UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 59 | Number 6 Article 3

8-1-1981

Survey of Developments in North Carolina Law 1980

North Carolina Law Review

SURVEY OF DEVELOPMENTS IN NORTH CAROLINA LAW, 1980*

TABLE OF CONTENTS

* This Survey discusses significant decisions handed down in 1980 by the North Carolina Supreme Court and the North Carolina Court of Appeals.

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

NOTE: Cases discussed in text have been Shepardized through March 1980.

I. ADMINISTRATIVE LAW

A. Insurance and the Commissioner

On November 29, 1977, the North Carolina Rate Bureau,[1] on behalf of its member companies and the North Carolina Reinsurance Facility,[2] filed with the Commissioner of Insurance a proposed rate increase for automobile insurance including bodily injury and property damage liability, medical payments, and physical damage insurance for nonfleet private passenger automobiles.[3] In 1978 the Rate Bureau made an additional filing proposing territorial rate differentials for automobile insurance[4] and revised premium rates for homeowners insurance and workmens' compensation insurance.

The Commissioner disapproved these filings in their entirety. Four cases appealing this disapproval were decided by the North Carolina Supreme Court in 1980.[5] Pursuant to G.S. 58-9.6(b),[6] the court declared the decision of the Commissioner null and void, finding that "it is apparent that the multiple errors committed by the Commissioner in the proceedings and order before us are of such magnitude as to make remand futile."[7]

1. Scope of Review of Commissioner's Orders

The North Carolina Administrative Procedure Act (NCAPA) provides that review of a final agency decision may be sought under the act unless "adequate procedure for judicial review is provided by some other statute, in which case the review shall be sought under such statute."[8] The supreme court held

---

1. The North Carolina Rate Bureau is established by chapter 58, article 12B of the North Carolina General Statutes, and all companies writing "essential" lines of insurance (certain residential fire and property insurance, automobile theft and physical damage insurance, automobile liability and allied lines, and workmen's compensation and employers' liability insurance) are required to be members. Law of June 30, 1977, ch. 828, § 6, 1977 N.C. Sess. Laws, 1st Sess. 1119 (codified at N.C. GEN. STAT. §§ 58-124.17(1), -124.18 (Cum. Supp. 1979)). The Bureau promulgates rules to which all members must adhere, and it is responsible for making rate filings. Writers of nonessential lines may become members of the Bureau as well but are not required to join. *See generally Survey of Developments in North Carolina Law, 1977—Insurance*, 56 N.C.L. REV. 843, 1088-92 (1978).

2. The North Carolina Reinsurance Facility was created by chapter 28, article 25A of the North Carolina General Statutes as a reinsurance pool for high risk drivers whom insurers do not wish to insure individually. All insurance companies licensed to write motor vehicle insurance in the state are required to participate in the Facility. Law of June 30, 1977, ch. 828, § 20, 1977 N.C. Sess. Laws, 1st Sess. 1119 (codified at N.C. GEN. STAT. § 58-248.34(e) (Cum. Supp. 1979)). The same statute provides procedures to make the Facility self-sustaining and provides that the Facility shall make neither a profit nor a loss. The Facility is required to accept any risk ceded to it by its members.

3. State *ex rel.* Comm'r of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 392, 269 S.E.2d 547, 557 (1980).

4. *See* notes 56-62 and accompanying text *infra*.

5. State *ex rel.* Comm'r of Ins. v. North Carolina Rate Bureau, 300 N.C. 485, 269 S.E.2d 602 (1980); State *ex rel.* Comm'r of Ins. v. North Carolina Rate Bureau, 300 N.C. 474, 269 S.E.2d 595 (1980); State *ex rel.* Comm'r of Ins. v. North Carolina Rate Bureau, 300 N.C. 460, 269 S.E.2d 538 (1980); State *ex rel.* Comm'r of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

6. N.C. GEN. STAT. § 58-9.6(b) (1975).

7. 300 N.C. at 459, 269 S.E.2d at 594.

8. N.C. GEN. STAT. § 150A-43 (1978).

that a statute provides adequate procedure for review only if it requires a scope of review equal to that under Chapter 150A, article 4 of the North Carolina General Statutes.[9] In light of "subtle differences" between G.S. 150A-51 and G.S. 58-9.6(b),[10] the review statute specifically applicable to insurance ratemaking cases, the court found G.S. 150A-51 controlling except to the extent that the chapter 58 provision expands the judicial function.[11] Since other portions of the chapter 58 provision previously had been found inadequate and thus subordinate to the NCAPA,[12] the court here perceived its decision as a step toward achieving some uniformity in judicial review of administrative decisions.[13]

2. Commissioner's Authority to Require Audits of Ratemaking Data

The supreme court held that, viewing the statutes *in pari materia*, it is within the Commissioner's statutory authority to require that data be audited in order for him to deem it reliable and credible.[14] The court recognized the general North Carolina rule that in the regulation of insurance rates the Commissioner has only the authority given him by statute,[15] but the court interpreted the rule broadly. Indeed, the court thought it beyond doubt that "our Legislature intended for the Commissioner of Insurance to promulgate such reasonable rules and regulations as he deems necessary to discharge the functions of his office. . . ."[16] The opinion cited with approval decisions by the United States Supreme Court that held that even though a power asserted by an agency is novel or unprecedented it is not necessarily unauthorized unless statutory authority clearly indicates the contrary.[17]

---

9. 300 N.C. at 395, 269 S.E.2d at 559.

10. One such difference is that N.C. GEN. STAT. § 150A-51 (1978) provides that an agency decision can be reversed whenever a substantial right *may* have been prejudiced, while N.C. GEN. STAT. § 58-9.6 (1975) allows reversal when such rights *have* been prejudiced.

11. 300 N.C. at 395, 269 S.E.2d at 559.

12. Occidental Life Ins. Co. v. Ingram, 34 N.C. App. 619, 240 S.E.2d 460 (1977).

13. 300 N.C. at 395, 269 S.E.2d at 559. *See* Daye, *North Carolina's New Administrative Procedure Act: An Interpretive Analysis*, 53 N.C.L. REV. 833, 899-900 (1975).

Professor Daye recommends repeal of all judicial-review provisions in individual statutes to alleviate the lack of uniformity. Daye is concerned that this lack of uniformity could be compounded by decisions holding only part of a specific review provision inadequate, thus applying the NCAPA to matters arising under that portion while applying the specific provision to other matters. *Id.* at 899 n.306.

The supreme court's decision attempts to meet the expressed concern by making the NCAPA provision controlling on ratemaking cases as well as other insurance cases. The decision does not result in complete uniformity, however, since the specific statute will apparently still apply to the extent that it broadens the judicial review afforded under the NCAPA. This result does nothing to alleviate the need Daye correctly recognized for members of the bar to become familiar with each agency's individual review provisions since lawyers must still determine whether such provisions add to the NCAPA scope of review. *Id.* at 899.

14. 300 N.C. at 400, 269 S.E.2d at 562.

15. *Id.* at 398-99, 269 S.E.2d at 560-61 (citing State *ex rel.* Comm'r of Ins. v. North Carolina Fire Ins. Rating Bureau, 292 N.C. 471, 234 S.E.2d 720 (1977); State *ex rel.* Comm'r of Ins. v. North Carolina Auto. Rate Administration Office, 287 N.C. 192, 214 S.E.2d 98 (1975)).

16. 300 N.C. at 400, 269 S.E.2d at 562.

17. *Id.* at 400-01, 269 S.E.2d at 562-63 (citing United States v. Morton Salt Co., 338 U.S. 632 (1950) (power not necessarily unauthorized) and Permian Basin Area Rate Cases, 390 U.S. 747 (1968) (statutory authority to the contrary)).

The North Carolina court's view is consistent with the modern tendency to be liberal in granting discretion to administrative agencies in carrying out their statutory purposes.[18] It is also consistent with the primary reason for establishing administrative agencies—to reduce what would otherwise be an overwhelming burden on the legislature to administer laws in highly complex and technical areas.

While the Commissioner's discretion is broad, however, it is not unfettered. Though the court held that the requirement that data be audited is within the Commissioner's authority, it also held that such a rule cannot be made during a contested case but only pursuant to the rulemaking provisions of the NCAPA. The Commissioner argued that his determination was relieved from the NCAPA requirements by statutory exclusions applicable to "[s]tatements of policy or interpretations that are made in the decision of a contested case" and to "[i]nterpretative rules and general statements of policy of the agency."[19] The court disagreed, finding the Commissioner's requirement to be a legislative rule, rather than a mere interpretation, and thus subject to the rulemaking provisions.[20] Unlike policy or interpretive statements, the Commissioner's rule set up new substantive requirements with sanctions for failure to comply.[21]

The court, in interpreting the legislative intent behind G.S. 150A-10, ruled that the ad hoc adjudication technique should be used only when its advantages clearly outweigh possible deleterious public consequences resulting from retroactive application of a rule adopted without public hearing.[22] In this case the court found none of the factors that justify rulemaking in adjudication. These factors are present, according to the United States Supreme Court, when a problem arises in the case which the administrative agency could not reasonably foresee, or when the agency has not had sufficient experience with a particular problem to have made a hard and fast rule, or when the problem is so specialized and varying that it is impossible to deal with under a general rule.[23]

On the other side of the scale, the court found numerous factors mitigating against the ad hoc rulemaking in this situation. These factors include the extent of the change that the new requirement would make in long-established procedure. In addition, no investigation had been made into the cost of such a

---

18. *See* 1 AM. JUR. 2d *Administrative Law* § 118 (1962). *But see* 300 N.C. at 414, 269 S.E.2d at 570. N.C. GEN. STAT. § 150A-9 provides in part:

> It is the intent of this Article to establish basic minimum procedural requirements for the adoption, amendment, or repeal of administrative rules. Except for emergency rules . . ., the provisions . . . are applicable to the exercise of any rulemaking authority . . . No rule . . . is valid unless adopted in substantial compliance with this Article.

19. N.C. GEN. STAT. § 150A-10 (1978).

20. 300 N.C. at 412, 269 S.E.2d at 568.

21. *Id.* The court again cites Professor Daye's article, *supra* note 13, at 852-53, for a definition of legislative rules. *See also* 1 F. COOPER, STATE ADMINISTRATIVE LAW 175 (1965).

22. 300 N.C. at 415-16, 269 S.E.2d at 570-71. The rule was adopted from 1 F. COOPER, *supra* note 21, at 181-82.

23. SEC v. Cheneny Corp., 332 U.S. 194, 202-03 (1947).

requirement, which undoubtedly would be borne ultimately by consumers, or the feasibility of the rule in logistical terms.[24] The court also criticized the vagueness of the Commissioner's ad hoc rule and declared the Commissioner's actions arbitrary and capricious.[25] The court's decision indicates a policy favoring rulemaking over ad hoc adjudication except in cases in which the latter is clearly necessary to the effective accomplishment of the agency's functions.[26]

3. North Carolina Reinsurance Facility[27]

The same case presented the first substantial challenge to the Reinsurance Facility.[28] The challenge by the Commissioner was prompted by the Rate Bureau's proposal that the rates for risks ceded to the Reinsurance Facility be ten percent higher than the proposed rates for voluntarily insured risks.[29]

The applicable statutory provision states that "[a]ll rates shall be on an actuarially sound basis" and that "there shall be a strong presumption that the rates and premiums for the business of the Facility are neither unreasonable nor excessive."[30] The court held that even though the record was replete with evidence indicating that the proposed differential was actuarially sound, the

---

24. 300 N.C. at 419, 269 S.E.2d at 572.

25. *Id.* at 420, 269 S.E.2d at 573.

26. *Id.* The court's finding that the Commissioner's rule was arbitrary and capricious was made pursuant to N.C. GEN. STAT. § 58-9.6(b)(6) (1975) and N.C. GEN. STAT. § 150A-51(6) (1978).

See 1 F. COOPER, *supra* note 21, at 181-82. The court also cites several cases in accord with this general position. 300 N.C. at 416-17, 269 S.E.2d at 571. *See generally* NLRB v. E & B Brewing Co., 276 F.2d 594 (6th Cir. 1960), *cert. denied*, 366 U.S. 908 (1961); NLRB v. Guy F. Atkinson Co., 195 F.2d 141 (9th Cir. 1952).

In this same case the court again stressed the importance of public hearings and indepth study of new agency rules when it branded the Commissioner's adoption of a new formula for underwriting profit as "arbitrary and capricious." 300 N.C. at 451, 269 S.E.2d at 590. The court stated that although the formula had been used in another state, it was still arbitrary and capricious to "blindly" adopt a novel approach without careful study of the appropriateness of the formula for North Carolina. *Id.* at 451-53, 269 S.E.2d at 590-91.

The court also held the proposed formula impermissible as a matter of law because it takes into account income on invested capital, *see* notes 42-55 and accompanying text *infra*, and because the formula uses a hypothetical "risk free" rate of return. *Id.* at 450, 269 S.E.2d at 589. The court held that the legislature could not have intended a requirement that underwriting profit be computed on the latter hypothetical basis since G.S. 58-79.1 (1975) specifically requires casualty insurance companies to invest in one or more of ten different types of investments including first mortgage bonds, ground rents, certain stocks, and real estate. 300 N.C. at 450, 269 S.E.2d at 589. Clearly these are not risk-free investments.

Finally, the court's desire for public hearings and input into ratemaking decisions was stressed again in the second case decided on the same day. *See* State *ex rel.* Comm'r of Ins. v. North Carolina Rate Bureau, 300 N.C. 460, 269 S.E.2d 538 (1980). The court interpreted N.C. GEN. STAT. § 150A-23(d) (1978) to mean that the Commissioner may allow anyone to intervene in an agency hearing at his complete discretion. 300 N.C. at 468, 269 S.E.2d at 543. In addition, the court held that the Commissioner properly could authorize citizen groups to hold hearings throughout the state on proposed rate changes since ratemaking is so important to all the citizens of the state. *Id.*, 269 S.E.2d at 543-44.

27. *See* note 2 *supra*.

28. 300 N.C. at 424, 269 S.E.2d at 575.

29. *Id.* at 422-23, 269 S.E.2d at 574.

30. N.C. GEN. STAT. § 58-248.33(1) (Cum. Supp. 1979).

Commissioner ignored that evidence and that his findings were unsupported by substantial evidence.[31] Furthermore, the court held that the legislature must have intended that Facility rates be higher than those for voluntarily retained risks.[32] Such a result is clearly required if the Facility is to follow the legislative mandate to accept all ceded applicants despite their driving records, to fix rates on an actuarially sound basis, and to operate in a manner that produces neither a profit nor a loss.[33]

The court gave short shrift to the Commissioner's other attacks on the Facility. The Commissioner found unfair rate discrimination in the absence of objective criteria for deciding which risks would be ceded to the Facility.[34] The finding, however, was unenforceable because the statute allows a company to cede any risk it does not wish to retain.[35] In addition, the insurance industry is not likely to abuse the privilege since the only way it can profit from a customer is by *not* ceding the risk.[36]

The Commissioner also concluded that the rate proposal was improper because any increase in the number of ceded risks would result in a total rate increase of more than six percent, in violation of G.S. 58-124.26.[37] While this conclusion is mathematically correct the court concluded that it was erroneous as a matter of law.[38] Obviously, if additional cessions to the Facility constituted rate increases, the statutory provision allowing unlimited cessions to the Facility could itself operate to cause an impermissible rate increase, as could a number of other premium variations caused by factors such as the territory in which the car is principally garaged.[39]

Finally, the court ended its discussion by calling for establishment of guidelines by the legislature or the Commissioner on the meaning of "unfair rate discrimination."[40] Since the court, as well as the legal profession and the industry, has been unable to determine what the legislature wants to encompass within this requirement, it is to be hoped that the General Assembly or the agency will respond with sufficiently clear guidelines to ensure proper implementation of its policies.[41]

---

31. 300 N.C. at 431, 269 S.E.2d at 579.

32. *Id.* at 434, 269 S.E.2d at 580-81.

33. *Id.*

34. *Id.* at 422-23, 269 S.E.2d at 574. The Commissioner's power to declare an unfairly discriminatory rate ineffective was contained in N.C. GEN. STAT. § 58-248.33(l) (Cum. Supp. 1977) (amended 1979).

35. 300 N.C. at 434, 269 S.E.2d at 581. The applicable statutory provision is N.C. GEN. STAT. § 58-248.35 (1975). The court noted that no constitutional challenge to the statute was raised. 300 N.C. at 435, 269 S.E.2d at 581.

36. 300 N.C. at 435, 269 S.E.2d at 581.

37. N.C. GEN. STAT. § 58-124.26 (Cum. Supp. 1979) (amended 1979).

38. 300 N.C. at 436, 269 S.E.2d at 581.

39. *Id.*

40. *Id.* at 437, 269 S.E.2d at 582.

41. Some of the Commissioner's worries about unfair discrimination between ceded risks and voluntary risks were alleviated by the 1979 Legislature's amendment to the statute passed after the filing at issue was made. Law of May 29, 1979, ch. 676, §§ 1-2, 1979 N.C. Sess. Laws, 1st Sess. 721 (codified at N.C. GEN. STAT. § 58-248.33(l) (Cum. Supp. 1979)). As amended, G.S. 58-248.33(l) defines a "clean risk" as any owner of a private, nonfleet automobile if the owner and each li-

4. Income on Invested Capital

The Commissioner further challenged the rate filings on the ground that income on invested capital was not taken into account in the ratemaking formula.[42] The North Carolina Court of Appeals had recently decided that investment income may be considered in evaluating the reasonableness of a filing.[43] However, that case concerned only invested income from unearned premium and loss reserves. The supreme court concluded that investment income from unearned premium and loss reserves may properly be considered, but income from invested capital may not.[44]

In reaching this conclusion, the court relied primarily upon language in previous North Carolina cases. The court, in *In re North Carolina Automobile Rate Administrative Office*,[45] recognized that the industry view, and at that time the Commissioner's view as well, was that profit should not be based on invested capital since the required capital assets of an insurance company are not held for working capital but as reserves to guarantee its ability to pay off all liabilities.[46]

A second rationale that the court found persuasive is that insurance companies, since they do not require costly equipment or large capital investments, cannot properly determine rates by reference to the capital invested and the value of their property. "[P]roper profit levels for insurance companies may be more appropriately ascertained by taking a percentage of their premiums than by specifying a certain rate of return on their capital investment."[47] Finally, the court found this rule on invested capital consistent with the rule in the majority of jurisdictions.[48]

The statute in effect when the challenged rate filing was made did not refer to consideration of investment income on either unearned premium and loss reserves or on invested capital.[49] The statute was amended and now provides for consideration of "investment income earned or realized by insurers from their unearned premium, loss, and loss expense reserve funds generated from business within this State."[50] Thus, the statute was amended to provide for consideration of unearned premiums and loss reserves; however, it still

---

censed driver in his household have two years of driving experience and if none of them has had any chargeable accident or conviction for a moving violation during the three year period prior to applying for insurance. The statute provides that rates charged "clean risks" ceded to the Facility may not exceed rates charged "clean risks" who are not reinsured by the Facility.

42. 300 N.C. at 440, 269 S.E.2d at 584.

43. State *ex rel.* Comm'r of Ins. v. North Carolina Rate Bureau, 40 N.C. App. 85, 252 S.E.2d 811 (1979).

44. 300 N.C. at 441, 269 S.E.2d at 584.

45. 278 N.C. 302, 180 S.E.2d 155 (1971).

46. *Id.* at 315, 180 S.E.2d at 164.

47. 300 N.C. at 443-44, 269 S.E.2d at 585-86. *See also* State *ex rel.* Comm'r of Ins. v. State *ex rel.* Att'y General, 19 N.C. App. 263, 268, 198 S.E.2d 575, 579, *cert. denied*, 284 N.C. 252, 200 S.E.2d 659 (1973).

48. 300 N.C. at 444, 269 S.E.2d at 586. *See* 2 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 21:38 (2d ed. 1959).

49. N.C. GEN. STAT. § 58-124.19 (Cum. Supp. 1977) (amended 1979).

50. *Id.* § 58-124.19(2) (Cum. Supp. 1979).

says nothing about income from invested capital. In light of the holding in *In re North Carolina Automobile Rate Administrative Office* against consideration of such income,[51] a strong inference arises that the legislature is in accord.

The case raised one final issue that, though quickly disposed of by the court, is still important. When the legislature passed the statute implementing the file and use system, the Commissioner was given the affirmative duty to act if he wishes to challenge a proposed rate change.[52] The Rate Bureau argued that it necessarily follows that the burden of proof in ratemaking cases has been shifted to the Commissioner.[53] The court, however, held that such a drastic change in the law cannot be implied without specific language by the legislature indicating intent to make such a change.[54] In addition, the court noted that such a change was included in the proposed statute but was deleted before the final version was passed, thus indicating an intent to leave the burden of proof on the Rate Bureau.[55]

5. Territorial Rate Differentials

In the second case decided by the supreme court on the same day, the court upheld the Rate Bureau's proposal to use territorial rate differentials.[56] The proposed rates were statistically calculated in each line of coverage on the basis of the loss experience of each territory in one of three levels; (1) five percent below the statewide base rate; (2) five percent above the statewide base rate; and (3) the indicated statewide base rate.[57]

The Commissioner argued that the use of territorial rate differentials would violate G.S. 58-30.4's limitation on classification and subclassification plans.[58] As the court points out, however, the statute makes no mention of the

---

51. *See* notes 42-43 and accompanying text *supra*.

52. Law of June 30, 1977, ch. 828, § 7, 1977 N.C. Sess. Laws, 1st Sess. 1119 (codified at N.C. GEN. STAT. §§ 58-124.20 to -124.22 (Cum. Supp. 1979) (amended 1979)). Under the file and use system the insurer or Rate Bureau is required only to file the new rates and accompanying data with the Commissioner. The rates take effect automatically without prior approval of the Commissioner. N.C. GEN. STAT. § 58-124.20(a) (Cum. Supp. 1979). If the Commissioner wishes to challenge the rates he must hold a hearing. If he finds that the rates fail to comply with statutory requirements he can declare them ineffective. *Id.* § 58-124.21(a). This decision is subject to appeal pending which insurers may continue to use the new rates if the purportedly excessive amounts are placed in an escrow account. *Id.* § 58-124.22(b) (Cum. Supp. 1977) (amended 1979). This sytem replaced the North Carolina requirement of prior approval for all new rate filings. 300 N.C. at 454, 269 S.E.2d at 591.

53. 300 N.C. at 454, 269 S.E.2d at 591.

54. *Id.*

55. *Id.*, 269 S.E.2d at 592.

56. State *ex rel.* Comm'r of Ins. v. North Carolina Rate Bureau, 300 N.C. 460, 473, 269 S.E.2d 538, 546 (1980). Data on premiums and losses throughout the state are collected using a territorial approach. Each insured vehicle is assigned to a territory according to the place where it is principally garaged. All premiums and losses with respect to the vehicle are reported in its assigned territory. This territorial rate system is commonly used throughout the country. *Id.* at 471, 269 S.E.2d at 545.

57. *Id.*, 269 S.E.2d at 546.

58. *Id.* at 471-72, 269 S.E.2d at 546. N.C. GEN. STAT. § 58-30.4 (Cum. Supp. 1979) (amended 1979) provides for four basic classifications: (1) pleasure use only; (2) pleasure use except driving to and from work; (3) business use; and (4) farm use. The statute further mandates that the Rate Bureau set up subclassifications reflecting statistical driving experience and exposure

establishment of territories; and it was clear to the court that territories are not encompassed within the term "classifications."[59] The court derived this conclusion from another insurance statute which lists "territories" separately from "classifications."[60] In addition, the court had previously held that the statute's purpose was to abolish any use of age or sex as rating factors.[61] The court found "absolutely no intent" on the part of the legislature in the cited statute or elsewhere to prohibit the consideration of territories in ratemaking.[62]

Perhaps the most important aspect of the supreme court's decisions in these cases, aside from the specific holdings, is a clear message to the Commissioner that the court intends to protect fully the file and use system. The court is prohibiting the Commissioner from springing new requirements on the insurance industry after its filings have already been made. The Commissioner is required, whenever possible, to use the formal rulemaking procedures, thus putting the industry on notice of any changes in policy.

Had the court held otherwise the Commissioner could impose insufferable delays on the Rate Bureau by challenging every rate filing with some new requirement which the Bureau could not possibly have anticipated. In addition, the direction to use the rulemaking procedures should foster a more careful study of proposed changes and more public input than would hastily adopted changes serving merely to frustrate filings already made.

B. Utilities Regulation

North Carolina courts reviewed several ratemaking decisions by the North Carolina Utilities Commission in 1980. In *State ex rel. Utilities Commission v. CF Industries, Inc. (CFI)*[63] a natural gas retailer had overcollected approximately $625,000 under the curtailment tracking rate (CTR)[64] allowed by the North Carolina Utilities Commission for the year ending October 31, 1977. Instead of ordering a full refund, the commission allowed the retailer to offset that amount by the amount of undercollection under the previous year's CTR, some $518,000.[65] The North Carolina Supreme Court held in *CFI* that such an offset did not constitute retroactive ratemaking and therefore was per-

---

of insured drivers in each of the four main classifications except that no subclassification may be based directly or indirectly on age or sex.

59. 300 N.C. at 472, 269 S.E.2d at 546.

60. *Id.* N.C. GEN. STAT. § 58-124.25 (Cum. Supp. 1979) provides that "[r]ates, rating systems, territories, classifications and policy forms lawfully in use on September 1, 1977, may continue to be used thereafter, notwithstanding any provision of this Article."

61. State *ex rel.* Comm'r of Ins. v. North Carolina Auto. Rate Administrative Office, 294 N.C. 60, 64, 241 S.E.2d 324, 326 (1978); State *ex rel.* Comm'r of Ins. v. North Carolina Auto. Rate Administrative Office, 293 N.C. 365, 368, 239 S.E.2d 48, 50 (1977).

62. 300 N.C. at 472, 269 S.E.2d at 546.

63. 299 N.C. 504, 263 S.E.2d 559 (1980).

64. The CTR is a variable surcharge, imposed on the basis of projected volumes of gas available for the year, designed to guarantee to the retailer a certain absolute amount (Base Period Margin) of revenue over the cost of fuel regardless of the volume available to be sold. At the end of the year the retailer "trues up" the CTR and refunds any overcollections or recoups any undercollections. *Id.* at 505-06; 263 S.E.2d at 560-61.

65. *Id.* at 506, 263 S.E.2d at 561.

missible.[66] The court acknowledged the general rule that a utility may not increase a fixed general rate for current customers in order to recover a previous deficit,[67] but found that the CTR is not a fixed general rate; rather, the CTR is by nature an estimated rate that is corrected in light of actual experience through the trueing up process.[68] The court reasoned, therefore, that since a utility could be forced to refund any overcollections above the guaranteed base, it must be allowed to recoup any undercollections.[69]

In *State ex rel. Utilities Commission v. Bird Oil Co.*[70] the court of appeals struck down a dedicated rate provision that allowed common carriers to offer a special low rate for any tanker truck "dedicated" to the intrastate use of a single customer for at least 100 hours per week for at least twenty consecutive weeks. The court found the provision unreasonably discriminatory[71] against small oil jobbers in violation of G.S. 62-140(a)[72] and G.S. 62-259,[73] because only large oil companies have 100 hours of transport demand per week to occupy the dedicated tankers.[74] The court rejected appellees' contention that the lower rate for dedicated service was reasonable because cost-justified,[75] thus bringing North Carolina in line with the federal approach under the Interstate Commerce Commission.[76]

In *State ex rel. Utilities Commission v. Virginia Electric and Power Co. (VEPCO)*[77] the court of appeals held that in an expedited rate adjustment proceeding provided by G.S. 62-134(e),[78] the North Carolina Utilities Com-

66. *Id.* at 509, 263 S.E.2d at 562-63.

67. *Id.* at 507, 263 S.E.2d at 562. *See, e.g.*, State *ex rel.* Util. Comm'n v. Edmisten, 291 N.C. 451, 232 S.E.2d 184 (1977); State *ex rel.* Util. Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

68. 299 N.C. at 508-09, 263 S.E.2d at 562. See note 64 *supra* for comments on the trueing-up process.

69. *Id.* at 509, 263 S.E.2d at 563. The court failed to explain adequately why there should be a distinction betwen general ratemaking and CTR ratemaking with respect to collection of deficits from prior years. Clearly, if a utility must refund any excesses, it should be allowed to recoup any deficits *from the year just ended*. This case, however, concerns the rolling forward of a deficit from an earlier year. Moreover, this deficit was caused by the utility's own erroneous calculation of the Base Period Margin (BPM), not from any shortfall of revenue below the BPM as approved at the time. *Id.* at 505, 263 S.E.2d at 560.

70. 47 N.C. App. 1, 266 S.E.2d 838 (1980).

71. *Id.* at 18, 266 S.E.2d at 847.

72. "No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage. . . ." N.C. GEN. STAT. § 62-140(a) (Supp. 1979).

73. "[I]t is declared the policy of the State of North Carolina to preserve and continue all motor carrier transportation services now afforded this state . . . and to prevent discrimination, undue preferences or advantages, or unfair or destructive competitive practices between all carriers. . . ." N.C. GEN. STAT. § 62-259 (1975).

74. 47 N.C. App. at 6, 266 S.E.2d at 841.

75. *Id.* at 11-12, 266 S.E.2d at 843-44. Appellees argued that discounted rates would draw more business to common carriers. The carriers' fixed costs would be spread over a larger volume. Consequently, the unit cost for transport would decline. *Id.*

76. *See, e.g.*, Central & S. Motor Freight Tariff Ass'n v. United States, 273 F. Supp. 823, 829 (D. Del. 1967).

77. 48 N.C. App. 453, 269 S.E.2d 657 (1980).

78. [U]pon application by any public utility for permission and authority to increase its rates and charges *based solely upon the increased cost of fuel* . . . the Commission shall suspend such proposed increase for a period not to exceed 90 days. . . . The Commis-

mission may not consider factors such as "heat rate"[79] and "plant availability"[80] because those factors deal with overall system efficiency, not with the reasonableness of the price paid for fuel.[81] The court indicated that system efficiency could be considered in a general rate case,[82] but not in the special fuel cost pass-through proceeding under G.S. 62-134(e).[83]

C. *State and Local Government*

1. Review of State Agency Action

In *Orange County v. North Carolina Department of Transportation*[84] the court of appeals reversed and remanded, in part, the dismissal by the superior court of a suit to enjoin planning and construction of the connnecting link of Interstate 40 through Orange and Durham Counties.[85] The complaint raised several administrative procedure issues, including whether the state Board of Transportation had improperly given permission for a specific route within the approved I-40 corridor before a final environmental impact statement (EIS) was prepared.[86] Plaintiffs also questioned whether the Board violated state and federal regulations by denying a hearing to local landowners[87] and by providing inadequate procedures for the public corridor hearings.[88] Plaintiffs further contended that the Board of Transportation's enabling statute[89] was an

---

sion shall promptly investigate applications filed pursuant to provisions of this subsection and shall hold a public hearing within 30 days . . . and shall base its order upon the record adduced at the hearing. . . . A proceeding under this subsection *shall not be considered a general rate case*.

N.C. GEN. STAT. § 62-134(e) (Supp. 1979) (emphasis added).

79. The court defined "heat rate" as "the ratio between the amount of heat, expressed in BTU's, required to produce a kilowatt-hour of electricity. . . . [Thus,] the lower the heat rate, the more efficient is the conversion of fuel into electricity." 48 N.C. App. at 460-61, 269 S.E.2d at 661-62.

80. "Plant availability" refers to the relationship between the amount of electricity actually generated from a given plant and the theoretical maximum capacity of that plant. *Id.* at 460, 269 S.E.2d at 661-62.

81. *Id.* at 462, 269 S.E.2d at 662.

82. Standards for a general rate case are provided by N.C. GEN. STAT. § 62-133 (1975 & Supp. 1979).

83. 48 N.C. App. at 462, 269 S.E.2d at 662.

84. 46 N.C. App. 350, 265 S.E.2d 890, *cert. denied*, 301 N.C. 94 (1980).

85. The court held that mandamus and an injunction are interchangeable remedies. *Id.* at 384-85, 265 S.E.2d at 912-13. Accordingly, just as in the case of mandamus, if plaintiffs prove their case, the injunction will be effective against the individual defendants so long as they remain in their official capacities. *Id.* at 386, 265 S.E.2d at 913.

86. The complaint further alleged that the draft EIS relied upon by the Board was materially misleading in that it listed, as "alternatives" to the approved I-B route, two routes which were to be constructed regardless of the decision on I-B. The court remanded this factual issue to the trial court. *Id.* at 383, 265 S.E.2d at 911-12.

87. 19 N.C.A.C. 2A.0501 (1980), promulgated by the North Carolina Department of Transportation and in effect at the time of the denial of a hearing, provided that "[a]ny person having business with the Board of Transportation *shall* be heard by the Board" (emphasis added). The word "shall" has since been changed to "may." *See* note 97 *infra*.

88. At 23 C.F.R. §§ 790.5-.7 (1980), procedures for public hearings at both the corridor and design stages of a federally aided highway project are provided. Specifically, plaintiffs claim the Board of Transportation gave inadequate notice of the corridor hearing in violation of 23 C.F.R. § 790.7(a).

89. N.C. GEN. STAT. § 136-44.1 (Supp. 1979) requires the Department of Transportation to

unconstitutionally broad delegation of legislative authority to an administrative body.

The court dealt first with the reviewability of the administrative action under the North Carolina Administrative Procedure Act (NCAPA).[90] G.S. 150A-43 delineates four prerequisites to judical review: (1) an aggrieved person, (2) a final agency decision, (3) a contested case, and (4) exhaustion of administrative remedies.[91]

The court found all plaintiffs to be "aggrieved" under the statute because each had a direct or personal stake in the placement of the highway.[92] The court also ruled that the plaintiffs had standing as taxpayers to challenge the unauthorized expenditure of public funds for the highway because they had a sufficient geographical nexus to the proposed route.[93] It is established precedent that a taxpayer has no standing to challenge public expenditures that affect members of the general public in an equal fashion.[94] Citing its opinion in *Texfi Industries, Inc. v. Fayetteville*,[95] however, the court held that taxpayers in and around the proposed route could show a direct and peculiar injury, thereby giving them standing as "aggrieved" persons.[96]

The Board of Transportation contended that its actions to date were unreviewable because they were not final agency decisions within the meaning of G.S. 150A-43. The court found, however, that the Board's denial of plaintiffs' request for a hearing in violation of its own regulations[97] did constitute a final

---

"develop and maintain a statewide system of roads and highways commensurate with the needs of the state as a whole. . . ." The court found that statutes such as G.S. 136-45 (Supp. 1979) (general guidelines for state highway system), G.S. 136-42.1 (Supp. 1979) (preservation of cultural and historic landmarks), and the North Carolina Environmental Policy Act, G.S. 113A-1 through -10 (1978 & Supp. 1979), when read together, provide adequate standards to govern administrative discretion; the delegation was therefore constitutional. *See* Adams v. North Carolina Dept. of Natural and Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978), for a discussion of the nondelegation doctrine in North Carolina.

