leases. In upholding the covenant at issue, the court adopted the general rule that such covenants "will be enforced where the language of the lease unmistakably indicates that the parties intended to provide for such renewal."<sup>186</sup>

Plaintiffs bought a tract of land that included a portion leased to defendants by plaintiffs' predecessor in title.<sup>187</sup> The lease provided for an initial ten year period and stated that

if said property has been kept in a good state of repair, and if said parties of the second part so desire, this lease shall be renewed for an additional period of 10 years, and thereafter shall be renewable every 10 years for so long as the parties of the second part so desire.<sup>188</sup>

The lease was to be binding on the parties, "their heirs, executors, administrators, and assigns."<sup>189</sup> The court rejected plaintiffs' contention that because of the language "if said parties of the second part so desire," the instrument created only a tenancy at will with an indefinite term.<sup>190</sup> Instead, the court found that a true lease was intended because of the definite ten year term with successive renewal terms of ten years.<sup>191</sup> In support of its conclusion concerning the validity of the covenant of perpetual renewal, the court determined that the intention of the lessor to grant the right was clearly stated under the general rule;<sup>192</sup> however, the question of the lessor's intent is but one factor, as the court recognized. Another significant factor is the Rule against Perpetuities. The law considers the covenant to renew a vested interest, and therefore it is not in violation of the Rule; the court accepted this standard interpretation.<sup>193</sup>

The court's decision to test the validity of covenants of perpetual

185. 37 N.C. App. 168, 245 S.E.2d 572, *cert. granted*, 295 N.C. 733, 248 S.E.2d 867 (1978) (No. 92 PC).

186. *Id.* at 171, 245 S.E.2d at 574. *See also* Annot., 31 A.L.R.2d 607, 623 (1953).

187. 37 N.C. App. at 169, 245 S.E.2d at 573.

188. *Id.* at 170, 245 S.E.2d at 573-74.

189. *Id.*

190. *Id.* at 170-71, 245 S.E.2d at 574. The principal differentiating characteristic between a lease and a tenancy at will is the existence in a lease of a designated, fixed term. *See* Barbee v. Lamb, 225 N.C. 211, 34 S.E.2d 65 (1945); J. CRIBBET, *supra* note 41, at 53, 55; C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 65, 83 (1962); 8 STRONG'S NORTH CAROLINA INDEX 3D *Landlord and Tenant* § 15 (1977); J. WEBSTER, *supra* note 4, §§ 89, 208.

191. 37 N.C. App. at 171, 245 S.E.2d at 574.

192. *Id.*

193. *Id.*; *cf.* J. GRAY, THE RULE AGAINST PERPETUITIES § 230, at 231 (4th ed. 1942) (covenant



renewal according to the intent of the parties is a reasonable one. Because there is no technical perpetuities objection to such covenants, they should be afforded legal recognition when this recognition accords with the express wishes of the lessor and lessee. In addition, covenants of perpetual renewal serve as a significant tool in the commercial realm "to aid alienability."<sup>194</sup>

The court of appeals in *Jones v. Andy Griffith Products, Inc.*<sup>195</sup> for the first time considered possible standards for determining whether a lessor has reasonably or unreasonably withheld consent to a proposed sublease by the lessee. Plaintiffs leased premises in front of a shopping center (owned by plaintiff Jones) to defendant Andy Griffith Products, Inc.; Griffith in turn assigned the leasehold to defendant Silver's Enterprises, Inc.<sup>196</sup> Both Griffith and Silver's operated restaurants on the premises.<sup>197</sup> Plaintiffs sued to recover unpaid rent and taxes on the property, and defendant Silver's claimed that plaintiffs had unreasonably refused to approve a sublease to the operator of an electronics store.<sup>198</sup> The court of appeals affirmed the lower court's holding that plaintiffs' refusal to consent was reasonable and that defendants therefore were liable for the rent and taxes due.<sup>199</sup>

The lease provision in issue stated: "Any subletting by Lessee shall be subject to the approval of Lessor, which approval shall not be unreasonably withheld."<sup>200</sup> Plaintiffs objected to the proposed sublease on two grounds: they wished to keep a restaurant on the premises, and the suggested subtenant was already a tenant in another building in the shopping center.<sup>201</sup> The court looked to New Jersey and New York opinions for guidance in determining whether these stated reasons for withholding consent were reasonable. The New Jersey case, *Broad & Branford Place Corp. v. J.J. Hockenjos Co.*,<sup>202</sup> offered only a basic reasonable man standard: "the action of a reasonable man in the land-

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to renew is "part of the lessee's present interest"); L. SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS § 132, at 282 (2d ed. 1966) ("the renewed lease is but an extension of the old").

194. L. SIMES, *supra* note 193, § 230, at 282. Simes advances this view to explain why covenants of perpetual renewal are held not to violate the Rule against Perpetuities.

195. 35 N.C. App. 170, 241 S.E.2d 140, *cert. denied*, 295 N.C. 90, 244 S.E.2d 258 (1978).

196. *Id.* at 170-71, 241 S.E.2d at 141.

197. *Id.* at 172, 241 S.E.2d at 141.

198. *Id.*

199. *Id.* at 176, 241 S.E.2d at 144.

200. *Id.* at 171, 241 S.E.2d at 141.

201. *Id.* at 172, 241 S.E.2d at 142. The evidence revealed that the building was constructed for restaurant purposes and that a restaurant in the building would afford plaintiffs a greater opportunity to realize percentage rentals. *Id.* at 174, 241 S.E.2d at 143.

202. 132 N.J.L. 229, 39 A.2d 80 (1944).

lord's position."<sup>203</sup> *American Book Co. v. Yeshiva University Development Foundation, Inc.*,<sup>204</sup> the New York case, provided more concrete aid to the court in a series of "objective" tests of reasonableness: "(1) financial responsibility, (2) the 'identity' or 'business character' of the subtenant—i.e. his suitability for the particular building, (3) the legality of the proposed use, (4) the nature of the occupancy—i.e. office, factory, clinic, or whatever."<sup>205</sup> The court of appeals found that lessor's refusal was grounded on considerations such as those in tests (2) and (4), and concluded that on the facts of *Jones*, the withholding of consent from a subtenant in a different business was reasonable.<sup>206</sup> A caveat to the holding was the court's statement that this type of case will always turn on its facts so that a finding that a lessor's reason for refusal of consent accords with one or more of the tests may not necessarily be conclusive proof that the landlord's grounds were reasonable.<sup>207</sup>

One may question the significance of the court's reference to the reasonable landlord standard and the "objective" tests of *American Book Co.* because the inquiry is essentially a factual one in each case; the standards used by the court of appeals will provide no definite answers on the issue of reasonableness. Although the tests may be viewed as simply common sense expressions of the expectations of the lessor and lessee, their articulation by the court of appeals will nevertheless serve as a useful tool for analysis of this type of sublease consent provision.

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203. *Id.* at 232, 39 A.2d at 82. The court also stated:

Arbitrary considerations of personal taste, sensibility, or convenience do not constitute the criteria of the landlord's duty under an agreement such as this. Personal satisfaction is not the sole determining factor. . . . The term "reasonable" is relative and not readily definable. As here used, it connotes action according to the dictates of reason—such as is just, fair and suitable in the circumstances.

*Id.* See generally Annot., 54 A.L.R.3d 679 § 6 (1973).

204. 59 Misc. 2d 31, 297 N.Y.S.2d 156 (1969).

205. *Id.* at —, 297 N.Y.S.2d at 160.

206. 35 N.C. App. at 176, 241 S.E.2d at 144.

207. *Id.* The court noted that the burden of proof on the unreasonableness of the landlord's refusal to consent is on the lessee. *Id.* See generally *Broad & Branford Place Corp. v. J.J. Hockenjos Co.*, 132 N.J.L. 229, 233, 39 A.2d 80, 82 (1944); Annot., 54 A.L.R.3d 679, 683 (1973).

The court did not have to consider whether the proposed subtenant's status as a current tenant of plaintiff *Jones* in the shopping center would be reasonable grounds to refuse consent to the sublease. One court has found that this excuse—that the proposed subtenant was a tenant in another building owned by the landlord—was "insufficient in law" to constitute a reasonable refusal of consent by the landlord. *Krieger v. Helmsley-Spear, Inc.*, 62 N.J. 423, 424, 302 A.2d 129, 129 (1973).

*G. Personal Property*<sup>208</sup>

The subject of the court of appeals' inquiry in *Montford v. Grohman*<sup>209</sup> was the effect on plaintiff's constitutional personal property exemption (for the protection of personal property from the claims of creditors) of a security interest held by defendant finance company in plaintiff's household goods. Plaintiff and defendant finance company entered into a consumer loan agreement by which defendant took a security interest in all of plaintiff's personal property and plaintiff waived her legal exemption rights.<sup>210</sup> Plaintiff defaulted on the loan; defendant established its right to possess plaintiff's property and that her belongings were worth no more than \$500.<sup>211</sup> The lower court found that plaintiff was entitled to her constitutional personal property exemption of \$500,<sup>212</sup> despite the security interest held by the finance company.<sup>213</sup> Holding that the security interest took priority over the personal property exemption, the court of appeals reversed and determined that plaintiff was not entitled to retain \$500 of personal property.<sup>214</sup>

The constitutional personal property exemption exempts "from sale under execution or other final process of any court, issued for the collection of any debt" an amount of personal property, not less than \$500, for all state residents.<sup>215</sup> Plaintiff argued that this exemption should protect her last \$500 of assets even though she had freely entered into the security agreement with defendant finance company.<sup>216</sup> The court of appeals, however, declared that the exemption is limited to the situation expressly covered by its language—it serves to preserve a debtor's property from final sale but not to guarantee that he will be

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208. The supreme court in *Lee-Moore Oil Co. v. Cleary*, 295 N.C. 417, 245 S.E.2d 720 (1978), found that the owner of a chattel and the owner of the realty to which the chattel is attached may agree expressly or impliedly, orally or in writing, that the chattel will remain the personal property of the owner rather than become a fixture of the property, and that such an agreement will be binding on subsequent purchasers of the realty who take with knowledge of the arrangement.

209. 36 N.C. App. 733, 245 S.E.2d 219 (1978), *appeal dismissed*, 295 N.C. 551, 248 S.E.2d 727 (1978).

210. *Id.* at 734, 245 S.E.2d at 220.

211. *Id.* N.C. GEN. STAT. § 25-9-503 (Cum. Supp. 1977) establishes the right of the secured party to take possession of the collateral upon default of the debtor.

212. N.C. CONST. art. X, § 1.

213. 36 N.C. App. at 734, 245 S.E.2d at 221.

214. *Id.* at 738, 245 S.E.2d at 223.

215. N.C. CONST. art. X, § 1. N.C. GEN. STAT. § 1-378 (1969) limits the amount of the personal property exemption to a maximum of \$500.

216. 36 N.C. App. at 735, 245 S.E.2d at 221.

able to keep his last assets in all circumstances.<sup>217</sup> The owner is free to dispose of or encumber those assets in a manner outside the reach of the personal property exemption, that is, by voluntary sale, gift, or, as here, security interest.<sup>218</sup> Plaintiff's choice to enter into the security agreement was binding on her, and the personal property exemption did not render defendant finance company's security interest null.<sup>219</sup> The New Mexico court in *Hernandez v. S.I.C. Finance Co.*,<sup>220</sup> cited by the court of appeals, reached a similar conclusion on the theory that if an owner can sell his otherwise "exempt" property, he certainly can encumber it with a security interest. The owner then cannot call upon the statutory exemption for protection from his contract.<sup>221</sup>

Although the court reached the proper result according to the language and policy of the exemption, it did suggest that this area might be an appropriate one for legislative action.<sup>222</sup> If such security interests in household goods were barred, a debtor's final assets would be preserved, except for sale or gift by the debtor.<sup>223</sup> Whether this result would be sound is questionable; as the New Mexico court stated, subjecting one's goods to a security interest is not as final a step as selling those goods. Therefore, if the legislature were to prevent security interests in household goods, arguably it should also prevent a debtor from selling his final assets. Neither result accords with the debtor's ownership rights in the property. The *Montford* result is preferable to a legislative change in the personal property exemption because it recognizes the owner's power to dispose of his property as he wishes through voluntary security agreements.

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217. *Id.* at 736, 245 S.E.2d at 222.

218. *Id.*

219. *Id.* at 737, 245 S.E.2d at 222; *cf.* *Gaster v. Hardie*, 75 N.C. 460 (1876) (establishing the following order of payment when debtor has given a chattel mortgage: (1) mortgage debt, (2) debtor's personal property exemption, and (3) amounts owing to a judgment creditor).

The court expressly stated that the waiver provision in the agreement was not the basis of its decision. 36 N.C. App. at 737, 245 S.E.2d at 222-23. An executory waiver of the right to the exemption by the debtor is not enforceable. *See Branch & Co. v. Tomlinson*, 77 N.C. 388, 391 (1877).

220. 79 N.M. 673, 448 P.2d 474 (1968).

221. *Id.* at 675, 448 P.2d at 476. The court noted that "such property [often] is the poorman's only source of cash in an emergency," and he may need to sell or encumber it. *Id.*

222. 36 N.C. App. at 738, 245 S.E.2d at 223. The court referred to *First National Bank of Amarillo v. LaJoie*, 537 P.2d 1207 (Sup. Ct. Okla. 1975). The controlling statute in *LaJoie* prohibited a seller "in [a] consumer credit sale from taking [a] security interest in property other than [the] property sold." *Id.* at 1208, OKLA. STAT. tit. 14A, § 2-407 (1971). The provision is from the UNIFORM CONSUMER CREDIT CODE § 2.407. The limitation on security interests in § 2.407 applies, however, only to consumer credit sales and not to consumer loans (the situation in *Montford*). *Id.*; *see* 537 P.2d at 1209.

223. 36 N.C. App. at 738, 245 S.E.2d at 223.

*H. Wills, Trusts and Estates*<sup>224</sup>

The North Carolina Court of Appeals for the first time interpreted the meaning of "net income" in the determination of the surviving spouse's year's allowance under G.S. 30-31<sup>225</sup> in *Pritchard v. First-Citizens Bank & Trust Co.*<sup>226</sup> In *Pritchard* the widow petitioned the clerk of superior court for allotment of a year's allowance pursuant to G.S. 30-27<sup>227</sup> (allowance assigned in superior court) rather than the minimum year's allowance of \$2000 in G.S. 30-15.<sup>228</sup> Determining that the widow's petition complied with G.S. 30-31, the superior court awarded her a year's allowance of \$40,640; one of the remaindermen under the trust established by decedent for his wife and children appealed.<sup>229</sup>

224. In a will construction case, *Sutton v. Sutton*, 35 N.C. App. 670, 242 S.E.2d 644 (1978), the court of appeals construed a gift by a husband to his wife of "a sufficient amount of my real and personal property when added to the value of my home, and other property that she will receive outside of this Will, that will equal one-third of my net estate" to be a gift of an undivided interest in the testator's real property rather than a specific dollar figure because testator provided in the will that the property was to be managed and the income to be distributed for the benefit of his wife.

In *Thompson v. Ward*, 36 N.C. App. 593, 244 S.E.2d 485, *cert. denied*, 295 N.C. 556, 248 S.E.2d 735 (1978), the court of appeals held that a holographic devise of "the use of" certain realty to the heirs of testatrix's brother-in-law for "as long as they wish to live there" was a gift of only a life estate despite the statutory presumption that any devise of realty is in fee simple under N.C. GEN. STAT. § 31-38 (1977); the testatrix's intent to convey a lesser estate was clearly shown because she used language of "fee simple" elsewhere when she so intended.

In *In re Will of Weston*, 38 N.C. App. 564, 248 S.E.2d 359 (1978), the court of appeals found that an attesting witness, if he had sight at the time of the execution of the will and was able to testify satisfactorily that the will read to him was the one he had witnessed, was "available" to give testimony to prove an attested will under N.C. GEN. STAT. § 31-18.1 (1976) even though he was blind at the time of the proceeding.

In a caveat proceeding challenging testatrix's capacity to make a will in *In re Will of Worrell*, 35 N.C. App. 278, 241 S.E.2d 343, *cert. denied*, 295 N.C. 90, 244 S.E.2d 263 (1978), the court of appeals held that an instruction by the trial court that the jury was to consider whether testatrix "recognized her obligation to the objects of her bounty and their relation to her" was not in error and that this factor was relevant to the question of testamentary capacity.

225. N.C. GEN. STAT. § 30-31 (1976) provides in part:

The said commissioners shall be sworn by the magistrate and shall proceed as prescribed in this Chapter, except that they may assign to the plaintiff a value sufficient for the support of the plaintiff according to the estate and condition of the decedent and without regard to the limitations set forth in this Chapter . . . and the total value of all allowances shall not in any case exceed the one half to the average annual net income of the deceased for three years next preceding his death.

The purpose of the year's allowance is to provide the surviving spouse with immediate funds for support pending administration of the decedent's estate.

226. 38 N.C. App. 489, 248 S.E.2d 467 (1978).

227. N.C. GEN. STAT. § 30-27 (1976). For discussion of the operation of the allowance assigned in superior court, see 1 N. WIGGINS, WILLS AND ADMINISTRATION OF ESTATES IN NORTH CAROLINA § 173 (1964).

228. N.C. GEN. STAT. § 30-15 (1976).

229. 38 N.C. App. at 490-91, 248 S.E.2d at 468-69. The evidence established that the commissioners had based the award on the decedent's "adjusted gross income" from his federal income

Holding that "net income" under G.S. 30-31 signifies the after-tax income of the decedent, the court of appeals reversed the award because the lower court had improperly used an adjusted gross income base.<sup>230</sup>

Appellant contended that the allowance to the surviving spouse of a maximum amount of "one half of the average annual net income of the deceased for three years next preceding his death" should be construed as one-half of the average sum left after the deduction of federal and state income taxes and not one-half of the average adjusted gross income of decedent.<sup>231</sup> The court of appeals looked to the purpose of the statute in order to resolve the issue. The 1868-69 Legislative Session enacted the alternative system that now exists: the widow may take either a minimal allowance,<sup>232</sup> or, upon the required showing,<sup>233</sup> may take an amount "sufficient for the support of herself and her family according to the estate and condition of her husband . . . ."<sup>234</sup> The court found that the intention of the second alternative, by which the spouse may take a much greater sum than the \$2000 of G.S. 30-15, was to grant the surviving spouse "of a solvent decedent . . . an amount sufficient to maintain for a period that standard of living to which he or she had been accustomed . . . ."<sup>235</sup> The court concluded that the allowance should be based upon that amount of income that the family in the past actually had had available for its living needs.<sup>236</sup> "Net income" thus under G.S. 30-31 can refer only to the decedent's income after deductions for federal and state income taxes are made.<sup>237</sup>

The decision of the court of appeals is a sound one. G.S. 30-27 provides the surviving spouse with the opportunity to claim an allowance based upon the familial standard of living prior to decedent's death. This privilege should not be abused by allowing the spouse to claim an allowance based on one-half of the average gross income of

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tax returns for the three years before his death. The average adjusted gross income figure based on the three years was \$81,289. *Id.* at 490, 248 S.E.2d at 469.