90. N.C. GEN. STAT. §§ 150A-1 through -64 (1978 & Supp. 1979). *See generally* Daye, *North Carolina's New Administrative Procedure Act: An Interpretive Analysis*, 53 N.C.L. REV. 833 (1975).

91. N.C. GEN. STAT. § 150A-43 (1978 & Supp. 1979).

92. Orange County's planning scheme stood to be affected by the I-40 placement; the individual plaintiffs stood to lose their land through eminent domain; and the nonprofit corporation, Sensible Highways and Protected Environments (SHAPE), was composed of residents living in or near the proposed route. 46 N.C. App. at 360-61, 265 S.E.2d at 899.

93. *Id.* at 361, 265 S.E.2d at 899. Here, plaintiffs claimed the expenditure was unauthorized because the required procedures were not followed. Each individual plaintiff had the requisite geographical nexus. *See* note 92 *supra*.

94. Green v. Eure, 27 N.C. App. 605, 608, 220 S.E.2d 102, 105 (1975), *cert. denied* 289 N.C. 297, 222 S.E.2d 696 (1976).

95. 44 N.C. App. 268, 270, 261 S.E.2d 21, 23 (1979). For a discussion of taxpayer standing in the federal context, see Note, *Taxpayer Standing in the Wake of Flast v. Cohen*, 81 DICK. L. REV. 495 (1977). *See generally* Annot., 11 A.L.R. Fed. 556 (1972); Annot., 17 A.L.R. Fed. 33 § 8 (1973).

96. 46 N.C. App. at 361, 265 S.E.2d at 899. *See also* City of Davis v. Coleman, 521 F.2d 661, 671 (9th Cir. 1975).

97. The regulation in effect when the denial was made provided that "[a]ny person having business with the Board of Transportation *shall* be heard by the Board." 19 N.C.A.C. 2A.0501 (1980) (emphasis added).

On July 1, 1978 this regulation was superceded by a provision that the Board "*may* hear any person or persons on any transportation matter." 19A N.C.A.C. 1A.0302(1) (1981) (emphasis added). The court in *Orange County* indicated in dictum that the new regulation is valid because there is no statutory or constitutional requirement that the Board hear any citizen on a particular

agency decision.

On the other hand, the court held that the Board's decisions relating to notice, public hearings, and the sufficiency of the EIS under federal regulations[98] were not sufficiently final to allow judicial review unless federal location approval had been sought and obtained.[99] Only at that point in the planning of a federally-aided highway project is the commitment to a particular route definite enough to ensure that judicial intervention will not lead to piecemeal litigation.[100] The court remanded the case for a determination of whether federal location approval had been obtained since the complaint was filed.[101] Nevertheless, the court proceeded to decide the case as if location approval had been obtained.

The denial of the individual hearing guaranteed by the Board's regulations was clearly a final decision because it immediately and completely closed off plaintiffs' opportunity to be heard. Presumably no further internal review of that denial was available. On the other hand, the alleged improprieties in the EIS procedures could be challenged effectively after federal location approval was obtained. The court believed it should not intervene until the Federal Highway Administration had had a chance to review the EIS for legal sufficiency and content.[102] Perhaps, like the exhaustion-of-remedies requirement, this approach to the finality requirement is designed to allow an administrative hierarchy to correct its own mistakes before a court steps in.

The court rejected the Board of Transportation's argument that this proceeding was not a "contested case" and therefore was unreviewable. As defined by the NCAPA, a " '[c]ontested case' means any agency proceeding . . . wherein the legal rights . . . of a party are required by law to be determined by an agency after an opportunity for an adjudicatory hearing."[103] Normally, an adjudicatory hearing is required only in the condemnation proceeding that follows the location proceedings. In North Carolina, however, all administrative actions must meet the requirements of the North Carolina Environmental Policy Act (NCEPA).[104] Administrative regulations promulgated under the NCEPA do provide for appeal of an environmental determination to a hear-

---

transportation matter. 46 N.C. App. at 382, 265 S.E.2d at 911. N.C. GEN. STAT. § 136-62 (1974 & Supp. 1979) does at least give citizens a right to comment on any highway proposal by presenting a petition to the local county commission for transmission to the Board of Transportation.

98. 23 C.F.R. §§ 771.1 through .22 (1979) (environmental impact statements); 23 C.F.R. §§ 790.1 through .11 (1979) (public hearings concerning highway projects).

99. 46 N.C. App. at 372-73, 265 S.E.2d at 905-06. *See* 23 C.F.R. § 790.9 (1979) (requirements for location and design approval).

100. 46 N.C. App. at 372-73, 265 S.E.2d at 905-06. *See* Kleppe v. Sierra Club 427 U.S. 390, 406 n.15 (1976) (appeal ripe when agency action sufficiently mature to assure that judicial review will not cause undue disruption and lead to piecemeal adjudication).

101. 46 N.C. App. at 387, 265 S.E.2d at 914. In the event the case proved ripe on remand, the court said in dictum that with respect to a federally-aided highway project, the state may select a route before preparing the final EIS because federal regulations require that procedure. *Id.* at 383, 265 S.E.2d at 911.

102. *See* 23 C.F.R. § 771.14(b) (1979).

103. N.C. GEN. STAT. § 150A-2(2) (1978).

104. N.C. GEN. STAT. §§ 113A-4(1), -6 (1978).

ing officer appointed by the Governor.[105] The court reasoned, therefore, that the law did require a hearing and that the present dispute constituted a contested case.[106]

Although the NCAPA requires exhaustion of administrative remedies as a prerequisite to judicial review, the court of appeals in *Orange County* held that plaintiffs' failure to use a petitioning procedure provided by administrative regulations did not bar judicial review under G.S. 150A-43. The court noted that the regulations had not been published and properly indexed as required by the NCAPA.[107] Consequently, there was no practical way for a party to discover what remedies were available under the regulations.[108] The court reasoned that despite the general rule that ignorance of the law is no excuse, a party could not, consistent with due process, be held responsible for exhausting remedies contained in regulations that are "effectively hidden in the catacombs of the state bureaucracy."[109]

This holding by the court of appeals was an apparent admonition to the state to comply with G.S. 150A-63. In January 1981 the North Carolina Administrative Code was published.[110] Consequently, it is now less likely that lack of notice of available remedies will again provide an excuse for failure to exhaust administrative remedies.

Finally, the court rejected the state's contention that sovereign immunity barred the suit because the Board of Transportation's discretionary power to locate highways is unreviewable under G.S. 136-59.[111] Instead, the court held that the Board's duty to provide certain procedures was ministerial; therefore,

---

105. 1 N.C.A.C. 25.0106 (1981).

106. 46 N.C. App. at 374-75, 265 S.E.2d at 906-07. The court conspicuously failed to address directly the question whether the hearing required by the NCAPA regulations could legitimately be considered adjudicatory.

In Lloyd v. Babb, 296 N.C. 416, 251 S.E.2d 843 (1979), the North Carolina Supreme Court cited Daye, *supra* note 90, at 868-72 for the proposition that "contested case" as used in the NCAPA has two elements: (1) an agency proceeding; (2) that determined the rights of a party. 296 N.C. at 424-25, 251 S.E.2d at 850. Professor Daye's analysis was based, however, on an earlier version of the statute which defined "contested case" as "any agency proceeding, by whatever name called, wherein the legal rights, duties, or privileges of specific parties are to be determined." Daye, *supra* note 90, at 869. In 1975 the General Assembly amended the statute to its present form. Law of May 14, 1976, 1975 N.C. Sess. Laws, 2d Sess. c. 983, 61, 62. The supreme court's definition of "contested case" in *Lloyd* therefore should not be considered a license to disregard the new statutory language relating to an adjudicatory hearing.

107. G.S. 150A-63 requires the Attorney General to organize, index, and publish as soon as possible after Feb. 1, 1976, a compilation of all administrative rules. A complete compilation was finally published in January, 1981, well after this case arose. As of February 1981, however, there was still no master index of regulations by corresponding statutory authority. N.C. GEN. STAT. § 150A-63 (1978).

108. 46 N.C. App. at 377, 265 S.E.2d at 908. *See generally* Bell, *Administrative Law: The Proposed North Carolina Statutes for Registration and Publication of State Administrative Regulations*, 8 WAKE FOREST L. REV. 309 (1972). *Cf.* Powers v. Owen, 419 P.2d 277 (Okla. Crim. 1966) (although ignorance of the law is no excuse for crimnal conduct, due process may bar prosecution if the law is essentially unascertainable absent extensive and costly legal research).

109. 46 N.C. App. at 377, 265 S.E.2d at 908.

110. *See* note 108 *supra*.

111. "No action shall be maintained in any of the courts of this State against the Board of Transportation to determine the location of any State highways or portion thereof, by any person, corporation, or municipal corporation." N.C. GEN. STAT. § 136-59 (1981).

any alleged breach of that duty was subject to judicial review.[112]

2. Municipal Corporations

Actions by various North Carolina municipalities were scrutinized by the appellate courts in 1980. In *Cauble v. City of Asheville*,[113] the North Carolina Supreme Court held that proceeds from the payment of city parking tickets constituted criminal fines; therefore, those proceeds must be given to the county for the support of public schools pursuant to article IX, section 7 of the North Carolina Constitution.[114] The majority reasoned that although violation of a city ordinance is normally a civil infraction, G.S. 14-4 had automatically turned such civil violations into criminal misdemeanors.[115] The court believed that it made no difference that these tickets are paid voluntarily and without criminal prosecution; it is the nature of the offense, not the method of enforcement, that determines whether the proceeds are criminal fines or civil penalties.[116]

Justice Exum, joined by Justice Britt, dissented, arguing that unless the parking violation was enforced through a criminal prosecution, the proceeds could not constitute criminal fines.[117] In essence, Justice Exum contended that the same act may constitute both a civil violation and a criminal act. If the city chooses to enforce its rule through a civil proceeding, the proceeds are civil penalties and need not be given to the county for public education, he concluded.[118]

In *Hawks v. Town of Valdese*[119] the North Carolina Supreme Court held that a town may not annex, through an involuntary annexation proceeding,[120] an area which abuts solely on a previously annexed satellite area.[121] Specifi-

112. 46 N.C. App. at 378, 265 S.E.2d at 908-09.

113. 301 N.C. 340, 271 S.E.2d 258 (1980).

114. "[T]he clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to . . . the several counties, and shall be . . . used exclusively for maintaining free public schools." N.C. CONST. art. IX, § 7.

115. 301 N.C. at 342-43, 271 S.E.2d at 259-60. N.C. GEN. STAT. § 14-4 (1976) provides that "[i]f any person shall violate an ordinance of a county, city, or town, he shall be guilty of a misdemeanor and shall be fined not more than fifty dollars ($50.00), or imprisoned for not more than thirty days." *Cf.* Board of Educ. v. Henderson, 126 N.C. 689, 36 S.E. 158 (1900) (G.S. 14-4, making violation of ordinance a criminal offense, viewed as necessary to facilitate administration and enforcement of proper police government in a municipality).

116. 301 N.C. at 344, 271 S.E.2d at 260. *See* State v. Rumfelt, 241 N.C. 375, 85 S.E.2d 398 (1955) (criminal fine appropriate in criminal prosecution for violation of parking ordinance); State v. Addington, 143 N.C. 683, 57 S.E. 398 (1907) (in civil bastardy proceeding, criminal punishments may not be inflicted under guise of civil penalties).

117. 301 N.C. at 347, 271 S.E.2d at 262.

118. *Id.* at 347-48, 271 S.E.2d at 262. The dissent noted that the *Addington* and *Rumfelt* cases cited by the majority involved instances in which individuals had been found guilty in criminal prosecutions. *Id.* at 347, 271 S.E.2d at 262. *See* note 116 *supra*.

The court in *Henderson* also limited its definition of fines to those funds the city "has collected *upon prosecutions* for violations of the criminal laws of the state." 126 N.C. at 692, 36 S.E. at 159 (emphasis added).

119. 299 N.C. 1, 261 S.E.2d 90 (1980).

120. N.C. GEN. STAT. § 160A-33 through -56 (1976 and Supp. 1979).

121. N.C. GEN. STAT. § 160A-58.1 (1976) allows annexation of a noncontiguous satellite area,

cally, the court construed G.S. 160A-36(b)(1)[122] to require that the area annexed be contiguous to the primary corporate boundary, not to a satellite corporate boundary.[123]

The court also held that a satellite may not be included in the area to be annexed for the purpose of computing the aggregate external boundaries of that area under G.S. 160A-36(b)(2).[124] In this case, one proposed annexation area extended from the primary corporate limit and wrapped around the eastern, northern, and western sides of an existing satellite. Under the court's ruling, the long perimeter of the tentacle must be measured rather than the short cut across the southern boundary of the satellite.[125] Thus, the town was not able to meet the requirement in G.S. 160A-36(b)(2) that "one-eighth of the aggregate external boundaries of the area to be annexed coincide with the municipal boundary of Valdese."[126]

3. Permits and Licenses

In *In re Broad and Gales Creek Community Association*[127] the North Carolina Supreme Court held that in denying a dredging permit under G.S. 113-229(e)(2),[128] the Department of Natural Resources and Community Development properly considered the effects on riparian neighbors of a planned boat ramp as well as the effects of the dredging process itself.[129] The court believed that limiting the inquiry to the immediate effects of the dredging would undercut the department's ability to achieve the legislative purposes of preserving estuarine resources and promoting the public welfare.[130]

In *Porsh Builders, Inc. v. City of Winston-Salem*[131] the North Carolina

provided the area meets certain criteria and provided all landowners in the area sign a petition requesting annexation.

122. "The total area to be annexed must meet the following standards: (1) It must be adjacent or contiguous to the municipality's boundaries at the time the annexation proceeding is begun." N.C. GEN. STAT. § 160A-36(b)(1) (1976).

123. 299 N.C. at 10-12, 261 S.E.2d at 96-97. A satellite area automatically comes within the primary corporate limit when the town annexes the area up to the satellite. N.C. GEN. STAT. § 160A-58.6 (1976).

124. 299 N.C. at 15, 261 S.E.2d at 98. N.C. GEN. STAT. § 160A-36(b)(2) (1976) provides that "the total area to be annexed must meet the following standards: . . . (2) At least one eighth of the aggregate external boundaries of the area must coincide with the municipal boundary."

125. 299 N.C. at 14-15, 261 S.E.2d at 98-99. In a different context, the court indicated that a satellite may not be included in the area to be annexed because inclusion would skew the sixty-percent urban development requirement for proposed annexation under N.C. GEN. STAT. § 160A-36(c) (1976). *Id.* at 7-8, 261 S.E.2d at 94-95.

126. 299 N.C. at 15, 261 S.E.2d at 98.

127. 300 N.C. 267, 266 S.E.2d 645 (1980).

128. "The Department [of Natural Resources and Community Development] may deny an application for a dredge or fill permit upon finding: . . . (2) that there will be significant adverse effect on the value and enjoyment of the property of any riparian owners." N.C. GEN. STAT. § 113-229(e)(2) (Supp. 1979).

129. 300 N.C. at 281-82, 266 S.E.2d at 655-56.

130. *Id.* Justice Exum dissented, reasoning that the department was barred from considering the ultimate use for which the dredging was requested. *Id.* at 284-86, 266 S.E.2d at 656-58. The Coastal Resources Commission did not have the authority or expertise to act as a "super zoning commission." *Id.* at 285, 266 S.E.2d at 657.

131. 47 N.C. App. 661, 267 S.E.2d 697 (1980).

Court of Appeals interpreted the meaning of G.S. 160A-514(d).[132] In that case two developers had submitted bids to buy a parcel of land owned by the Winston-Salem Redevelopment Commission. Each bidder's development proposal met the city zoning requirements and the requirements of the Crystal Towers Community Development Plan (CTCDP). After deciding that the proposal of the lower bidder was more consistent with the purposes of the CTCDP, the Board of Aldermen accepted that bid.[133]

In a two-to-one decision[134] the North Carolina Court of Appeals reversed the lower court and held that the applicable statute, G.S. 160A-514(d),[135] requires the city to accept the highest bid if that bid meets the applicable zoning and development plan requirements and if the bidder is financially able to carry through with his proposal.[136]

D. Workers' Compensation Law

1. Byssinosis Cases

Byssinosis, or "brown lung," has become an important and controversial part of North Carolina's Worker's Compensation Act.[137] Recent developments in the area will have far-reaching effects on the direction that brown lung compensation will take. In 1980 the courts struggled with determining whether to apportion compensation between byssinosis and nonwork-related diseases, and the legislature dealt with byssinosis compensation by passing a statute that allows coverage for byssinosis claims regardless of the date of the last injurious exposure.[138]

The original statute dealing with occupational diseases covered by worker's compensation was passed in 1935 and consisted of a specific list of diseases that would be considered work-related and therefore compensable.[139] The list, in what was then G.S. 97-53(13), included "infection or inflamation of the skin or eyes or other *external* contact surfaces . . . due to irritating oils, cutting compounds, chemical dust, liquids, fumes, gases, or vapors."[140] Byssinosis was not specifically covered by this relatively general section nor was it

---

132. N.C. GEN. STAT. § 160A-514(d) (1976).

133. 47 N.C. App. at 662, 267 S.E.2d at 698.

134. Judge Martin dissented without opinion. *Id.* at 664, 267 S.E.2d at 699.

135. N.C. GEN. STAT. § 160A-514(d) (1976) provides that

> no sale of any property by the commission or agreement relating thereto shall be effected except after advertisement, bids and award as hereinafter set out. The commission shall, by public notice, . . . invite proposals and shall make available all pertinent information to any persons interested in undertaking a purchase of property. . . . *After receipt of all bids, the sale shall be made to the highest responsible bidder.* All bids may be rejected. All sales shall be subject to the approval of the governing body of the municipality.

(Emphasis added.)

136. 47 N.C. App. at 663-64, 267 S.E.2d at 698-99.

137. N.C. GEN. STAT. § 97-1 through -122 (1979).

138. Law of June 25, 1980, ch. 1305, 1979 N.C. Sess. Laws, 2d Sess. 217.

139. Law of March 26, 1935, ch. 123, 1935 N.C. Pub. Laws 130.

140. *Id.* § 1(b)(13) (emphasis added).

one of the diseases that were specifically listed.[141] In 1963 the legislature sought to broaden the coverage of occupational diseases by adding the language "any other internal or external organ or organs of the body."[142] Byssinosis arguably was compensable under this amendment if sufficient proof of causation could be produced, but the statute was applicable only to claims for which the last injurious exposure took place after the 1963 effective date.[143]

This section of the act was amended even further in 1971,[144] when coverage was expanded to include virtually any work-related disease. The amended act covered any disease "proven to be due to causes and conditions which are characteristic of . . . a particular trade . . . but excluding all ordinary diseases of life to which the general public is equally exposed."[145] The North Carolina Supreme Court's interpretation of this amendment,[146] in combination with the 1963 statute, arguably allowed compensation for most brown lung claims.

The court first considered the statutory language in *Booker v. Duke Medical Center*,[147] which involved a claim for death benefits under the Worker's Compensation Act. The decedent had been disabled by serum hepatitis prior to 1971 but had not died until 1974. The court held that since the dependents' claim for death benefits could not arise until the employee's death, this case was one arising on or after July 1, 1971; therefore the 1971 amendment was applicable.[148] In *Wood v. J.P. Stevens & Co.*,[149] a claim for disability due to byssinosis, the court ruled that it would be possible for a claim to arise after 1971 even though the last injurious exposure had occurred in 1958. Plaintiff alleged that she had not become completely disabled until 1975; if this were true, the court concluded, then her claim did not originate until 1975.[150] Such a finding would be important because the statute in force in 1958,[151] unlike the one in force in 1975,[152] did not specifically allow compensation for byssinosis.

Until this year there were still claims that could not be covered because of a gap left open by the 1963 and the 1971 amendments. Often the employee has been disabled for some time before he discovers that he has byssinosis. In

141. Diseases listed specifically were certain types of poisoning, asbestosis, silicosis, bursitis, and blisters due to use of tools or appliances. *Id.* § 1(b). Whether a court might find byssinosis covered by the pre-1963 act is not clear.

142. Law of June 18, 1963, ch. 965, § 1, 1963 N.C. Sess. Laws 1224.

143. *Id.*

144. Law of June 14, 1971, ch. 547, 1971 N.C. Sess. Laws 477.

145. *Id.* § 1. The amendment was to be applicable to cases originating on or after July 1, 1971. *Id.* § 3.

146. *See* Booker v. Duke Medical Center, 297 N.C. 458, 256 S.E.2d 189 (1979); Wood v. J.P. Stevens & Co., 297 N.C. 636, 256 S.E.2d 692 (1979). *See* text accompanying notes 147-49 *infra*.

147. 297 N.C. 458, 256 S.E.2d 189 (1979).

148. *Id.* at 466-67, 256 S.E.2d at 195.

149. 297 N.C. 636, 256 S.E.2d. 692 (1979).

150. *Id.* at 651, 256 S.E.2d at 701-02.

151. The 1958 version of N.C. GEN. STAT. § 97-53(13), with regard to breathing disorders, contains the language found in the original Workman's Compensation Act, Law of March 26, 1935, ch. 123, § 1(b)(13), 1935 N.C. Pub. Laws 131, *as amended by* Law of June 12, 1957, ch. 1396, § 6, 1957 N.C. Sess. Laws 1590.

152. The 1975 version of N.C. GEN. STAT. § 97-53(13) contains the language found in Law of June 14, 1971, ch. 547, 1971 N.C. Sess. Laws 477.

Taylor v. J.P. Stevens & Co.,[153] the North Carolina Supreme Court held that a byssinosis claimant has two years from the date of diagnosis to bring a workers' compensation claim. The court also held that the date of correct diagnosis would have no effect on which statute would be applicable; rather, the applicability of the 1963 or 1971 versions of G.S. 97-53(13) would depend on when the claimant was first disabled.[154] Thus, a sitatuion could arise in which the last injurious exposure took place before 1963, the disability occurred prior to 1971, and the claim would not be asserted until 1981. This situation would not be covered by the 1963 amendment because the last injurious exposure occurred prior to 1963, and the 1971 amendment would not apply because the disability occurred prior to 1971. The legislature, seeking to fill this gap, passed the 1980 act providing compensation for byssinosis if adequate causation is proved, regardless of the date of the last injurious exposure. Thus, if the court found byssinosis not compensable by the pre-1963 statute, recovery would be allowed even though no statute was applicable at the time of disablement.

The retroactive effect of the new statute raises two constitutional questions.[155] The North Carolina Supreme Court has labeled a statute impermissibly retroactive "only when it interferes with rights which had vested or liabilities which had accrued prior to its passage,"[156] or when the statute im-

153. 300 N.C. 94, 265 S.E.2d 144 (1980). Plaintiff in this case had experienced difficulty in breathing since 1939 and finally quit working in the textile mill in 1963. She was not diagnosed as suffering from byssinosis until 1975 at which time she filed her claim. The holding allowed her to file her claim two years after the date of discovery rather than one year from the last exposure. The court construed G.S. 97-58(b) & (c) *in pari materia*. G.S. 97-58(b) states that the time within which notice must be given to the employer shall begin when the employee has been advised by competent medical authority that he has an occupational disease. Section 97-58(c) states that the right to compensation shall be barred unless the claim is filed within two years after death, disability, or disablement. The court found that it would render the statute ridiculous if the employee could give the employer notice of injury after discovery, but would at the same time be barred from filing a claim on that injury. 300 N.C. at 102, 265 S.E.2d at 148-89.

154. *Id.* at 102-03, 265 S.E.2d at 149. The supreme court had previously held that "[a]n employee has no right to claim compensation in occupational disease cases until the disablement occurs . . . . [A]pplying the law in effect at the time of the disablement to a claim arising from that disablement does not involve a retroactive application of the law." Wood v. J.P. Stevens & Co., 297 N.C. at 650, 256 S.E.2d at 701.

155. The pertinent sections of the constitutions are:

> U.S. CONST. art I, § 10: "No State shall . . . pass any Bill of Attainder . . . or Law impairing the Obligation of Contracts . . . ."
>
> U.S. CONST. amend. XIV: "Nor shall any State deprive any person of . . . property, without due process of law."
>
> N.C. CONST. art. I, § 16: "No law taxing retrospectively sales, purchases, or other acts previously done shall be enacted." [Similar to provisions of N.C. CONST. of 1868, art. I, § 17 (superseded 1970).]
>
> N.C. CONST. art. I, § 19: "No person shall be . . . disseized of his freehold, liberties, or privileges . . . or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws . . . ." [Similar to provisions of N.C. CONST. of 1868, art. I, § 17 (superseded 1970).]

156. Wood v. J.P. Stevens & Co., 297 N.C. at 650, 256 S.E.2d at 701. *See generally* 16A C.J.S. *Constitutional Law* § 417 (1956) for discussion of the rule that retrospective laws are generally unconstitutional if they impair existing or vested rights or create new obligations with respect to past transactions.

pairs obligations of contracts.[157] There appear to be no impairment-of-contract problems because the North Carolina Supreme Court has clearly stated that the proper question for analysis in a worker's compensation case is not "whether the amendment affects some imagined obligation of contract but rather whether it interferes with vested rights and liabilities."[158]

This statute, if construed to be retroactive, will create a right for the employee and a liability for the employer where none existed before. It will allow an employee to make a claim for byssinosis even though at the time the disability occurred he would have had no claim. It is unclear from the North Carolina cases, however, whether this constitutes interference with vested property rights in the employer.[159] Claims under the new amendment could be considered a taking of the employer's property without due process because the employer had no statutory notice, prior to the disablement creating liability, that byssinosis claims arising from exposure prior to 1963, and disablement prior to 1971, were compensable.[160]

---

157. Piedmont Memorial Hospital, Inc. v. Guilford County, 221 N.C. 308, 311, 20 S.E.2d 332, 334 (1942). The court further noted that "[a] statute is not rendered unconstitutionally retroactive merely because it operates on facts which were in existence prior to its enactment." Booker v. Duke Medical Center, 297 N.C. at 467, 256 S.E.2d at 466.

158. Wood v. J.P. Stevens & Co., 297 N.C. at 650, 256 S.E.2d at 701. The court noted that "the relationship between a covered employer and employee is clearly not contractual in the usual sense of that term." *Id.* at 648, 256 S.E.2d at 700. "The liability of the employer under our Workmen's Compensation Act arises not from the individual employment contract but from the Act itself." *Id.* at 649, 265 S.E.2d at 700.

Some states have invalidated legislative enactments increasing workers' compensation payments as impermissible alterations of a substantial term of an existing contract between the employee and employer. *See, e.g.*, Mitchell v. United States Fidelity and Guar. Co., 206 F. Supp. 489 (E.D. Tenn. 1962); Lyon v. Wilson, 201 Kan. 768, 443 P.2d 314 (1968); Noffsker v. K. Barnett & Sons, 72 N.M. 471, 384 P.2d 1022 (1963); Loveless v. State Workmen's Compensation Comm'r, 155 W.Va. 264, 184 S.E.2d 127 (1971).

159. Only one case could be found that held a statute unconstitutional because it created a new cause of action retroactively, and in that case there was also a contract that would have been impaired. Bank of Pinehurst v. Derby, 218 N.C. 653, 12 S.E.2d 260 (1940). In Leak v. Gray, 107 N.C. 468, 12 S.E. 312 (1890), the court stated that "[w]hen the effect of a law is to divest the vested right of property, except for the use of the public, and then only after providing for payment of its value, it will be declared void." *Id.* at 478, 12 S.E.2d at 314.

Other states have split on the divestment theory in retroactive workers' compensation amendment cases. *See, e.g.*, Price v. All Am. Eng'r Co., 320 A.2d 336 (Del. 1974) (suggesting that if the statute did divest vested property rights, it was nonetheless permissible as a valid exercise of the state's police power); Cooper v. Wicomico County, Dept. of Pub. Works, 278 Md. App. 596, 366 A.2d 55 (1976) (remanding without affirming or reversing a circuit court's invalidation of supplemental allowances as impermissibly divesting vested rights).

The United States Supreme Court held the Massachusetts workers' compensation scheme to be a valid exercise of legislative power in Boston & Maine R.R. v. Armburg, 285 U.S. 234 (1932). Earlier, the Court had ruled that states, in the exercise of their police power, may affect contracts and modify property rights without violating either the impairment of contracts bar in article I, section 10 or the fourteenth amendment to the Constitution. Union Dry Goods Co. v. Georgia Pub. Serv. Corp., 248 U.S. 372 (1919). Moreover, the Court held that the Constitution does not forbid the creation of new rights or the abolition of old ones in order to attain permissible legislative objectives. Silver v. Silver, 280 U.S. 117 (1929).

160. Several state courts have upheld, against due process challenges, retroactive increases in workers' compensation payments. *See, e.g.*, Clark v. Chrysler Corp., 377 Mich. 140, 139 N.W.2d 714 (1966) (reclassification of injuries that occurred prior to effective date of statute, resulting in increased benefits payable after the effective date); Hahti v. Fosterling, 357 Mich. 578, 99 N.W.2d 490 (1959) (amendment requiring employer to pay additional medical benefits on account of injury occurring prior to effective date of the amendment); Schmidt v. Wolf Contracting Co., 269

Even if the 1980 amendment is found to be constititutional there will still be obstacles for byssinosis claimants. Since byssinosis has been recognized fairly recently, in both the medical and legal communities,[161] proof of causation remains a problem. It is not enough merely to show that the claimant has a pulmonary disease and was once exposed to cotton dust.[162] The court of

---

A.D. 201, 55 N.Y.S.2d, *aff'd per curiam*, 295 N.Y. 748, 65 N.E.2d 568 (1946) (under state statute increasing maximum compensation benefits for injuries occurring prior to effective date of statute, compensation was to be paid only for periods after the effective date).

The United States Supreme Court has upheld federal statutes providing benefits to coal miners, rejecting due process attacks. In National Independent Coal Operators' Ass'n v. Brennan, 372 F. Supp. 16 (D.D.C.), *aff'd mem.*, 419 U.S. 955 (1974), the Court upheld that portion of the Black Lung Benefits Act which required payment of benefits for disability or death occurring prior to the Act's effective date; the lower court had held that the Act did not violate the due process clause of the fifth amendment.

In Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976), coal operators claimed that the due process clause of the fifth amendment was violated by the amended Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 923(b) (1972), in that the operators were required to compensate former employees who had ended employment before passage of the Act and their survivors, creating unexpected liability for past, completed acts which were legal at the time. The following comments of the Court may be particularly instructive:

> [T]his Court long ago upheld against due process attack the competence of Congress to allocate the interlocking economic rights and duties of employers and employees upon workmen's compensation principles . . . regardless of contravening arrangements between employer and employee.

428 U.S. at 15.

> [O]ur cases are clear that readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations . . . . This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.

Id. at 16.

> The retrospective aspects of legislation . . . must meet the test of due process.

Id. at 17.

> We find, however, that the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor—the operators and the coal consumers.

Id. at 18.

> In sum, the Due Process Clause poses no bar to requiring an operator to provide compensation for a former employee's death or disability due to pneumoconiosis arising out of employment in the mines, even if the former employee terminated his employment in the industry before the Act was passed.

Id. at 19-20.

Usery was cited in United States Trust Co. v. New Jersey, 431 U.S. 1, 17 n.13 (1977), in which the Court observed that the "Due Process Clause generally does not prohibit retrospective civil legislation, unless the consequences are particularly 'harsh and oppressive.' " (Citation omitted.)

161. The symptomatic history usually associated with byssinosis is: Grade one-half: Sensation of tightness and difficulty of breathing which may be associated with a cough. The symptoms appear on the first day of returning to work after a period away from the mill but decrease with continued exposure. Grade one: Symptoms may be present on more than one day after returning to work. Grade two: Symptoms are present throughout the work week, with evidence of lung dysfunctions. Grade three: Failure to improve even after being away from work with symptoms of tightness, shortness of breath, often accompanied by cough and sputum production. Moore v. J.P. Stevens & Co., 47 N.C. App. 744, 751, 269 S.E.2d 159, 163 (1980). In Wood v. J.P. Stevens & Co. the court observed that the development and causes of brown lung "are still the subject of scientific debate" (citing Bouhuys, Schoenberg, Beck & Schilling, *Epidemiology of Chronic Lung Disease in a Cotton Mill Community*, in 5 TRAUMATIC MEDICINE AND SURGERY FOR THE ATTORNEY 607 (Serv. vol. 1978); 5A LAWYERS' MEDICAL CYCLOPEDIA OF PERSONAL INJURIES AND APPLIED SPECIALITIES § 33.59a (1972 & Supp. 1979); Dickie & Chosy, *Some Important Occupational Diseases*, in 3 TRAUMATIC MEDICINE AND SURGERY FOR THE ATTORNEY 729 (Serv. vol. 1975)).

162. "[B]yssinosis, or brown lung disease, seldom occurs without a smoking history." 1B A.

appeals upheld a denial of compensation in two recent pulmonary disease cases,[163] finding that the claimants had not carried the burden of proof on the issue of causation.

If the causal link is shown, the question becomes how much compensation to award. Many byssinosis claimants also suffer from diseases which could be classified as nonwork-related. It is established doctrine that if the work-related cause acts on a pre-existing condition to create total disability, the employer is liable for the entire disability.[164] With byssinosis, the problem is slightly different. It involves a concurrently developing condition rather than a pre-existing one.[165]

The North Carolina Court of Appeals has applied the pre-existing injury rule but the supreme court has indicated that it will take a different tack. In

---

LARSON, WORKMEN'S COMPENSATION LAW § 41.64(b), 7-432 (1980). "[P]roof of industrial causation in occupational disease-smoking cases has two components—the legal and the medical." *Id.* at § 41.64(c), 7-435.

To establish legal causation, the claimant must show that the employment contributed to the disease in the sense of "arising out of employment," and that the disease is occupational rather than an ordinary disease of life. Most courts adopt the view that a worker's preexisting disease or other predisposition does not prevent compensability; the employer takes the employee as he finds him; hence the employment condition need only be a contributing cause rather than the sole or dominant cause to establish compensability. Moreover, the disease can be shown to be occupational by showing that the nature of the employment or the quantity of exposure was different from ordinary life experiences. When legal cause is shown, the claimant must also show medical causation, which means that the employment exposure contributed to the disease as a matter of medical fact. *Id.* at 7-435 through 7-439.