230. *Id.* at 493-94, 248 S.E.2d at 470-71.

231. *Id.* at 490, 248 S.E.2d at 469.

232. Law of March 27, 1869, ch. 93, § 10, 1868-69 N.C. Pub. Laws 205 (current version at N.C. GEN. STAT. § 30-15 (1976)).

233. *Id.* § 22, 1868-69 N.C. Pub. Laws 205 (current version at N.C. GEN. STAT. § 30-29 (1976)).

234. *Id.* § 24, 1868-69 N.C. Pub. Laws 205 (current version at N.C. GEN. STAT. § 30-31 (1976)).

235. 38 N.C. App. at 491, 248 S.E.2d at 469. The court emphasized that the § 30-31 computation provides the maximum allowance that may be assigned; the award may of course be for less than this maximum amount. *Id.* at 493, 248 S.E.2d at 470.

236. *Id.* at 493, 248 S.E.2d at 470.

237. *Id.*

the decedent without taking into account the tax burdens incurred by that income. The court's interpretation—limiting the basis for the allowance to the after-tax income of the decedent—protects the interests of both the surviving spouse and the estate and is consonant with the policy of the alternative allowance procedures.

In *Dew v. Shockley*,<sup>238</sup> the court of appeals determined that testatrix's gift of all of her property to her "two brothers and three sisters, to have and to hold the same for and during the term of their natural lives with remainder in fee to their children, in equal shares, the children of any deceased child to take the share the parent, if living, would take,"<sup>239</sup> conveyed a joint life estate with right of survivorship to her brothers and sisters and a remainder in fee to their children *per capita*. Although the court's construction of the gift as a joint life estate is correct according to North Carolina precedent, its reasoning concerning the *per capita* remainder to the children is erroneous.

The common law presumption favoring joint tenancies with right of survivorship still applies to the creation of life estates,<sup>240</sup> G.S. 41-2,<sup>241</sup> which abolishes survivorship in joint tenancies in estates of inheritance, is not applicable. Because there was no language in the will indicating an intent that the brothers and sisters take as tenants in common, the court found the presumption controlling.<sup>242</sup> Similarly, the general rule in class gifts is that members of the class take *per capita* rather than *per stirpes*.<sup>243</sup> The testatrix's intent was clear on this point because she gave the remainder to the children "in equal shares."<sup>244</sup> The court concluded that any children of a deceased child would take *per stirpes*, however, because any gift to them was expressly limited to the amount that the parent would have taken if alive.<sup>245</sup>

The court stated that any children alive at the testatrix's death would take a vested remainder subject to open to allow children born after her death but before the termination of the life estate to share in

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238. 36 N.C. App. 87, 243 S.E.2d 177, *cert. denied*, 295 N.C. 465, 246 S.E.2d 9 (1978).

239. *Id.* at 88, 243 S.E.2d at 179.

240. *Id.* at 89, 243 S.E.2d at 179; *see* *Burton v. Cahill*, 192 N.C. 505, 135 S.E. 332 (1926) (deed of life estate to two daughters with remainder to their children: daughters took as joint tenants with right of survivorship and children took *per capita*).

241. N.C. GEN. STAT. § 41-2 (1976).

242. 36 N.C. App. at 89-90, 243 S.E.2d at 180.

243. *See* *Wachovia Bank & Trust Co. v. Bryant*, 258 N.C. 482, 128 S.E.2d 758 (1963); *Burton v. Cahill*, 192 N.C. 505, 135 S.E. 332 (1926).

244. 36 N.C. App. at 90, 243 S.E.2d at 180.

245. *Id.*

the gift.<sup>246</sup> The court, however, confused this question of when the class closes with the question of the minimum membership of the class:

Were the distribution purely *per capita*, with the roll called at the falling in of the life estate, children of brothers and sisters, alive at testatrix's death, or born during the life estate, but dead by the falling in of the life estate, would not be in the class of takers, and their children would take nothing. The *per stirpes* direction preserves the grandchildren's share.<sup>247</sup>

Because the children took a vested remainder, the *per stirpes* direction was not necessary to preserve their interests or make them transmissible.<sup>248</sup> If a child were to die prior to the termination of the life estate, his remainder would not be defeated, absent an express or implied condition of survivorship; the authoritative view, which the court apparently did not follow, is that there is no implied condition of survivorship in a gift to a class such as this.<sup>249</sup>

The limitation to "the children of any deceased child" meant that the children of the brothers and sisters took a vested remainder subject to divestiture if they died before the life tenants and left children; the children's children then would take their interests.<sup>250</sup> The critical case arises, however, if a child were to predecease the life tenants and leave no children. According to the court, his interest would be lost. This approach is contrary to the general view that the child's remainder will pass to his estate because it has not been divested by the occurrence of a condition subsequent.<sup>251</sup> Therefore, the court's implication that a child must survive to the termination of the life estate in order to take an interest in the property is inconsistent both with the general rules on minimum membership for class gifts and with prior North Carolina law.<sup>252</sup>

246. *Id.* at 91, 243 S.E.2d at 181. See also *Wachovia Bank & Trust Co. v. Taylor*, 255 N.C. 122, 120 S.E.2d 588 (1961); *Beam v. Gilkey*, 225 N.C. 520, 35 S.E.2d 641 (1945) (direction that property be equally divided among children of life tenant did not affect vesting of remainder); *Chas. W. Priddy & Co. v. Sanderford*, 221 N.C. 422, 20 S.E.2d 341 (1942).

247. 36 N.C. App. at 90, 243 S.E.2d at 180.

248. 2 L. SIMES & A. SMITH, *THE LAW OF FUTURE INTERESTS* § 653, at 105 (2d ed. 1956).

249. *Id.* § 578, at 19. The supreme court has found an implied condition of survivorship in an alternative contingent remainder to a class of brothers and sisters, although the condition precedent was unrelated to survivorship. *Lawson v. Lawson*, 267 N.C. 643, 148 S.E.2d 546 (1966).

250. 2 L. SIMES & A. SMITH, *supra* note 248, § 583, at 25-26; see *Parker v. Parker*, 252 N.C. 399, 113 S.E.2d 899 (1960).

251. 2 L. SIMES & A. SMITH, *supra* note 248, § 583, at 26-27.

252. See *Pinnell v. Dowtin*, 224 N.C. 493, 31 S.E.2d 467 (1944) (gift to two named children rather than to class); *Mason v. White*, 53 N.C. (8 Jones) 421 (1862). The supreme court in *Mason* held that in a gift of a life estate to testator's wife and remainder to the wife's children, the estate of a child who had predeceased the wife (life tenant) could claim the child's share: "there is no ground on which it can be concluded that the death of one of the legatees divested her legacy in



Although the court's interpretation causes no difficulty at the present time because no children of the brothers and sisters have predeceased the life tenants without children, this problem could certainly arise in the future. Because the textatrix created a vested remainder in the children without any express condition of survival, the court's construction would ignore her intention by depriving the estate of children who predecease the life tenants and leave no children of their own from sharing in the property.

KATHRINE AYCOCK MCLENDON  
S. LEIGH RODENBOUGH

## X. TAXATION

### A. State and Local Sales Tax

In *Gregory Poole Equipment Co. v. Coble*,<sup>1</sup> the North Carolina Court of Appeals held that exemption from the state sales tax does not preclude the assessment of a local sales tax.<sup>2</sup>

Plaintiff, a dealer in industrial equipment, had accepted used machinery as a trade-in on new machinery. Although the three percent state sales tax was paid on the sale of the new equipment, no local sales tax was paid to three counties in which the dealer operated because the equipment was sold and delivered to purchasers outside those counties.<sup>3</sup> Later plaintiff sold the used equipment to purchasers within those same three counties, but paid neither state nor local sales tax on the sales.<sup>4</sup> Because state sales tax had been paid on the sale of the new

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favor of the surviving legatees. To have this effect, there must be words of exclusion; e.g., "to the children of A, living at the time of her death." *Id.* at 423.

1. 38 N.C. App. 483, 248 S.E.2d 378 (1978).

2. *Id.* at 487, 248 S.E.2d at 381.

3. *Id.* at 484, 248 S.E.2d at 379. N.C. GEN. STAT. § 105-467 (1972) provides:

The local sales tax . . . shall be applicable to such retail sales . . . which are made . . . by retailers whose place of business is located within the taxing county. . . . However, no tax shall be imposed where the tangible personal property sold is delivered to the purchaser at a point outside the taxing county by the retailer or his agent, or by a common carrier.

4. 38 N.C. App. at 484, 248 S.E.2d at 379.

equipment, the used equipment sales were clearly exempt from state sales tax under G.S. 105-164.13(16).<sup>5</sup>

Plaintiff's contention that the used equipment sale was also exempt from local sales tax was based on the language of the statute governing local sales tax, which authorizes a one percent local sales tax on sales of articles "now subject to" the three percent state sales tax.<sup>6</sup> Plaintiff argued that a sale is "subject to" state sales tax only when that tax is assessed and collected.<sup>7</sup> Using this interpretation, plaintiff maintained that because its sale of the used equipment was not "subject to" the state tax by reason of the exemption, local sales tax could not apply.<sup>8</sup>

The court agreed with the Secretary of Revenue that "subject to" refers not to those transactions for which a state sales tax is actually assessed, but to any transaction to which the state sales tax is applicable, without regard to whether that transaction might ultimately qualify for an exemption under another section of the statute.<sup>9</sup> Because plaintiff's sale of the used equipment was "subject to" the state sales tax before that sale qualified for the exemption, local sales tax could be collected on the sale, even though state sales tax was not.<sup>10</sup>

The court noted that, for local sales tax not to apply to the transaction, plaintiff would have had to have qualified for an exemption from that tax, just as it had for the state sales tax.<sup>11</sup> This conclusion was supported by the language of G.S. 105-467,<sup>12</sup> which clearly states that the exemptions and exclusions applicable to the state sales tax are equally applicable to the local tax. Plaintiff had qualified for an exemption from the state tax on the sale of the used equipment because it had paid tax on the new equipment for which the used was taken in trade.<sup>13</sup> Had plaintiff also paid local sales tax on the sale of the new equipment, it would have owed no local tax on the later sale of the used equipment.

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5. N.C. GEN. STAT. § 105-164.13(16) (1972) provides that sales of used articles taken in trade are exempt from state sales tax "provided the tax levied in this Article is paid on the gross sales price of the new article."

6. *See id.* § 105-467.

7. 38 N.C. App. at 487, 248 S.E.2d at 380.

8. *Id.*

9. *Id.* at 487, 248 S.E.2d at 381.

10. *Id.*

11. *Id.*

12. N.C. GEN. STAT. § 105-467 (1972). "The exemptions and exclusions contained in G.S. 105-164.13 . . . shall apply with equal force and in like manner to the local sales and use tax authorized to be levied and imposed under this Article." *Id.*; *see* note 5 *supra*.

13. *See* note 5 and accompanying text *supra*.

This result is undoubtedly correct if the local and state sales tax provisions are to be harmonized. In G.S. 105-474<sup>14</sup> the legislature has clearly expressed its intent that all provisions relevant to the state sales tax apply to the local sales tax, and that the provisions governing each are to be harmonized.<sup>15</sup> If the state sales tax exemptions and exclusions are to apply "with equal force and in like manner"<sup>16</sup> to the local tax, whether a local exemption is available must be determined by reference to the statute governing state sales tax exemptions.<sup>17</sup> The particular exemption involved in this case deals with transactions in used goods. Those goods are exempt from state sales tax only when they are taken in trade on a new article, on which the state sales tax is paid.<sup>18</sup> A condition must be met for the exemption to apply. If the exemption is to apply "with equal force" to the local sales tax, an equivalent condition must be met. Because the transaction in this case clearly did not meet this condition, the local sales tax was properly assessed.

### *B. Estate and Inheritance Taxes*

The North Carolina Court of Appeals, in *First National Bank of Shelby v. Dixon*,<sup>19</sup> held that the beneficiary of a life insurance policy must contribute to payment of federal estate and state inheritance taxes incurred by reason of inclusion of the policy's proceeds in a decedent's gross estate.<sup>20</sup> The court also held that the federal and state tax liabilities caused by the policy's inclusion are not debts of the estate but liens upon the asset in the hands of the beneficiary.<sup>21</sup>

Because federal and state law apparently conflicted on the issue of liability for estate taxes attributable to inclusion of life insurance policies in the estate, and the North Carolina statute was silent on the issue of liability for inheritance taxes on the same amount, plaintiff bank, as administrator of an estate, had brought an action for declaratory judgment against the beneficiary of two life insurance policies.<sup>22</sup> The federal Internal Revenue Code gives the personal representative of an

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14. N.C. GEN. STAT. § 105-474 (1972).

15. *See id.*

16. *Id.* § 105-467.

17. *Id.* § 105-164.13 (1972 & Cum. Supp. 1977) is aimed primarily at exempting sales of certain products from the state sales tax. Prescription drugs are, for example, exempt from the state sales tax and therefore also exempt from local sales tax. *See id.* § 105-164.13(13) (1972).

18. *Id.* § 105-164.13(16) (1972).

19. 38 N.C. App. 430, 248 S.E.2d 416 (1978).

20. *Id.* at 435-36, 248 S.E.2d at 419-20.

21. *Id.* at 437, 248 S.E.2d at 420.

22. *Id.* at 431, 248 S.E.2d at 417.

estate the right to recover from beneficiaries of life insurance policies the proportionate share of tax imposed on the estate when the proceeds of the policy were included in the decedent's gross estate,<sup>23</sup> unless decedent's will directs otherwise.<sup>24</sup> North Carolina case law has held, however, that unless a decedent's will contains contrary instructions, federal estate taxes are to be paid by the residuary estate without contribution even though the estate includes nonprobate assets such as life insurance.<sup>25</sup> Further, the state statute, G.S. 105-13,<sup>26</sup> provides that proceeds of life insurance policies receivable by beneficiaries are taxable when the decedent retained incidents of ownership,<sup>27</sup> but does not specify who shall pay the state tax.

Defendant, decedent's wife, was the residuary legatee of decedent's estate and the beneficiary of two life insurance policies owned by decedent and valued at \$160,000.<sup>28</sup> The proceeds of the policies<sup>29</sup> had been included in decedent's gross estate for purposes of federal<sup>30</sup> and North Carolina<sup>31</sup> taxation, and therefore gave rise to both estate and

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23. Under the federal statute, I.R.C. § 2042, "incidents of ownership," which would cause the policy to be included in the decedent's gross estate, include the "power to change the beneficiary, to surrender or cancel the policy, to assign the policy, to revoke an assignment, to pledge the policy for a loan," etc. Treas. Reg. § 20.2042-1(c)(2) (1958). The term

also includes a reversionary interest in the policy or its proceeds, whether arising by the express terms of the policy or other instrument or by operation of law, but only if the value of the reversionary interest immediately before the death of the decedent exceeded five percent of the value of the policy.

*Id.* § 20.2042-1(c)(3).

Under North Carolina law, the term "incident of ownership" includes a reversionary interest in the policy or its proceeds. A reversionary interest "includes a possibility that the policy, or the proceeds of the policy, may return to the decedent or his estate, or may be subject to a power of disposition by him." N.C. GEN. STAT. § 105-13(2) (1972).

24. I.R.C. § 2206 provides:

Unless the decedent directs otherwise in his will, if any part of the gross estate on which tax has been paid consists of proceeds of policies of insurance on the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds of such policies bear to the taxable estate.

25. See *Cornwell v. Huffman*, 258 N.C. 363, 128 S.E.2d 798 (1972); *Craig v. Craig*, 232 N.C. 729, 62 S.E.2d 336 (1950). See generally Comment, *Apportionment of the Federal Estate Tax—Should North Carolina Adopt an Apportionment Statute?*, 52 N.C.L. REV. 737 (1974).

26. N.C. GEN. STAT. § 105-13 (1972).

27. See note 23 *supra*.

28. 38 N.C. App. at 431, 248 S.E.2d at 417.

29. The proceeds of the policies, after adjustments for the applicable marital deduction and other exemptions, were included in the decedent's gross estate. *Id.*; see I.R.C. § 2206. When proceeds of the policy are received by the surviving spouse and a marital deduction is allowed (I.R.C. § 2056), § 2206 only applies to such insurance policy proceeds to the extent that those proceeds exceed the aggregate marital deduction.

30. See I.R.C. § 2042.

31. See N.C. GEN. STAT. § 105-13 (1972).

inheritance taxes. Decedent's will did not indicate how the tax liability was to be satisfied, and the personalty in the estate was insufficient to pay the taxes assessed by reason of the policies' inclusion in the gross estate.<sup>32</sup> Plaintiff argued that decedent's wife, as beneficiary of the policies, should pay the ratable portion of the estate and inheritance taxes assessed because of the inclusion.<sup>33</sup>

Defendant contended that she was not responsible for any portion of the federal estate taxes because those taxes were a debt of the estate, and therefore had to be satisfied out of the residuary estate.<sup>34</sup> This contention rested on *Park v. Carroll*,<sup>35</sup> in which federal estate taxes were clearly denominated debts of the estate chargeable to the residuary estate and not against specific legacies or devises.<sup>36</sup> The court distinguished *Park*, stating that the contention that federal estate taxes are debts of the estate is premised on the estate's personal representative controlling "all of the assets of the estate to which [he] may look for satisfaction of the tax imposed and for which he is primarily liable."<sup>37</sup> Because the personal representative does not have control of nonprobate assets such as life insurance proceeds, the court said the tax liability incurred on those proceeds is not a debt of the estate, but a lien upon the assets in the hands of the beneficiaries.<sup>38</sup> The court thus carved out an exception to the *Park* rule that required the federal estate tax liability, as a debt of the estate, to be satisfied out of the residuary estate.<sup>39</sup> The exception is narrow: to the extent that the federal estate tax liability is based on inclusion in the gross estate of nonprobate assets such as life insurance,<sup>40</sup> the tax liability is not a debt satisfiable out of the residuary estate, but a lien on the asset in the hands of the recipi-

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32. 38 N.C. App. at 431-32, 248 S.E.2d at 417.

33. *Id.* at 432, 248 S.E.2d at 418.

34. *Id.* at 437, 248 S.E.2d at 420.

35. 18 N.C. App. 53, 196 S.E.2d 40 (1973).

36. The *Park* court noted:

In North Carolina where the testator fails to express in his will any direction as to the payment of the debts of the estate (including federal estate taxes), legacies abate in the following order: (1) residuary, (2) general, (3) specific and demonstrative, ratably and, after the personalty has been exhausted, the same order applies to the testator's realty.

*Id.* at 57, 196 S.E.2d at 43. See also N.C. GEN. STAT. § 28A-15-5 (1976).

37. 38 N.C. App. at 437, 248 S.E.2d at 420.