163. Brown v. J.P. Stevens & Co., 49 N.C. App. 118, 270 S.E.2d 602 (1980); Moore v. J.P. Stevens & Co., 47 N.C. App. 744, 269 S.E.2d 159 (1980). In *Brown*, claimant did not contend on appeal that he had byssinosis; rather he contended "that the whole record does show that he had a pulmonary disease which was due to causes and conditions which are peculiar to his employment. . . ." 49 N.C. App. at 120, 270 S.E.2d at 604. The court held that the hearing commissioner's finding of fact—that the lung disease was not caused by cotton dust and lint—was sufficient to support a denial of compensability. *Id.*

In *Moore* the court upheld the Industrial Commission's finding that exposure to cotton dust and lint did not cause plaintiff's disease. The court noted that medical testimony indicated that plaintiff's breathing problems were not symptomatic of byssinosis. The medical expert stated that it was possible, rather than probable, that plaintiff's disease was caused by occupational exposure. 47 N.C. App. at 751-52, 269 S.E.2d at 164.

164. *See, e.g.*, Little v. Anson County Schools Food Serv., 295 N.C. 527, 531-32, 246 S.E.2d 743, 746 (1978).

165. According to Larson, most courts "hold that when distinctive employment hazards act upon . . . preexisting conditions to produce a disabling disease, the result is an occupational disease." 1B A. LARSON, WORKMEN'S COMPENSATION LAW § 41.63, 7-418 (1980). Moreover,

> [t]he line between occupational disease and aggravation of preexisting disease or weakness has become blurred. The ultimate working rule that seems to emerge is simply that a disability which would be held to arise out of the employment under the tests of increased risk and aggravation of a preexisting condition will be treated as an occupational disease.

Id. at 7-423.

Furthermore, since the 1970s courts have begun to deal with "dual causation" cases, *i.e.*, "any occupational disease causation problem in which a personal element, such as smoking, combines with an employment element, such as inhalation of . . . textile fibres . . . to produce lung cancer, emphysema, bronchitis, and the like." *Id.* at § 41.64(a), 7-424 & 7-425. No clear trend has been established; "variations in outcome have turned on all sorts of variations in the relative strengths of the personal and employment contributions, or in other facts, or in the statutes themselves." *Id.* at 7-425.

Walston v. Burlington Industries,[166] the appeals court found the pre-existing disease rule to be applicable.[167] This case is different from the typical byssinosis claim because plaintiff claimed that the occupational conditions aggravated his nonwork-related diseases. Plaintiff apparently tried to invoke the pre-existing disease rule by claiming an occupational disease per se, thereby avoiding the problem of concurrent development. The Industrial Commission denied compensation since it concluded that he did not have an occupational disease. The court of appeals held that the record had shown that (1) environmental factors that characterized plaintiff's place of employment were also substantial factors in causing his diseases, and (2) by virtue of his employment plaintiff was "exposed to such irritants in greater quantities than persons otherwise employed."[168] The court remanded the case to the Commission to inquire as to the extent to which plaintiff's intervening occupational exposure had contributed to the onset of his resulting disabling disease.[169]

In *Morrison v. Burlington Industries*,[170] the court of appeals held that the disability should not be apportioned between work-related and nonwork-related causes. Once the causal link was shown between the disability and the occupation, the employer was to be liable for the total disability. The supreme court reversed the court in *Morrison*[171] and held that the record did not contain sufficient evidence for review, remanding to the Industrial Commission for further testimony.[172] The court enumerated three factors that the evidence must show in order for the court to determine if the commission's findings were supported by the evidence: (1) the percentage, if any, of plaintiff's disablement that results from an occupational disease, (2) the percentage of plaintiff's disablement that results from diseases unrelated to plaintiff's occupation but accelerated or aggravated by plaintiff's occupational disease, and (3) the percentage of plaintiff's disablement that results from diseases or infirmities unrelated to plaintiff's occupation which were not accelerated or aggravated by plaintiff's occupational diseases.[173]

The court did not state whether it would follow the pre-existing injury doctrine as did the court of appeals, but the remand itself implies that it will not. Rather, it appears that the court will apportion. The court would not need the information it requested on remand if it were going to follow the court of appeals. The court's request for the percentage of disability unrelated to the occupational disease strongly suggests that the court wishes to apportion

166. 49 N.C. App. 301, 271 S.E.2d 516 (1980).

167. *Id.* at 310, 271 S.E.2d at 521-22. The court noted that the majority of jurisdictions that had addressed the issue held that when work hazards acted upon a pre-existing condition to produce a disabling disease, then the disability was due to an occupational disease. *Id.*

168. 49 N.C. App. at 309, 271 S.E.2d at 521.

169. *Id.* at 311, 271 S.E.2d at 522.

170. 47 N.C. App. 50, 266 S.E.2d 741 (1980). In this case plaintiff had been found to be totally disabled. The Industrial Commission accepted expert testimony which showed that only fifty to sixty percent of the disability was due to byssinosis.

171. 301 N.C. 226, 271 S.E.2d 364 (1980).

172. *Id.* at 231-32, 271 S.E.2d at 368.

173. *Id.*, 271 S.E.2d at 367.

between work-related and nonwork-related causes. Such an approach would seem to be a considerable departure from the general rule that apportionment does not apply "in any case in which the prior condition was not a disability in the compensation sense."[174] Especially with cases of byssinosis, in which smoking may combine with industrial exposure, the worker's personal affliction alone may not render him even partially disabled; yet, in conjunction with the employment exposure, the conditions yield byssinosis disability. If the worker were not in the textile mill, he might not be considered disabled at all. Consequently, it would seem that dual causation analysis,[175] rather than the pre-existing condition rule[176] or an apportionment approach, would be appropriate. Moreover, should the supreme court choose to expand the apportionment approach, it must be careful not to jeopardize the pre-existing condition rule. Whatever path the supreme court chooses, the decision is important since it will enable the Industrial Commission finally to begin processing these claims, many of which are being litigated.

2. Employer's Failure to Provide Medical Care

In *Schofield v. Great Atlantic & Pacific Tea Co.*[177] the supreme court interpreted G.S. 97-25 of the Workers' Compensation Act. G.S. 97-25 covers the medical treatment that must be provided by an employer to an injured employee. Plaintiff suffered a knee injury in 1972, for which his employer provided medical treatment until 1974. At that time the employer advised plaintiff that treatment would no longer be provided, but plaintiff challenged the finding before the Industrial Commission. In 1976 the Industrial Commission decided that the employer was liable for necessary treatment after the 1974 termination date. Prior to notification of the Commission's decision, plaintiff's knee injury worsened and he was forced to seek emergency treatment for an infection when he was 150 miles away from defendant's physicians. This treatment continued for seventeen months even though the infection was under control after six months, without notification to the Commission that plaintiff had employed his own physician.[178] Under G.S. 97-25,[179] an employee may go to a physician of his own choosing in an emergency only if the employer has failed to provide medical care, or, if the Commission has approved his choice in the absence of an emergency. The Industrial Commission awarded plaintiff the medical expenses for the entire seventeen months[180] despite the end of the emergency treatment after six months.

174. 2 A. LARSON, WORKMEN'S COMPENSATION LAW § 59.20, 10-273 (1980). "To be apportionable, then, an impairment must have been independently producing some degree of disability before the accident, and must be continuing to operate as a source of disability after the accident." *Id.* at 10-285. Moreover, if the prior condition is latent, and it is operated on by the industrial injury to precipitate disability, the entire disability is compensable. *Id.* at 10-270.

175. *See* causation analysis at note 162 *supra*.

176. *See* notes 164, 165 and accompanying text *supra*.

177. 299 N.C. 582, 264 S.E.2d 56 (1980).

178. *Id.* at 584-85, 264 S.E.2d at 58-59.

179. N.C. GEN. STAT. § 97-25 (1979).

180. 299 N.C. at 585, 264 S.E.2d at 59.

The North Carolina Supreme Court found two issues to be important: (1) whether it was the employer's failure to provide medical care that led plaintiff to seek his own physician; and (2) whether medical expenses not attributable to the actual emergency should be awarded. The court defined failure, as used in G.S. 97-25, to mean inability to provide medical care as well as a willful refusal;[181] thus an emergency on a weekend at a distance from home constituted inability to provide services.[182] Even if there had not been a medical emergency, defendant's notification to plaintiff in 1974 that services would no longer be provided amounted to a wilfull "failure to provide" medical services.[183] The court went on to hold that in the absence of an emergency, the employee who wishes to select his own physician must request the approval of the Industrial Commission within a reasonable time.[184] What constitutes a reasonable time will be a question of fact for the Commission. The court remanded the case to the Commission for a decision on when plaintiff should have notified the Commission and to award expenses on that basis.[185]

E. Unemployment Compensation

Several 1980 cases involved construction of G.S. 96-14,[186] which deals with situations that result in denial of unemployment benefits. The North Carolina Court of Appeals construed "voluntary" as used in G.S. 96-14(1) and held in *In re Werner*[187] that a resignation pursuant to a demand from a supervisor would not be considered a voluntary separation.[188] In *In re Clark*[189] the court found, under the same statutory provision, that a resignation based on valid ethical grounds would not be considered voluntary separation. In *Clark* a social worker refused to begin custody proceedings to remove children from certain families after promising those families that the children would not be removed permanently if each family agreed to a temporary removal. She resigned her position with the Department of Social Services because she believed that she was being required to violate the ethical stndards of her profession.[190]

The court was called upon to define misconduct as used in G.S. 96-14(2),

181. *Id.* at 589, 264 S.E.2d at 61.

182. *Id.*

183. *Id.* (quoting N.C. GEN. STAT. § 97-25 (1979)).

184. *Id.* at 593, 264 S.E.2d at 63.

185. *Id.* at 596, 264 S.E.2d at 65.

186. "An individual shall be disqualified . . . if . . . such individual is . . . unemployed because he left work voluntarily without good cause attributable to the employer." N.C. GEN. STAT. § 96-14(1) (1981).

187. 44 N.C. App. 723, 263 S.E.2d 4 (1980). The court also held that the failure of the employee to seek redress under the employer's grievance procedure would not render the separation voluntary. Since the General Assembly had not sought this effect expressly, the court would not read it into the statute. *Id.* at 728, 263 S.E.2d at 7.

188. Delaware's interpretation of a similar statute was relied upon since it was an issue of first impression in North Carolina. *See* Anchor Motor Freight, Inc. v. Appeal Bd., 325 A.2d 374 (Super. Ct. Del. 1974).

189. 47 N.C. App. 163, 266 S.E.2d 854 (1980).

190. *Id.*, 266 S.E.2d at 855.

which disqualifies an individual from receiving unemployment benefits if he was discharged due to misconduct in connection with his work. In *In re Cantrell*[191] a truckdriver refused to make a trip for personal reasons even though it was his turn under the rotation system. The court upheld the Employment Security Commission's determination that this was misconduct under the applicable statute; thus the claimant was not entitled to compensation. The key factors in the determination of misconduct were (1) the reasonableness of the employer's request, and (2) the reasonableness of the employee's refusal in light of available alternatives.[192] These two questions apparently are to be considered in the context of the particular facts of the case. A refusal to make the drive "for either racial or unidentified personal reasons . . . was not reasonable or justified."[193]

In *Jones v. Department of Human Resources*[194] plaintiff was discharged, without warning, for unsatisfactory job performance. The State Personnel Commission found that he had not received proper notice and ordered reemployment, but did not award compensation for pecuniary loss.[195] The state argued that the State Personnel Commission had complete discretion over the remedies it granted. The court of appeals rejected this argument as a contravention of the spirit of the State Personnel Act. The court believed that the mandatory language of the statute,[196] as well as its remedial purpose, indicated that the remedies authorized were not discretionary; the court noted that the remedy ordered by the commission failed to return an employee to the condition he would have been in had the wrongful discharge not taken place.[197] The Supreme Court of North Carolina disagreed and upheld the commission but limited its discretion.[198] It held that when the claim for wrongful discharge is based merely on lack of notice and the record shows that job performance was unsatisfactory, it is within the commission's discretion not to award back pay.[199] The dispositive reasoning was that the failure to give warnings had not been the cause of the dismissal and that plaintiff's reinstatement would be sufficient to protect his due process rights.[200] To grant

191. 44 N.C. App. 718, 263 S.E.2d 1 (1980).

192. *Id.* at 722, 263 S.E.2d at 3.

193. *Id.* at 723, 263 S.E.2d at 4.

194. 44 N.C. App. 116, 260 S.E.2d 654 (1980). Jesse Jones had been discharged from his position as a janitor at the Governor Morehead School due to unsatisfactory job performance. His employer had not given him the required notice prior to his discharge; therefore the discharge was wrongful. *Id.* at 121-24, 260 S.E.2d at 656-58.

195. *Id.* at 120, 260 S.E.2d at 657.

196. N.C. GEN. STAT. § 126-35 (Cum. Supp. 1980): "No permanent employee . . . shall be discharged . . . except for just cause."

197. 44 N.C. App. at 124, 260 S.E.2d at 660.

198. Jones v. Department of Human Resources, 300 N.C. 687, 268 S.E.2d 500 (1980).

199. *Id.* at 692-93, 268 S.E.2d at 503-04.

200. *Id.* at 693, 268 S.E.2d at 504.

back pay to the claimant in a situation such as this would constitute a windfall to him.[201]

CLYDE LOWELL BALL, JR.
DAWN ELIZABETH GANTT
MELISSA A. MAGEE-BREMER

201. *Id.* The court relied on Carey v. Piphus, 435 U.S. 247 (1978), to support this rationale. In that case procedural due process requirements were not met because there was no hearing before dismissal. The United States Supreme Court held that, absent proof of actual injury, only nominal damages could be awarded since the failure to accord due process had not been the cause of the suspensions. The Court based its holding on the finding that the suspension would have taken place even if the hearing had been held so there was no actual injury. *Id.* at 260. The North Carolina Supreme Court's reliance on this case in *Jones* seems to be misplaced. The purpose of notice requirements in a situation in which the employee's job performance is unsatisfactory is to give him a chance to improve. If the employee improves he may not be dismissed. Thus, the state in *Jones*, unlike *Carey*, could not have proved that Jones would have been dismissed even if his due process rights had been met because there was the possibility of improved performance.

II. CIVIL PROCEDURE

A. Privilege Against Self-Incrimination

In *Byrd v. Hodges*[1] the court of appeals held that in a civil action in which punitive damages are sought the defendant may refuse to answer the plaintiff's complaint, asserting the privilege against self-incrimination, without such refusal to answer being deemed an admission under rule 8(d).[2]

The underlying action in *Byrd* was for damages for alienation of affection and criminal conversation. Plaintiff Byrd alleged seven separate instances of sexual intercourse between defendant Hodges and plaintiff's wife.[3] Such a course of conduct, if true, would be a misdemeanor under North Carolina criminal law.[4] Plaintiff sought $100,000 in compensatory damages and $100,000 in punitive damages.[5]

Defendant was deposed prior to the issuance of the complaint, but refused to answer any questions on the ground that his answers might tend to incriminate him. Plaintiff then filed a complaint; defendant, in his answer, refused to reply to plaintiff's allegations, again invoking the privilege against self-incrimination. The superior court "treated as admitted" the unanswered allegations of the complaint, and judgment was entered for plaintiff except for the amount of damages.[6]

The court of appeals, noting that rule 8(d) supports the superior court's holding, identified the issue as "whether a defendant who has been sued for punitive damages may assert his privilege against self-incrimination by refusing to plead without suffering the stricture of Rule 8(d)."[7]

The court also noted that the case of *Allred v. Graves*[8] had established that the privilege against self-incrimination attached to testimony in a civil proceeding in which punitive damages were sought. Finding that the privilege against self-incrimination, preserved both in the state and national constitutions,[9] is "basic to our law," the *Byrd* court saw "no reason why a party should be required to incriminate himself by pleading if he is not required to do so by

---

1. 44 N.C. App. 509, 261 S.E.2d 269 (1980).

2. *Id.* at 510, 261 S.E.2d at 270. N.C.R. CIV. P. 8(d): "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading."

3. *Id.* at 509, 261 S.E.2d at 269-70.

4. N.C. GEN. STAT. § 14-184 (1969): "If any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed and cohabit together, they shall be guilty of a misdemeanor . . . punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both."

The courts have interpreted this statute to apply only to "habitual intercourse," as opposed to "single or nonhabitual intercourse." State v. Kleiman, 241 N.C. 277, 279-80, 85 S.E.2d 148, 151 (1954); State v. Robinson, 9 N.C. App. 433, 176 S.E.2d 253 (1970).

5. 44 N.C. App. at 509, 261 S.E.2d at 270.

6. *Id.*

7. 44 N.C. App. at 510, 261 S.E.2d at 270.

8. 261 N.C. 31, 134 S.E.2d 186 (1964).

9. U.S. CONST. amend. V; N.C. CONST. art. 1, § 23.

deposition in a civil action."[10]

In response to plaintiff's argument that defendant could enter a general denial to the complaint without waiving his privilege, the court replied that "a defendant and his attorney may not be able in good conscience to deny an allegation."[11] To require an answer would force defendant either to admit that which he was privileged not to admit, or knowingly to file a false pleading.[12] "Rule 8(d) must yield to the constitutional right of the defendant not to incriminate himself."[13]

The decision of the superior court was reversed and the case remanded for a hearing on the use of the self-incrimination plea. "If the court should find that the defendant's answers would tend to incriminate him, it shall enter an order that the allegations to which the defendant does not plead are deemed denied."[14]

That the privilege against self-incrimination should apply to the defendant's pleadings appears correct. The *Allred* court found that the privilege "may be exercised by a witness *in any proceeding*,"[15] and "also applies in civil actions and proceedings, as, for example, with reference to *an answer* in chancery."[16] The majority rule among those state courts that have faced the issue appears to be "that a defendant cannot be required by his answer to a pleading to state facts which will tend to [in]criminate him, since the answer may be read in evidence as an admission upon the trial."[17] Although *Allred*, having established the right to invoke the privilege in a proceeding in which punitive damages are sought, adequately supports the *Byrd* holding, *Byrd* could be based on another ground. Even if no punitive damages had been sought, defendant Hodges should have been allowed to invoke the privilege[18] because the allegations in plaintiff's complaint, if true, would make defendant guilty of a crime under North Carolina law.[19]

The more difficult question in *Byrd*, however, was not whether the privi-

---

10. 44 N.C. App. at 510, 261 S.E.2d at 270.

11. *Id.*

12. *Id.* Though not referred to in the court's opinion, N.C.R. Civ. P. 11 imposes a good faith requirement on an attorney who signs a pleading.

13. *Id.*

14. *Id.* at 510-11, 261 S.E.2d at 270.

15. 261 N.C. at 35, 134 S.E.2d at 190 (emphasis added); *accord*, McCarthy v. Arndstein, 266 U.S. 34 (1924).

16. 261 N.C. at 35, 134 S.E.2d at 190 (emphasis added) (quoting 98 C.J.S. *Witnesses* § 433, at 246 (1957)).

17. Amana Soc'y v. Selzer, 250 Iowa 380, 384, 94 N.W.2d 337, 339 (1959); *see* Annot., 52 A.L.R. 143 (1928).

18. "[A] witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to incriminate him." 261 N.C. at 34, 134 S.E.2d at 189.

The request for punitive damages, while, on these facts, not determinative with respect to the availability of the privilege, is, however, relevant to the consequences which flow from its use. *See* text accompanying note 29 *infra*.

19. *See* note 4 and accompanying text *supra*. The application of the privilege to civil actions seeking punitive damages was critical in *Allred* because in that case, defendants had already been tried on criminal charges and "all criminal charges . . . in respect to the facts alleged in the complaint had been finally disposed of." 261 N.C. at 40, 134 S.E.2d at 193.

lege attached, but what consequences might flow from its exercise. There is a split of authority on this issue, represented by the cases of *Amana Society v. Selzer*[20] and *DeAntonio v. Solomon*.[21] In *Amana Society* the Iowa Supreme Court allowed defendant to claim the privilege in his answer,[22] but held that "defendant's failure to deny [the allegation of the complaint] should be deemed an admission thereof."[23] The court justified its holding on the ground that "it is proper in a civil case to draw an inference of the . . . misconduct with which a litigant is charged from his refusal to testify upon the ground of self-incrimination."[24] While defendant was not required to answer the complaint by reason of his privilege, he could not "assert such . . . privilege as a ground * * * for escaping the consequences of his failure to answer. * * * In other words, he cannot escape the *civil consequences* of his default in answering the allegations of his adversary."[25]

In *Bauer v. Stern Financing Co.*,[26] a case involving the effect of claiming the privilege on a request for summary judgment, the court treated the exercise of the privilege as an admission and justified the result in this manner:

> Such a result is not designed to punish plaintiff for his refusal to answer. It is simply a recognition of the provisions of rule 237 that the absence of a genuine issue of fact—from whatever cause—justifies in appropriate cases the entry of summary judgment. The *reason* for such absence is incidental; the *fact* of the absence is determinative.
>
> When plaintiff says he is being punished for exercising his right to remain silent, he is overlooking the real matter before us: that his silence, justifiable or not, prevents a justiciable issue from arising on the question involved.[27]

If one takes the *Amana Society* approach the textual requirements of rule 8(d) will be determinative: failure to answer, for whatever reason, is then deemed an admission. To paraphrase *Bauer*, the *reason* for such failure is incidental; the *fact* of the failure is determinative.

Both *Amana Society* and *Bauer* dealt with civil actions in which there was no claim for punitive damages.[28] *Byrd*, however, was an action for both compensatory and punitive damages, and thus falls within the ambit of *Allred*. *Allred* indicated that actions seeking punitive damages are to be treated, for purposes of applying the privilege, as "quasi-criminal" in nature, therefore the

---

20. 250 Iowa 380, 94 N.W.2d 337 (1959).

21. 42 F.R.D. 320 (D. Mass. 1967).

22. 250 Iowa at 384, 94 N.W.2d at 340.

23. *Id.* at 387, 94 N.W.2d at 341.

24. *Id.* at 388, 94 N.W.2d at 342; *accord*, Baxter v. Palmigiano, 425 U.S. 308 (1976); *cf.* State v. Garrett, 44 N.C. 357 (1853) (defendant not required to answer disparaging question, but refusal to answer could be considered by jury).

25. 250 Iowa at 389, 94 N.W.2d at 342 (quoting Annot., 52 A.L.R. 143, 148-49 (1928)) (emphasis added).

26. 169 N.W.2d 850 (Iowa 1969), *cert. denied*, 396 U.S. 1008 (1970).

27. *Id.* at 854. The court cited *Amana Society* in support of its holding.

28. *Id.*

privilege attaches just as it does in criminal cases.[29] Following this logic, the *Amana Society* doctrine should not apply on the *Byrd* facts because the result would be analogous to an automatic finding of guilt in a criminal proceeding, a result which may not follow simply from the invocation of the privilege.[30]

The alternative reasoning to *Amana Society* is presented in *DeAntonio v. Solomon*,[31] a case consistent in its holding with *Byrd*. The federal district court held that

> [t]he court must regard the defendant's assertion of his privilege against self-incrimination in defense against various allegations in the complaint as having the effect of a denial of such allegations and therefore considers a material issue of fact to exist as to those allegations. Although Rule 8(d), Fed. R. Civ. P., provides that averments in a complaint are admitted when not denied, the defendant's right to assert his privilege against self-incrimination would be considerably watered down if his failure to explicitly deny averments might result in a summary judgment against him.[32]

DeAntonio was based on the decisions of the United States Supreme Court in *Spevack v. Klein*[33] and *Garrity v. New Jersey*.[34] These two cases held that, when "sanctions" imposed on the assertion of the privilege against self-incrimination "water down" the privilege, such sanctions are not to be allowed.[35] The most recent Supreme Court formulation of this rule is *Lefkowitz v. Cunningham*,[36] in which Chief Justice Burger, writing for the majority, stated as

> settle[d] that government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized. It is true . . . that our earlier cases were concerned with penalties having a substantial economic impact. But the touchstone of the Fifth Amendment is compulsion, and direct economic sanctions and imprisonment are not the only penalties capable of forcing the self-incrimination which the Amendment forbids.[37]

DeAntonio assumes that applying rule 8(d) to invocations of the privilege against self-incrimination imposes a sanction on the use of the privilege. This is in contrast to *Amana Society*, in which no such penalty was found.[38] The *DeAntonio* approach is more sound, for requiring defendant to forfeit his case

29. 261 N.C. at 38, 134 S.E.2d at 192. The *Allred* court specifically noted that, criminal charges against defendants having been settled, the privilege would *not* apply if plaintiff "relinquish[ed] all claim to punish defendants by punitive damages." *Id.* at 39-40, 134 S.E.2d at 193.

30. *See* Griffin v. California, 380 U.S. 609, 614-15 (1956); Ullman v. United States, 350 U.S. 422, 426-28 (1965).

31. 42 F.R.D. 320 (D. Mass., 1967).

32. *Id.* at 322.

33. 385 U.S. 511 (1967).

34. 385 U.S. 493 (1967).

35. 42 F.R.D. at 322. *See Spevack*, 385 U.S. at 514; *Garrity*, 385 U.S. at 500.

36. 431 U.S. 801 (1977).

37. *Id.* at 806.

38. *See* text accompanying note 27 *supra*.

in order to preserve his right against self-incrimination is arguably exactly the type of "direct economic sanction" to which Chief Justice Burger referred.

The court of appeals in *Byrd* may have agreed with the *DeAntonio* position; the same remedies were provided by both courts.[39] Since the *Byrd* court failed in its short opinion to make clear whether its result was based solely on the presence of a claim for punitive damages, however, it left the door open to a future application of the *Amana Society* rationale.[40] A literal reading of the opinion appears to leave room for *Amana Society*,[41] but the underlying rationale, insofar as it can be perceived, might indicate a broader basis of the opinion.[42]

Though the *Amana Society* rationale appears to remain available,[43] the *DeAntonio* rationale seems more in keeping with *Lefkowitz* and with the broader reasoning in *Allred*, which called for a "liberal construction" of the constitution, "especially with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both persons and property."[44]

B. Jury Trials

In *Frissell v. Frissell*,[45] the court of appeals clarified the circumstances under which a party waives the right to a jury trial. The court reaffirmed that a party may waive the right to jury trial, which is guaranteed by Article I, Section 19 of the North Carolina Constitution,[46] by failing to appear at trial.[47] The court was forced to expressly overrule inconsistent language in *Heidler v. Heidler*,[48] which had been decided only a year earlier under similar facts.[49] However, *Heidler* involved an ineffective waiver of the jury trial right under rules 38(d) and 39(a) of the Rules of Civil Procedure,[50] which provide for consensual withdrawal of demands for jury trials. The *Heidler* court did not consider waiver of the right other than under the Rules of Civil Procedure. Thus, *Frissell* makes clear that the rules do not exclusively determine waiver of the right to a jury trial and that failure to appear at trial may constitute such

39. *Compare* 44 N.C. App. at 511, 261 S.E.2d at 270 *with* 42 F.R.D. at 322.

40. *See* text accompanying notes 22-30 *supra*.

41. *See* text accompanying notes 8-10 *supra*.

42. *See* text accompanying notes 12 & 13 *supra*.

43. The Supreme Court has not directly decided the question, and it denied certiorari in the *Bauer* case, 396 U.S. 1008 (1970).

44. 261 N.C. at 38, 134 S.E.2d at 192.

45. 47 N.C. App. 149, 266 S.E.2d 866 (1980).

46. N.C. CONST. art. I, § 19.

47. 47 N.C. App. at 153, 266 S.E.2d at 868.

48. 42 N.C. App. 481, 256 S.E.2d 833 (1979).

49. 47 N.C. App. at 153, 266 S.E.2d at 868. *Heidler* involved a defendant who requested a jury trial. At trial, plaintiff failed to appear and defendant waived her right to the jury trial. However, plaintiff did not consent to the withdrawal of the jury trial demand as required by N.C. R. CIV. P. 38(d). The court held that rule 38(a) does not provide that failure to appear at trial constitutes consent to the withdrawal of the jury trial demand. 42 N.C. App. at 486, 256 S.E.2d at 835.

50. N.C.R. CIV. P. 38(d), 39(a).

a waiver.[51]

The court of appeals also held in 1980 that an agreement by the parties that a verdict of a stated majority of the jurors should be taken as the verdict of the jury may be made at any time under rule 48 of the Rules of Civil Procedure.[52]

C. *Jurisdiction*[53]

The North Carolina court of appeals decided several cases involving jurisdictional issues in 1980. In *Webb v. James*[54] the court of appeals held that when defendants entered into negotiations with plaintiffs for a continuance of the action, they made an "appearance"[55] within the meaning of rule 55(b)(2)[56] and, therefore, a default judgment entered by the clerk was void.[57]

In *Williams v. Williams*[58] counsel for defendant participated in a pretrial conference in the trial judge's office, and the issue arose whether this was a general appearance which would lead to a waiver of any objections to lack of personal jurisdiction. The court of appeals held that, although it was a close case, the subject matter of the conference[59] was sufficiently directed toward a "purpose in the cause" to constitute a general appearance under G.S. 1-75.7.[60]

In *McGinnis v. McGinnis*[61] the court of appeals held that even though the appellant had filed a timely appeal the trial court was not divested of jurisdic-

---

51. 47 N.C. App. at 152-53, 266 S.E.2d at 868.

52. United States Indus., Inc. v. Tharpe, 47 N.C. App. 754, 765, 268 S.E.2d 824, 831 (1980). In *Tharpe*, a personal injury and wrongful death action, defendant agreed, during the deliberation of the jury, to accept a verdict of nine or more of the jurors. *Id.* at 764, 268 S.E.2d at 831. The verdict was 11 to 1, but defendant argued on appeal that the agreement must be made prior to the start of the jury deliberations. Although defendant could have demanded a unanimous verdict, his agreement to accept a lesser verdict, even when made during the jury deliberations, was held to be binding upon him. *Id.* at 765, 268 S.E.2d at 831.

53. In Questor Corp. v. DuBose, 46 N.C. App. 612, 265 S.E.2d 501, *cert. denied*, 300 N.C. 375, 267 S.E.2d 678 (1980), an action to declare void a sheriff's deed for failure to pay cash at an execution sale (the execution price was set off by creditors' judgment in violation of G.S. § 1-339.47), the court held that the action was not an action to void the deed, but an attempt to attack collaterally the execution sale. Since such an attack may be brought only by motion in the cause or on appeal within 10 days of the entry of the clerk's order, the court had no jurisdiction of the matter, and the action should have been dismissed.

54. 46 N.C. App. 551, 265 S.E.2d 642 (1980).

55. Negotiations between parties after the action has been filed have been held to constitute an appearance. *See, e.g.*, Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975), *cert. denied*, 289 N.C. 619, 223 S.E.2d 396 (1976). An appearance may also arise by implication when the defendant takes some step in the proceedings beneficial to himself or detrimental to the plaintiff. Roland v. W & L Motor Lines, 32 N.C. App. 288, 231 S.E.2d 685 (1977).

56. N.C.R. Civ. P. 55(b)(2).

57. *Id.* When an appearance has been made, a default judgment can only be entered by a judge with three days written notice to the defendant prior to the hearing on the motion.

58. 46 N.C. App. 787, 266 S.E.2d 25 (1980). The defendant in this child custody case was not served with a summons, but N.C. Gen. Stat. § 1-75.7(1) (Cum. Supp. 1979) confers personal jurisdiction over any defendant who has made a general appearance in the action. 46 N.C. App. at 788, 266 S.E.2d at 27.

59. The purpose of the conference was to discuss the validity of an order restraining defendant from removing the child from the jurisdiction. 46 N.C. App. at 787, 266 S.E.2d at 26.

60. N.C. Gen. Stat. § 1-75.7(1) (Cum. Supp. 1979).

61. 44 N.C. App. 381, 261 S.E.2d 491 (1980).

tion[62] because appellant failed to perfect his appeal within the eighty-eight days before judgment was rendered. This failure to perfect appeal was tantamount to an abandonment, to which the general rule of divestiture does not apply.[63]

In *Harding v. Harding*[64] the court of appeals held that in contempt proceedings for disobedience of a court order the defense of invalidity of the order for want of subject matter jurisdiction of the issuing court could be raised, even though the deadline for appeal from the order had passed.[65]

D. Service of Process[66]

In *Hassell v. Wilson*[67] the supreme court ruled that a deputy sheriff's failure to indicate on a return of service the place the papers were left and when the service was made according to the provisions of rule 4(j)(1)a.,[68] made the return "insufficient on its face to show valid service."[69]

Plaintiffs, husband and wife, owned a house and lot subject to a deed of

---

62. The general rule in North Carolina is that an appeal takes the case out of the jurisdiction of the trial court. *See* Sink v. Easter, 288 N.C. 183, 197, 217 S.E.2d 532, 541 (1975).

63. 44 N.C. App. at 385-87, 261 S.E.2d at 494-95. In the instant case, appellant neither tendered a proposed record on appeal within 30 days pursuant to N.C.R. APP. P. 11(c), nor did he seek an extension of time in which to settle the record pursuant to N.C.R. APP. P. 27(c). *Id.* at 386, 261 S.E.2d at 494-95.

64. 46 N.C. App. 62, 264 S.E.2d 131 (1980).

65. *Id.* at 64, 264 S.E.2d at 132. The court treats the case as one of first impression in North Carolina and adopts the general rule, as set forth in 17 AM. JUR. 2d *Contempt* § 42 (1964). In fact, the question was decided in North Carolina in Patterson v. Patterson, 230 N.C. 481, 53 S.E.2d 658 (1949); and again as recently as Carolina Freight Carriers Corp. v. Local 61, Int'l Bhd. of Teamsters, 11 N.C. App. 159, 180 S.E.2d 461, *cert. denied*, 278 N.C. 701, 181 S.E.2d 601 (1971).

66. In *In re* Rogers, 44 N.C. App. 713, 262 S.E.2d 312 (1980), an appeal from civil commitment proceedings, the court of appeals held that a copy of the proposed record on appeal should have been served on the special advocate who represented the State at the civil commitment hearing rather than on the Attorney General, despite the language of N.C. GEN. STAT. § 122-58.9 (Cum. Supp. 1979) that the "Attorney General shall represent the petitioner on appeal." The appointed special advocate had represented the State at the civil commitment hearing "and was qualified to determine for the State if the proposed record on appeal was accurate." 44 N.C. App. at 717, 262 S.E.2d at 314. This made him the "attorney of record" for the purposes of N.C.R. APP. P. 26. The court also stated that the clerk of the superior court of Granville County had no authority to make a determination of proper service of the record under N.C.R. APP. P. 11. *Id.* at 716, 262 S.E.2d at 313. Finally, the court noted that N.C. GEN. STAT. § 122-58.7(b) (Cum. Supp. 1979) had been amended to make staff attorneys from the Attorney General's office who represent the State at commitment hearings in the future the opposing counsels of record for the purposes of rule 26. Law of June 8, 1979, ch. 915, § 13, 1979 N.C. Sess. Laws, 1st Sess. 1260, 1262.

In Quattrone v. Rochester, 46 N.C. App. 799, 266 S.E.2d 40 (1980), the court held that failure to file the affidavit of compliance required under N.C. GEN. STAT. § 1-105(3) (Cum. Supp. 1979), which provides for service of process on the Commissioner of Motor Vehicles, until 14 days after service of the summons on the Commissioner and after the hearing on defendant's motion to dismiss, did not invalidate the service when all the requirements of G.S. 1-105 were complied with for service on a nonresident defendant. The court stated that the filing of the affidavit "merely perfects the record and furnishes proof of compliance with G.S. 1-105 for the guidance of the courts"—it does not affect the completeness of the service. 46 N.C. App. at 802, 266 S.E.2d at 42.

67. 301 N.C. 307, 272 S.E.2d 77 (1980).

68. N.C.R. CIV. P. 4(j)(1)a.

69. 301 N.C. at 315, 272 S.E.2d at 82.

trust held by a savings and loan association,[70] and sought to set aside an order of foreclosure and the trustee's deed. The ensuing circumstances are best expressed by the court:

> Plaintiff husband was employed away from home . . . and entrusted his wife with the duty and necessary funds to make the required payments on the loan. This she failed to do. She also failed to tell her husband she was not making the payments. Foreclosure proceedings were begun against the home. When [the] deputy sheriff served notice of the foreclosure hearing on [wife], she hid the papers under a mattress, never delivered them to her husband, and never told him about them. [Wife] did attend the hearing before the clerk . . . but said nothing about it to her husband. Pursuant to the foreclosure order issued after the hearing . . . the foreclosure sale was held . . . . [The property was conveyed to defendants] for the price of $6,300. [Husband] first learned of these developments [after the sale] when his sister and brother found the papers and brought them to him. Plaintiffs purchased their home in 1971 for $7,900 and made extensive additions and renovations. Apparently they are willing to reimburse defendants for the $6,300 [and] have deposited this amount with the clerk.[71]

Noting that this independent action could be allowed to attack the foreclosure proceedings only if the "defect in the service of process appear[ed] on the face of the return itself,"[72] the court pointed out the requirement that plaintiff-husband be "served with notice of the foreclosure hearing in accordance with the Rules of Civil Procedure."[73] Personal service was not attempted, but substituted service under rule 4(j)(1)a was.[74] This rule invalidates service that is not made at "a place which constitutes the dwelling of both the person to be served and the person with whom the papers are left."[75] When service is challenged, G.S. 1-75.10 provides for proof of service "by the officer's certificate thereof, showing *place*, time and manner of service."[76]

In the officer's return of service,[77] the blank space on the form for indicat-

70. At the time payments were stopped, plaintiffs owed $5,035.62 plus interest to the association. *Id.* at 309, 272 S.E.2d at 79.

71. *Id.*

72. *Id.* at 312, 272 S.E.2d at 80.

73. *Id.*

74. *Id.*

75. *Id.* at 312, 272 S.E.2d at 81. See N.C.R. Civ. P. 4(j)(1)a.: "[B]y leaving copies thereof at the *defendant's dwelling house* or *usual place of abode* with *some person* of suitable age and discretion *then residing therein*; . . ." (emphasis added).

76. N.C. Gen. Stat. § 1-75.10(1)(a) (1969) (emphasis added).

77. I certify that this Order of Service was received on the 15th day of September, 1977 and together with the copy of the Notice of Hearing was served as follows: on Tex. R. Hassell.

On the 16 day of Sept., 1977 at the following place:

(Address where copy delivered or left)

By: X leaving copies with Phronia Loy Hassell who is a person of suitable age and

ing the place of service was not filled in.[78] The court reasoned that "[p]lace is a prerequisite to valid substituted service under rule 4(j)(1)a; and place must be stated in the return under G.S. 1-75.10. Therefore the return was insufficient on its face to show valid service."[79]

The court distinguished *Guthrie v. Ray*,[80] in which the supreme court held "that a similar return of service substantially complied with Rule 4(j)(1)a,"[81] because the return showed the address where service was made—the same address given for defendant in the summons.[82]

Earlier cases, including *State v. Moore*,[83] had concluded that "if the return merely recites that it was 'served' without detailing the manner of service it is sufficient to show proper service."[84] These cases, however, concerned personal service, not substituted service, and were decided prior to the enactment of rule 4(j)(1)a and G.S. 1-75.10.[85] In addition, the statute supporting the decisions in those cases was repealed at the same time G.S. 1-75.10 was enacted.[86]

Because the statute authorizing substituted service is "in derogation of the common law," it is to be "strictly construed, and must be followed with particularity;"[87] the *Hassell* court concluded that an "affirmative" showing of "due service" was necessary.[88] The court went on, however, to point out that while "the defect . . . is sufficient to permit the foreclosure proceedings to be attacked in an independent action, it is not . . . necessarily fatal to the foreclosure proceedings."[89] The return may be amended, if the court allows, and the amendment given retroactive effect.[90] Whether amendment should be allowed "rests within the sound discretion of the trial judge," and leave to amend must be "warranted by the facts, circumstances and the ends of justice."[91] The question was remanded to the trial court.[92]

In *Kahan v. Longiotti*[93] the court of appeals held that

---

discretion and who resides in the designated recipient's dwelling house or usual place of abode.

301 N.C. at 310, 272 S.E.2d at 79.

78. *Id.* at 313, 272 S.E.2d at 81.

79. *Id.* at 315, 272 S.E.2d at 82.

80. 293 N.C. 67, 235 S.E.2d 146 (1977).

81. 301 N.C. at 313, 272 S.E.2d at 81.

82. *Id.* The court noted, however, that "[t]he better practice [was] to state explicitly in [the] return of service that the place where the summons was left was the dwelling house or usual place of abode of both the named defendant and 'the person . . .' to whom [the summons was delivered]." *Id.* (quoting *Guthrie*, 293 N.C. at 70, 235 S.E.2d at 148).

83. 230 N.C. 648, 55 S.E.2d 177 (1949).

84. 301 N.C. at 313, 272 S.E.2d at 81.

85. *Id.* at 314, 272 S.E.2d at 81-82.

86. *Id.* at 314 n.4, 272 S.E.2d at 82 n.4.

87. *Id.* at 314, 272 S.E.2d at 82.

88. *Id.* at 315, 272 S.E.2d at 82.

89. *Id.* at 315, 272 S.E.2d at 82-83.

90. *Id.* at 315-16, 272 S.E.2d at 83.

91. *Id.* at 316, 272 S.E.2d at 83.

92. *Id.* at 316-17, 272 S.E.2d at 83.

93. 45 N.C. App. 367, 263 S.E.2d 345, *cert. denied*, 300 N.C. 374, 267 S.E.2d 675 (1980).

> an intervenor party who is granted permission to intervene pursuant to Rule 24(b)(2)[94] is not required to then issue [sic] a summons and complaint pursuant to Rule 4[95] but that the service pursuant to Rule 5[96] of the motion to intervene accompanied with the complaint is sufficient service upon the party against whom relief is sought or denied in the intervenor's pleading and is sufficient to acquire jurisdiction over the party if all other requisites for jurisdiction over the party are met.[97]

In *Kahan* plaintiff-intervenor, a corporation, was allowed to intervene in an action on a partnership of joint venture accounting as an assignee of the original plaintiff, which status entitled it to an accounting.[98] Defendant was properly served with the intervenor's complaint and the motion to intervene. Defendant opposed the motion to intervene because no summons was ever issued to the defendant in connection with plaintiff-intervenor's suit. This opposition was futile and defendant was given thirty days in which to respond to intervenor's complaint.[99]

The trial court found that plaintiff-intervenor's compliance with rule 5[100] was sufficient notice to defendant and a rule 4[101] summons was not required.[102] The court of appeals noted that rule 24(c) requires that "[a] person desiring to intervene shall serve a motion to intervene upon all parties affected thereby."[103] Unlike the original federal rule, the North Carolina version of 24(c) does not expressly provide that the motion to intervene shall be served "as provided in Rule 5."[104] The court found, however, that rule 5 service "is the better procedure."[105]

Defendant had relied on *In re Indiana Transportation Co.*[106] and *Ruck v. Spray Cotton Mills*[107] as requiring that an intervenor "issue summons and serve the complaint pursuant to Rule 4."[108] The court of appeals distinguished *Indiana Transportation* as a situation in which "defendant was no longer subject to process in the jurisdiction"[109] and as treating the 373 wrong-

---

94. N.C.R. Civ. P. 24(b)(2).

95. N.C.R. Civ. P. 4.

96. N.C.R. Civ. P. 5.

97. 45 N.C. App. at 372, 263 S.E.2d at 348.

98. *Id.* at 368, 263 S.E.2d at 346.

99. *Id.* at 369, 263 S.E.2d at 346-47.

100. N.C.R. Civ. P. 5 requires that pleadings and motions subsequent to the original complaint "shall be served upon each of the parties," N.C.R. Civ. P. 5(a), "in the manner provided for service and return of process in Rule 4," N.C.R. Civ. P. 5(b).

101. N.C.R. Civ. P. 4(a): "Upon the filing of the complaint, summons shall be issued forthwith."

102. 45 N.C. App. at 370, 263 S.E.2d at 347.

103. N.C.R. Civ. P. 24(c).

104. Fed. R. Civ. P. 24(c).

105. "[A]nd certainly in keeping with the spirit and purpose of the Rules of Civil Procedure." 45 N.C. App. at 372, 263 S.E.2d at 348.

106. 244 U.S. 456 (1917).

107. 120 F. Supp. 944 (M.D.N.C. 1954).

108. 45 N.C. App. at 374, 263 S.E.2d at 349.

109. *Id.* In the instant case, defendant did not contest personal jurisdiction. *Id.*

ful death actions as "separate", whereas in *Kahan* "the same basic facts . . . are alleged by both plaintiff and plaintiff intervenor and the same rules of partnership law are applicable."[110] Additionally, the court pointed out that it is questionable whether the *Indiana Transportation* rule "survived the adoption of the Federal Rules."[111] *Ruck* was distinguished as dealing with an attempt at intervention in an "independent proceeding,"[112] whereas *Kahan* dealt with "a claim on common questions of fact and law."[113]

Plaintiff-intervenor had not commenced an action under rule 3,[114] but had entered an already extant action. Defendant had "ample time" in which to answer the new complaint, and issuance of a new summons under the circumstances would have been "superfluous."[115]

The court of appeals also held in 1980 that delivery of a copy of the summons and complaint to a defendant's place of business rather than to his residence does not comply with rule 4(j)(1)(a) of the Rules of Civil Procedure and is not sufficient service of process to confer jurisdiction over the defendant.[116]

E. Statutes of Limitations[117]

The case of *First Citizens Bank & Trust Co. v. Martin*[118] dealt with the applicability of the one-year statute of limitations "[f]or a deficiency judgment on any . . . promissory note . . . after the foreclosure of a mortgage or deed of

110. *Id.* at 374, 263 S.E.2d at 350.

111. *Id. See* Berman v. Herrick, 30 F.R.D. 9, 13 (E.D. Pa. 1962); 3B J. MOORE, FEDERAL PRACTICE ¶ 24.20 (2d ed. 1980); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1919 (1972).

112. In *Ruck* the original action was for the payment of dividends; in *Kahan* intervenors brought an action for collection of attorney's fees. 45 N.C. App. at 375, 263 S.E.2d at 350.

113. *Id.*

114. N.C.R. CIV. P. 3.

115. 45 N.C. App. at 376, 263 S.E.2d at 351.

116. Hall v. Lassiter, 44 N.C. App. 23, 25, 260 S.E.2d 155, 157 (1980). The *Hall* court refused to extend Wiles v. Welparnel Constr. Co., 295 N.C. 81, 243 S.E.2d 756 (1978), to apply to cases in which manner of service of the summons does not comply precisely with rule 4. Despite broad language in *Wiles* about actual notice curing defects in service of process, the opinion was thus limited to cases involving formal defects in the summons or complaint. 44 N.C. App. at 25, 260 S.E.2d at 157. *Wiles* involved a summons which was directed to a corporation's registered agent rather than to the corporate defendant itself, as required by N.C.R. CIV. P. 4(b). 295 N.C. at 85, 243 S.E.2d at 758.

117. In Citizens Ass'n v. City of Washington, 45 N.C. App. 7, 262 S.E.2d 343, *cert. denied*, 300 N.C. 195, 269 S.E.2d 622 (1980), applying G.S. 159-62 to a contest of referendum results, the court held that the statutory time limit for bringing claims was computed from the first publication of the results, and that a second publication of the corrected results did not operate to extend the original time limit.

In Central Syss., Inc. v. General Heating & Air Conditioning Co., 48 N.C. App. 198, 268 S.E.2d 822 (1980), Judge Webb ruled that although plaintiff had taken a voluntary dismissal under N.C.R. CIV. P. 41, and had not served defendant with process within the statutory limit of 90 days after the preceding endorsement, the action was not barred but was simply discontinued pursuant to N.C.R. CIV. P. 4(e), and could be revived by suing out an alias or pluries summons or by obtaining an extension from the clerk of the time in which to serve process. 48 N.C. App. at 201, 268 S.E.2d at 823. Defendants had claimed that the one-year statute of limitations for reinstituting an action after taking a voluntary dismissal had run.

118. 44 N.C. App. 261, 261 S.E.2d 145 (1979), *cert. denied*, 299 N.C. 741, 267 S.E.2d 661 (1980).

trust on real estate securing such . . . note"[119] to a maker of the note who is not a mortgagor of the property.[120] The court of appeals held that "only a party with an interest in the mortgaged property may assert [the one-year statute of limitations] as a bar to an action for a deficiency judgment."[121]

In this question of first impression the court noted a split among jurisdictions[122] and found support for its holding in legislative intent. The present statute, first enacted in 1933,[123] "was obviously intended to restrict the personal liability of debtors upon the foreclosure of property during the depression."[124] Another statute[125] enacted in 1933 allowed an assertion that the purchase price was below fair market value as a defense to an action for a deficiency by a mortgagee who had purchased the property.[126] The defense was made available only to a "maker of any such obligation *whose property [had] been so purchased*."[127] From this the court concluded that the legislature intended to extend protection only to those with "a property interest in the mortgaged property," and *not* to "other parties liable on the underlying debt."[128]

The court also noted that under the terms of the note each maker was liable for the entire debt. If plaintiff had brought this action prior to foreclosure, defendant would have been fully liable and without recourse to the statute of limitations. Defendants, having suffered no loss as a result of the foreclosure on property in which they held no interest, should not be able to assert the abbreviated limitations period "merely because the plaintiff elected to foreclose on the mortgaged property first."[129] Finally, the court noted that its holding was "consistent with the general rule that a statute of limitations should not be applied to cases not clearly within its provisions."[130]

In *Stutts v. Duke Power Co.*[131] the court of appeals distinguished two complaints based on defendant's allegedly libelous statements made at the time it discharged plaintiff from employment. The first complaint was based on the denial by the Employment Security Commission of plaintiff's unemployment benefits because of defendant's statement on the discharge slip that plaintiff was "discharged for misconduct" and for "a dishonest act."[132] The second claim was based on the impairment of plaintiff's reputation and his

119. N.C. GEN. STAT. § 1-54(6) (1969).
120. 44 N.C. App. at 262-63, 261 S.E.2d at 147.
121. *Id.* at 264, 261 S.E.2d at 148.
122. *Id.* at 263, 261 S.E.2d at 147.
123. Law of May 15, 1933, ch. 529, § 1, 1933 N.C. Sess. Laws 880 (current version at N.C. GEN. STAT. § 1-54(6) (1969)).
124. 44 N.C. App. at 263, 261 S.E.2d at 147.
125. Law of April 18, 1933, ch. 275, § 3, 1933 N.C. Sess. Laws 402 (current version at N.C. GEN. STAT. § 45-21.36 (1976)).
126. 44 N.C. App. at 263, 261 S.E.2d at 148.
127. *Id.* at 263-64, 261 S.E.2d at 148.
128. *Id.* at 264, 261 S.E.2d at 148.
129. *Id.*
130. *Id.*
131. 47 N.C. App. 76, 266 S.E.2d 861 (1980).
132. *Id.* at 79, 266 S.E.2d at 864.

ability to obtain other employment as a result of defendant's including in plaintiff's employment record that he was discharged for a dishonest act, and repeating that charge through its employees and agents to plaintiff's fellow workers and to prospective employers.[133]

Although the two complaints "stemmed" from the same discharge, the court held they were not based on the same claim.[134] Thus the latter action, which was commenced after the statute of limitations had run, could not be saved under rule 41(a)(1) by relating it back to the date of the filing of the former complaint, which was voluntarily dismissed under rule 41 within one year of the filing of the second complaint.[135]

In *Burcl v. North Carolina Baptist Hospital, Inc.*,[136] the court of appeals held that plaintiff's wrongful death action was barred because she had not qualified as administratrix in North Carolina within the statutory two year period,[137] and the amendment to her complaint did not relate back to the original action that was dismissed because the plaintiff was a foreign administratrix.

Plaintiff argued that she acted in good faith, that defendant had not been prejudiced by the amendment, and that in a case such as this, the statute of limitations should not be strictly construed to deny a hearing of the action on its merits.[138] The court of appeals' adherance to an unbending interpretation of the statute of limitations seems unwarranted by the facts of *Burcl* or by the policies behind the statute.

In *Danielson v. Cummings*[139] the supreme court was faced with the question of when the statute of limitations begins to run after the taking of a voluntary dismissal: from the time notice is given in open court of intent to take a dismissal or from the time written notice of dismissal is filed with the clerk.

The court held that the statute began to run from the time of oral notice in open court because

---

133. *Id.* at 80-81, 266 S.E.2d at 864.

134. *Id.* at 79, 266 S.E.2d at 864.

135. *Id.* at 81, 266 S.E.2d at 864. N.C.R. CIV. P. 41(a)(1) provides that if an action is brought within the statute of limitations and is then voluntarily dismissed without prejudice, a new action based on the same claim can be commenced within one year of the dismissal.

The *Stutts* court also stated that the actionable words must be alleged in the complaint " 'substantially' *in haec verba*, or with sufficient particularity to enable the court to determine whether the statement was defamatory." 47 N.C. App. at 84, 266 S.E.2d at 866. The court found that the plaintiff's complaint met the standard as required. *Id.*

136. 47 N.C. App. 127, 266 S.E.2d 726, *cert. denied*, 301 N.C. 86, 273 S.E.2d 444 (1980). Plaintiff was the administratrix of decedent's estate in Virginia and brought a wrongful death action in North Carolina pursuant to N.C. GEN. STAT. § 28A-18-2(a) (1976). The original action could not be maintained because an administrator of another state may not bring suit in North Carolina, but plaintiff was qualified as an ancillary administratrix in North Carolina.

137. N.C. GEN. STAT. § 1-53(4) (1979).

138. *But see* Merchants Distrib. v. Hutchinson, 16 N.C. App. 655, 193 S.E.2d 436 (1972).

139. 300 N.C. 175, 265 S.E.2d 161 (1980). *Danielson* was a personal injury case. On February 1, 1977, plaintiff's counsel gave notice in open court of his intention to take a voluntary dismissal, but he did not file written notice until April 25, 1977. Defendant then pled the statute of limitations, arguing that it had been one year and 14 days since plaintiff took a voluntary dismissal in open court. The applicable statute of limitations was one year. Plaintiff contended that the statute begins to run from the time written notice is filed.

> when parties confront each other face-to-face in a properly convened session of court where a written record is kept of all proceedings, there is no necessity to file a paper writing in order to take notice of a voluntary dismissal. In such a case, oral notice of dismissal is clearly adequate, and fully satisfies the "filing" requirements of rule 41(a)(1).[140]

F. Res Judicata[141]

The plaintiff in *Thompson v. Northwestern Security Life Insurance Co.*[142] had previously brought an action against defendant in her capacity as administratrix of the estate of her husband, whose life had been insured by a policy issued by defendant.[143] That action had been dismissed for failure to prosecute.[144] In the instant action plaintiff again served defendant, this time in her individual capacity as beneficiary under the policy.[145] The trial court denied defendant's motion to dismiss plaintiff's claim on grounds of res judicata.[146]

The court of appeals, noting that a judgment on the merits bars relitigation of issues in a subsequent action by "parties or their privies" to the first action,[147] nevertheless found that the "insufficient identity of parties"[148] caused by the change in capacity in which plaintiff sued prevented a res judicata bar to the suit.[149] Lack of identity of parties was predicated on plaintiff's entitlement to payment under the policy only "in her *individual* capacity as the wife and beneficiary of the insured," and not in her capacity as administratrix in the prior action.[150]

This result is difficult to reconcile with *King v. Grindstaff*[151] and *Thompson v. Lassiter*.[152] In *Grindstaff* the court found that when the sole benefi-

---

140. *Id.* at 179, 265 S.E.2d at 163. N.C.R. Civ. P. 41(a)(1) provides that "any claim . . . may be dismissed by the plaintiff without order of court (1) by filing a notice of dismissal at any time before plaintiff rests his case." *See also* Wood v. Wood, 297 N.C. 1, 252 S.E.2d 799 (1979).

Another case concerning voluntary dismissals was Swygert v. Swygert, 46 N.C. App. 173, 264 S.E.2d 902 (1980), in which it was held that when the defendant has filed a counterclaim that arises out of the same transaction alleged in the complaint, plaintiff thereby loses the right to take a voluntary dismissal without defendant's consent. The case approved the ruling in McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

141. Department of Social Servs. v. Skinner, 48 N.C. App. 621, 269 S.E.2d 678 (1980), held that a court ruling that plaintiff had no standing to sue did not have res judicata effect when no summons had been issued in the previous action. Due to the failure of summons, the prior action was held to be a nullity and the recital of lack of standing was of no effect.

142. 44 N.C. App. 668, 262 S.E.2d 397, *cert. denied*, 300 N.C. 202, 269 S.E.2d 620 (1980).

143. *Id.* at 671, 262 S.E.2d at 399.

144. *Id. See* N.C.R. Civ. P. 41(b): "For failure of the plaintiff to prosecute . . . a defendant may move for dismissal of an action . . . against him. . . . Unless the court . . . otherwise specifies, a dismissal under this section . . . operates as an adjudication upon the merits."

145. 44 N.C. App. at 671, 262 S.E.2d at 399.

146. *Id.*

147. 44 N.C. App. at 677, 262 S.E.2d at 403; *see* note 144 *supra*.

148. 44 N.C. App. at 677-78, 262 S.E.2d at 403.

149. *Id.*

150. *Id.* at 677, 262 S.E.2d at 403 (emphasis in original). The issue in either proceeding would be the same—whether the insurance company is liable on the policy.

151. 284 N.C. 348, 200 S.E.2d 799 (1973).

152. 246 N.C. 34, 97 S.E.2d 492 (1957).

ciaries under the wrongful death statute were plaintiffs in a prior action against the same defendants based on the same issues, sufficient identity of parties existed to make judgment on those issues conclusive, the beneficiaries being the real parties in interest in the subsequent wrongful death action.[153] The court of appeals' ruling tends to indicate that an administrator, even if an heir to the estate, is *not* the real party in interest of an action brought on behalf of the estate.

Even if sufficient identity of parties is not found, principles of res judicata may still apply, according to *Lassiter*, with regard to

> [a] person who is not a party but who controls an action, individually or in cooperation with others, . . . if he has a proprietary interest or financial interest in the judgment or *in the determination of a question of fact or a question of law with reference to the same subject matter, or transactions*.[154]

The result of *Northwestern Security Life* may indicate an unwillingness on the part of the court of appeals to apply the *Lassiter* rule to situations in which the questions were not actually litigated, or, more likely, to situations in which, as a matter of law, there could be no recovery for the party in the capacity in which the previous action had been brought.[155]

The court's opinion also tends to ignore the general rule that a final judgment is conclusive with regard to "all material and relevant matters within the scope of the pleadings, which the parties, in the exercise of reasonable diligence, could and should have brought forward."[156] The court easily could have found that plaintiff, "in the exercise of reasonable diligence, could and should have brought forward" her individual claim and her claim as administratrix at the same time.[157]

In *Phillips v. Phillips*[158] the court of appeals held that although the separation agreement between plaintiff and defendant was not specifically raised in an earlier action[159] between the same parties, it formed the basis of plaintiff's right to recover and was therefore within the scope of the pleadings. Thus, the issue of the validity of the separation agreement was res judicata in this action.[160] The court also stated that res judicata was not a defense to breach of

---

153. 284 N.C. at 357-58, 200 S.E.2d at 806.

154. 246 N.C. at 39, 97 S.E.2d at 496 (emphasis in original).

155. *See* 44 N.C. App. at 677, 262 S.E.2d at 403.

156. Bruton v. Carolina Power & Light Co., 217 N.C. 1, 7, 6 S.E.2d 822, 826 (1940).

157. *Cf.* Andrews v. Masons, 189 N.C. 697, 128 S.E. 4 (1925) (plaintiff suing on life insurance policy both in personal capacity and as administratrix.)

158. 46 N.C. App. 558, 265 S.E.2d 441 (1980). The case involved a suit for back alimony in which defendant pled as defenses fraud and duress in the separation agreement.

159. The earlier action ended in a consent judgment for the plaintiff. "[A] consent judgment [as well as a judgment on trial of issues] is *res judicata* as between the parties upon all matters embraced therein." McLeod v. McLeod, 266 N.C. 144, 153, 146 S.E.2d 65, 71 (1966). For a helpful definition of res judicata, see Masters v. Dunstan, 256 N.C. 520, 124 S.E.2d 574 (1962).

160. "The plea of *res adjudicata* applies not only to the points upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject in litigation." Painter v. Board of Educ., 288 N.C. 165, 173, 217 S.E.2d 650, 655 (1975).

the agreement when the alleged breach arose subsequent to the earlier action.[161]

Principles of res judicata were held to bar "litigating or relitigating issues in an arbitration proceeding which are raised or could have been raised in the prior action" in *C & O Development Co. v. American Arbitration Association*.[162]

G. Summary Judgment

Steel Creek Development Corp. v. James[163] evidenced an attempt by the supreme court to provide guidelines as to when summary judgment should be granted. The court stated that when the movant has carried his burden of proof on the motion for summary judgment, his motion is entitled to be granted unless his opponent responds by producing evidence or has an excuse for not doing so.[164] Assuming the opposing party has no excuse for not producing evidence, after the movant has carried his burden he may be granted summary judgment through either of two ways. First, the movant may show through evidence obtained via discovery that the opponent cannot produce enough evidence to support at least one essential element of his affirmative defense.[165] Second, if the opponent, in response to the movant's carrying his burden, responds with affidavits or other evidence, the movant will thereby obtain a forecast of his opponent's evidence that may once again reveal that the opponent cannot support at least one essential element of his affirmative defense.[166] "Thus, a party may succeed on a summary judgment motion upon the strength of his own evidence or upon the weakness of the opposing party's evidence when such a forecast of that evidence can be obtained in discovery or

161. 46 N.C. App. at 563, 265 S.E.2d at 444.

162. 48 N.C. App. 548, 553, 269 S.E.2d 685, 687 (1980). This appears to be the first time in North Carolina that res judicata has been used to bar arbitration proceedings. The question was not directly raised by appellant, who attacked the power of the court to determine whether the subject matter in question had been previously reduced to a binding judgment and the finding by the trial court that the requirements for application of res judicata had been met, *id.* at 552-53, 269 S.E.2d at 686, not whether res judicata principles were applicable to bar arbitration proceedings as opposed to judicial proceedings. In any event, the result would appear to be a generally accepted one. *See* DOMKE, COMMERCIAL ARBITRATION § 39.04 (1968).

The trial court's power to issue a stay of arbitration proceedings was justified on the grounds that it is the province of the courts to determine "the extent of a judgment's binding effect," 48 N.C. App. at 552, 269 S.E.2d at 687.

163. 300 N.C. 631, 268 S.E.2d 205 (1980).

164. *Id.* at 639, 268 S.E.2d at 210.

N.C.R. CIV. P. 56(c) dictates 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 judgment as a matter of law."

It is well settled that the party moving for summary judgment has the burden of proof on the motion. *See* Koontz v. City of Winston-Salem, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). In order for the plaintiff to obtain summary judgment, he must establish that there is no genuine issue of a material fact on any of the essential elements of his claim, and that there is no genuine issue of a material fact as to one or more elements of the opponent's affirmative defenses, if any. *See* Steel Creek Dev. Corp. v. James, 300 N.C. 631, 637-38, 268 S.E.2d 205, 209-10 (1980).

165. *Cf.* Moore v. Fieldcrest Mills, Inc., 296 N.C. 467, 474, 251 S.E.2d 419, 424 (1979) (elements of a claim).

166. See 2 A. MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE § 1660.5 (2d ed. Supp. 1970).

in response to movant's *prima facie* showing on the motion."[167]

Middleton v. Myers[168] involved a tort suit for malicious prosecution in which plaintiff claimed that defendant planted drugs in plaintiff's car and called the police to arrest plaintiff. The defendant-movant's affidavit stated that he informed the police in good faith. Plaintiff-opponent's affidavits showed that defendant was a pharmacist with access to illegal drugs, that defendant refused to tell the arresting officer where he received his information that the drugs would be in the car, and, finally, that defendant fabricated testimony about a conversation he overheard that implicated plaintiff in illegal drug operations.[169]

Justice Brock, writing for the majority, stated that movant's affidavit averring good faith carried his burden of proof on the motion, and that plaintiff's counter-affidavits failed to create any factual issue of the maliciousness of defendant's conduct.[170] Both of these majority propositions are dubious at best, especially when the evidence is viewed in the light most favorable to the party opposing the motion for summary judgment, the plaintiff.[171] Justice Exum's forceful dissent[172] correctly recognized the pitfall that this and other courts have fallen into—sitting as a trier of fact on a motion for summary judgment.[173]

In *Bell v. Martin*[174] defendant failed to file a responsive pleading, and plaintiff's motion for summary judgment on the allegations in the complaint was granted by the trial court and affirmed by one court of appeals.[175] The supreme court reversed, holding that the proper motion was for an entry of default under rule 55(a),[176] because the granting of summary judgment precluded defendant from presenting any testimony in opposition to the motion or defenses on the merits.[177]

The supreme court, in *Kavanau Real Estate Trust v. Debnam*,[178] settled the question left open by the court of appeals[179] whether summary judgment for plaintiff could be entered even before defendant had filed an answer by

167. 300 N.C. at 639, 268 S.E.2d at 211.

168. 299 N.C. 42, 261 S.E.2d 108 (1980).

169. 299 N.C. at 51, 261 S.E.2d at 113-14 (Exum, J., dissenting).

170. 299 N.C. at 46, 261 S.E.2d at 110-11.

171. *See, e.g.*, Patterson v. Reid, 10 N.C. App. 22, 178 S.E.2d 1 (1970). Additionally, any doubt as to whether a genuine issue of fact exists must be resolved against the movant. *See, e.g.*, Bentley v. Langley, 39 N.C. App. 20, 249 S.E.2d 481 (1978).

172. 299 N.C. at 50-52, 261 S.E.2d at 113-14 (Exum, J., dissenting). Justice Huskins also filed a dissent in which Justices Copeland and Exum joined. *Id.* at 47-50, 261 S.E.2d at 111-13 (Huskins, J., dissenting).

173. Courts are not to resolve disputed issues of fact on a motion for summary judgment. *See, e.g.*, Patterson v. Reid, 10 N.C. App. 22, 178 S.E.2d 1 (1970).

174. 299 N.C. 715, 264 S.E.2d 101 (1980).

175. 43 N.C. App. 134, 258 S.E.2d 403 (1979).

176. N.C.R. Civ. P. 55(a). *See* notes 182-88 and accompanying text *infra*.

177. 299 N.C. at 721-22, 264 S.E.2d at 105.

178. 299 N.C. 510, 263 S.E.2d 595 (1980), *aff'g* 41 N.C. App. 256, 254 S.E.2d 638 (1979).

179. In the case of Alpine Village, Inc. v. Lomas & Nettleton Financial Corp., 27 N.C. App. 403, 219 S.E.2d 242 (1975), *cert. denied*, 289 N.C. 302, 222 S.E.2d 695 (1976).

holding that under rule 56(a)[180] such a judgment was proper.[181]

H. Default Judgments

In *Love v. Nationwide Mutual Insurance Co.* [182] plaintiff obtained a judgment against defendant's insured, who did not appear at the trial. However, plaintiff's counsel did not serve Nationwide with a copy of the summons, complaint, or other pleadings, and Nationwide was never notified of the action by its insured. Plaintiff then brought suit against Nationwide to collect on its judgment against the insured.

G.S. 20-279.21(f)(1)[183] precludes collecting from the insurer on a default judgment against the insured, unless the insurer has been served in the default judgment action. In a case of first impression, the North Carolina Court of Appeals held that a "default judgment" under G.S. 20-279.21(f)(1) includes "all judgments obtained where an insured person . . . has not timely filed a responsive pleading or has otherwise made hismself *subject to* a Rule 55 default."[184]

The court of appeals first determined that plaintiff's decision to go to trial and to bypass the procedure for the entry of default under rule 55 of the Rules of Civil Procedure did not bar her from obtaining a judgment against a nonappearing defendant.[185] The court then decided that in light of the purpose of the statute, which is to give insurers notice of actions against their insureds so the insurers can protect their interests, when a judgment is had against a nonappearing defendant after trial it comes within the meaning of "default judgment" as that term is used in the statute.[186] The court believed the burden

---

180. N.C.R. Civ. P. 56(a), which provides that a motion for summary judgment may be made "at any time after the expiration of 30 days from the commencement of the action."

181. The supreme court reasoned that by statute a motion for summary judgment was allowed after 30 days from the commencement of the action, without regard to defendant's having answered, *see* note 180 *supra*; that even if defendant had answered, he would not be able to rest on his pleadings, but would still be required to file affidavits in opposition to plaintiff's motion; and that the result reached by the court of appeals, that summary judgment was "not premature," 41 N.C. App. at 262, 254 S.E.2d at 642, was correct, 299 N.C. at 513, 263 S.E.2d at 598.

182. 45 N.C. App. 444, 263 S.E.2d 337 (1980).