38. *Id.*

39. "[I]n the absence of a contrary testamentary provision, federal estate taxes are chargeable to the residuary estate . . ." 18 N.C. App. at 58, 196 S.E.2d at 43.

40. The exception applies not only to life insurance proceeds under I.R.C. § 2206, but also to property over which decedent had a power of appointment, as governed by I.R.C. § 2207. See *First Nat'l Bank v. Wells*, 267 N.C. 276, 148 S.E.2d 119 (1966).

ent or beneficiary.<sup>41</sup> The estate's personal representative can, therefore, reach those nonprobate assets for satisfaction of any tax their inclusion in the gross estate might incur.

This decision brings North Carolina law squarely in line with the federal statute.<sup>42</sup> Although the court was compelled to distinguish *Park* in order to find that the federal estate tax provision did not conflict with North Carolina principles governing payment of estate taxes from the residuary estate,<sup>43</sup> had any conflict existed the federal statute would have controlled.<sup>44</sup>

The court had less difficulty resolving the question whether a beneficiary of life insurance policies should contribute to state inheritance taxes, even though no North Carolina statute or decision deals precisely with the issue. The North Carolina statute provides that proceeds of life insurance policies receivable by beneficiaries are subject to inheritance tax when the decedent retained incidents of ownership, but does not specify who shall pay the tax.<sup>45</sup> G.S. 105-15 does provide that devisees under decedent's will are primarily liable for inheritance taxes on property devised to them under the will, but does not address the question of liability for inheritance taxes on nonprobate assets such as life insurance policies.<sup>46</sup> Confronted with statutory silence on the issue, the court was "constrained by equity and the example of our federal and sister state governments"<sup>47</sup> to hold that the beneficiary is primarily liable for taxes incurred by reason of a life insurance policy's inclusion in decedent's taxable estate.<sup>48</sup>

This decision ensures that the personal representative of the estate, who is liable under state law for all inheritance taxes due on any estate under his control,<sup>49</sup> may proceed against the beneficiary of a life insurance policy when the proceeds are includable in the decedent's taxable estate under G.S. 105-13.<sup>50</sup> Otherwise, inheritance taxes imposed by reason of both probate and nonprobate assets would have to be satisfied by the estate without contribution from the nonprobate assets, cre-

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41. 38 N.C. App. at 437, 248 S.E.2d at 420.

42. By judicial decision, North Carolina law now parallels both I.R.C. § 2206 and I.R.C. § 2207. See note 40 *supra*.

43. 38 N.C. App. at 434, 248 S.E.2d at 419.

44. *Id.*

45. N.C. GEN. STAT. § 105-13 (1972).

46. *Id.* § 105-15.

47. 38 N.C. App. at 436, 248 S.E.2d at 420.

48. *Id.*

49. N.C. GEN. STAT. § 105-28 (1972).

50. *Id.* § 105-13.

ating an undue burden on the probate assets of the estate.<sup>51</sup>

*C. Ad Valorem Taxes :<sup>52</sup> Exempt Property<sup>53</sup>*

All real and personal property within North Carolina is subject to taxation<sup>54</sup> unless excluded from the tax base<sup>55</sup> or exempt from taxation.<sup>56</sup> The statutory exemptions and exclusions are based not only on the character of the owner, but also on how the property is used.<sup>57</sup> If the use of the property can be characterized as commercial, that property will have to bear its just share of the community tax burden, regardless of the character of the owner.<sup>58</sup> As might be expected, statutes exempting specific property from taxation because of the purpose for which that property is used are construed strictly against exemption and in favor of taxation.<sup>59</sup>

In *In re North Carolina Forestry Foundation*,<sup>60</sup> the North Carolina Supreme Court affirmed two court of appeals decisions<sup>61</sup> denying an

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51. It should be kept in mind that estate planning can avoid the result dictated by this case. The life insurance policy will not be swept back into decedent's gross estate unless decedent retained incidents of ownership in the policy. See note 23 *supra*. Also, decedent's will can specify how the federal estate and state inheritance taxes are to be satisfied. See text accompanying note 24 *supra*.

52. Uniform appraisal standards for all real and personal property subject to ad valorem taxation appear in N.C. GEN. STAT. § 105-283 (Interim Supp. 1978). In 1978 the legislature amended the statute to provide that the value of land acquired by eminent domain is not evidence of the true value in money of comparable land for purposes of appraising property for ad valorem taxation. Law of June 16, 1978, ch. 1297, § 1, 1977 N.C. Sess. Laws, 2d Sess. 1978, at 215. The amendment is effective for tax years beginning on or after January 1, 1979.

The amendment serves to ensure that land will be appraised at its "true value," since the higher prices sometimes paid for strategically located land acquired by eminent domain will not be allowed to distort the appraised value of similar property.

53. The second session of the 1977 legislature amended § 105-275(1) to extend from 12 months to 48 months the period that property awaiting export may be stored without losing its exemption from county property taxes. The amendment is effective January 1, 1980. Law of June 16, 1978, ch. 1200, § 4, 1977 N.C. Sess. Laws, 2d Sess. 1978, at 121 (to be codified at N.C. GEN. STAT. § 105-275(1)).

54. See N.C. GEN. STAT. § 105-274 (1972).

55. See *id.* § 105-275 (Cum. Supp. 1977). Under the statute certain classes of both real and personal property are designated special classes and are not to be "listed, appraised, assessed, or taxed." *Id.*

56. See *id.* § 105-278.1 to .9.

57. See, e.g., *id.* § 105-278.4. This statute exempts real and personal property owned by a nonprofit educational institution if that property is of a kind "commonly employed in the performance of those activities . . . properly incident to the operation of an educational institution" and if the property is "wholly and exclusively used for educational purposes." *Id.*

58. See *Trustees of Guilford College v. Guilford County*, 219 N.C. 347, 13 S.E.2d 622 (1941); *County of Rockingham v. Board of Trustees of Elon College*, 219 N.C. 342, 13 S.E.2d 618 (1941).

59. See *Latta v. Jenkins*, 200 N.C. 255, 258, 156 S.E. 857, 858-59 (1931).

60. 296 N.C. 330, 250 S.E.2d 236 (1979).

61. 35 N.C. App. 414, 242 S.E.2d 492 (1978), *aff'd*, 296 N.C. 330, 250 S.E.2d 236 (1979) (tax liability for Foundation's property in Onslow County (approximately 51,000 acres)); 35 N.C. App.

exemption or exclusion for 81,000 acres of timberland owned by the North Carolina Forestry Foundation. The Foundation claimed tax exempt status for the timberland under four statutes. Three of those statutes exempt property used exclusively for educational, scientific or charitable purposes;<sup>62</sup> the other exempts property owned by the University of North Carolina.<sup>63</sup>

The court found that the Foundation's property was exempt under none of the statutes. In 1945, the Foundation had leased the forest to a paper company for ninety-nine years in order to secure an outlet for the forest's merchantable timber and pulpwood.<sup>64</sup> Under the original lease, the Foundation was responsible for cutting and delivering the timber and pulpwood to the paper company, and retained operational control of the forest.<sup>65</sup> That control was relinquished pursuant to a 1951 lease amendment, which gave the lessee virtually complete control over the forest.<sup>66</sup> Although all revenues received from the lease were still used by the Foundation for educational purposes, the land itself was operated by the corporate lessee primarily as a commercial timber farm and only incidentally used by the Foundation for research.<sup>67</sup> The property could not qualify for tax exemption, therefore, under any of the three statutes requiring *exclusive* use for educational, scientific or charitable purposes.<sup>68</sup> Nor could it qualify for exemption as property

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430, 242 S.E.2d 502 (1978), *aff'd*, 296 N.C. 330, 250 S.E.2d 236 (1979) (tax liability for approximately 30,000 acres in Jones County).

62. N.C. GEN. STAT. § 105-275(12) (Cum. Supp. 1977) excludes from the tax base "[r]eal property owned by a nonprofit corporation or association exclusively held and used by its owner for educational and scientific purposes as a protected natural area." *Id.* § 105-278.4 exempts real and personal property used for educational purposes if "[w]holly and exclusively used for educational purposes by the owner or occupied gratuitously by another nonprofit educational institution . . . and wholly and exclusively used by the occupant for nonprofit educational purposes." *Id.* § 105-278.6(7) exempts property owned by "[a] nonprofit, life-saving, first aid, or rescue squad organization" if "[a]s to real property, it is actually and exclusively occupied and used . . . for charitable purposes."

63. *Id.* § 116-16 (1972) exempts the lands and other property belonging to the University of North Carolina from all kinds of public taxation.

64. 296 N.C. at 332, 250 S.E.2d at 238. When the forest was acquired in 1934, the attorney general expressed his opinion that it should be tax exempt. The lease was executed in 1945, and amended to give the lessee control in 1951, but it was not until 1969 that the attorney general decided that the forest was no longer tax exempt. *Id.* at 331-33, 250 S.E.2d at 238-39.

65. *Id.* at 332, 250 S.E.2d at 238.

66. *Id.* at 338, 250 S.E.2d at 241.

67. *Id.* at 339, 250 S.E.2d at 241-42.