183. N.C. Gen. Stat. § 20-279.21(f)(1) (Supp. 1979) provides, in part:

> As to policies issued to insureds in this State under the assigned risk plan or through the North Carolina Motor Vehicle Reinsurance Facility, a *default judgment* taken against such an insured shall not be used as a basis for obtaining judgment against the insurer unless counsel for the plaintiff has forwarded to the insurer, or to one of its agents, by registered or certified mail with return receipt requested, or served by any other method of service provided by law, a copy of summons, complaint, or other pleadings, filed in the action. . . .

Id. (emphasis added).

184. Love v. Nationwide Mut. Ins. Co., 45 N.C. App. 444, 448, 263 S.E.2d 337, 339 (1980).

185. *Id.* at 447, 263 S.E.2d at 339. The court cited Whitaker v. Whitaker, 16 N.C. App. 432, 192 S.E.2d 80 (1972), as controlling. *Whitaker* held that an entry of default under N.C.R. Civ. P. 55(a) is not a prerequisite to a judgment against a defendant who has not answered, but has appeared at trial.

186. 45 N.C. App. at 448, 263 S.E.2d at 339-40. *See* N.C. Gen. Stat. § 20-279.21 (1978 & Supp. 1979).

placed on plaintiff's attorney to notify the insurer[187] would be slight compared to the risk of loss to the insurer if it is denied the opportunity to defend against the action. Therefore, the failure to give the insurer notice of the action against the insured barred the plaintiff from maintaining her action against Nationwide to collect on the judgment.

In another case the court of appeals held that filing of an answer thirty-seven days after being served with the complaint does not prevent the clerk from entering a default judgment.[188]

I. Rule 60(b) Relief from Judgment

In *Endsley v. Wolfe Camera Supply Corp.*,[189] a case of first impression under rule 60(b)(1) of the Rules of Civil Procedure,[190] plaintiff failed to appear in court, when his trial reconvened, due to his counsel's being delayed at another hearing in another county on the same morning. The court of appeals held that the counsel's delay was a sufficient ground for setting aside the judgment against plaintiff on the basis of "surprise."[191] The trial court had found that plaintiff's attorney was unaware of the conflict at the time the plaintiff's hearing was scheduled, and that the attorney's secretary had informed the clerk of the court of the conflict and possible delay.[192] The trial court concluded that plaintiff was "surprised" by the delay in the other proceedings and that the judgment against plaintiff should be set aside.

The court of appeals affirmed, although it noted that the "surprise" involved might be more appropriately called "mistake" or "excusable neglect."[193] In support of its affirmation, the court of appeals cited the North Carolina Supreme Court's statement that "[t]he surprise contemplated by the statute is some condition or situation in which a party to a cause is unexpectedly placed to his injury, without any fault or negligence on his own, which ordinary prudence could not have guarded against."[194] Also, the court relied

187. 45 N.C. App. at 448, 263 S.E.2d at 340. Plaintiff's counsel would have "to inquire into the insurance status of the defendant" to determine if any notice is necessary. *Id.*

188. Peebles v. Moore, 48 N.C. App. 497, 502, 269 S.E.2d 694, 697 (1980). The court held that while the type of response to a complaint required from the defendant has been liberally construed, the 30 day time limit will be strictly applied. 48 N.C. App. at 502, 269 S.E.2d at 697. However, the court went on to hold that the superior court had abused its discretion in failing to set aside the entry of default where the equities of the situation favored setting aside the default. *Id.* at 507, 269 S.E.2d at 700.

189. 44 N.C. App. 308, 261 S.E.2d 36 (1979).

190. N.C.R. Civ. P. 60(b) reads, in part: "On 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 for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect. . . ."

191. 44 N.C. App. at 310, 261 S.E.2d at 38.

192. *Id.* at 309, 261 S.E.2d at 37. The court found that the attorney was scheduled to be in District Court in Gaston County at 9:30 a.m., one hour before the trial in the instant case was to reconvene in Mecklenburg County. The court also found that the judge was late in arriving at the Gaston County courthouse, thus causing the delay. *Id.*

193. 44 N.C. App. at 312, 261 S.E.2d at 39. Although it did not seem to affect the court of appeals, it is at least questionable whether the failure of plaintiff's attorney to keep track of his schedule only one day in advance can be termed "excusable neglect."

194. 44 N.C. App. at 310, 261 S.E.2d at 38 (citing Townsend v. Coach Co., 231 N.C. 81, 85, 56 S.E.2d 39, 42 (1949)).

on *Greater Baton Rouge Golf Association v. Recreation and Park Commission*,[195] a Fifth Circuit case with strikingly similar facts. In *Golf Association* the Fifth Circuit reversed a district court's denial of a rule 60(b)[196] motion and urged that a liberal construction be given to the rule.[197] The *Endsley* result seems consistent with the remedial intent of rule 60(b) and the general policy of preventing hardship and injustice to litigants resulting from overly technical or narrow applications of the Rules of Civil Procedure.

In *Laroque v. Laroque*[198] the court of appeals ruled that when neither defendant nor counsel were present at trial[199] and had no notice of the trial because the trial was held the day after plaintiff received defendant's answer, defendant's rule 60(b)[200] motion should have been granted for excusable neglect.[201]

J. Appeal and Error[202]*—Interlocutory Appeals*

Several important decisions in 1980 evidenced an attempt by the court of appeals to resolve ambiguities in North Carolina law regarding when an inter-

195. 507 F.2d 227 (5th Cir. 1975). In *Golf Association* the attorney was aware of the conflict in his schedule, although he had reason to believe that he could make both hearings on the same morning. *Id.* at 228.

196. N.C.R. CIV. P. 60(b).

197. 507 F.2d at 228-29.

198. 46 N.C. App. 578, 265 S.E.2d 444, *cert. denied*, 300 N.C. 558, 270 S.E.2d 109 (1980). Plaintiff filed her complaint on April 6 and defendant answered on May 5. Plaintiff's calendar request for a May 9 trial was granted.

199. When defendant was not present for trial a default judgment was entered against him pursuant to N.C.R. CIV. P. 55.

200. N.C.R. CIV. P. 60(b)(1) provides for reopening a final judgment on a finding of excusable neglect.

201. N.C. GEN. R. PRAC. 2(d) provides that when an attorney wants to schedule a case for trial earlier than five months after the date the complaint is filed, he should give a copy of his certificate of readiness to opposing counsel. It is implicit in this rule that a defendant not represented by counsel (as in this case) be mailed a copy of the certificate as well. This was not done, therefore the usual rule that a party must keep himself advised of the time and date of trial did not apply. *See generally* Craver v. Spaugh, 226 N.C. 450, 38 S.E.2d 525 (1946).

202. In Cook v. Export Leaf Tobacco Co., 47 N.C. App. 187, 266 S.E.2d 754 (1980), the court held that partial summary judgment on the issue of indemnity for damages is not an appealable final judgment under N.C.R. CIV. P. 54(b) because there had been no determination of liability or of damages on the underlying transaction. 47 N.C. App. at 189, 266 S.E.2d at 756. The court also held that the partial summary judgment was not appealable under N.C. GEN. STAT. § 1-277 (Cum. Supp. 1979) and N.C. GEN. STAT. § 7A-27(d) (1969) because it would not injure the appellant if not corrected prior to the appeal from a final judgment. *Id.* at 188, 266 S.E.2d at 755.

In C.C. Woods Constr. Co. v. Budd-Piper Roofing Co., 46 N.C. App. 634, 265 S.E.2d 506 (1980), the court held that a motion for a new trial or for a modification of judgment under N.C.R. CIV. P. 59 and the court's orders denying the motions and fixing the time for service of the record on appeal could not extend the 150 day time limit of N.C.R. APP. P. 12(a) for the filing of the record on appeal once notice of appeal from the judgment had been given. 46 N.C. App. at 636, 265 S.E.2d at 507. Where an extension of time in which to file the record is not granted by the court and the appellant has failed to comply with the time limit, N.C.R. APP. P. 27(c) requires dismissal of the appeal. *Id.*

In Econo-Travel Motor Hotel Corp. v. Foreman's Inc., 44 N.C. App. 126, 260 S.E.2d 661 (1979), *cert. denied*, 299 N.C. 544, 265 S.E.2d 404 (1980), the court stated that the failure of briefs to refer to the assignments of error and to the exceptions pertinent to the questions presented on appeal, as required by N.C.R. APP. P. 28(b)(3), was grounds for dismissal of the appeal. 44 N.C. App. at 128, 260 S.E.2d at 663. However, the strong factual basis for the appeal in this case led the court to exercise its discretion in the interests of justice, under rule 2 of the appellate rules, to

locutory appeal[203] may be taken. In *Bailey v. Gooding*[204] the plaintiff obtained an entry of default[205] and defendant moved under North Carolina Rule of Civil Procedure 60(b)[206] to set aside the entry of default. The motion was denied, plaintiff's later motion for a default judgment was granted, and the trial judge ordered a jury trial solely on the issue of damages. Defendant again filed a rule 60(b) motion, this time to set aside the default judgment; the motion was granted and plaintiff appealed.

The court of appeals vacated the order granting the motion, reasoning that because a trial on damages was forthcoming the 60(b) motion was an appeal from an interlocutory order and, therefore, should not have been heard.[207]

The court went on to consider whether the trial judge erred by refusing to set aside the entry of default, ruled that the trial court applied the wrong standard, and remanded for a determination whether good cause, the proper standard, had been shown.[208]

Judge Hedrick, in a vigorous dissent, stated that it was an improper exercise of the court's discretion to review and reverse interlocutory orders. He argued that the court should remand for trial on the issue of damages and only then allow defendant to file his 60(b) motion.[209]

In sum, the *Bailey* court both disallowed the appeal and invoked its discretionary power to review the appeal. Such a paradoxical ruling does little to clarify this confusing area of civil procedure. The court's reasoning seems to be that when a glaring error appears on the face of the record,[210] it is a matter of judicial economy to remand and rectify the error rather than to proceed directly to a trial on damages and then hear an appeal that will definitely result in reversal. The *Bailey* reasoning seems to represent a minor movement by the court of appeals away from the traditional North Carolina practice of

---

consider the appeal. Nonetheless, the opinion included a strong admonition to the bar that the rules are mandatory for all parties before the court. *Id.*

203. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." Tridyn Indus. v. American Mutual Insurance Co., 296 N.C. 486, 488, 251 S.E.2d 443, 445 (1973) (perhaps the most frequently cited North Carolina decision in this area). An interlocutory appeal is an appeal from an interlocutory order.

204. 45 N.C. App. 335, 263 S.E.2d 634 (1980).

205. *See* N.C.R. Civ. P. 55(a).

206. N.C.R. Civ. P. 60(b) provides that "[o]n motion and upon such terms as are just, the court may relieve a party . . . from a final judgment . . . for [mistake, inadvertance, excusable neglect, fraud, etc.]. . . ."

The court also held that the proper application of a rule 60(b) motion is to a default judgment, in accordance with rule 55(d), and not to the entry of default as the trial court had ruled. Defendant should have been able to simply show "good cause" to relieve himself from the entry of default, again pursuant to rule 55(d). The standard for setting aside an entry of default is less strict than the standard for vacating a default judgment. *See, e.g.*, Crotts v. Camel Pawn Shop, Inc., 16 N.C. App. 392, 192 S.E.2d 55 (1970), *cert. denied*, 282 N.C. 425, 192 S.E.2d 835 (1971).

207. 45 N.C. App. at 343, 263 S.E.2d at 639-40.

208. *See* note 206 *supra*.

209. 45 N.C. App. at 346, 263 S.E.2d at 641.

210. *See* discussion at note 206 *supra*. The proper standard for setting aside an entry of default is for "good cause" shown and the trial judge applied the stricter 60(b) standard.

granting appeals from interlocutory orders.[211]

The court of appeals added further confusion to the area of interlocutory appeals in *Metcalf v. Palmer*[212] and *Davis v. Mitchell*.[213] In *Metcalf* a default judgment for defendant was set aside by the trial judge, in accordance with rule 60(b)(1), by reason of neglect of plaintiff's counsel. Defendant's appeal from the granting of the motion to set aside the default judgment was clearly interlocutory—the order did not terminate, but rather revived, the action.

The question for the court of appeals was whether the granting of the rule 60(b) motion affected a substantial right of the defendant under G.S. 1-277(a).[214] More precisely, the issue was whether the right to avoid a trial on the merits is a substantial right that would permit an interlocutory appeal if it were denied.[215]

The *Metcalf* court, quoting *Davis v. Mitchell*, recognized that the "Supreme Court and this Court have historically entertained appeals from orders setting aside default judgments even though such orders are clearly interlocutory and *only questionably may be considered as affecting a substantial right*";[216] nevertheless, the court held the order to set aside the default was not appealable. The *Davis* court, however, did grant an interlocutory appeal on an order setting aside a default judgment even though it noted that "avoidance of a rehearing or trial *is not considered to be. . .a 'substantial right.'* "[217] The *Davis* court conceded that, although the federal courts and most state courts hold that setting aside a default judgment is not ordinarily appealable, the North Carolina courts, despite substantial criticism,[218] have "historically entertained interlocutory appeals."[219]

The *Metcalf* court acknowledged that its holding was "not altogether logically consistent with" the North Carolina tradition of allowing interlocutory appeals from orders setting aside default judgments,[220] but stated that it has "been reluctant to [grant interlocutory appeals] absent an express direction from our Supreme Court."[221]

Metcalf and *Davis* exemplify the continued uncertainty regarding the ap-

---

211. "Our appellate courts have . . . historically entertained [interlocutory] appeals. Davis v. Mitchell, 46 N.C. App., 272, 274, 265 S.E.2d 248, 250 (1980).

212. 46 N.C. App. 622, 265 S.E.2d 484 (1980).

213. 46 N.C. App. 272, 265 S.E.2d 248 (1980).

214. N.C. GEN. STAT. § 1-277(a) (Cum. Supp. 1979) provides that "[a]n appeal may be taken from every judicial order or determination of a judge of a superior or district court . . . which affects a substantial right claimed in any action or proceeding. . . ."

215. Defendant did not show any detrimental reliance on the judgment so that the only substantial rights question involved the right to avoid a trial on the merits.

216. 46 N.C. App. at 625, 265 S.E.2d at 485 (citing Davis v. Mitchell, 46 N.C. App. at 274, 265 S.E.2d at 250) (emphasis added).

217. 46 N.C. App. at 274, 265 S.E.2d at 250 (emphasis added).

218. *See, e.g., Survey of Developments in North Carolina Law, 1978—Civil Procedure*, 57 N.C.L. REV. 827, 914-18 (1979).

219. *Id. See, e.g.*, Shackleford v. Taylor, 261 N.C. 640, 135 S.E.2d 667 (1964). *But see* Tridyn Indus. v. American Mut. Ins. Co., 296 N.C. 486, 251 S.E.2d 443 (1973); Waters v. Qualified Personnel Inc., 294 N.C. 200, 240 S.E.2d 338 (1978).

220. 46 N.C. App. at 625, 265 S.E.2d at 485.

221. *Id.*

pealability of orders setting aside default judgments. While *Davis* granted the interlocutory appeal, it stated in dictum that no substantial right is affected by setting aside a default judgment. In the same term the *Metcalf* court refused to hear the interlocutory appeal, but admitted that setting aside a default judgment arguably affects a substantial right, citing *Davis* as authority.

In *Steel Creek Development Corp. v. James*[222] the North Carolina Supreme Court had an opportunity to provide much needed guidance to the court of appeals, but failed to do so. *James* involved an action for trespass in which plaintiffs sought damages and an injunction to force defendants to remove concrete anchors allegedly placed on plaintiffs' submerged lands. The injunction was granted and a trial set on the issue of damages. Defendants appealed the order granting the injunction and the supreme court allowed the appeal, reasoning that to comply with the injunction would necessitate an immediate removal of the anchors from plaintiff's land and thus a substantial right would be affected within the meaning of G.S. 1-277(a)[223] and 7A-27(d).[224]

Justice Copeland cited *Whalehead Properties v. Coastland Corp.*[225] in support of the holding in *James*. In *Whalehead* summary judgment was granted on defendant's counterclaim on the issue of liability and a trial was set to determine damages, but it was also held that defendant was not entitled to specific performance. Defendant's interlocutory appeal on the denial of specific performance was granted because to refuse to hear the appeal would have eliminated defendant's opportunity to obtain specific performance.

Thus, *James* seems confined to the narrow holding that when an injunction is granted and a trial set on damages, the granting of the injunction is appealable if the defendant would incur undue cost or inconvenience by complying. The supreme court failed to offer any guidance as to when interlocutory appeals should be granted in other areas.

It is difficult to comprehend the rationale behind North Carolina's allowance of appeals from interlocutory orders in circumstances where no substantial right is affected other than the avoidance of a trial on the merits.[226] It is certainly not judicially economical to hear appeals from grants of rule 60(b) motions. Because it is a discretionary ruling, the number of erroneously granted 60(b) motions is probably small; moreover, the trial on the merits is postponed for the duration of the appeal.

One argument for granting such appeals is that the parties must go

222. 300 N.C. 631, 268 S.E.2d 205 (1980). It should be noted that *James* did not involve an appeal from an order setting aside a default judgment as did *Bailey*, *Davis*, and *Metcalf*. Rather, defendants appealed from an order granting specific performance to plaintiffs when there was a trial forthcoming on the issue of damages.

223. *See* note 214 *supra*.

224. 300 N.C. at 636, 268 S.E.2d at 209. N.C. GEN. STAT. § 7A-27(d)(1) (Cum. Supp. 1979) provides for an appeal of right "[f]rom any interlocutory order or judgment of a superior or district court in a civil action or proceeding which . . . [a]ffects a substantial right. . . ."

225. 299 N.C. 270, 261 S.E.2d 899 (1980).

226. *But see* Metcalf v. Palmer, 46 N.C. App. 622, 265 S.E.2d 484 (1980); Tridyn Ind. v. American Mut. Ins. Co., 296 N.C. 486, 251 S.E.2d 443 (1973).

through the possibly needless expense of a new trial and may rely on the granting of the motion to their detriment, so perhaps it is more prudent and expeditious to hear the appeal immediately. However, these factors clearly should be taken into account by the trial judge in deciding whether or not to grant the 60(b) motion in the first instance.

In the majority of state courts and in the federal courts the granting of a 60(b) motion is unappealable unless the trial judge certifies it as an important question, and even then the appeal is discretionary with the appellate court.[227] The basis for this antiquated practice in North Carolina seems to be purely historical. It arose at a time when appellate judges were distrustful of trial judges because the latter were not required to have any legal training, and when there was a relatively small volume of litigation awaiting appeal. Neither is the case today.

In another development in the law of appellate procedure, the court of appeals held in *Hanes v. Kennon*[228] that appellant's failure to adhere to the formal requirements of the Rules of Appellate Procedure[229] required the court to deem abandoned the exceptions not properly set forth, thus requiring dismissal of the appeal.[230] Appellant's error was in his failure to tie the assignments of error and exceptions to the questions presented for review.[231]

---

227. *See* 7 J. MOORE, FEDERAL PRACTICE § 401 (2d ed. 1978); 15 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 586 (1976).

228. 46 N.C. App. 597, 265 S.E.2d 488 (1980).

229. N.C.R. APP. P. 28(b)(3) states:

> An argument. This shall contain the contentions of the appellant with respect to each question presented together with citations of the authorities, statutes, and those portions of the record on appeal upon which he relies. Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error and exceptions pertinent to the question, identified by their numbers and by the pages of the printed record on appeal at which they appear. Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.

230. 46 N.C. App. at 600-01, 265 S.E.2d at 491. The court, however, discussed the substantive issues presented by the appeal, and noted that they were "bound" by the findings of the trial court. *Id.* at 598-600, 265 S.E.2d at 490.

231. *Id.* at 600, 265 S.E.2d at 491. Plaintiff Appellants' Brief at 1-6, Hanes v. Kennon, 46 N.C. App. 597, 265 S.E.2d 488 (1980):

> QUESTIONS FOR REVIEW
>
> 1. Whether or not the Court allowed evidence which was inadmissible on the grounds of irrelevancy, calling for conclusions on the part of witnesses, asking for conclusions of law on the part of witnesses, and asking for opinions from witnesses;
>
> . . .
>
> 5. Whether or not the Court erred as a matter of law in allowing the defendant the right of way provided in the Court's order.
>
> STATEMENT OF THE CASE
>
> [The facts are set forth.]
>
> ARGUMENT
>
> The primary question to be resolved in this appeal is how much right of way was conveyed by the deed to Defendant (R p 11) which stated, [argument is continued]
>
> . . .
>
> Exceptions Nos. 11, 12, 13, 14, 15, and 16 (R p 49)
>
> The Court further erred in asking the defendant why he did not buy the property, since any reason the defendant might have for not buying the property at the present

K. Other Cases

In *Cody v. Department of Transportation*[232] the court of appeals held that the trial court erred in dismissing plaintiff's suit for damage to his property caused by blasting as to one of the defendants—DOT. The trial court reasoned that because DOT had a provision in its contract with the other defendant, a contractor, providing that the latter shall reimburse the former for any damages caused by the latter's blasting operations, DOT was judgment-proof and not a necessary party to the action.

The court of appeals recognized that the plaintiff could have sued either the contractor under a strict liability theory[233] and/or DOT under an inverse condemnation theory,[234] and that contracting parties cannot by the terms of a private agreement eliminate a statutory cause of action benefitting a citizen.[235]

In *Duke Power Co. v. Winebarger*[236] the supreme court broadly inter-

---

time could have no visible connection to the intentions of the parties in 1958. See REDDING v. BRADDY, supra.

Exception No. 4 (R p 40)

. . .

Compare with Plaintiff Appellant's Brief at 1-10, Terry v. Terry, 46 N.C. App. 583, 265 S.E.2d 463 (1980)):

QUESTIONS PRESENTED

I. Did the trial Court err in concluding that plaintiff's First Claim fails to state a claim and in dismissing it upon defendant's Rule 12 (b)(6) motion?

II. Did the trial Court err in concluding that plaintiff's Third Claim fails to state a claim and in dismissing it upon defendant's Rule 12(b)(6) motion?

. . .

STATEMENT OF THE CASE

[The facts are set forth.]

ARGUMENT

I. PLAINTIFF'S FIRST CLAIM STATES A CAUSE OF ACTION FOR FRAUD SUFFICIENT TO WITHSTAND DEFENDANT'S MOTION TO DISMISS PURSUANT TO RULE 12(b)(6).

Assignment of Error No. 1;

Exception No. 1 (R p 16)

Plaintiff contends his First Claim states a cause of action [the argument continues]

. . .

II. PLAINTIFF'S THIRD CLAIM SUFFICIENTLY STATES A CAUSE OF ACTION AGAINST DEFENDANT FOR BREACH OF HIS FIDUCIARY DUTY AS EXECUTOR OF THE ESTATE OF EDWARD McKINLEY TERRY, SR.

Assignment of Error No. 2;

Exception No. 2 (R p 16)

[Argument continues]

232. 45 N.C. App. 471, 263 S.E.2d 334, *cert. denied*, 300 N.C. 372, 267 S.E.2d 674 (1980). The Department of Transportation (DOT) hired defendant contractor to perform reconstruction work. The work necessitated blasting operations that destroyed a building on the plaintiff's property. *Id.* at 472, 263 S.E.2d at 334.

233. *See* Falls Sales Co. v. Board of Transp., 292 N.C. 437, 233 S.E.2d 569 (1977).

234. N.C. GEN. STAT. § 136-111 (Cum. Supp. 1979).

235. 45 N.C. App. at 473-74, 263 S.E.2d at 335-36. The court cited several practical considerations for its holding. First, the contractor may be insolvent and may have violated any insurance contract that would have benefitted the plaintiff. Second, the contractor may be popular in the community, thereby causing biased jury problems. Finally, the state is solvent and is an ideal defendant from the plaintiff's point of view. *Id.* at 475, 263 S.E.2d at 336.

236. 300 N.C. 57, 265 S.E.2d 227 (1980). For a further discussion of *Winebarger*, see the Evidence section of this Survey.

preted rule 46(a)(1).[237] Counsel objected to questions asked of a witness when the same questions were allowed to be asked of two previous witnesses over strenuous objection. The objection was overruled after a discussion between court and counsel and it was clear that continued objection would be fruitless.[238]

The supreme court held that when a line of questioning is apparent to both the court and the parties, the statutory requirement that counsel object to a "specified" line of questioning is satisfied.[239] The *Winebarger* ruling recognizes the tactical disadvantages of counsel's repeatedly objecting in view of the jury.

In *Eubanks v. First Protection Life Insurance Co.*[240] the court of appeals ruled that defendant's counterclaim was actually an affirmative defense because it stated no claim for relief,[241] and therefore, plaintiff's failure to reply to defendant's "counterclaim" did not constitute an admission of the facts stated therein.[242]

In *Southern National Bank v. B & E Construction Co.*[243] the court of appeals held that in order for a party to have requests for admissions deemed admitted for insufficiency of the responses under rule 36 of the Rules of Civil Procedure, he must first move to have the trial court determine the sufficiency of the responses and obtain a ruling from the court that the responses are insufficient.[244]

In *Gardner v. Gardner*[245] the supreme court held that when the question of proper venue had been settled judicially, a statute enacted subsequent to the decision could not be applied retroactively to reopen the question of venue in

237. N.C.R. Civ. P. 46(a)(1) provides that "when there is [an] objection to the admission of evidence involving a specified line of questioning, it shall be deemed that a like objection has been taken to any subsequent admission of evidence involving the same line of question."

238. 300 N.C. at 68-69, 265 S.E.2d at 234.

239. *Id.* at 68, 265 S.E.2d at 234.

240. 44 N.C. App. 224, 261 S.E.2d 28 (1979), *cert. denied*, 299 N.C. 735, 267 S.E.2d 661 (1980). In *Eubanks* plaintiff brought suit to collect the proceeds of a life insurance policy on plaintiff's intestate. Defendant's "counterclaim" alleged that the intestate had misrepresented his medical history and, therefore, defendant was not liable on the policy.

241. N.C.R. Civ. P. 8(c) provides that "[w]hen a party has mistakenly designated a defense as a counterclaim. . . , the court, on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."

242. If defendant's allegations had amounted to a counterclaim, plaintiff's failure to reply would have constituted an admission of the facts stated therein pursuant to N.C.R. Civ. P. 8(d).

243. 46 N.C. App. 736, 266 S.E.2d 1 (1980).

244. 46 N.C. App. 736, 738-39, 266 S.E.2d 1, 2 (1980). The court of appeals reversed the trial court's treatment of requests to admit for the purposes of ruling on a motion for summary judgment when the responses given to the requests were simply "admitted" or "denied". 46 N.C. App. at 738, 266 S.E.2d at 2. The court construed the 1975 amendments to N.C.R. Civ. P. 36, Law of June 24, 1975, ch. 762, 1975 N.C. Sess. Laws, 1st Sess. 1039, to require the trial court to make a determination of the sufficiency of the answers or objections to the requests and, if it finds them insufficient, to order the matter admitted or to order the party to file an amended answer. 46 N.C. App. at 739, 266 S.E.2d at 2-3. The court believed this procedure would eliminate unfair surprise to the responding party who may have discovered for the first time at trial that matters which he intended to deny were, in fact, to be used as binding admissions against him. *Id.* (citing 8 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2263 (1970)).

245. 300 N.C. 715, 268 S.E.2d 468 (1980).

litigation pending at the time of enactment.[246]

In *Synco, Inc. v. Headen*[247] the court of appeals held that under rule 53(f)(3) of the Rules of Civil Procedure the referee must file a transcript of the evidence along with his report, but this requirement may be waived by agreement of the parties.[248]

In *ITCO Corp. v. West*[249] the court of appeals held that exceptions to the homestead allotment must be filed with the clerk of the superior court of the county in which the allotment is made.[250]

The second session of the 1979 General Assembly amended the General Statutes to authorize clerks of superior court to hold persons in civil contempt for failure to comply with an order of the court, and to give magistrates in district court power to punish persons only for direct criminal contempt (committed within the sight or hearing of the magistrate or in immediate proximity to the room in which the proceedings are being held).[251]

ROBERT FRANKLIN BEARD III
JOEL LEE LULLA
JOHN FRANCIS MORRIS

246. In the lower court proceedings both a motion for dismissal on the basis of improper venue, pursuant to N.C.R. CIV. P. 12(b)(3), and a motion for change of venue for convenience of the parties, pursuant to G.S. 1-83(2), had been denied. *Id.* at 716-17, 268 S.E.2d at 470. The first denial was upheld on appeal. *Id.* at 716, 268 S.E.2d at 470. The second was not appealed. *Id.* at 717, 268 S.E.2d at 470. The statute on which the motion for change in venue in question was based, G.S. 50-3, was enacted prior to the court of appeals' affirmation of the trial court's order granting alimony *pendente lite.* 300 N.C. at 717, 268 S.E.2d at 470.

The supreme court determined that application of the statute, which would have required a change of venue under the circumstances, would alter "the legal effect of previous rulings by the trial court that venue [was] properly [laid]." *Id.* at 718, 268 S.E.2d at 471.

N.C. CONST., art. 4, § 1, forbids giving effect to a legislative declaration to alter a final judgment of a court. State v. Matthews, 270 N.C. 35, 153 S.E.2d 791 (1967); Piedmont Mem. Hosp. v. Guilford County, 221 N.C. 308, 20 S.E.2d 332 (1942). Therefore, because a final adjudication of venue is "secure," 300 N.C. at 719, 268 S.E.2d at 471; Dellinger v. Bollinger, 242 N.C. 696, 89 S.E.2d 592 (1955); the statute "may not be given effect to alter or amend a final exercise of the courts' rightful jurisdiction." 300 N.C. at 719, 268 S.E.2d at 471.

247. 47 N.C. App. 109, 266 S.E.2d 715 (1980).

248. The parties were unable to secure the transcript of the evidence at what they considered to be a reasonable cost. The referee did not make any request for the transcript. The trial court dismissed the action to review the referee's decision under N.C.R. CIV. P. 50 for failure to present the transcript for review. The court of appeals held that it was the duty of the referee to submit a copy of the transcript and not that of the parties to the action. 47 N.C. App. at 114, 266 S.E.2d at 718. However, if the parties had agreed to waive the transcript requirement of rule 53 and to accept the notes of the referee for consideration at trial by the jury, they would be bound by that agreement. *Id.* at 115, 266 S.E.2d at 718.

249. 44 N.C. App. 185, 260 S.E.2d 443 (1979).

250. 44 N.C. App. 185, 187, 260 S.E.2d 443, 445 (1979). Plaintiff obtained judgment and execution in Wilson County, while defendant's property was located in Franklin County. The homestead allotment by the sheriff of Franklin County was approved by the superior court of Wilson County, which also dismissed the defendant's exceptions. On appeal, the court held that the Wilson County superior court did not have jurisdiction to determine the validity of the exceptions to the allotment by the sheriff of Franklin County under N.C. GEN. STAT. § 1-381 (1969). 44 N.C. App. at 187, 260 S.E.2d at 445.

251. Law of June 12, 1980, ch. 1080, 1979 N.C. Sess. Laws, 2d Sess. 6 (codified in N.C. GEN. STAT. §§ 5A-21,-23, 7A-103,-292 (Interim Supp. 1980)).

III. COMMERCIAL LAW

A. Unfair Trade Practices

In *Marshall v. Miller*[1] the North Carolina Supreme Court reversed the court of appeals holding that bad faith is an essential element in a private suit for treble damages brought for violation of G.S. 75-1.1(a),[2] which prohibits unfair methods of competition and deceptive acts or practices. Plaintiffs, residents of a mobile home park owned and operated by defendant, claimed that defendant had promised and failed to provide playgrounds, a basketball court, a swimming pool, garbage pickup, yard care, paved and lighted streets, and common facilities.[3] The trial court ruled that defendant could be held liable if he intended to perform his contract but lacked the ability to provide the facilities that plaintiff claimed were promised.[4] The court of appeals found the instruction erroneous because it allowed the jury to find defendant liable under G.S. 75-1.1(a) without a showing of bad faith.[5]

The court of appeals noted that the North Carolina Supreme Court has directed lower courts interpreting G.S. 75-1.1(a) to look to federal decisions interpreting the Federal Trade Commission (FTC) Act[6] because the language of section five of that Act[7] is identical to G.S. 75-1.1(a). The court found that the existence of bad faith is irrelevant when the Federal Trade Commission decides to issue a cease and desist order[8] for violation of section five of the Act.[9] The court also noted that a good faith defense is not recognized when the North Carolina Attorney General seeks injunctive relief[10] under G.S. 75-14[11] for violation of G.S. 75-1.1(a). The court of appeals determined, however, that "although good faith may be irrelevant when injunctive relief is sought by the Attorney General . . . it should be relevant where a private party seeks *treble*

---

1. 302 N.C. 539, 276 S.E.2d 397 (1981), *modifying* 47 N.C. App. 530, 268 S.E.2d 97 (1980). The supreme court's decision has attracted such widespread attention that the Board of Editors chose to include it in the 1980 Survey along with the discussion of the 1980 court of appeals decision.

2. N.C. GEN. STAT. § 75-1.1(a) (Cum. Supp. 1979) provides: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

3. 302 N.C. at 540, 276 S.E.2d at 398.

4. 47 N.C. App. at 534, 268 S.E.2d at 99.

5. 47 N.C. App. at 542, 268 S.E.2d at 103.

6. *Id.* at 543, 268 S.E.2d at 103; Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 262, 266 S.E.2d 610, 620 (1980); Hardy v. Toler, 288 N.C. 303, 308, 218 S.E.2d 342, 345 (1975).

7. 15 U.S.C. § 45(a)(1) (1976).

8. 15 U.S.C. § 45(b) (1976).

9. 47 N.C. App. at 544, 268 S.E.2d at 104.

10. *Id.*

11. N.C. GEN. STAT. § 75-14 (1975) provides:

> If it shall become necessary to do so, the Attorney General may prosecute civil actions in the name of the State on relation of the Attorney General to obtain a mandatory order, including (but not limited to) permanent or temporary injunctions and temporary restraining orders, to carry out the provisions of the Chapter, and the venue shall be in any county as selected by the Attorney General.

damages."[12] When the state's attorney general seeks civil penalties under G.S. 75-15.2,[13] he is required to show that defendant's activity was "specifically prohibited by court order or knowingly violative of a statute."[14] The court of appeals concluded that since persons are not subject to civil penalties by the attorney general without a showing of bad faith, "treble damages should not be assessed against a defendant (in a private suit) who acts in good faith where he is not otherwise on notice that his conduct violates G.S. 75-1.1(a)."[15]

The supreme court concluded that the court of appeals' holding that bad faith is an essential element in treble damage suits is inconsistent with the higher court's ruling in *Johnson v. Phoenix Mutual Life Insurance Co.*[16] In *Johnson*, the supreme court noted that G.S. 75-1.1(a), like section 5 of the

12. 47 N.C. App. at 544, 268 S.E.2d at 104 (emphasis original).

In stating this proposition the court cited two recent North Carolina cases, Wachovia Bank & Trust Co. v. Smith, 44 N.C. App. 685, 262 S.E.2d 646, and United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1049 (E.D.N.C. 1980). In the Wachovia case, defendants filed a counterclaim against the dealer who sold them a mobile home on the ground that the dealer's sale of a mobile home with defects and his failure to perform certain services constituted unfair or deceptive acts or practices in violation of G.S. 75-1.1(a). In limiting its holding to the particular facts of the case, the court stated that "absent evidence of willful deception or bad faith, we cannot conclude that the existence of defects in the mobile home or [the dealer's] failure to perform the above stated services constitutes a violation of G.S. 75-1.1 to warrant the award of treble damages under G.S. 75-16." 44 N.C. App. at 691, 262 S.E.2d at 650. While reiterating the position that a breach alone does not constitute a violation of G.S. 75-1.1(a), the court left open the question of what "specific actions, if any which do not constitute fraud, would nonetheless be a violation of G.S. 75-1.1." 44 N.C. App. at 691, 262 S.E.2d at 650. This decision, therefore, stopped short of the rule formulated in *Marshall* that bad faith is an essential element for a treble damage suit under G.S. 75-1.1(a).

In *United Roasters* the judge held that "intentional wrongdoing"was an essential element of a G.S. 75-1.1(a) violation in a treble damage suit. The court held that "given the fact that section 75-16 is punitive in nature, the requirement of a jury finding of intentional wrongdoing to constitute a violation of the statute is consistent with the position of the courts of North Carolina generally concerning punitive damages." 485 F. Supp. at 1059. The district court's result was affirmed by the Fourth Circuit Court of Appeals. 649 F.2d 985 (4th Cir. 1981). The district court's holding appears to be in conflict with the recent decision in Holley v. Coggin Pontiac, Inc., 43 N.C. App. 229, 259 S.E.2d 1 (1979), in which the court of appeals stated that G.S. 75-16 has remedial and private enforcement objectives as well as punitive objectives. The bad faith requirement in *United Roasters*, therefore, would prevent the attainment of these other objectives. Finally, the district court held that although previous decisions allowing treble damages involved intentional torts, it does not necessarily follow that such intent is an essential element for a G.S. 75-16 cause of action. The Fourth Circuit Court noted that the supreme court decision in *Marshall* may severely undercut the district court's position on this issue. 649 F.2d at 991.

13. N.C. GEN. STAT. § 75-15.2 (Cum. Supp. 1979) provides:

> In any suit instituted by the Attorney General, in which the defendant is found to have violated G.S. 75-1.1 and the acts or practices which constituted the violation were, when committed, specifically prohibited by a court order or knowingly violative of a statute, the court may, in its discretion, impose a civil penalty of five thousand dollars ($5,000) against the defendant for each violation. In determining the amount of the civil penalty, the court shall consider all relevant circumstances, including, but not limited to, the extent of the harm caused by the conduct constituting a violation, the nature and persistence of such conduct, the length of time over which the conduct occurred, the assets, liabilities, and net worth of the person, whether corporate or individual, and any corrective action taken by the defendant. Any penalty so assessed shall be paid to the General Fund of the State of North Carolina.

14. *Id.*

15. 47 N.C. App. at 544, 268 S.E.2d at 104.

16. 300 N.C. 247, 266 S.E.2d 610 (1980) (cited in *Marshall*, 302 N.C. at 548, 276 S.E.2d at 399).

FTC Act, "contemplates two distinct grounds for relief": unfair grounds and deceptive grounds.[17] In adopting the standards used in the federal courts to determine whether an act is unfair or deceptive, the court never discussed the presence or absence of good faith on the part of the defendant.[18] The court stated that a practice is unfair if "it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers."[19] It is deceptive if "it has the capacity or tendency to deceive."[20] Each of these tests indicates that it is the effect of the act or statement upon the consumer, not the defendant's intent, that determines whether the statute has been violated.[21]

In reaching its decision in *Marshall*, the court of appeals analogized G.S. 75-16,[22] which allows private suits for treble damages for violations of G.S. 75-1.1(a), to G.S. 75-15.2, which authorizes the attorney general to sue for civil penalties for violation of G.S. 75-1.1(a). The court never explicitly defined "bad faith," although it indicated it was equating "bad faith" with actual knowledge that one's conduct is unfair or deceptive. Under G.S. 75-15.2, the court said, "a defendant against whom a mandatory order is issued is thereafter on notice that a civil penalty may be imposed," and one who "knowingly" violates the statue "needs no such notice."[23] Thus, if bad faith is an essential element for a G.S. 75-1.1(a) violation, plaintiff would have to prove defendant's bad intent with evidence that the defendant had received specific notice that his conduct was illegal unless the practice was so outrageous that bad faith could be inferred from the practice alone. A defense of good faith, then, would defeat a claim.

It is not clear, however, that the legislature intended "good faith" to be a defense under G.S. 75-15.2 or 75-16 since under the FTC Act "good faith" is never a defense for a civil penalty suit for violation of a cease and desist order.[24]

Unlike the FTC Act, the North Carolina legislation, through G.S. 75-16, allows a private party to bring suit and collect treble damages for a violation of the unfair and deceptive trade practice prohibition. The supreme court

---

17. *Id.* at 263, 266 S.E.2d at 621.

18. Amicus Curiae Brief for State of North Carolina, at 2.

19. 300 N.C. at 263, 266 S.E.2d at 621 (quoting Federal Trade Comm'n v. Sperry & Hutchinson Co., 405 U.S. 233, 244-45 n.5 (1972); Spiegel Inc. v. Federal Trade Comm'n, 540 F.2d 287, 293 (7th Cir. 1976)).

20. 300 N.C. at 265, 266 S.E.2d at 622 (citations omitted).

21. Amicus Curiae Brief for State of North Carolina, at 3.

22. N.C. GEN. STAT. § 75-16 (Cum. Supp. 1979) provides:

> 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 in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.

23. 47 N.C. App. at 544, 268 S.E.2d at 104.

24. 1 S. KANWIT, FEDERAL TRADE COMMISSION § 10.06, at 10-21 (Regulatory Manual Series 1980).

found this private right of action provided in G.S. 75-16 to be more closely analogous to that given by section 4 of the Clayton Act[25] which gives a federal cause of action for treble damages to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." The dual enforcement scheme of G.S. 75-1.1(a) is similar to that of the federal antitrust laws which allow both public and private suits. When G.S. 75-16 is used in conjunction with G.S. 75-1.1(a) it becomes a hybrid statute in that its substantive provisions are identical to section five of the FTC Act while its enforcement scheme is similar to section four of the Clayton Act.

Although the FTC Act does not confer a private right of action,[26] the Commission can bring suit in federal district court for civil penalties, the maximum of which is $10,000 per violation.[27] In all FTC suits for civil penalties, notice of some kind beyond the broad prohibition against unfair or deceptive trade practices is an essential element for a section five violation.[28] The congressional determination that specific notice is required for an FTC Act violation before civil penalties are assessed against a defendant is rational in light of the purpose of the Federal Trade Commission. As an administrative agency charged with enforcing the FTC Act,[29] it is sensible for the agency to spend its resources seeking voluntary compliance with the act by giving specific notice. Such a strategy is less vexatious to business interests than the threat of immediate suit and more efficient for the Commission. Civil penalties, unlike treble

---

25. 15 U.S.C. § 15 (1976) (*cited in Marshall*, 302 N.C. at 542, 276 S.E.2d at 398).

26. 1 S. KANWIT, *supra* note 24, § 1.07, at 1-22 to -23.

27. 15 U.S.C. § 45(l) (1976) provides in part:

> Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation. . . .

15 U.S.C. § 45(m)(1)(A) (1976) provides in part:

> The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this chapter respecting unfair or deceptive acts or practices . . . with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule.

15 U.S.C. § 45(m)(1)(B) (1976) provides in part:

> If the Commission determines . . . that any act or practice is unfair or deceptive, and issues a final cease and desist order with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—
>
> (1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and
>
> (2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful . . . .

28. Notice under 15 U.S.C. § 45(l) is provided by the issuance of the cease and desist order. Under 15 U.S.C. § 45(m)(1)(A) notice is provided by publication of the FTC rule with the added provision that the defendant have actual knowledge or knowledge fairly implied that such act is unfair or deceptive and is prohibited by the rule. Under 15 U.S.C. § 45(m)(1)(B) notice is given with issuance of the cease and desist order with the added stipulation that the defendant have actual knowledge that such act or practice is unfair or deceptive and is prohibited. This provision is used to collect penalties from defendants who were not the original targets of the cease and desist order.

29. *See generally* 1 S. KANWIT, *supra* note 21, § 1.02, at 1-3 to -6.

damages sought in private suits, are imposed only to force compliance with the law,[30] not to compensate victims for injuries sustained. Additionally the agency, unlike a private party, is designed to provide specific notice through its rule-making power[31] and authority to issue cease and desist orders[32] without resort to the courts. It is clear that the reasons that support giving specific notice in the FTC situation do not operate where a private party is seeking compensation for a violation of G.S. 75-1.1(a).

The rationale supporting the imposition of treble damages in antitrust cases was stated succinctly by Professors Areeda and Turner:[33]

> The treble damage remedy serves, of course, to compensate private persons for their injuries. Trebling those damages punishes the defendant for his violation. . . . Such awards generate a powerful financial incentive for injured persons to detect, disclose, attack, and end violations of the antitrust laws. Private enforcement thus increases the likelihood that a violator will be found out, greatly enlarges the penalties and thereby helps discourage illegal conduct. The statutory scheme thus supplements public enforcement, which is inevitably selective and not always likely to concern itself with local, episodic, or less than flagrant violations.[34]

If bad faith were considered an essential element of a cause of action under G.S. 75-1.1(a), the victim of an unfair or deceptive trade practice would be left without means of recovery unless the defendant had specific notice that his action violated the law or unless the conduct in question was egregious enough to infer bad faith. This requirement might discourage private plaintiffs from paying the costs of civil suit when the claim may be defeated by a good faith defense and will diminish the deterrent effect of treble damage suits. It would be particularly significant in North Carolina because there is no agency comparable to the FTC to enforce this statute.

Requiring a showing of bad faith before liability is imposed would, however, ensure that blameless defendants cannot be punished by imposition of treble damages. Since treble damages are similar to criminal sanctions because they are intended to punish the wrongdoer,[35] courts might be reluctant to find a violation absent a finding of bad faith.[36] This could disrupt the development of trade practice law because courts might distort the law to avoid imposing treble damages on defendants who had no notice that their actions violated the law.[37]

Although a defense of good faith protects a blameless defendant from imposition of treble damages, this protection could be afforded in ways that do

30. *Id.* § 10.05, at 10-15.
31. 15 U.S.C. § 57a(a)(1)(B) (1976).
32. 15 U.S.C. § 45(b) (1976).
33. 2 P. AREEDA & D. TURNER, ANTITRUST LAW (1978).
34. *Id.* ¶ 331b, at 149-150 (footnotes omitted).
35. *See id.* at 149.
36. *See id.* ¶ 331b2, at 150.
37. *See id.*

not defeat policies underlying the treble damage sanction. One alternative is making treble damages discretionary and awarding only compensatory damages in certain situations. While the language of section four of the Clayton Act (and G.S. 75-16) seems to leave little room for judicial discretion, Areeda and Turner point out that:

> [I]t is by no means clear that unqualified statutory language cannot be interpreted to contain implied qualifications (1) in infrequent situations not within the contemplation of those who wrote the statute and (2) where qualification would best serve both the fundamental purposes of the statute and the ends of justice.[38]

Such a judicial move, however, is open to charges of unwarranted intervention since it can be argued that the legislature has already determined that treble damages are mandatory. Discretionary treble damages would also weaken a plaintiff's incentive to bring suit, thus diminishing the impact of the enforcement scheme.

A second alternative is using a Rule of Reason similar to that used in antitrust cases. The Rule of Reason evaluates the activity "in the light of statutory purposes, knowledge of the world, and the insights of economic analysis."[39] In applying a similar analysis to trade practice cases, a court would determine whether a practice is unfair or deceptive by viewing the conduct "against the background of all of the relevant facts"[40] and "against the background of actual human experience."[41] With the foregoing analysis, the court may be able to prevent the imposition of treble damage sanctions when they are inappropriate by looking at the practice in the context of its surroundings to determine if it violates G.S. 75-1.1(a). It can be argued, however, that this suggestion will not remedy the situation, but rather will disrupt the development of trade practice law through distorted applications.

The court of appeals' holding in *Marshall* that bad faith is an essential element in a private suit for violation of G.S. 75-1.1(a) was rational in light of the court of appeals' concern with the possibility that blameless defendants may be subjected to treble damage sanctions. Unfortunately, in its analysis the court of appeals failed to take into consideration the compensatory and enforcement objectives of the statute. The supreme court's failure to uphold the court of appeals' requirement of a showing of bad faith in G.S. 75-1.1(a) treble damage suits raises a different series of issues. The line between the *Johnson* standard of "immoral, unethical, oppressive, unscrupulous, or substantially injurious" and the "bad faith" standard struck down by the supreme court in *Marshall* is not entirely clear. The language of the *Marshall* opinion does not distinguish adequately the application of G.S. 75-1.1(a) to transactions between consumers and businessmen from the application of the statute to arm's length dealings between businessmen. After the supreme court deci-

38. *Id.* ¶ 331b3, at 151.
39. *Id.* ¶ 314b, at 47.
40. Harrington Mfg. Co. v. Powell Mfg. Co., 38 N.C. App. 393, 401, 248 S.E.2d 739, 744 (1978), *cert. denied*, 296 N.C. 411, 251 S.E.2d 469 (1979).
41. *Id.* at 400, 248 S.E.2d at 744.

sion doing away with the "lack of bad faith" defense, it is at least arguable that the breach of a valid contract between two commerical concerns might lead to a chapter 75 treble damages award to the nonbreaching party. Presumably, however, the court could remove such breaches from the treble damage sanction in either of two ways. The court could apply a Rule of Reason analysis to determine that a breach of contract between two commercial concerns is not deceptive or "immoral, unethical, oppressive, unscrupulous, or substantially injurious to *consumers*," and thus does not violate G.S. 75-1.1(a). In the alternative, the court could determine that the legislature did not intend to include these contract breaches under G.S. 75-1.1(a) and that to exclude these actions from the statutory prohibition would not defeat the purpose of the statute or the ends of justice. Under either analysis the damaged party still would have a cause of action under contract law. It is all too evident that the supreme court opinion in *Marshall* has left many issues undecided and that further judicial or legislative clarification of this area is badly needed.

B. Uniform Commercial Code

In *Brown v. Coastal Truckways, Inc.*,[42] the North Carolina Court of Appeals considered the applicability of G.S. 25-1-207 to the common problem of the "payment in full" or "conditional" check. Plaintiff in *Brown*, upon termination of his employment as a salesman for defendant, disputed the amount of commission defendant owed him.[43] Defendant mailed plaintiff a check with a notation in the lower left hand corner "account in full."[44] Several days later plaintiff wrote to defendant indicating that the check did not settle the amount in full and that he would strike the notation and deposit the check.[45] After depositing the check with the "account in full" language deleted, plaintiff sued defendant upon his refusal to pay the balance of his commissions.[46] The trial court granted summary judgment for defendant on the grounds that the check represented an accord and satisfaction.[47]

Prior to North Carolina's adoption of the Uniform Commercial Code,[48] the facts of the case would unequivocally constitute an accord and satisfaction under North Carolina law, and would thereby extinguish plaintiff's claim.[49] Under the common law doctrine of accord and satisfaction, when a debtor tenders a conditional check to a creditor, the creditor is deemed to accept the conditions if he accepts the check. Such acceptance results in an accord and satisfaction regardless of the creditor's objections.[50] At issue in *Brown* was

42. 44 N.C. App. 454, 261 S.E.2d 266 (1980).
43. *Id.* at 454-55, 261 S.E.2d at 267 (1980).
44. *Id.*
45. *Id.* at 455, 261 S.E.2d at 267.
46. *Id.*
47. *Id.*
48. Law of May 26, 1965, ch. 700, 1965 N.C. Sess. Laws. 768 (codified at N.C. GEN. STAT. §§ 25-1-101 to 25-10-106) (effective July 1, 1967).
49. *See* Phillips v. Phillips Constr. Co., 261 N.C. 767, 136 S.E.2d 48 (1964); Moore v. Green, 237 N.C. 614, 75 S.E.2d 649 (1953); Rosser v. Bynum & Snipes, 168 N.C. 340, 84 S.E. 393 (1915).
50. An accord and satisfaction is an agreed upon method of discharging an obligor's duty

whether G.S. 25-1-207, part of the Uniform Commercial Code, provides a creditor in receipt of a conditional check with a means of keeping the check without accepting its conditions. G.S. 25-1-207 provides as follows:

> A party who with explicit reservation of rights performs or promises performance . . . in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as "without prejudice," "under protest" or the like are sufficient.[51]

In affirming the trial court, the court of appeals held that G.S. 25-1-207 did not apply to the conditional check, and thus plaintiff's acceptance of defendant's conditioned check represented an accord and satisfaction.[52]

Certain commentators have argued that the language of U.C.C. section 1-207 allows a creditor to accept a conditional check and reserve his rights to further claim simply by striking any notation of condition and substituting "under protest" or "deposited without prejudice" along with his indorsement.[53] At least one state supreme court has accepted this argument.[54] The

---

under an existing contract. Though not entirely clear, the underlying theory of this doctrine seems to be that the offer of partial or conditional performance of the obligor's duties and the subsequent acceptance of the offer constitutes a new contract as to the completion of the original contract. In the full-payment check situation, when the debt is unliquidated and in dispute, the full-payment check is seen as an offer to compromise. If the creditor accepts the check, he has entered into a binding agreement despite the fact that he may have marked through the notation or added his own reservation clause. Arguably, the creditor who accepts a full-payment check in this fashion has manifested an intention to reject the compromise, but the courts have routinely denied this argument on the theory that the acceptance and depositing of the check outweigh any other manifestations of the creditor's intent. *See generally* Rosenthal, *Discord and Dissatisfaction: Section 1-207 of the Uniform Commerical Code*, 78 COLUM. L. REV. 48 (1978).

It should be noted that when the debt is liquidated, undisputed, and due, consideration is a necessary condition to an accord and satisfaction. Because the doctrine of accord and satisfaction was formulated to facilitate compromise, in situations where there was nothing to compromise, the common law would not impute discharge of indebtedness unless consideration was exchanged. *Id.* at 52. Recently the North Carolina Court of Appeals adhered to this principle in FCX, Inc. v. Ocean Oil Co., 46 N.C. App. 755, 266 S.E.2d 388 (1980). In *FCX* plaintiff sold petroleum to the corporate defendant on credit. A dispute arose as to the amount defendant owed plaintiff. The parties subsequently agreed the total account amounted to $38,322.49. Defendant then tendered a check for $26,377.49 marked "payment in full." Plaintiff retained the check but refused to cash it. Plaintiff sued for the balance and defendant claimed accord and satisfaction. Plaintiff's motion for summary judgment was granted by the trial court. On appeal, the court of appeals reversed and held that the account agreed upon by the parties represented the book value of the account, but did not reflect possible set-offs defendant claimed against plaintiff. Because the agreed figure did not represent the totality of the transactions between the parties, the court held that a jury question existed as to whether the debt was liquidated or in dispute. *Id.* at 758, 266 S.E.2d at 390. Moreover, the court maintained that if the parties were found by the jury to be in dispute, the partial payment check, if accepted by plaintiff, constituted an accord and satisfaction. *Id.* at 759, 266 S.E.2d at 390. On the other hand, if the debt were found to be liquidated, the partial payment check could not constitute an accord and satisfaction without additional consideration. *Id.*

51. N.C. GEN. STAT. § 25-1-207 (1965).

52. 44 N.C. App. at 458. Relying on N.C. GEN. STAT. § 25-3-802, the court held that the Code applied to these circumstances despite the fact that the case involved an employment contract. Under 3-802, if a check is given in payment and the underlying obligor is discharged on the check, he is also discharged on the underlying claim. N.C. GEN. STAT. § 25-3-802(1)(b).

53. *See* J. WHITE & R. SUMMERS, THE UNIFORM COMMERCIAL CODE 544-47 (2d ed. 1980); Hawkland, *The Effect of U.C.C. § 1-207 on the Doctrine of Accord and Satisfaction by Conditional Check*, 74 COM. L.J. 329 (1969); *But see* McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. PA. L. REV. 795, 824-28 (1978); Rosenthal, *supra* note 50.

court of appeals maintained, however, that a close reading of the provision would not support its application to the full payment check situation.[55] The court noted that the language of the statute refers to circumstances where a party assents to " 'performance in a manner demanded or offered by' " the other party.[56] Because plaintiff struck the noted condition and informed defendant that he would not accept the check as full payment, the court argued that he did not assent to performance in a manner offered by defendant. Thus, G.S. § 25-1-207 did not apply.[57]

To buttress this conclusion the court proceeded to examine the Official Comments to U.C.C. section 1-207 and suggested that the drafters of the Uniform Commercial Code probably did not intend U.C.C. section 1-207 to address accord and satisfaction circumstances.[58] Rather, the court argued, the Official Comment suggests that the provision was drafted to allow a party to continue performance of a contract despite a potential dispute. The provision could then be relied on as a defense to charges that continued performance constituted a waiver of the continuing parties rights under the contract. Because plaintiff had terminated his contract with defendant, the court found that the facts of *Brown* were not within the scope of U.C.C. section 1-207 as delineated by the Official Comment.[59]

The decision in *Brown* is sound. The full-payment check represents a shortcut to compromise in the area of debtor-creditor disputes. Because of its long-accepted utility, this aspect of common law accord and satisfaction should not be subject to revision based on belated and weak references to the Uniform Commercial Code. Moreover, as the court of appeals demonstrated, this particular use of U.C.C. section 1-207 can be accomplished only by distorting the provision beyond areas it was designed to cover. Finally, if the statute could be applied to full-payment checks and creditors were allowed to reserve their rights by counter-notation, then settlement of these disputes could be accomplished only through more complicated negotiation or by litigation. A policy that fosters complication in commercial transactions violates the avowed spirit of the Uniform Commercial Code, and the court was correct

54. Scholl v. Tallman, 247 N.W.2d 490 (S.D. 1976). In Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969), the North Carolina Court of Appeals denied an accord and satisfaction in a conditional check case on the grounds that the debt was liquidated and no consideration had been exchanged. The court noted, in dictum, that U.C.C. § 1-207 might be applicable and would lead to the same result. The South Dakota Supreme Court cited *Baillie* as support for their decision in *Scholl*. 247 N.W.2d at 492. In *Brown*, however, the court of appeals, though mentioning *Baillie*, denied its relevance to *Brown* because in *Brown* the debt was unliquidated. 44 N.C. App. at 458, 261 S.E.2d at 269.

55. 44 N.C. App. at 457, 261 S.E.2d at 268.

56. *Id.* (quoting N.C. GEN. STAT. § 25-1-207 (1965)).

57. *Id.*

58. *Id.* at 457-58, 266 S.E.2d at 268-69. One scholar has suggested that the drafters of the U.C.C. wrote a provision specifically designed to deal with the full payment check but that upon further consideration the provision was dropped. *See* Rosenthal, *supra* note 50, at 59-60.

59. 44 N.C. App. at 457-58, 266 S.E.2d at 268. The court also noted that where the Code was intended to change the common law, the drafters generally mentioned it in the Official Comments. No such reference is found in the Official Comment to U.C.C. § 1-207. *Id.* at 458, 266 S.E.2d at 268.

in avoiding this interpretation.[60]

C. Contracts

In *Oroweat Employees Credit Union v. Stroupe*[61] plaintiff, a lending institution, financed the purchase of a car by defendant Stroupe from defendant Smith Chevrolet Company. The check drawn on plaintiff was payable jointly to defendants, and a statement on the back of the check specified that endorsement would acknowledge payment in full and guarantee legal title to the car to plaintiff.[62] Both defendants endorsed the check and it was deposited, but title to the car was transferred to Stroupe rather than to plaintiff.[63] Stroupe subsequently defaulted on the loan and the credit union brought action against both Stroupe and Smith Chevrolet.

The North Carolina Court of Appeals, recognizing the case as one of first impression[64] and relying on decisions in other jurisdictions,[65] maintained that the case was simply a matter of contract law.[66] The court held that upon endorsement defendants created a contractual guaranty that title to the car would be transferred to the credit union.[67] Defendants were held to be co-guarantors in the contract.[68] The court reasoned that the language on the check constituted an offer, endorsement an acceptance, and the transfer of title to the credit union against the payment to the defendants an exchange of consideration.[69]

While the court acknowledge defendant's contention that G.S. 20-57[70] prohibited transfer of title to the credit union, it dismissed the defense of impossibility due to legislative enactment.[71] The court suggested that because of the statute defendant Smith should not have accepted the check, but that upon acceptance defendant could not subsequently repudiate its conditions.[72] In conclusion the court held that because Smith Chevrolet and Stroupe were co-guarantors on the indorsement, they could be sued jointly or severally on principles of guaranty, and if Smith Chevrolet was held liable it could proceed

60. *See* N.C. GEN. STAT. § 25-1-102. In Barber v. White, 46 N.C. App. 110, 264 S.E.2d 385 (1980), the court of appeals cited *Brown* and reiterated its holding that the Uniform Commercial Code will not prevent an accord and satisfaction in a full payment check case.

61. 48 N.C. App. 338, 269 S.E.2d 211 (1980).

62. *Id.* at 339, 269 S.E.2d at 212.

63. *Id.* at 339, 269 S.E.2d at 213.

64. *Id.* at 343, 269 S.E.2d at 215.

65. *Id.* at 343, 269 S.E.2d at 214 (citing Federal Employees Credit Union v. Capital Automobile Co., 124 Ga. App. 144, 183 S.E.2d 39 (1971); United Virginia Bank v. Dick Herriman Ford, Inc., 215 Va. 373, 210 S.E.2d 158 (1974)).

66. 48 N.C. App. at 343, 269 S.E.2d at 214.

67. *Id.* at 345, 269 S.E.2d at 216.

68. *Id.* at 346, 269 S.E.2d at 216.

69. *Id.* at 343, 269 S.E.2d at 214-15.

70. N.C. GEN. STAT. § 20-57 requires that title to an automobile be placed only in the name of the "owner". N.C. GEN. STAT. § 20-4.01(26) excludes a chattel mortgagee who is not in possession of the chattel from the definition of "owner" under the statute.

71. 48 N.C. App. at 344, 269 S.E.2d at 215.

72. *Id.*

against Stroupe for indemnity.[73]

The North Carolina Court of Appeals considered the standards for compliance with notice provisions in insurance policies in *Great American Insurance Co. v. C.G. Tate Construction Co.*[74] In *Great American* the defendant construction company's employee, while driving a bulldozer, allegedly caused an automobile to collide with a tanker truck.[75] The president of the defendant corporation was apprised of the accident but was told that his employees were not involved; consequently he did not notify the plaintiff insurance company with whom the corporation held a general liability policy.[76] When another party to the collision notified *Great American* of its intention to sue the defendant, the insurance company informed the defendant that it would not cover the defendant's liability because of defendant's failure to give notice of the accident "as soon as practicable" under the terms of the policy.[77] The trial court granted declaratory judgment in favor of plaintiff as to its non-liability because of defendant's failure to give notice of the accident.

The court of appeals noted that although North Carolina courts had not addressed the issue, a number of jurisdictions had held that "as soon as practicable" meant within a reasonable time.[78] Whether notice was filed within a reasonable time depends on the facts of each particular case. More importantly, the court held that an insurer must show that it was prejudiced by a delay of notice before it can deny its obligations under the policy.[79] The court pointed to the unequal bargaining strength of the insurer and the insured; the party seeking insurance does not have a choice as to the notice provision of an insurance policy.[80] Because the notice provision is designed to provide the insurer with an opportunity to investigate the claim and gather evidence for a potential defense, the court reasoned that unless failure to give notice reduced this opportunity the insurer was not prejudiced and should not be able to dodge its duties to the insured.[81] The court concluded that while the defendant may have failed to give notice of the accident within a reasonable time, whether the insurance company had been prejudiced by the delay was not decided at the trial level. The court remanded the case accordingly.[82]

---

73. *Id.* at 345-46, 269 S.E.2d at 216. The court explained that co-guarantors are " 'each liable for an equal proportionate share of the principal obligation, *as between themselves*,' . . . [but] 'where one guarantor receives property or other security which constitutes a means of indemnity for . . . loss, it inures to the benefit of all co-guarantors.' " *Id.* at 346, 269 S.E.2d at 216 (quoting 38 AM. JUR. 2D *Guaranty* § 128 (1968); 38 C.J.S. *Guaranty* § 114 (1943) (emphasis supplied by the court)). Because Stroupe had possession of the automobile (a means of indemnity), Smith would have an action for the price of the automobile against Stroupe.

74. 46 N.C. App. 427, 265 S.E.2d 467 (1980).

75. *Id.* at 429, 265 S.E.2d at 469.

76. *Id.*

77. *Id.* at 430, 265 S.E.2d at 470.

78. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Milam, 438 F. Supp. 227 (S.D.W.Va. 1977); Lumberman's Mut. Cas. Co. v. Oliver, 115 N.H. 141, 335 A.2d 666 (1975).

79. 46 N.C. App. at 436, 265 S.E.2d at 473.

80. *Id. See generally* 8 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4731 (1962, Cum. Supp. 1973 & Supp. 1979).

81. 46 N.C. App. at 436, 265 S.E.2d at 473.

82. *Id.* In Brandon v. Nationwide Mut. Fire Ins. Co., 46 N.C. App. 472, 265 S.E.2d 496, the

D. *Limited Partnership*

The formation of a limited partnership for the purpose of real estate investment and development is a common business practice. Because real estate development is a highly uncertain enterprise, in which anything can go wrong, the wise investor must pay close attention to his investment. But in a construction venture, a limited partner who has neither the skill nor the time to oversee a construction project will usually rely on the managerial skills of his general partner to complete the project according to plans. In *Browning v. Maurice B. Levien & Co.*[83] the North Carolina Court of Appeals considered a case in which complete inattention by the limited partners in a construction financing limiting partnership resulted in disaster.

In *Browning*, the plaintiffs were limited partners in a partnership formed to finance and build an apartment complex.[84] There were two general partners, a general contracting company and its principal stockholder and chief executive officer.[85] Each of the limited partners signed statements acknowledging that he had been advised of the risks of the venture, that he was in the fifty per-cent tax bracket, and that he had access to all necessary documents to form a judgment on the merits of the transaction.[86] The limited partnership arranged a construction loan with a New York bank.[87] As is common in construction financing, the bank hired an architect to inspect the construction site and certify progress payments to the general contractor.[88] The partnership did not require the general contractor to file a performance bond.[89] In July 1973, the architect certified that the project was 85.5 percent complete; the bank at that time had paid the corresponding amount of the loan to the general contractor.[90] In August 1973, the general contractor defaulted and, because the partnership failed to obtain further financing, the bank foreclosed.[91] The two general partners declared bankruptcy.[92] The plaintiffs filed an action against the architect on their own behalf and, in the alternative, derivatively on behalf of the partnership.[93] The plaintiffs alleged that the architect was negligent in

---

court of appeals considered another case in which the insurer denied liability because of the insured's failure to follow insurance policy procedures. In *Brandon* the insured plaintiff filed a proof-of-loss form with the defendant insurer after his residence burned. The insurance company alleged that the file was incomplete, refused to accept it, and on these grounds denied that proof of loss had been filed. The court of appeals rejected the trial court's decision to submit the issue to the jury and held that where uncontroverted evidence showed that the plaintiff had filed a timely proof of loss form, the insurance company could not, in its sole discretion, declare that an incomplete filing was a failure to file under the policy. *Id.*

83. 44 N.C. App. 701, 262 S.E.2d 355 (1980).

84. 44 N.C. App. at 702, 262 S.E.2d at 356.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* For a broad view of construction financing, *see generally* G. OSBORNE, G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW 702-799 (1979).

89. 44 N.C. App. at 703, 262 S.E.2d at 357.

90. *Id.*

91. *Id.*

92. *Id.*

93. 44 N.C. App. at 705-06, 262 S.E.2d at 358. The question of the right of the limited part-

certifying uncomplete work by the contractor and that the architect's negligence resulted in a $900,000 loss to the plaintiffs. The defendant offered the defense of contributory negligence based on the fact that the plaintiffs had failed to require a performance bond of the general contractor. The jury found that the defendant had been negligent and the plaintiffs contributorily negligent and awarded the plaintiff one dollar in damages.[94] In ordering a new trial the court of appeals held that contributory negligence was a proper issue for the jury under the facts of the case, but returned the case to trial court because of erroneous jury instructions.[95]

In holding that the plaintiffs could be properly charged with contributory negligence, the court pointed to the "business acumen" of the limited partners as constituting the standard of care.[96] The court maintained that the failure of the limited partners to require a performance bond created a jury question as to whether such failure would be accepted by a reasonable businessman of comparable experience, and whether the ommission was a proximate cause of the plaintiffs' damages.[97] Although the court allowed contributory negligence as a jury question, it ordered a new trial because the trial court, in its instructions to the jury, directed the jury to the plaintiffs' opportunity to inspect the project and records and their failure to learn of the overcertification until after the general contractor had defaulted.[98] The court of appeals contended there was no evidence that inspection of the partnership records would reveal the overcertification, so that, this ommission by the limited partners could not be proximate cause of the plaintiffs' damages.[99]

The court of appeals treated two other potentially difficult issues summarily. First, addressing the question of the limited partners' standing to sue on behalf of the partnership,[100] the court maintained that the injury involved ran directly to the limited partners' interests rather than to the partnership; hence there was no necessity for a derivative action.[101] The court denied that the limited partners' right to participate in proceeedings concerning "dissolution and winding up" under G.S. 59-10[102] invested the limited partners with a right to a derivative action.[103] Second, under North Carolina statutory and case

---

ners to sue the architect notwithstanding lack of privity arose, but the court pointed out it had settled that question in Davidson & Jones, Inc. v. County of New Hanover, 41 N.C. App. 661, 255 S.E.2d 580 (1979). "An architect . . . is liable for damages proximately caused by his negligence to anyone who can be reasonably foreseen as relying on that architect's performing his services in a reasonable manner." 44 N.C. App. at 704-05, 262 S.E.2d at 358.