68. Although the exclusive use issue was determinative, the Foundation's arguments for exemption also failed on other grounds. N.C. GEN. STAT. § 105-275 (Cum. Supp. 1977), for example, requires that exempt property be held and used exclusively as a protected natural area. The court said that the forest was not such an area "due to the extensive program of road building, construction of drainage ditches and fire lanes, site preparation . . . , leasing of hunting rights . . . , and the cutting of timber and pulpwood." 296 N.C. at 339, 250 S.E.2d at 242.



owned by the University of North Carolina under G.S. 116-16.<sup>69</sup> Although North Carolina State University was represented on the foundation's Board of Directors,<sup>70</sup> and was to receive the Foundation's assets upon dissolution,<sup>71</sup> the university had neither legal nor beneficial ownership of the forest.<sup>72</sup>

Prior North Carolina decisions clearly support the court's construction of the exemption statutes involved in this case. In determining whether property falls within a tax exemption provision, the primary or dominant use, and not an incidental or secondary use, will control.<sup>73</sup> Even property owned by the state or a municipal corporation will not be accorded tax exempt status when it enters the realm of commercial use.<sup>74</sup> In this case, the lease permitted the Foundation to use the property for educational and scientific purposes only upon the condition that such use not interfere with the operations of the corporate lessee.<sup>75</sup> The dominant use of the forest was clearly commercial, therefore, since the corporation's right to cut timber and pulpwood took precedence over the Foundation's use.<sup>76</sup>

Although the court's construction of the applicable exemption statutes cannot be faulted, the tax structure that mandated such a result deserves scrutiny. The North Carolina Constitution specifies that the legislature may only exempt from ad valorem taxation "property held for educational, scientific, literary, cultural, charitable, or religious purposes."<sup>77</sup> From 1969 through 1973 the Foundation was authorized by statute to pay ten cents per acre in lieu of the standard ad valorem tax on similar real property.<sup>78</sup> A comment accompanying the 1973 repeal<sup>79</sup>

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69. N.C. GEN. STAT. § 116-16 (1972); see 296 N.C. at 340, 250 S.E.2d at 242.

70. 35 N.C. App. 414, 430, 242 S.E.2d 492, 502 (1978). The court of appeals also noted that the Foundation's Board of Directors "is in no way controlled by North Carolina State University and apparently has the power to act without regard to the wishes of the University." *Id.*

71. *Id.*

72. 296 N.C. at 340, 250 S.E.2d at 242.

73. See *Redevelopment Comm'n v. Guilford County*, 274 N.C. 585, 593, 164 S.E.2d 476, 481 (1968).

74. *Id.* at 589, 164 S.E.2d at 479.

75. 296 N.C. at 333, 339, 250 S.E.2d at 238-39, 242.

76. *Id.* at 339, 250 S.E.2d at 241-42.

77. N.C. CONST. art. V, § 2, cl. 3.

78. 296 N.C. at 340, 250 S.E.2d at 239. This option was available under Law of July 1, 1969, ch. 185, § 1, 1969 N.C. Sess. Laws 1365 (formerly codified at N.C. GEN. STAT. § 105-279(b)). The section was repealed by Law of May 22, 1973, ch. 668, § 1, 1973 N.C. Sess. Laws 994. The provision allowed any corporation, trust, foundation, association or other entity that owned timberland and was organized and operated exclusively to receive, hold, invest and administer property and to make expenditures for the sole benefit of an educational institution, to pay to the county in which the timberland was located 15% of the proceeds of the gross sales of forest products or 10¢ per acre per year, whichever was greater.

of this "in lieu of" option noted that the provision was clearly unconstitutional.<sup>80</sup> The option failed to comport with the constitutional stricture that the purpose for which real property is held controls the legislative grant of exemptions. Although the "in lieu of" provision did not purport to exempt real property, it did allow imposition of an insignificant tax on timberland without regard to the purpose for which the land was held. Under the option, the Foundation's tax liability for the 81,000 acre forest was only \$8,100 per year, even though the forest was used primarily for commercial purposes. After repeal of the option, and with no "exclusive use" exemption available, the Foundation's 1974 tax liability for the 51,000 acres located in Onslow County was \$25,466.40.<sup>81</sup> The large discrepancy between the two tax liabilities illustrates that the "in lieu of" provision was tantamount to an exemption and was, therefore, subject to the constitutional restriction. Because it did not comply with the restriction, it was properly repealed. Its repeal signified that the Foundation and others owning timberland used commercially must bear their share of the tax burden, even if they expend revenues derived from a commercial use for the sole benefit of an educational institution.

#### *D. Income Tax*

The second session of the 1977 legislature enacted the Manufacturer's Income Tax Credit Act.<sup>82</sup> The Act provides an inventory tax credit against state income taxes for manufacturers who maintain excessive levels of inventories in the state.<sup>83</sup> Generally, manufacturers will qualify for the credit if their inventory exceeds fifteen per cent of their total cost of manufacturing.<sup>84</sup>

The tax credit applies against the income tax due for the year in which the applicable inventory tax is paid.<sup>85</sup> Although excess credits and losses may be carried forward five years, the carry-forward must be used in the earliest taxable year possible and to its maximum extent before any excess credit may be carried forward to a later taxable

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79. Law of May 22, 1973, ch. 668, § 1, 1973 N.C. Sess. Laws 994.

80. H. LEWIS, 1973 SUPPLEMENT TO THE ANNOTATED MACHINERY ACT OF 1971, at 69 (Institute of Government, University of North Carolina at Chapel Hill, 1973).

81. 35 N.C. App. 414, 418, 242 S.E.2d 492, 495 (1978). The liability to Jones County for the 31,000 acres located there is not revealed in the opinion.

82. N.C. GEN. STAT. § 105-163.01 to .02 (Interim Supp. 1978).

83. *Id.* § 105-163.03. The credit applies against taxes due for tax years beginning on or after January 1, 1980.

84. *Id.*

85. *Id.* § 105-163.03(8)(b).

year.<sup>86</sup> The manufacturer must file with his income tax return documentation supporting the availability of the credit.<sup>87</sup>

The inventory tax credit was designed to attract heavy industry to North Carolina. Because the statute does not provide an across-the-board credit for all manufacturers, many smaller North Carolina companies that have long supported local communities by providing employment and expanding the tax base will not qualify for the credit. Were the credit extended to all manufacturers, however, the revenue loss might well be burdensome. The justification for the limited credit is that the revenue loss expected when the current statute becomes effective will be offset eventually by additional tax revenues from companies that relocate in North Carolina. Whether heavy industry will indeed be attracted by another tax concession is debatable.

Of the many factors that influence a business' decision to locate in a particular area, state and local taxation may be the least significant. Studies of the effect of taxation on industrial location reveal that markets, sources of raw materials, and labor supply are the major determinants of location decisions for most businesses.<sup>88</sup> Not only do tax incentives not dominate business location decisions, but the benefits new industry brings to a state may well "prove less than their fiscal, social, and environmental costs."<sup>89</sup> Also, any benefits may be short-lived because all state governments can employ tax incentives. Existence of a tax concession in one state may spur neighboring states to offer concessions that are even more attractive. It is conceivable that competing states may end up with a less productive, less equitable tax structure without realizing the benefits of industrial expansion.<sup>90</sup>

Additionally, any tax concession to attract business must be considered in light of state tax policy, which has broader objectives than mere attraction of business. A fundamental tax policy is fairness in apportioning tax burdens, and a tax reduction for some will result in higher taxes for others. Tax equity is, therefore, sacrificed to the extent that some are singled out for preferential treatment.<sup>91</sup>

Any criticism of tax incentives does not mean that such incentives

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86. *Id.*

87. *Id.* § 105-163.03(8)(d), .04.

88. C. Liner, *Taxation and Industrial Location* (June 1, 1976) (unpublished article in University of North Carolina Law School Library).

89. G. CORNIA, W. TESTA & F. STOCKER, *STATE-LOCAL FISCAL INCENTIVES AND ECONOMIC DEVELOPMENT*, at iii (Academy for Contemporary Problems 1978).

90. *See id.* at 17.

91. *See id.* at 3, 18.

should never be used to attract business. It should, however, suggest that tax concessions alone will do little to attract industry. Businesses desiring to expand or relocate are more interested in the cost and availability of labor, raw materials and energy than in tax differentials.<sup>92</sup>

ALICE M. PETTEY

## XI. TORTS

### A. *Malpractice*<sup>1</sup>

The court of appeals, in *Ballenger v. Crowell*,<sup>2</sup> a medical malpractice action, considered issues of first impression concerning contribu-

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92. C. Liner, *supra* note 88, at 5. Liner's conclusion rests on the location theory, which assumes that "firms try to choose the location that maximizes total profit." *Id.* at 2. The factors likely to have the greatest impact on total profit are, therefore, the major determinants of business location under this theory. "For most firms, tax differentials are less important determinants because they have a small effect on total profit, are partly offset by income tax deductibility, and are often offset by such other considerations as local amenities and quality of public services." *Id.* at 5.

1. In *Chicago Title Insurance Co. v. Holt*, 36 N.C. App. 284, 244 S.E.2d 177 (1978), the North Carolina Court of Appeals held that claims for attorney malpractice sound in contract rather than tort. *Id.* at 288, 244 S.E.2d at 180. Plaintiff insurance company, relying on waivers of mechanics' and laborers' liens signed by defendant contractor, issued certain title insurance policies. Prior liens were later discovered on the property and plaintiff was required to make payment. The insurance company sued Holt on the basis of indemnity agreements in the lien waivers. Holt, in turn, filed a third-party complaint against the attorneys who had certified title to the insurance company alleging that the attorneys had failed to use reasonable care in determining the existence of unpaid lien creditors. Thus it was not the attorney's client who sued the attorney for malpractice but rather a third party.