94. 44 N.C. App. at 705, 262 S.E.2d at 358.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. Some courts have held that limited partners lack standing to enforce claims arising out of obligations that accrue directly to the partnership. *See* Note, *Procedures and Remedies in Limited Partners' Suits for Breach of the General Partner's Fiduciary Duty*, 90 HARV. L. REV. 763 (1977); *see also* Note, *Standing of Limited Partners to Sue Derivatively*, 65 COLUM. L. REV. 1463 (1965).

101. 44 N.C. App. at 704, 262 S.E.2d at 357.

102. N.C. GEN. STAT. § 59-10 (1975).

103. 44 N.C. App. at 704, 262 S.E.2d at 357.

law, the knowledge of general partners can be imputed to limited partners.[104] Thus it could be argued that the limited partners in *Browning*, through the general partners, had knowledge of, and acquiesced to, the negligent overcertification by the defendant architect. The court, however, held—without explanation—that the general partner's knowledge of the overcertification did not bar the limited partners from suing the architect.[105]

The *Browning* decision is essentially incorrect. In real estate development contracts a performance bond is simply insurance that the general contractor will perform his obligations under the contract. A performance bond is guaranteed mitigation of potential losses. But the lack of a performance bond cannot be the cause of actual injury.[106] In *Browning*, whether the plaintiffs provided for recovery from potential injury is irrelevant in determining whether the architect's negligence injured the plaintiffs. The injury in the case is an economic loss due to a wrongful disbursement of loan proceeds. The issue is whether the architect's negligence caused the wrongful disbursement. The limited partners' failure to secure a performance bond had no causal relationship to the architect's actions. It did not contribute to the plaintiff's *injury*.[107] Therefore the limited partners' omission, no matter how careless, is not evidence of contributory negligence. The *Browning* court, in effect, imposed a duty to insure upon the limited partners. In so doing the court confused care in protecting oneself from injury with care in providing for recovery from injury. The latter is not a recognized duty in American tort law.

The *Browning* opinion not only mishandles basic elements of tort law but also may cause unnecessary confusion in North Carolina limited partnership law as well. Under G.S. 59-7[108] a limited partner who "takes part in the control of the business" may become liable to creditors as a general partner. There is some controversy as to how actively a limited partner may participate in the business before he crosses the line and becomes liable as a general partner.[109] *Browning* imposes a duty on limited partners to make what is arguably

104. N.C. GEN. STAT. § 59-42 (1975) provides that except in case of fraud, notice to any partner of any matter relating to partnership affairs, and knowledge of any partner who could have communicated such knowledge to another partner, is imputed as notice to, or knowledge of, the partnership. In Howard v. Hamilton, 28 N.C. App. 670, 222 S.E.2d 913 (1976), the court of appeals held that knowledge of a lien on certain property by a general partner was imputed to the limited partners.

105. 44 N.C. App. at 706, 262 S.E.2d at 359.

106. "Contributory negligence is conduct on the part of the plaintiff, *contributing as a legal cause to the harm he has suffered*, which falls below the standard to which he is required to conform for his own protection." W. PROSSER, HANDBOOK OF THE LAW OF TORTS 416-17 (4th ed. 1971) (emphasis added).

107. This point can be illustrated by imagining that the limited partners had required a performance bond. In that case the surety would have been obligated to pay or complete construction. At that point the surety would have been subrogated to the plaintiff's claim against the architect (ignoring indemnity agreements). The injury to the plaintiff would have been unchanged by the acquisition of the performance bond. The architect ultimately would be liable because of his injury to the plaintiff.

108. N.C. GEN. STAT. § 59-7 (1975).

109. *See* Abrams, *Imposing Liability for "Control" Under Section 7 of the Uniform Partnership Act*, 28 CASE W. RES. L. REV. 785 (1978); Feld, *The "Control" Test for Limited Partners*, 82 HARV. L. REV. 1471 (1969).

a managerial decision. One may assume that the court did not intend to force limited partners in real estate partnerships into a position of full liability. But the court has held that in at least one instance limited partners must actively participate in the management of the partnership. Whether limited partners have other duties to participate actively in the partnership is unclear. In the future, determining the line between the duty to act under *Browning* and the consequences of limited partner's action under G.S. 59-7 may be a source of trouble for attorneys attempting to provide sound advice to their clients.

E. Express Warranty

In *Richard W. Cooper Agency, Inc. v. Irwin Yacht and Marine Corp.*,[110] defendant's express warranty purported to limit damages to the cost of replacement and repair of defects in materials and workmanship.[111] Plaintiff offered evidence only of the difference between the value of the defective goods as accepted and the value of goods as warranted.[112] The North Carolina Court of Appeals held that the evidence was sufficient to avoid a directed verdict because plaintiff's initial proof of breach of the express warranty would entitle him to at least nominal damages.[113] The court also reasoned that proof of the difference in value, at least in respect to a new good, would contribute to a determination of the cost of repair and replacement.[114]

Williams v. Hyatt Chrysler-Plymouth, Inc.[115] involved the dichotomy between limitation of warranties and limitation of remedies under the Uniform Commercial Code.[116] Many consumer goods are provided with a limited repair warranty.[117] These warranties usually contain a narrow express warranty, a disclaimer of all other implied and express warranties, an exclusive remedy, and a specific exclusion of liability for consequential damages.[118] In *Williams* the manufacturer provided a limited warranty to repair the good but failed to make the remedy exclusive.[119] The court emphasized the distinction between a limitation of the manufacturer's warranty obligation under G.S. 25-2-316[120] and a limitation of the remedy available to the purchaser upon

110. 46 N.C. App. 248, 264 S.E.2d 768 (1980).

111. *Id.* at 253, 264 S.E.2d at 771.

112. *Id.* at 252, 264 S.E.2d at 771. Since plaintiff was also proceeding under the theory that there was an implied warranty of merchantibility (N.C. GEN. STAT. § 25-2-314), plaintiff was proving the general measure of damages under the U.C.C. (N.C. GEN. STAT. § 25-2-714(2)—difference in values).

113. 46 N.C. App. at 253, 264 S.E.2d at 771.

114. *Id.* The court based its reasoning on the reverse application of the legal theory that the cost of repairs has a logical tendency to illuminate the issue of difference in value. *See* Simrel v. Meeler, 238 N.C. 668, 78 S.E.2d 766 (1953).

115. 48 N.C. App. 308, 269 S.E.2d 184 (1980).

116. *Id.* at 314-16, 269 S.E.2d at 188-89.

117. Eddy, *Effects of the Magnuson-Moss Act Upon Consumer Product Warranties*, 55 N.C. L. REV. 835, 840-41 (1977).

118. *Id.* at 841.

119. 48 N.C. App. at 315, 269 S.E.2d at 188-89 (except for excluding consequential damages).

120. N.C. GEN. STAT. § 25-2-316 (1965).

breach of that obligation under G.S. 25-2-719.[121] The manufacturer's failure expressly to limit its remedy made the remedies available to the purchaser cumulative[122] under G.S. 25-2-719(1)(b).[123] In limiting remedies for breach of warranty, the manufacturer may avoid this pitfall by skillfully drafting warranty clauses specifically making both the warranty obligation and the remedy exclusive.

In *Stutts v. Green Ford, Inc.*,[124] the court of appeals grappled with several other warranty issues. After purchasing a truck from the defendant,[125] plaintiff returned it to defendant's service department many times during the first seven months of ownership for repairs of numerous defects and failures.[126] When defendant failed to correct the problems plaintiff took the truck to another dealer.[127] When the warranty coverage ran out the truck still had a persistent oil leak and suffered a loss of power on inclines.[128]

Plaintiff filed suit for breach of express warranty and for consequential damages.[129] A directed verdict was granted to defendants Ford Motor Company and Green Ford, Inc.[130] The court of appeals vacated the judgments.[131]

The court construed the warranty to limit the manufacturer's and seller's obligation to the repair and replacement of defective parts[132] but held that plaintiff was not required to identify the specific parts or workmanship that were defective.[133] Plaintiff's recognition of the problems was sufficient to provide an inference of a defective part and thus invoked the warranty obligation.[134] Therefore, once plaintiff determined that the automobile was defective, he was entitled to return it to the dealer for correction.[135] This decision is based on the inability of the normal automobile purchaser to isolate a defective part.

The court also recognized that a failure to make repairs within a reason-

---

121. N.C. GEN. STAT. § 25-2-719 (1965).

122. 48 N.C. App. at 315-16, 269 S.E.2d at 189. Thus the purchaser had the remedies available under the U.C.C. in addition to the replacement and repair warranty provided by the manufacturer.

123. N.C. GEN. STAT. 25-2-719(1)(b) provides that "resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy."

124. 47 N.C. App. 503, 267 S.E.2d 919 (1980).

125. *Id.* at 508, 267 S.E.2d at 922.

126. *Id.* at 509, 267 S.E.2d at 923.

127. *Id.*

128. *Id.*

129. *Id.* at 507, 267 S.E.2d at 921-922. Plaintiff also requested a temporary restraining order against Ford Motor Credit Co. to prevent it from taking possession of the truck pending final determination of the case. Ford Motor Credit Co. alleged a counterclaim for the amount due to it under the installment contract. The trial court granted them a directed verdict on this issue. The court of appeals vacated this judgment, remanding for determination by the jury, the issue of how many monthly installments plaintiff had paid.

130. *Id.* at 507-508, 267 S.E.2d at 922.

131. *Id.* at 510, 267 S.E.2d at 923.

132. *Id.* at 512, 267 S.E.2d at 924.

133. *Id.* at 512-13, 267 S.E.2d at 924-25.

134. *Id.* at 513, 267 S.E.2d at 925.

135. *Id.* at 512-13, 267 S.E.2d at 924-25 (quoting Allen v. Brown, 181 Kan. 301, 307, 310 P.2d 923, 927-28 (1957)).

able time was sufficient to breach the warranty and provide a cause of action against the warrantor.[136] In doing so, the court adopted the rule of a number of other jurisdictions.[137]

Relying on *Lilley v. Manning Motor Co.*[138] defendants argued that by taking the truck to another dealer, plaintiff prevented defendants from carrying out the terms of the warranty.[139] The court rejected the argument, distinguishing *Lilley* on its facts.[140] The Court read *Lilley* to hold only that when there is no evidence that the dealer is unable to make the repairs a refusal to permit the dealer to comply with the warranty absolved the dealer of liability.[141] In *Stutts* there was evidence of unsatisfactory repairs to justify seeking another dealer.

For guidance in the new trial, the court discussed the appropriate measure of damages to apply in the case. Following other jurisdictions, the court determined that when a defect is not repaired in a reasonable period of time, the limited remedy "fail[s] of its essential purpose" under G.S. 25-2-719(2)[142] and that the purchaser may then recover other remedies provided for under the Uniform Commercial Code.[143] Thus the Court tied the breach of warranty standard and the failure of remedy determination into one test. Under limited repair warranties, the plaintiff may now prove that the warrantor has failed to repair the defect in a reasonable length of time or has refused to repair the defect. The plaintiff has then proved breach of the warranty obligation and failure of the limited remedy and thus has negated the limited warranty.

F. Close Corporations

In *Snyder v. Freeman*[144] the supreme court significantly altered traditional rules of corporate governance by holding that a contract executed by all shareholders of a close corporation, in their individual capacities only, may nevertheless bind the corporation, if the shareholders so intend.[145] Ordinarily, a corporation is bound by acts of its shareholders only when they act under

136. 47 N.C. App. at 513, 267 S.E.2d at 925.

137. The court cited Allen v. Brown, 181 Kan. 301, 310 P.2d 923 (1957); Givan v. Mack Truck, Inc., 569 S.W.2d 243 (Mo. Ct. App. 1978). 47 N.C. App. at 513, 267 S.E.2d at 925; and Cannon v. Pulliam Motor Co., 230 S.C. 131, 94 S.E.2d 397 (1956).

138. 262 N.C. 468, 137 S.E.2d 847 (1964).

139. 47 N.C. App. at 513, 267 S.E.2d at 925.

140. 262 N.C. 468, 137 S.E.2d 847 (1964).

141. 47 N.C. App. at 513, 267 S.E.2d at 925.

142. N.C. GEN. STAT. 25-2-719(2): "Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this chapter."

143. 47 N.C. App. at 514-15, 267 S.E.2d at 925-26. The Court goes on to hold that the measure of damages in this case should be the difference between the fair market value of the truck had it been as warranted and the fair market value of the truck the plaintiff accepted plus the increased value of repairs and replacements. *Id.* at 515, 267 S.E.2d at 926.

144. 300 N.C. 204, 266 S.E.2d 593 (1980).

145. *Id.* at 210, 266 S.E.2d at 597-98. The court alternatively held that the corporation could be bound by the shareholders' agreement under the principle of ratification, since the corporate entity had itself accepted benefits from the agreement and thus may have intended to adopt it.

authority conferred by the board of directors at a duly constituted meeting.[146] The court reasoned, however, that when the shareholders waive formalities established for their benefit, there is no need for the judiciary to insist on such formalities.[147] Although the holding circumvents the traditionally exclusive role of the board of directors in managing the everyday affairs of the corporation,[148] the result is consistent with realities of the close corporation. Requiring *all* shareholders as parties to the agreement ensures that all beneficially interested persons intend the consequences, despite the lack of any formal board action.

THOMAS J. HEFFERON
LISA MARIE NIEMAN
DAVID A. STOCKTON
GARRETT A. STONE

146. Park Terrace, Inc. v. Phoenix Indem. Co., 241 N.C. 473, 478, 85 S.E.2d 677, 680 (1955), *aff'd on rehearing*, 243 N.C. 595, 91 S.E.2d 584 (1956).

147. 300 N.C. at 210, 266 S.E.2d at 598 (citing Philadelphia Life Ins. Co. v. Crosland-Cullen Co., 234 F.2d 780, 783 (4th Cir. 1956)); H. BALLANTINE, CORPORATIONS § 126, at 296 (rev. ed. 1946).

148. *See* N.C. GEN. STAT. § 55-24 (1955).

IV. CONSTITUTIONAL LAW

A. Commerce Clause

In *Burke County Public Schools Board of Education v. Shaver Partnership*[1] the North Carolina Court of Appeals held that a contract between a North Carolina board of education and an Indiana architect for the design of a North Carolina school building did not involve "commerce" within the meaning of the Federal Arbitration Act (FAA).[2] The court therefore denied defendant's demand for arbitration under the FAA.[3] In reaching its decision, the court equated interstate commerce, as required for application of the FAA, with the "actual physical interstate shipment of goods."[4] This interpretation was based in part on the United States Supreme Court case of *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*.[5]

Prima Paint held that a consulting agreement between a Maryland corporation and a New Jersey corporation involved interstate commerce within the meaning of the FAA. The rationalization for this decision was the close connection of the consulting agreement with the interstate transfer and continued operations of an interstate manufacturing and wholesale business.[6] Although *Prima Paint* expressly held that application of the FAA was not limited to "contracts between merchants for the interstate shipment of goods,"[7] the court in *Burke County* interpreted the *Prima Paint* decision to require some involvement or relation between the transaction and the actual physical interstate shipment of goods.[8]

Defendant in *Burke* argued that there was sufficient interstate involvement in the contract to meet FAA requirements. Its contention was based on such factors as defendant's employment of out-of-state personnel, defendant's use of out-of-state facilities, plaintiff's payments to defendant at out-of-state offices, and defendant's specification of materials manufactured by out-of-

---

1. 46 N.C. App. 573, 265 S.E.2d 481 (1980).

2. Section 1 of the Federal Arbitration Act defines "commerce" as "commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and any State or foreign nation . . . ." 9 U.S.C. § 1 (1976).

Section 2 of the Act provides that the FAA is to govern the arbitrability of a contract that evidences a "transaction involving commerce." *Id.* § 2. If the FAA is applicable to a contract, federal arbitration rules supersede conflicting state law even if there is a choice of law clause in the contract. 46 N.C. App. at 574, 265 S.E.2d at 481.

3. 46 N.C. App. at 578, 265 S.E.2d at 483. The contractual dispute that was the subject of the suit concerned alleged design defects in the roof of the school building. *Id.* at 574, 265 S.E.2d at 481.

4. *Id.* at 576, 265 S.E.2d at 482.

5. 388 U.S. 395 (1967).

6. *Id.* at 401. The court stated that "[t]here could not be a clearer case of a contract evidencing a transaction in interstate commerce." *Id.*

7. *Id.* at 401 n.7. In making this determination the Court looked to legislative intent. A House Report on the Act stated that "[t]he control over interstate commerce [one of the bases for the legislation] reaches not only the actual physical interstate shipment of goods but also contracts relating to commerce." *Id.* at 401-02 n.7 (quoting H.R. REP. No. 96, 68th Cong., 1st Sess. 1 (1924)).

8. 46 N.C. App., at 576, 265 S.E.2d at 482.

state suppliers.[9] The court rejected defendant's argument, stating that "it is evident that the essence of the contract was for the defendant to provide architectural services to plaintiff for the construction of two high schools."[10] It regarded the contract's interstate involvement as incidental to the contract and, therefore, insufficient to establish interstate commerce within the meaning of the FAA.[11]

The decision in *Burke* is consistent with the 1979 North Carolina Court of Appeals decision in *Bryant-Durham Electric Co. v. Durham County Hospital Corp.*[12] In *Bryant-Durham* the court of appeals refused to extend application of the FAA to a North Carolina construction contract merely because some of the materials used by plaintiff to perform the contract were shipped in interstate commerce. The court again referred to the "subject of the contract" analysis, stating that "[a]s we interpret this section [9 U.S.C. § 2] the transaction which is the subject of the contract must be a transaction in interstate commerce."[13] Construction of the Durham County Hospital was considered the "subject of the contract;" consequently, the FAA was deemed inapplicable.[14]

The *Burke County* and *Bryant-Durham* decisions limit application of the Federal Arbitration Act to those contracts in which the subject or essence of the contract concerns actual physical interstate shipment of goods. Other transactions are governed by the North Carolina Arbitration Act.[15] As a result, contracting parties wishing to ensure arbitration of disputes would be well-advised to write arbitration clauses that are valid under state as well as federal law.[16]

B. First Amendment

In *Heritage Village Church & Missionary Fellowship, Inc. v. State*[17] the North Carolina Supreme Court held that the exemption of some but not all religious groups from the Solicitation of Charitable Funds Act[18] violated the

9. *Id.* at 576-78, 265 S.E.2d at 483.

10. *Id.* at 578, 265 S.E.2d at 483.

11. *Id.*

12. 42 N.C. App. 351, 256 S.E.2d 529 (1979).

13. *Id.* at 356, 256 S.E.2d at 532.

14. *Id.* The analysis in *Burke County* and *Bryant-Durham Electric* conflicts with an earlier holding of the Federal District Court for the Middle District of North Carolina in *Warren Bros. Co. v. Community Bldg. Corp.*, 386 F. Supp. 656 (M.D.N.C. 1974). In *Warren* the construction of an apartment complex in North Carolina was held clearly to involve interstate commerce within the meaning of the FAA. This was because the defendant contractor brought Georgia personnel in to work on the project, construction materials were shipped from South Carolina and Georgia, and the joint sureties on plaintiff's bond were California and New York companies. *Id.* at 664-65.

15. In *Bryant-Durham Electric* the court reasoned that holding the FAA applicable to any contract involving shipment of materials in interstate commerce would substantially limit use of state arbitration laws. The opinion states that "if this is the proper interpretation of the Federal Arbitration Act there would be little need for the State to have adopted an arbitration act." 42 N.C. App. at 356, 256 S.E.2d at 532.

16. The current North Carolina Arbitration Act is codified at N.C. GEN. STAT. §§ 1-567.1 to .20 (Cum. Supp. 1979).

17. 299 N.C. 399, 263 S.E.2d 726 (1980).

18. N.C. GEN. STAT. § 108-75.7(a)(1) (1978).

establishment clause of the first amendment.[19] In order to protect the public from fraudulent charitable solicitation, the legislature passed a licensing statute requiring charitable organizations to disclose the intended purpose and the actual use of the funds they collected within the state.[20] Although the Act exempted religious groups, the Act qualified that exemption by denying its benefits to religious groups that derived their financial support "primarily from contributions solicited from persons other than [their] own members."[21] The plaintiffs, nonprofit religious organizations, objected to the regulatory scheme because it interfered with conduct required by their religions, the solicitation of money for God.[22] The court of appeals affirmed a permanent injunction barring application of the Act to their organizations,[23] and the state appealed.

The first amendment guarantee of religious freedom has two clauses, an "establishment" clause and a "free exercise" clause.[24] The first clause concerns government benefits to religion in two general contexts: the extension of government aid to religion[25] and the extension of religious activities to government.[26] The second clause concerns government burdens upon religion, distinguishing between freedom to believe, an absolute right, and freedom to act, a right that the government may regulate in the pursuit of legislative purposes unrelated to religion.[27] The clauses overlap, creating a conflict of competing values; for example, the free exercise clause may require the exemption of a religion from a regulatory scheme, but the exemption may prefer that religion in violation of the establishment clause.[28] Nevertheless, the two clauses embrace the unifying principle of neutrality: the government may not use religion as a basis for controlling a benefit or for imposing a burden.[29]

The four judge majority opinion declined to analyze the case in terms of the free exercise clause, a surprising result given the factual similarity of this

---

19. 299 N.C. at 405, 263 S.E.2d at 729. The court also held that the qualified exemption violated similar provisions of the state constitution. *Id.* at 405-06, 263 S.E.2d at 729-30 (citing N.C. CONST. of 1868 art. I, §§ 13, 19 (1970)). However, the court relied mainly on United States Supreme Court cases interpreting the United States Constitution. *Id.* at 406 n.1, 263 S.E.2d at 730 n.1.

20. N.C. GEN. STAT. § 108-75.18(4)-(5) (1978).

21. *Id.* § 108-75.7(a)(1).

22. 299 N.C. at 412, 263 S.E.2d at 734.

23. *Id.* at 404-05, 263 S.E.2d at 729.

24. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

25. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971) (financial aid to parochial schools); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (tax exemption for church property).

26. *See, e.g.*, Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (Bible reading in public schools).

27. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940) (Jehovah's Witness solicited funds without a permit).

28. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (Amish ignored state compulsory school attendance law).

29. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961). The North Carolina Supreme Court expressly recognized this "neutrality" concept in *Heritage Village Church*, 299 N.C. at 406, 263 S.E.2d at 730.

case and the usual free exercise case.[30] Instead, the court adopted a three-prong test of establishment clause neutrality—first, the statute must have a "secular legislative purpose;" second, its effect must be primary, neither advancing nor inhibiting religion; and third, the statute must not create an "excessive government entanglement with religion."[31] Designed to protect the public from fraudulent charitable solicitation, the Act possessed a valid secular purpose.[32] However, the primary effect of the Act advanced orthodox religions by exempting them from regulation and inhibited evangelical religions by subjecting them to regulation.[33] Although orthodox religions rely upon their congregational members' generosity, while evangelical religions rely upon the general public's generosity, both types of religion collected funds as expressions of religious faith.[34] Consequently, any attempt to use the secular purpose of the statute to justify the qualified exemption's disparate treatment of religions created a religions test that belied the allegation of a neutral effect.[35] Having decided that the second prong of the test required either the exemption of all religions or the exemption of none, the court turned to the third prong—entanglement. The regulatory statute involves the government in the intended purposes and actual uses of the solicited funds. It would also permit any person to inject the government into any religious dispute.[36] Therefore, the court held that all religions deserved the protection of the exemption in order to promote the separation of church and state.[37]

The three-judge dissenting opinion vigorously objected to the decision. The dissenters first attacked the effect argument, contending that the majority misunderstood the establishment clause. They denied the existence of a non-neutral religious test,[38] and insisted that the Act's secular purpose required the regulation of soliciting religions and that the Act's accommodation of the free exercise clause required the exemption of nonsoliciting religions.[39]

---

30. In such cases, the claimant argues that a government regulation based on a state interest unrelated to religion interferes with (insists upon) conduct required by (forbidden by) his religious beliefs. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Cantwell v. Connecticut, 310 U.S. 296 (1940). In *Heritage Village Church* the religious groups claimed that the state statute regulating public charitable solicitation burdened the solicitation of God's money. Nevertheless, the state supreme court declined to consider this free exercise issue, noting only that such an inquiry would probably require the state to adopt less restrictive means to achieve its compelling interest. 299 N.C. at 408 n.3, 263 S.E.2d at 731 n.3.

31. 299 N.C. at 407-08, 263 S.E.2d at 731 (citing Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)). *Lemon* consolidated the approaches used in Abington School Dist. v. Schempp, 374 U.S. 203 (1963) ("purpose" and "effect") and Walz v. Tax Comm'n, 397 U.S. 664 (1970) ("entanglement").

32. 299 N.C. at 408, 263 S.E.2d at 731.

33. *Id.* at 411, 263 S.E.2d at 733.

34. *Id.* at 412, 263 S.E.2d at 734.

35. *Id.* The opinion cited a recent federal district court decision that made this argument, Bob Jones Univ. v. United States, 468 F. Supp. 890 (D.S.C. 1978). 299 N.C. at 413-14, 263 S.E.2d at 734-35.

36. 299 N.C. at 415, 263 S.E.2d at 735. The Act enables the state to investigate any organization "upon the complaint of any person." N.C. GEN. STAT. § 108-75.22(b) (1978).

37. 299 N.C. at 416, 263 S.E.2d at 736.

38. *Id.* at 416-17, 263 S.E.2d at 736 (Huskins, J., dissenting).

39. *Id.* at 417-22, 263 S.E.2d at 737-39 (Huskins, J., dissenting).

The dissenters also attacked the majority's entanglement argument. In the mainstream entanglement case, excessive regulation resulted when the state extended benefits to religion.[40] However, in the principal case, excessive regulation resulted when the state imposed burdens on religion.[41] Consequently, the majority actually raised a free exercise issue.[42] The dissenters disposed of this issue by recognizing that the bulk of the statute's provisions enjoyed a necessary relation to a compelling state interest.[43]

Despite this strong counterattack, the majority opinion still possesses considerable force. The establishment clause will not condone a qualified exemption to regulation based upon a religious test,[44] and the free exercise clause will not permit regulation of religious conduct based on such a test.[45] The decision stands on firm constitutional ground.

In *State ex rel. Gilchrist v. Hurley*[46] the North Carolina Court of Appeals rejected constitutional challenges to a North Carolina statute that permitted the state to abate a house of prostitution as a public nuisance.[47] Following numerous arrests of masseuses for soliciting prostitution, plaintiff-district attorney obtained a temporary restraining order, pursuant to the statute, against defendant-massage parlor.[48] Subsequently, the trial court permanently enjoined defendant from maintaining the parlor, and defendant appealed.[49]

The appellate court refused to find the statute's reference to "prostitution" unconstitutionally vague because the public nuisance statute cross-referenced a criminal prostitution statute that adequately defined the term[50] and because prostitution on its face included "the offering or receiving of the body, in return for a fee, for acts of vaginal intercourse, anal intercourse, fellatio, cunnilingus, masturbation, or physical contact with a person's genitals, pubic area, buttocks, or breasts."[51] The court also rejected defendant's "taking" challenge based on the state's exemption from the statutory bond requirement, an exemption that would allegedly permit the state to arbitrarily deprive individuals

40. *See* notes 25 & 31 and accompanying text *supra*.

41. The "benefit" accorded by exemption from the Act resulted in no regulation by the state. 299 N.C. at 424, 263 S.E.2d at 741 (Huskins, J., dissenting).

42. *Id.* at 425, 263 S.E.2d at 741 (Huskins, J., dissenting).

43. *Id.* at 426-30, 263 S.E.2d at 741-44 (Huskins, J., dissenting).

44. *Id.* at 412, 263 S.E.2d at 734 (Exum, J., majority opinion).

45. Cantwell v. Connecticut, 310 U.S. 296, 306-07 (1940) (secular "regulation . . . of solicitation, *which does not involve any religious test . . ., is not open to any constitutional objection*" (emphasis supplied)).

46. 48 N.C. App. 433, 269 S.E.2d 646 (1980), *cert. denied*, 301 N.C. 881, 274 S.E.2d 233 (1981).

47. The statute provides that the use of any building for the purpose of prostitution constitutes a nuisance, that the state may commence an action to abate such nuisance without posting bond, and that the state may obtain a temporary restraining order without notice. N.C. GEN. STAT. §§ 19-1, -2.1, -2.3 (1978).

48. 48 N.C. App. at 436-38, 269 S.E.2d at 649-50.

49. *Id.* at 439, 269 S.E.2d at 650.

50. *Id.* at 442-43, 269 S.E.2d at 652. Prostitution means "the offering or receiving of the body for sexual intercourse for hire." N.C. GEN. STAT. § 14-203 (1969).

51. 48 N.C. App. at 443, 269 S.E.2d at 653. Although the opinion purports to deal with defendant's overbreadth claim as well, the court's definition nevertheless sweeps up such constitutionally innocuous behavior as a doctor's examination.

of property, because the state's initiation of the nuisance action depended on the pursuit of the public welfare as opposed to the pursuit of private concerns.[52] Similarly, the court rejected a "taking" challenge based on the issuance of a temporary restraining order without notice, because the statute authorized the preservation rather than the destruction of property, established the right to an immediate hearing, and incorporated the procedural limitations imposed by the statute governing temporary restraining orders.[53] Finally, the court rejected defendant's first amendment claim and held that the United States Constitution did not protect association for purposes of prostitution.[54]

C. Fourteenth Amendment: Equal Protection[55]

In *Texfi Industries, Inc. v. City of Fayetteville*[56] the North Carolina Supreme Court upheld the constitutionality of G.S. 160A-24 to -30,[57] which sets forth the North Carolina procedure of annexation by referendum. Plaintiff corporation attacked the lawfulness of the statute on two grounds: first, the notice by publication provisions in G.S. 160A-24 were inadequate to safeguard plaintiff's right to due process of law;[58] and second, the referendum procedure gave residents but not corporations a right to vote in a referendum on annexation and thus denied plaintiff equal protection.[59]

---

52. *Id.* at 444-45, 269 S.E.2d at 653.

53. *Id.* at 446-47, 269 S.E.2d at 653-55. N.C. GEN. STAT. § 1A-1, Rule 65(b) (1969), controls the issuance of temporary restraining orders without notice.

54. 48 N.C. App. at 449, 269 S.E.2d at 656.

55. In Maines v. City of Greensboro, 300 N.C. 126, 265 S.E.2d 155 (1980), the supreme court denied the due process and equal protection claims of a Greensboro fireman discharged for violation of a city ordinance that required city employees living inside the city at the time of the adoption of the ordinance to continue to reside within the city. Because a North Carolina employment contract does not create a property interest, the United States Constitution does not guarantee the employee a right to a pretermination hearing; consequently, plaintiff's challenge to the adequacy of a hearing which he did in fact receive failed. *Id.* at 133, 265 S.E.2d at 160.

The court also rejected plaintiff's equal protection challenge based on the city manager's exemption of certain city employees who moved their residences outside the city after the effective date of the ordinance because those exemptions applied to employees who had financially committed themselves to such a move prior to that date. *Id.* at 132-33, 265 S.E.2d at 159-60.

56. 301 N.C. 1, 269 S.E.2d 142 (1980).

57. N.C. GEN. STAT. §§ 160A-24 to -30 (1976 & Supp. 1979).

58. G.S. 160A-24 provides for annexation by the governing body of the municipality as follows:

> After public notice has been given by publication once a week for four successive weeks in a newspaper in the county with a general circulation in the municipality . . . thus notifying the owner or owners of the property located in such a territory that a session of the municipal legislative body will meet for the purposes of considering the annexation of such territory to the municipality . . . .

Id. § 160A-24 (Cum. Supp. 1979).

59. G.S. 160A-25 allows qualified voters residing in the affected area to file a petition at a public hearing requesting a referendum on the question of annexation. The petition must be signed by at least 15% of the qualified voters residing in the affected area. After the petition is filed, the governing body of the municipality is required to submit the annexation question to a vote of the qualified resident voters. Qualified resident voters are those who "actively participated in the last gubernatorial election." *Id.* § 160A-25 (1976). In this case there were no natural persons residing in the affected area. There were, therefore, no residents qualified to vote in a referendum under G.S. 160A-25. 301 N.C. at 7, 269 S.E.2d at 147.

The public notice procedure used in this instance by the City of Fayetteville complied with statutory requirements.[60] The statutory notice procedure itself was held constitutionally valid as being "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action."[61] The court rejected plaintiff's argument that the city should have been required to mail personal notice of the pendency of annexation to each real property owner in the affected area. Since the publication procedure had been found constitutionally adequate, the court felt it was without authority to substitute its judgment for that of the legislature.[62] In addition, plaintiff was without standing to raise the issue since it owned no real property in the area.[63]

The crux of plaintiff's constitutional attack on the annexation procedure was its equal protection argument. G.S. 160A-25 permits "qualified resident voters" to submit a petition at a public hearing requesting a referendum on the issue of annexation. Only qualified resident voters are then allowed to vote in the referendum.[64] Corporations are not considered qualified resident voters,[65] and therefore are not permitted to petition for, or vote in, a referendum proceeding.

The court, acknowledging that corporations are entitled to assert equal protection claims,[66] used the traditional two-tiered equal protection analysis to determine the validity of the annexation statute.[67] The supreme court held that a corporation is not a suspect class for purposes of applying a strict scrutiny test. It stated that "[w]e are unable to conclude that corporations have been saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to make it appropriate to make such fictitious entities members of a suspect class."[68] The court also refused to apply strict scrutiny based on denial of a fundamental right.[69] The fundamental rights of corporations are limited to those constitutional guarantees that are not "purely personal" or unavailable to corporations for some other reason depending on the "nature, history, and purpose of the particular constitutional provision . . . ."[70] The corporate right to vote was not deemed fundamental due to the nature of the

60. The city published a notice in the Fayetteville Observer once a week for four consecutive weeks. The notice described the area proposed for annexation and set forth the date, hour, and place of public hearing. The hearing was held as scheduled and no opposition to the proposed annexation was voiced. 301 N.C. at 2, 269 S.E.2d at 144.

61. *Id.* at 9, 269 S.E.2d at 148. The court cited the due process test of Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950).

62. 301 N.C. at 10, 269 S.E.2d at 148.

63. *Id.* Texfi Industries was a Delaware corporation that leased real property under an agreement that required it to pay all real property taxes on the leased premises. *Id.* at 2, 269 S.E.2d at 144.

64. N.C. GEN. STAT. § 160A-25 (1976). *See* note 59 and accompanying text *supra*.

65. *See* note 59 and accompanying text *supra*.