In areas involving malpractice by other types of professionals, North Carolina courts have clearly recognized that the malpractice claim sounds in tort. Medical malpractice actions are an example of this approach. See text accompanying notes 21-28 *infra*. Additionally, in *Perfecting Servs. Co. v. Product Dev. & Sales Co.*, 261 N.C. 660, 136 S.E.2d 56 (1964), in which defendant design engineer was sued for negligence in the design of a mechanical model, the court found that industrial design is a profession and held that the professional "may incur liability in tort by reason of negligent performance." The reason the attorney malpractice claim did not sound in tort is not evident. Perhaps the court feared unlimited liability for attorneys if they were vulnerable to claims from those not in privity of contract. Perhaps the choice was the court's way of ensuring the "right" outcome in a case involving unusual facts. For a suggestion that the choice is based on desired outcome, see Averill, *Attorney's Liability to Third Persons for Negligent Malpractice*, 2 LAND & WATER L. REV. 380, 381 (1967). But the result is unsatisfactory for it leaves certain elements of the action under contract law, e.g., damages, while other elements, such as causation and duty of care, must, presumably, still be determined under tort law. For further discussion of *Holt*, see this Survey, *Commercial Law: Contracts*.

2. 38 N.C. App. 50, 247 S.E.2d 287 (1978).

tory negligence and limitation of actions.<sup>3</sup> Plaintiff had a chronic neurological disease for which defendant doctor began to treat him in 1960. Although the standard treatment for plaintiff's disease was surgery, defendant instead treated him with medication for the pain. Plaintiff, as a result, became addicted to morphine in 1962. Plaintiff knew that he was addicted, but believed that the treatment was proper and necessary because the doctor had so informed him. He continued under defendant's care until 1974, and during this entire period defendant continued to treat him with morphine. In 1974 plaintiff consulted other doctors, left defendant's care, and began treatment for the drug addiction.<sup>4</sup> Plaintiff sued defendant for malpractice and defendant, by way of defense, claimed that plaintiff was contributorily negligent in accepting his addiction.

The court held that plaintiff was not contributorily negligent as a matter of law,<sup>5</sup> relying on the general rule that a patient has a right to trust in his doctor's skill and judgment and will not be found guilty of contributory negligence for so doing.<sup>6</sup> Thus, a patient is not contributorily negligent for continuing his treatment when he knows that he has become an addict, unless he knows of the doctor's negligence or he himself does something wrong.<sup>7</sup> The facts in this case are quite the opposite of the situation in which a patient refuses to follow his doctor's instructions and thus causes himself further injury. When a patient relies on his doctor's judgment and is aware that the treatment is causing him injury, but is not aware that this is due to the doctor's negligence, he will not be barred from recovery because of his supposed contributory negligence.

The *Ballenger* decision is in line with the few cases presenting analogous fact situations cited by the court. In both *King v. Solomon*<sup>8</sup>

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3. For discussion of the court's treatment of limitation of actions, see text accompanying notes 11-17.

4. 38 N.C. App. at 51-53, 247 S.E.2d at 289-90.

5. *Id.* at 56, 247 S.E.2d at 292.

The very relation [between doctor and patient] assumes trust and confidence on the part of the patient in the capacity and skill of the physician; and it would indeed require an unusual state of facts to render a person who is possessed of no medical skill guilty of contributory negligence because he accepts the word of his physician and trusts in the efficacy of the treatment prescribed by him.

*Id.*

6. *Cf.* *Kelly v. Carroll*, 36 Wash. 2d 482, 219 P.2d 79 (1950) (patient's reliance on defendant drugless healer found not to be contributory negligence when patient died after defendant negligently misdiagnosed and treated him for appendicitis). *Id.* at 501, 219 P.2d at 90.

7. 38 N.C. App. at 55, 247 S.E.2d at 291.

8. 323 Mass. 326, 81 N.E.2d 838 (1948), *cited in* *Ballenger v. Crowell*, 38 N.C. App. at 55, 247 S.E.2d at 291.

and *Los Alamos Medical Center v. Coe*,<sup>9</sup> plaintiff patient became addicted to morphine because of defendant doctor's negligent treatment. In both cases, even though the patient knew of the addiction and sought more medication, it was held that the patient had the right to rely on the doctor's expertise and was, therefore, not liable for failing to question the treatment.

### B. *Limitation of Actions*

*Ballenger* also dealt with statute of limitations problems in medical malpractice actions. The court held that there may be a continued course of treatment exception to the general rule that malpractice actions accrue at the time of the defendant's negligence.<sup>10</sup> Defendant claimed that plaintiff's cause of action accrued in 1962 when he became addicted to morphine and was thus barred by the statute of limitations. Plaintiff claimed that the action accrued in 1974 when he ended the doctor-patient relationship with defendant. The court, agreeing with plaintiff, held that "the cause of action accrued at the earlier of (1) the termination of defendant's treatment of the plaintiff or (2) the time at which the plaintiff knew or should have known of his injury."<sup>11</sup>

In reaching its decision, the court reviewed the statutes of limitations governing malpractice actions as well as related case law. G.S. 1-15(b),<sup>12</sup> which concerns injuries not readily apparent, was found to be inapplicable since the injury in this case was patent. G.S. 1-15(c),<sup>13</sup> a subsection specifically concerning professional malpractice actions that was added by the 1975 amendment of G.S. 1-15, was also inapplicable because the case was pending when the amendment was enacted. Because these were the only special statutes that might have been applicable, the question before the court was whether North Carolina recognizes a common law continued course of treatment exception to the general three-year statute applicable in civil actions.<sup>14</sup>

The court then proceeded to review case law relating to limitation of actions in medical malpractice cases, beginning with *Shearin v. Lloyd*.<sup>15</sup> In that case, the North Carolina Supreme Court held that the

9. 58 N.M. 686, 275 P.2d 175 (1954), cited in *Ballenger v. Crowell*, 38 N.C. App. at 55, 247 S.E.2d at 291.

10. 38 N.C. App. at 59, 247 S.E.2d at 294.

11. *Id.* at 60, 247 S.E.2d at 294.

12. N.C. GEN. STAT. § 1-15(b) (Cum. Supp. 1977).

13. *Id.* § 1-15(c) (Cum. Supp. 1977).

14. *Id.* § 1-52 (Cum. Supp. 1977).

15. 246 N.C. 363, 98 S.E.2d 508 (1957).

cause of action accrues and the statute of limitations begins to run from the time of defendant's wrongful act, and *not* from the time when plaintiff patient discovers the injuries caused by the act. The *Shearin* court thus rejected the discovery rule exception<sup>16</sup> under which the cause of action is held not to accrue until the time of discovery of the harmful consequences of the doctor's negligence.<sup>17</sup>

*Shearin*, however, unlike *Ballenger*, involved a latent injury caused by the doctor's single act of negligence in leaving a foreign object in plaintiff's body. Because the continuing course of treatment exception does not apply to such circumstances, the question whether North Carolina recognizes a continued course of treatment exception was not before the *Shearin* court. The *Shearin* court's affirmance of the general rule that the cause of action accrues at the time of defendant's wrongful act did not therefore bar the *Ballenger* court from adopting the continuing course of treatment exception.<sup>18</sup>

G.S. 1-15(a) has now statutorily overruled *Shearin* by enacting a discovery rule exception. This provision provides for accrual of the cause of action in cases of latent injury at the time of discovery of the injury, but in no case later than four years (ten years when damages are sought by reason of a foreign object being left in the body) from the last act of defendant giving rise to the cause of action.<sup>19</sup> Because the *Ballenger* rule applies to different circumstances than does the discovery rule, there is no conflict between the four year outer limit in G.S. 1-15(c) and the absence from the *Ballenger* rule of any similar limit. In cases in which there is an ongoing doctor-patient relationship and a continuing course of treatment, that the injury is not discovered until more than four years after infliction will not bar the action so long as the injurious course of treatment continues.

Although referred to as an exception, the continuing course of treatment rule adopted in *Ballenger* may actually create no exception at all. The factual pattern that lies behind the *Ballenger* rule appears to be one in which there is negligent treatment throughout the entire course of the doctor-patient relationship. The "exception" apparently does not apply when a single negligent act is followed by continued treatment; rather, it applies when the entire course of treatment is neg-

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16. N.C. GEN. STAT. § 1-15(b), (c) (Cum. Supp. 1977) now supplies a statutory discovery rule exception.

17. *Jones v. Sugar*, 18 Md. App. 99, 105, 305 A.2d 219, 222 (1973).

18. See 38 N.C. App. at 57-58, 247 S.E.2d at 293.

19. N.C. GEN. STAT. § 1-15(c) (Cum. Supp. 1977).

ligent.<sup>20</sup> In this situation the entire treatment is tortious, and the negligence constitutes a continuing tort.<sup>21</sup> Thus

the [negligent] treatments were not separate and distinct acts, separate and distinct causes of action. They constituted an entire course of treatment . . . and the whole thereof constituted but one cause of action. . . . [T]he tort was a continuing one, and, where the tort is continuing, the right of action is also continuing.<sup>22</sup>

On these facts, then, there is no completion of defendant's wrongful act until the doctor-patient relationship is terminated. When the relationship ends and the wrongful act is completed, the cause of action accrues. This simply seems to be an extension of the general rule that the cause of action accrues at the time of defendant's wrongful act.

Moreover, interpretation of the second prong<sup>23</sup> of the continuing course of treatment "exception" creates some difficulty. That requirement provides that the statute of limitations will begin to run before the end of the course of treatment if the patient discovers the injury. But "discovery of the injury" could mean discovery of the actual physical injury itself or it could mean discovery of defendant doctor's negligence in causing the injury. The *Ballenger* court apparently applied the latter interpretation.<sup>24</sup> This ambiguity may cause conflicts in construction of the statutory discovery rule of G.S. 1-15(b) and (c).

Whichever interpretation is intended, it is clear that the *Ballenger* court accepts the discovery rule within the context of the continued course of treatment "exception." In this context the discovery rule acts to reduce the period of limitations. This approach accords with the policies behind the statute of limitations, which are "to prevent stale claims and to protect potential defendants from protracted fear of litigation."<sup>25</sup>

In *Ward v. Hotpoint Division, General Electric Co.*,<sup>26</sup> the court of appeals attempted to clarify prior law concerning accrual of actions in cases involving nonapparent defects in property that cause injury at some later time. Plaintiffs sued for damages resulting from a fire in a shopping center in 1969. The fire was allegedly caused by a negligently

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20. See *Tortorello v. Reinfeld*, 6 N.J. 58, 66, 77 A.2d 240, 244 (1950).

21. See Annot., 144 A.L.R. 209, 227 (1943).

22. *Peteler v. Robinson*, 81 Utah 535, 549, 17 P.2d 244, 249 (1932).

23. See text accompanying note 11 *supra*.

24. 38 N.C. App. at 60, 247 S.E.2d at 294. The court found that there was conflicting evidence about whether plaintiff knew that the medication provided by defendant was not necessary and held that this was a question for the jury on remand.

25. *Id.* at 59, 247 S.E.2d at 294.

26. 35 N.C. App. 495, 241 S.E.2d 710, *cert. denied*, 295 N.C. 94, 244 S.E.2d 263 (1978).



designed deep fat fryer that was manufactured and sold by defendant in 1962 to a company that was not a party to the action. Defendant claimed that the suit was barred by the statute of limitations because the action accrued in 1962 when the fryer was sold. The court, however, upheld plaintiffs' claim that there was no accrual of their cause of action until the time of the actual injury in 1969.<sup>27</sup>

As in *Ballenger*, G.S. 1-15(b) was found to be inapplicable because it concerns situations in which there is an injury that is not readily apparent to plaintiff. The court found that there was no injury at all to plaintiffs in this case until the time of the fire, and that that injury was readily apparent.<sup>28</sup> The court's examination of case law revealed that there are two lines of cases in North Carolina dealing with accrual of actions when a latent defect later causes injury to person or property. The line of cases represented by *Hocutt v. Wilmington & Weldon R.R.*,<sup>29</sup> *Raftery v. Vick Construction Co.*,<sup>30</sup> and *Pinkston v. Baldwin, Lima, Hamilton Co.*<sup>31</sup> provides that the cause of action accrues at the time of the actual injury. On the other hand, *Hooper v. Carr Lumber Co.*,<sup>32</sup> *State v. Cessna Aircraft Corp.*,<sup>33</sup> and *Jarrell v. Samsonite Corp.*<sup>34</sup> provided that the cause of action accrues at the time of defendant's wrongful act or omission. The court of appeals in *Ward* followed the *Hocutt* rule and relied on the holding that

the cause of action accrues and the statute of limitations begins to run at the time of actual injury to a plaintiff who is not in privity with the manufacturer or seller of defective goods and thus suffered no technical or slight injury at the time of the sale of the goods.<sup>35</sup>

There is usually no conflict between the *Hooper* and the *Hocutt* rules because the act and the injury are simultaneous. In cases in which the injured plaintiff is in privity with the defendant seller or manufacturer, for instance, defendant's wrongful act and the injury oc-

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27. *Id.* at 496-97, 241 S.E.2d at 711-12.

28. *Id.* at 500, 241 S.E.2d at 713.

29. 124 N.C. 214, 32 S.E. 681 (1899) (diversion of water through defendant's ditches caused flooding of plaintiff's land many years after ditches dug).

30. 291 N.C. 180, 230 S.E.2d 405 (1976) (plaintiff's intestate killed when hit on head by part of crane manufactured by defendant's predecessor more than three years before injury).

31. 292 N.C. 260, 232 S.E.2d 431 (1977) (plaintiff's intestate killed when crane manufactured by defendant fell).

32. 215 N.C. 308, 1 S.E.2d 818 (1939) (defendant's logging operations caused flooding of plaintiff's land).

33. 9 N.C. App. 557, 176 S.E.2d 796 (1970) (plaintiff's building damaged when engine of plane manufactured by defendant failed and plane crashed into building).

34. 12 N.C. App. 673, 184 S.E.2d 376 (1971), *cert. denied*, 280 N.C. 180 (1972) (plaintiff customer in restaurant injured when she fell from defective chair manufactured by defendant).

35. 35 N.C. App. at 499-500, 241 S.E.2d at 713.

cur at the same time, because the sale of a defective product constitutes the first injury to the plaintiff buyer.<sup>36</sup> Difficulties arise, however, in determining the time of accrual of the cause of action when the plaintiff injured by the defective product is *not* in privity with the defendant seller. In this situation the injury and defendant's wrongful act are not simultaneous because no technical injury arises at the time of the sale.

As recognized by *Ward*, in the latter circumstances it is usually determined that the cause of action accrues when actual injury occurs. This comports with the general rule in North Carolina, as discussed above in relation to medical malpractice cases, which provides that a cause of action accrues at the time of defendant's wrongful act that causes injury to the plaintiff. The crucial moment is the one at which the first injury occurs. Between parties that are in privity even a technical injury is sufficient to begin the running of the statute. It is unimportant that the substantial damages do not occur until some later time.<sup>37</sup> With respect to a party not in privity with the seller, however, not until the defect actually causes substantial injury to that party is there an invasion of his rights and a cause of action. In the latter circumstances *Hooper*, nevertheless, provided that the cause of action accrued at the time of the wrongful act.

The court of appeals in *Ward*, however, follows the *Hocutt* rule and holds that in the nonprivity situation the statute of limitations does not begin to run until the time of the injury. It thus appears that, under the court's interpretation of these two cases, *Hooper* is not controlling in situations in which the wrongful act and the injury are not simultaneous.

### C. Consortium

In *Cozart v. Chapin*,<sup>38</sup> the court of appeals held that a husband has no cause of action for loss of consortium resulting from injuries to his wife even when the injuries were intentionally inflicted.<sup>39</sup> Plaintiff wife sued defendant dentist alternatively on theories of negligence and assault and battery, and in conjunction with this action plaintiff husband

36. See *Thurston Motor Lines v. General Motors Corp.*, 258 N.C. 323, 128 S.E.2d 413 (1962).

37. See *Williams v. General Motors Corp.*, 393 F. Supp. 387 (M.D.N.C. 1975), *aff'd*, 538 F.2d 327 (4th Cir. 1976); *Mast v. Sapp*, 140 N.C. 533, 53 S.E. 350 (1906); Annot., 4 A.L.R.3d 821, 830 (1965).

38. 35 N.C. App. 254, 241 S.E.2d 144, *cert. denied*, 294 N.C. 736, 244 S.E.2d 154 (1978).

39. *Id.* at 255, 241 S.E.2d at 145-46.

sued for loss of consortium.<sup>40</sup>

The *Chapin* court suggested that it might be time to reexamine the rule first established in *Hinnant v. Tidewater Power Co.*<sup>41</sup> barring an action for loss of consortium due to injuries negligently caused the spouse by a third person. The court nevertheless proceeded to extend the rule by finding that a claim for loss of consortium is also barred when the injuries were *intentionally* inflicted. Under the court of appeals' reading of *Hinnant*, an action for loss of consortium might lie when there is intentional infliction of injury to consortium itself (as, for example, in cases of alienation of affections or criminal conversation), but not when there is an intentional infliction of some injury to the person of one's spouse causing loss of consortium.

#### D. Damages

In *Matthews v. Lineberry*<sup>42</sup> plaintiff student was permitted to recover damages for loss of time from school and for repeating a course. Defendant claimed that there was no evidence of monetary loss or damages and that there could be no recovery because damages were too uncertain. The court, in upholding plaintiff's recovery, observed that rules on uncertainty of damages relate to uncertainty about the cause or fact of damages and not about their measure or extent.<sup>43</sup>

It appears that these precise elements of damages have not before been claimed in North Carolina. As a general rule, however, "the fact that the full extent of the damages must be a matter of some speculation is no ground for refusing all damages."<sup>44</sup> Thus damages may be allowed even when it is not possible to calculate with precision the claimed item.

To some extent, one may analogize the present facts to the situation of lost work time. Although there is an immediate economic impact when one misses work and not when one loses time from school, loss of school time could have an economic impact at a later time. Moreover, a plaintiff is entitled to recover damages for prospective as well as past and present injuries.<sup>45</sup> Finally, not only may a plaintiff

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40. As a result of a dental operation, plaintiff wife suffered severe paralysis in her lower lip and was experiencing numbness and tingling on contact. *Id.* at 255, 241 S.E.2d at 145.

41. 189 N.C. 120, 126 S.E. 307 (1925).

42. 35 N.C. App. 527, 241 S.E.2d 735, *cert. denied*, 295 N.C. 91, 244 S.E.2d 259 (1978).

43. *Id.* at 529, 241 S.E.2d at 737.

44. *Brown v. Moore*, 286 N.C. 664, 673, 213 S.E.2d 342, 349 (1975) (wrongful death action for death of 17-year-old boy).

45. *King v. Britt*, 267 N.C. 594, 597, 148 S.E.2d 594, 598 (1966).

recover for loss of earnings, a plaintiff may also recover for "loss of time, or loss from inability to perform ordinary labor."<sup>46</sup> Certainly in this case plaintiff suffered a loss of time from school and an inability to perform ordinary school activities, and thus recovery for these losses is justified by the prevailing rules on damages.

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46. *Owens v. Kelly*, 240 N.C. 770, 773, 84 S.E.2d 163, 165 (1954).