66. 301 N.C. at 12, 269 S.E.2d at 150.

67. *Id.* at 10, 269 S.E.2d at 149.

68. *Id.* at 12, 269 S.E.2d at 149.

69. *Id.*

70. *Id.* at 13, 269 S.E.2d at 150 (citing First National Bank v. Bellotti, 435 U.S. 765, 780 n.14 (1978)). *First National Bank* stated further: "Certain 'purely personal' guarantees . . . are un-

corporate entity.[71] Corporations were regarded as artificial entities designed for the purpose of managing economic resources. The court reasoned that corporations, by their nature, do not share in the concerns of the general voting public.[72]

The practical difficulties in allowing corporate suffrage also influenced the court's decision. The court feared that the possibility of diversification of a single corporation into many affiliates and subdivisions would allow a multiplication of corporate voting power, to the detriment of natural persons.[73]

After rejecting the strict scrutiny standard of equal protection, the court applied a rational basis test to determine the constitutionality of the statute.[74] G.S. 160A-25 was held to bear a rational relation to the legitimate governmental purpose of insuring the integrity of the right to vote.[75] Such practical problems as the variety of interests represented by a single corporation, the possibility of corporate location in a number of jurisdictions, and the possibility of multiplication of corporate subsidiaries were deemed sufficiently incompatible with the integrity of the franchise to justify denial of corporate suffrage.[76]

Justice Exum, dissenting, argued that the legislature did not intend use of the referendum procedure of annexation in a case when no qualified resident voters resided in the affected area.[77] He viewed the history of the annexation statutes, as well as the statutes themselves, as evidence of an intent to permit annexation only by the will of qualified voters in the area, or when the area itself had become sufficiently urbanized to permit annexation under G.S. 160A-30 or 160A-45.[78] In this case, the city was not required to prove that the affected area met urbanization standards because it was proceeding by way of referendum.

Justice Carlton joined in Justice Exum's dissent. Additionally, he disagreed with the majority's equal protection argument. He saw no incompati-

---

available to corporations and other organizations because the 'historic function' of the particular guarantee has been limited to the protection of individuals." 435 U.S. at 779 n.14.

71. 301 N.C. at 13, 269 S.E.2d at 150. In Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969), the United States Supreme Court held that the voting rights of natural persons were fundamental. The Court stated that "any alleged infringement on the right to vote must be carefully and meticulously scrutinized." *Id.* at 626 (quoting Reynolds v. Sims, 377 U.S. 533, 562 (1964)). *See* Lloyd v. Babb, 296 N.C. 416, 251 S.E.2d 843 (1979), which held that state laws that have the effect of denying certain classes the right to vote must have compelling justification.

72. 301 N.C. at 13, 269 S.E.2d at 150.

73. *Id.*

74. *Id.* In Rexham Corp. v. Town of Pineville, 26 N.C. App. 349, 216 S.E.2d 445 (1975), the North Carolina Court of Appeals applied the rational basis test in holding that the annexation procedure of G.S. 160A-33 to -44 does not violate equal protection. The statute allows town-initiated annexation for towns with a population of less than 5,000. N.C. GEN. STAT. §§ 160A-33 to -44 (1976 & Cum. Supp. 1979). In Plemmer v. Matthewson, 281 N.C. 722, 190 S.E.2d 204 (1972), the supreme court stated that the manner of annexation rests entirely in the discretion of the legislature. As a result, an annexation ordinance authorizing annexation without the consent of inhabitants of the affected area was held valid.

75. 301 N.C. at 13-14, 269 S.E.2d at 150.

76. *Id.*, 269 S.E.2d at 150-51.

77. *Id.* at 14-17, 269 S.E.2d at 151 (Exum, J., dissenting).

78. *Id.*, 269 S.E.2d at 151-52 (Exum, J., dissenting).

bility between allowing a corporate right to vote and protecting the integrity of the voting franchise.[79] He further stated that "[d]enial of the right to vote should not be predicated upon the fear of potential abuse. Such abuse can be prevented by appropriate legislation."[80]

Texfi permits municipalities to circumvent checks on annexation decisions by following referendum procedures in areas where there are no qualified resident voters. It also denies corporate residents the right to affect the decision to annex even though they own real property in the area.[81] Despite judicial recognition of the constitutional rights of corporations,[82] these rights are not deemed coextensive with those of natural persons.[83] It is thus within the discretion of the court to decide whether a particular right is available to corporations by applying the "purely personal" and "historic function" tests of *First National Bank v. Bellotti*.[84]

In *Hohn v. State*[85] the North Carolina Court of Appeals upheld G.S. 1-17(b)[86] against a claim that it was violative of equal protection. Plaintiff in *Hohn* alleged that he had been the victim of various acts of medical malpractice as a four-year-old child. Plaintiff filed suit to recover for these injuries when he was twenty years old and the action was dismissed as barred by the statute of limitations. G.S. 1-17(b) provides that an action on behalf of a minor for malpractice shall be brought within three years unless this time limit expired before the minor reaches the age of nineteen, in which case the action may be commenced before the minor reaches the age of nineteen.[87] Plaintiff contended that G.S. 1-17(b) created an arbitrary classification by limiting the time a minor has to bring a malpractice action to less than the time allowed a minor for other tort claims, which is normally three years after reaching the age of eighteen. The court rejected this claim, noting that no suspect class or fundamental right was involved. Rather, the statute was permissibly based on the "substantial distinction between persons who have malpractice claims and those with other types of tort claims."[88] The court did not elaborate upon the basis for this distinction other than stating that any claim that G.S. 1-17(b) was enacted for the benefit of insurance companies must be directed to the legislature.[89]

---

79. *Id.* at 17, 269 S.E.2d at 152 (Carlton, J., dissenting).

80. *Id.* (Carlton, J., dissenting).

81. This factor was not present in this case. *See* note 63 and accompanying text *supra*.

82. *See, e.g.*, First National Bank v. Bellotti, 435 U.S. 765 (1978); G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977); Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961).

83. Corporations have been denied certain constitutional rights such as the privilege against compulsory self-incrimination, Wilson v. United States, 221 U.S. 361, 382-86 (1911), and the right to privacy, California Bankers Ass'n v. Shultz, 416 U.S. 21, 65-67 (1974).

84. 435 U.S. 765 (1978). *See* note 70 and accompanying text *supra*.

85. 48 N.C. App. 624, 269 S.E.2d 307 (1980).

86. N.C. GEN. STAT. § 1-17(b) (Cum. Supp. 1979).

87. *Id.*

88. 48 N.C. App. at 627, 269 S.E.2d at 308.

89. *Id.*

D. Fourteenth Amendment: Due Process

1. Civil Contempt and Right to Counsel

The United States Supreme Court held in *Argersinger v. Hamlin*[90] that no defendant may be imprisoned, for even the most petty infraction of the law, without the benefit of counsel at his trial. *Argersinger*, the Court's ultimate expression of the indigent defendant's sixth amendment right to appointed counsel, sets forth an absolute rule of entitlement in criminal cases. Beyond the reach of the *Argersinger* rule, however, is a variety of civil cases in which imprisonment is possible, but the indigent's entitlement to counsel is much less clear. These include civil contempt for nonpayment of child support. According to the North Carolina Supreme Court's recent ruling in *Jolly v. Wright*,[91] an indigent defendant without the assistance of counsel for his defense may be held in civil contempt and imprisoned for nonsupport.

In 1976, defendant in *Jolly* signed a voluntary agreement to pay child support. The agreement was approved by a district court judge and enforceable as a court order.[92] In 1979, the Wake County Child Support Enforcement Agency filed a motion in the Superior Court of Wake County alleging that defendant was $650 in arrears, and the court ordered defendant to appear and show cause why he should not be held in civil contempt and committed to jail. On the day of the hearing, a local legal aid attorney made a limited appearance for defendant, alleging that he was indigent and requesting that counsel be appointed for indigent defendants in all civil contempt cases for nonpayment of child support. The motion was denied. Further action on the contempt charge was stayed pending appeal of the motion, and the North Carolina Supreme Court, allowing a motion to bypass the court of appeals, took the case for initial appellate review.[93]

The supreme court affirmed the lower court's ruling and held that there is no absolute statutory or constitutional entitlement to appointed counsel for indigent defendants in civil contempt cases for nonsupport. The court first addressed defendant's claim that G.S. 7A-451(a)(1),[94] which provides for the appointment of counsel in "any case" in which imprisonment is likely to be adjudged, must apply to civil contempt for nonsupport—a case in which imprisonment is likely. The court rejected this claim, finding that the legislative intent of G.S. 7A-451(a)(1) was to reflect "the scope of entitlement to court-appointed counsel in sixth amendment cases in light of current constitutional doctrine,"[95] rather than to lay down a broad rule of entitlement to counsel in

90. 407 U.S. 25 (1972).

91. 300 N.C. 83, 265 S.E.2d 135 (1980).

92. *Id.* at 83, 265 S.E.2d at 137. The agreement is enforceabile pursuant to N.C. GEN. STAT. § 110-132 (Supp. 1979).

93. 300 N.C. at 84, 265 S.E.2d at 137-38.

94. G.S. 7A-451(a)(1) states in pertinent part: "(a) An indigent person is entitled to services of counsel in the following actions and proceedings: (1) Any case in which imprisonment, or a fine of five hundred dollars ($500), or more, is likely to be adjudged . . . ." N.C. GEN. STAT. § 7A-451(a)(1) (Cum. Supp. 1979).

95. 300 N.C. at 87, 265 S.E.2d at 140.

all cases involving imprisonment. That construction of the statute was supported very convincingly by a review of the revisions of the statute since it was enacted, with each revision corresponding to a change in the United States Supreme Court's interpretation of the right to counsel under the sixth amendment.[96] Thus, G.S. 7A-451(a)(1) provides for appointment of counsel only in criminal cases to which the sixth amendment applies, and not in civil cases.[97]

The court then turned to the most important issue in the case—whether an indigent defendant in civil contempt nonsupport proceedings has a constitutional[98] right to counsel under the sixth amendment[99] or the due process clause of the fourteenth amendment.[100] The court dispensed with the sixth amendment claim to entitlement by finding that civil contempt for nonsupport is not sufficiently criminal in nature for the sixth amendment to apply. In North Carolina, the court held, civil contempt for nonsupport is unquestionably a civil offense. The purpose of civil contempt proceedings is to compel compliance with a court order, rather than to punish; thus, imprisonment is imposed only after a determination that defendant is capable of complying with the support order and may be lifted as soon as he does comply.[101] Furthermore, North Carolina's new statutory definition of civil contempt[102] makes it clear that civil contempt is not a form of punishment.[103] Thus, it follows that the sixth amendment's criminal guarantees are inapplicable to

96. *See id.* at 86-90, 265 S.E.2d at 139-41. As originally enacted in 1969, G.S. 7A-451(a)(1) provided: "(a) An indigent person is entitled to services of counsel in the following actions and proceedings: (1) Any felony case, and any misdemeanor case for which the authorized punishment exceeds six months imprisonment. . . ." (corresponding to the requirements of Gideon v. Wainwright, 372 U.S. 335 (1963)). The statute was amended to its present form, *see* note 94 *supra*, in 1973 to reflect the new sixth amendment doctrine of Argersinger v. Hamlin, 407 U.S. at 25. 300 N.C. at 86-87, 269 S.E.2d at 139-40. North Carolina legislation incorporating sixth amendment rulings of the Supreme Court goes back to Powell v. Alabama, 287 U.S. 45 (1932). 300 N.C. at 87-88 n.1, 269 S.E.2d at 140 n.1.

97. 300 N.C. at 90, 269 S.E.2d at 141. *See* note 113 *infra*.

98. The provisions of the North Carolina and United States constitutions are identical for the purpose of this analysis. 300 N.C. at 92 n.2, 269 S.E.2d at 142 n.2.

99. U.S. CONST. amend. VI provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

100. U.S. CONST. amend. XIV, § 1 states: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

101. 300 N.C. at 92, 269 S.E.2d at 142.

102. N.C. GEN. STAT. § 5A-21 to -25 (Cum. Supp. 1979).

103. *Id.* § 5A-21, Official Commentary, states in part: "This section is based on the Commission's recognition that civil contempt should be solely a matter of forcing the contemnor to comply with a court order and, unlike criminal contempt, is not a form of punishment."

While *Jolly*'s conclusion that civil contempt for nonsupport is not a criminal offense is certainly correct, *see* text at notes 122-26 *infra*, it is worth noting that several North Carolina decisions prior to the enactment of G.S. 5A-21 took a somewhat different view of the nature of civil contempt. *See, e.g.*, Blue Jeans Corp. v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969), where the court noted that "[i]n this State a contempt proceeding has been described as *sui generis*, criminal in nature, which may be resorted to in civil or criminal actions." (citations omitted). *Id.* at 508, 169 S.E.2d at 870. *See also* United Artists Records v. Eastern Tape Corp., 18 N.C. App. 183, 186-87, 196 S.E.2d 598, 601, *cert. denied*, 283 N.C. 666, 197 S.E.2d 880 (1973):

> A contempt proceeding, whether civil or criminal, is *sui generis*, and criminal in nature. . . . Although the distinction between civil and criminal contempt is often un-

civil contempt nonsupport proceedings.[104] If there is a right to counsel in these cases, then its source is the due process clause of the fourteenth amendment.[105]

Jolly's due process analysis is based on *Gagnon v. Scarpelli*,[106] a United States Supreme Court case dealing with the right to counsel in probation revocation hearings, which like civil contempt are civil proceedings that may result in imprisonment. *Jolly* draws from *Gagnon* two elements that are essential to *Jolly*'s result: (1) the conclusion that due process does not require automatic appointment of counsel in all civil cases in which imprisonment is possible because the *Argersinger* rule that imprisonment triggers an absolute right to counsel is exclusively a sixth amendment principle, whose application to the due process analysis was "authoritatively rejected by the Court in *Gagnon v. Scarpelli*;"[107] and (2) a rule of law for determining whether due process requires automatic appointment of counsel, or whether it may be satisifed on a case-by-case approach in a particular kind of civil case where imprisonment is possible:

> According to *Gagnon*, whether due process requires an automatic or case-by-case approach to appointment of counsel depends on the type of proceedings under consideration. If the proceedings are informal in nature and if the legal and factual issues generally raised at such proceedings are not complex, then *Gagnon* suggests that the minimum requirements of due process may be satisfied by evaluating the necessity of counsel on a case-by-case basis.[108]

Applying the *Gagnon* test to the case at hand, the court found that civil contempt proceedings for nonsupport generally are informal in nature and do not present complex issues,[109] so a case-by-case approach to appointment of counsel is permissible. Accordingly, the court held that "due process requires appointment of counsel for indigents in nonsupport civil contempt proceedings only in those cases where assistance of counsel is necessary for an adequate presentation of the merits, or to otherwise ensure fundamental fairness."[110]

---

clear, the primary purpose of a civil contempt proceeding is "to *punish* as for contempt". . . .

Thus, it may be seen that contempt in North Carolina is treated as an offense against "the majesty of the law," [and] is essentially criminal in nature . . . .

104. 300 N.C. at 92, 269 S.E. at 142.

105. *Id.*

106. 411 U.S. 778 (1973).

107. 300 N.C. at 91, 269 S.E.2d at 141. *See also* note 15 *infra*.

108. *Id.* at 91-92, 269 S.E.2d at 142.

109. *Id.* at 93, 269 S.E.2d at 143. The court stated:

> In general, the legal and factual issues in such proceedings are neither numerous nor complex. Defendant's obligation to pay child support has been previously adjudicated. The existence and present effectiveness of the court order obligating defendant to pay child support can be determined by reference to court records. . . . Inquiries as to whether the purpose of the order may still be served by compliance, defendant's ability to pay, reasons for the arrearage and mitigating circumstances normally are not complicated.

Id.

110. *Id.*

If a right to counsel exists in civil contempt cases when imprisonment is possible, it must be grounded in either the sixth amendment or the due process clause of the fourteenth amendment. Beyond that departure point, the case law is contradictory and vague as to whether either of those grounds for appointment of counsel applies to civil contempt for nonsupport. Under the sixth amendment the scope of entitlement to counsel is clear—counsel will automatically be appointed in criminal cases when there is any possibility that defendant will be imprisoned.[111] The difficulty is whether civil contempt for nonsupport is sufficiently "criminal" in nature for the sixth amendment to apply. Under the fourteenth amendment the problems are reversed—imprisonment is certainly a deprivation of liberty so that procedural due process must be observed, but it is unclear whether "due process of law" includes the appointment of counsel.

In *Gideon v. Wainwright*[112] the United States Supreme Court held that the sixth amendment mandates appointment of counsel for indigents in state felony prosecutions. That ruling was expanded in *Argersinger v. Hamlin*, where the Supreme Court set forth an absolute rule of entitlement to counsel in all cases where imprisonment is possible. *Argersinger* is an interpretation of the requirements of the sixth amendment, however, and the sixth amendment is by its own terms limited to criminal prosecutions.[113] Thus, if civil contempt for nonsupport is to come under the *Argersinger* rule, it must qualify as a criminal proceeding under the sixth amendment.

State courts have split on this question. The supreme courts of New Hampshire[114] and Michigan[115] both refused to apply *Argersinger* to civil contempt for nonsupport, in light of the coercive, non-punitive nature of the imprisonment. Other state courts, however, have reached the contrary result. In *Tetro v. Tetro*[116] the Supreme Court of Washington eschewed the civil/criminal distinction entirely and held that the *Argersinger* rule compels

111. More precisely, defendant is entitled to counsel when he is actually going to be imprisoned as a result of the proceeding, under the most recent clarification of the *Argersinger* rule. Scott v. Illinois, 440 U.S. 367 (1979).

112. 372 U.S. 335 (1963).

113. U.S. CONST. amend. VI ("In all criminal prosecutions . . . ."). The Supreme Court in *Argersinger* stated that "[t]he Sixth Amendment . . . provides specified standards for 'all criminal prosecutions' . . . ." 407 U.S. at 27. The Court concluded:

> We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.
>
> That is the view of the Supreme Court of Oregon, with which we agree. It said in *Stevenson v. Holzman*, 254 Ore. 94, 102, 458 P.2d 414, 418:
>
> "We hold that no person may be deprived of his liberty who has been denied the assistance of counsel as guaranteed by the Sixth Amendment. This holding is applicable to all criminal prosecutions. . . ."

Id. at 37-38.

114. Duval v. Duval, 114 N.H. 422, 322 A.2d 1 (1974).

115. Sword v. Sword, 399 Mich. 367, 249 N.W.2d 88 (1976). Both *Sword* and *Duval* reached the same result as *Jolly*, and on precisely the same analysis; their reasoning so mirrors *Jolly*'s that any discussion of them here would be redundant. Both are cited in *Jolly*. 300 N.C. at 92, 269 S.E.2d at 143.

116. 86 Wash. 2d 252, 544 P.2d 17 (1975).

the automatic appointment of counsel in civil contempt nonsupport cases. Although it recognized that nonsupport hearings are not technically criminal trials, the court reasoned that "insofar as the right to counsel is concerned, the label put on proceedings is less important than the threat of imprisonment they entail. It was this threat that the court in *Argersinger v. Hamlin* . . . held was determinative of the existence of the right to counsel in criminal cases."[117] Thus, the Washington court would apply the *Argersinger* rule to all cases, civil or criminal, when the possibility of imprisonment exists.[118] Similarly, New York has adopted a per se rule of appointment in civil contempt nonsupport cases in reliance on *Argersinger*, although its highest court has never ruled on the issue.[119] The Court of Appeals for the Ninth Circuit, the only federal appeals court that has reached this precise issue, held in *Henkel v. Bradshaw*[120] that *Argersinger's* per se rule applies to civil contempt for nonsupport. Indeed, a salient feature of nearly all[121] of the cases that have adopted a per se rule of appointment is their reliance on *Argersinger*.

Is civil contempt for nonsupport sufficiently criminal for the sixth amendment to apply? The leading case on the distinction between civil and criminal contempt in the United States is *Gompers v. Buck's Stove & Range Co.*[122] There the United States Supreme Court held that it is not the nature of the underlying suit, but the reason why the contempt sanction is imposed, which determines the nature of the contempt:

> It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.[123]

That distinction may not be particularly sharp in many cases. The *Gompers* court itself recognized that even when imprisonment is imposed with the sole

---

117. *Id.* at 254-55, 544 P.2d at 19.

118. *Id.* "[W]hen a judicial proceeding may result in the defendant being physically incarcerated, counsel is required regardless of whether the trial is otherwise 'criminal' in nature. The grim reality of a threatened jail sentence overshadows the technical distinctions between 'criminal,' 'quasi-criminal,' and 'civil' violations. . . ." *Id.*

119. Rudd v. Rudd, 45 A.D.2d 22, 356 N.Y.S.2d 136 (1974); People v. Jackson, 74 Misc. 2d 797, 346 N.Y.S.2d 353 (Sup. Ct. 1973).

120. 483 F.2d 1386 (9th Cir. 1973). In *Henkel* the court held that, although under *Argersinger* defendant could not be imprisoned unless counsel was appointed, he had alleged no "irreparable injury" sufficient to warrant injunctive relief under 28 U.S.C. § 1343 (Supp. III 1979).

121. There are exceptions. In Otton v. Zaborac, 525 P.2d 537 (Alaska 1974), the Supreme Court of Alaska held that due process of law—apart from any sixth amendment grounds—mandates the automatic appointment of counsel for indigents in civil contempt nonsupport proceedings because "[t]he potential deprivation of liberty is nonsupport contempt proceedings is as serious a matter as the restraint of liberty possible in criminal . . . proceedings." *Id.* at 539. It should be noted that the decision was partly based on the right to jury trials in nonsupport proceedings in Alaska, previously recognized in Johansen v. State, 491 P.2d 759 (Alaska 1971).

Pennsylvania also follows a per se rule of apportionment in civil contempt nonsupport actions, although its highest court has never reached the issue. The opinion is extremely circumspect, saying only that due process of law includes appointment of counsel in these cases, without citing any authority. Commonwealth v. Hendrick, 220 Pa. Super. 225, 283 A.2d 722 (1971).

122. 221 U.S. 418 (1911).

123. *Id.* at 441.

intent to coerce defendant into complying with a court order, defendant is incidentally punished as well.[124] Nevertheless, the *Gompers* distinction has been widely accepted[125] and is workable when it is possible to ascertain the dominant purpose of the imprisonment, as will usually be the case. In civil contempt for nonsupport, at least, the distinction is fairly clear. The purpose of imprisonment there is not to punish the defendant for his failure to pay child support in the past, but to coerce him into paying it now. The defendant cannot be imprisoned unless he possesses the means to comply with the court order, and if he complies he is released immediately.[126] Theoretically at least, a defendant faced with civil contempt for nonsupport can purge himself of the contempt by paying his support obligation, and thus avoid a prison stay altogether. The imprisonment is purely a threat to coerce compliance, and not a punitive measure. And thus civil contempt for nonsupport unquestionably is a civil offense, to which the procedural guarantees of the sixth amendment have no application.

This is not to suggest that the courts relying on *Argersinger* were guilty of oversight. As the *Tetro* opinion suggests, they were aware of the civil/criminal dichotomy but felt that the reality of a prison sentence at the end of a civil action justified the extension of *Argersinger* outside the purely criminal area.[127] Thus, their decisions were grounded more in policy than in an accurate interpretation of *Argersinger*. The New York Appellate Division's opinion in *People ex rel. Amendola v. Jackson*[128] makes this point clear:

> The . . . attempt to [classify] procedural due process into criminal and civil divisions may well result in the negation of any semblance of due process in a given case. . . . The protection of that right rises above every consideration and is, in this court's opinion, its chief charge.
>
> It is a peculiar sophistry that commands attention to the distinction between civil and criminal proceedings when, at the end of either, the commitment to a jail cell looms before the accused. The

---

124. *Id.* at 443.

> It is true that either form of imprisonment also has an incidental effect. For if the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for criminal contempt and the imprisonment is solely punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience.

Id. See also Nelles, *The Summary Power to Punish for Contempt*, 31 COLUM. L. REV. 956 (1931). "I venture to say that every 'civil' contempt whose contumacy is carried to the point at which the contemnor may be committed is a 'criminal' contempt as well. . . ." *Id.* at 961. In the context of civil contempt for nonsupport that is certainly true. Defendant must be in arrears on his support payments to be held in civil contempt; yet, if he is in arrears, he has violated the court order obligating him to pay support, and thus is chargeable with criminal contempt under N.C. GEN. STAT. § 5A-11(a)(3) (Cum. Supp. 1979).

125. *See* Moscovitz, *Contempt of Injunctions, Civil and Criminal*, 43 COLUM. L. REV. 780, 786 n.25 (1943).

126. 300 N.C. at 92, 269 S.E.2d at 142. *See also* N.C. GEN. STAT. § 5A-21(a) (Cum. Supp. 1979).

127. *See* notes 116-18 and accompanying text *supra*.

128. 74 Misc. 2d 797, 346 N.Y.S.2d 353 (Sup. Ct. 1973).

> loss of liberty is equivalent regardless of the manner provided for its execution and despite the forum in which it is mandated.[129]

The civil/criminal distinction is, however, more than a matter of labels and sophistry. The sixth amendment rule that imprisonment compels automatic appointment of counsel, while relevant and even persuasive when applied to defining the scope of the right to counsel in civil cases,[130] is irrelevant to the preliminary inquiry of finding a constitutional source for that right. To apply sixth amendment guarantees to a civil case, simply because the fact of imprisonment makes it desirable to have such guarantees, is little more than wishful thinking. Precedent compels the conclusion that *Jolly*'s is the more correct approach, and *Argersinger* cannot be direct authority for the appointment of counsel in civil contempt cases. The right to counsel in those cases must be grounded in the due process clause of the fourteenth amendment.

Due process of law is a flexible and elusive concept, and there is no particular set of procedures that must be observed in all cases.[131] The Supreme Court has determined exactly what process is due in a particular type of hearing by balancing the grievousness of the loss to the individual against the state's interest in inflicting that loss.[132] The most definitive statement of the Court's modern balancing approach is found in *Mathews v. Eldridge*,[133] in which the Court said:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires the consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the financial and administrative burdens that the additional or substitute procedural requirement would entail.[134]

In those rare civil cases in which imprisonment of defendant is possible, the

---

129. *Id.* at 800-01, 346 N.Y.S.2d at 357.

130. The applicability of *Argersinger* and other sixth amendment cases to a fourteenth amendment analysis of the right to counsel in civil contempt cases is discussed at text accompanying notes 161-63 *infra*.

131. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands."); Hannah v. Larche, 363 U.S. 420, 442 (1960) ("[Due process] is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts.").

132. Although this balancing analysis was originally used in connection with deprivation of property cases, *see, e.g.*, Fuentes v. Shevin, 407 U.S. 67 (1972) (replevin); Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886 (1961) (right to employment), the Court's use of the same analysis when liberty interests were at stake indicates that the test is equally applicable there. *See, e.g.*, Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972).

133. 424 U.S. 319 (1976). *Mathews* presented the question whether due process requires a hearing before the termination of disability benefits—again, a deprivation of property case. For an indication that the same due process calculus is applicable to cases involving deprivation of liberty, see Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816 (1977) (even assuming a foster family has a protected "liberty" interest in retaining a foster child, informal procedures before removal of the child satisfied due process under a *Mathews* analysis).

134. 424 U.S. at 334-35.

balance is most strongly in defendant's favor, and due process may include the appointment of counsel if defendant is indigent.[135] The Supreme Court has addressed the issue of entitlement to counsel under the fourteenth amendment in civil cases in which imprisonment is possible only twice,[136] in *In re Gault*[137] and *Gagnon v. Scarpelli*.[138]

In *Gault* the Court addressed the requirements of procedural due process in juvenile delinquency hearings in which civil commitment may result.[139] Reasoning that the possibility of imprisonment in delinquency hearings makes them "comparable in seriousness" to felony prosecutions,[140] the Court held that counsel must be appointed when defendant and his parents cannot afford retained counsel.[141] *Gault* is some authority for the proposition that imprisonment triggers an automatic due process right to counsel in civil cases, just as it does under the sixth amendment in criminal cases. But there were independent grounds, other than the loss of liberty, that mandated appointment of counsel in *Gault*—the close similarity of the delinquency hearing to a criminal prosecution,[142] together with the likelihood that a juvenile will be less capable of presenting his own defense than an adult defendant. *Gault* would be slim authority for a requirement that counsel be appointed in all civil cases in which imprisonment is possible.

Indeed, that proposition was rejected by implication in *Gagnon v. Scarpelli*, the case relied upon so strongly by the North Carolina Supreme Court in *Jolly*. *Gagnon* dealt with the right to counsel in probation revocation

---

135. The constitutional argument for counsel as a component of due process is that the right to be heard, if it is to be effective, must include the right to be heard by counsel. That idea originated in Powell v. Alabama, 287 U.S. 45 (1932), where, in discussing the requirements of procedural due process in a criminal (capital rape) case, the Court said:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. . . . If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing and, therefore, of due process in the constitutional sense.

Id. at 68-69.

136. The Court has found a right to appointed counsel, additionally, in civil cases involving mental commitments, Jackson v. Indiana, 406 U.S. 715 (1972), and commitment of sex offenders, Specht v. Patterson, 386 U.S. 605 (1967); both cases are irrelevant to the present analysis.

137. 387 U.S. 1 (1967).

138. 411 U.S. 778 (1973).

139. Defendant, fifteen-year old Gerald Gault, was accused of making an obscene phone call. At his hearing Gault was declared "delinquent" and was committed to a reformatory until he reached the age of twenty-one. 387 U.S. at 7-9. The maximum criminal penalty for the same offense would have been no more than two months in jail. *Id.* at 29.

140. "A proceeding in which the issue is whether a child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution." *Id.* at 36. Note that the Court made the analogy to a felony prosecution because the right to counsel under *Gideon* as interpreted at that time applied only to felony cases.

141. *Id.* at 41.

142. *Id.* at 36. Gault's alleged offense was a violation of a generally applicable criminal statute, which prohibited the use of obscene language in the presence of a woman. *Id.* at 8. He was tried in a civil rather than a criminal court only because he was under age twenty-one. *Id.* at 29.

hearings. Its analysis drew heavily from the court's prior decision in *Morrissey v. Brewer*,[143] which outlined procedural requirements for parole revocation hearings.[144] After reviewing the *Morrissey* decision,[145] the *Gagnon* Court concluded that there are no differences of constitutional import between the revocation of parole and probation,[146] and that a probationer is entitled to the same due process guarantees specified in *Morrissey*.[147]

The Court then turned to the more important question—whether defendant is entitled to appointed counsel at the revocation hearing. Again drawing from *Morrissey*, the Court distinguished the nature of revocation hearings from that of criminal trials. Probation or parole revocation is rehabilitative in nature rather than punitive.[148] Ideally, the probation or parole officer has his client's interests at heart and is not a prosecutor representing the state. Although this unity of interests between the officer and his charge breaks down when the officer decides to recommend revocation, "the officer is not by this recommendation converted into a prosecutor committed to convict."[149] Revocation hearings, therefore, are not full-fledged adversary proceedings,[150] and consequently there is less need for defendant to be represented by counsel. While counsel will be necessary in some revocation hearings to ensure the effectiveness of the rights guaranteed in *Morrissey*, due process is satisfied by appointment of counsel in only those cases in which special circumstances make counsel necessary for an adequate presentation of defendant's case.[151]

The *Gagnon* Court recognized that its holding resurrected an approach to appointment of counsel long defunct in criminal cases and took care to justify its use of the case-by-case approach.[152] The fact that revocation hearings are

---

143. 408 U.S. 471 (1972).

144. In *Morrissey* the Court held that a parolee is entitled to the following due process protections at a parole revocation hearing: written notice of the claimed violations; disclosure of evidence against him; opportunity to confront and cross-examine witnesses against him; a "neutral and detached" hearing body; and a written statement by the factfinder of the evidence it relied on in its decision. *Id.* at 489. The Court reached that result upon a careful balancing analysis of the kind later outlined in Mathews v. Eldridge, 424 U.S. 319 (1976), which included a lengthy discussion of the parolee's conditional liberty interest. *See* note 153 *infra*.

145. 411 U.S. at 781-82.

146. *Id.* at 782 n.3.

147. 411 U.S. at 782. *See* note 14 *supra*.

148. "[T]he 'purpose [of probation or parole] is to help individuals reintegrate into society as constructive individuals as soon as they are able. . . .'" *Id.* at 783 (quoting *Morrissey*, 408 U.S. at 477).

149. 411 U.S. at 785.

150. *Gagnon* expresses a concern that the introduction of counsel for defendants on a regular basis would "alter significantly the nature of the proceeding," since the State would undoubtedly then employ its own attorney to act as a prosecutor. The result would be a proceeding more adversarial in nature, with perhaps more pressure on the hearing body to reincarcerate defendants. *Id.* at 787.

151. *Id.* at 786-87.

152. *Id.* at 788.

> [D]ue process is not so rigid as to require that the significant interests in informality, flexibility, and economy must always be sacrificed.
>
> In so concluding, we are of course aware that the case-by-case approach to the right to counsel in felony prosecutions adopted in *Betts v. Brady*, 316 U.S. 455 (1942), was later rejected in favor of a *per se* rule in *Gideon v. Wainwright*, 372 U.S. 335 (1963). See also *Argersinger v. Hamlin*, 407 U.S. 25 (1972). We do not, however, draw from *Gideon*

both less complex and less adversarial than criminal trials provided some justification.[153] That reason alone, however, was not entirely satisfactory to the Court because it did not "dispose altogether of the argument that under a case-by-case approach there may be cases in which a lawyer would be useful but in which none would be appointed because an arguable defense would be uncovered only by a lawyer."[154] Thus, the Court further justified its approach by noting that a parolee or probationer is deprived only of *conditional* liberty,[155] a less grievous loss of liberty that does not entitle him to the higher degree of due process protection provided by a per se approach to appointment of counsel:

> [W]e think it is a sufficient answer that we deal here, not with the right of an accused to counsel in a criminal prosecution, but with the more limited due process right of one who is a probationer or parolee only because he has been convicted of a crime.[156]

The Court underscored this point by citing *In re Gault* as a civil case in which defendant is "differently situated from an already-convicted probationer or parolee, and is entitled to a higher degree of protection."[157]

Thus the defendant's situation in *Gagnon* served to justify a case-by-case approach to appointment of counsel. An "already convicted probationer"[158]

---

and *Argersinger* the conclusion that a case-by-case approach to furnishing counsel is necessarily inadequate to protect constitutional rights in varying types of proceedings.

Id.

153. The differences between revocation hearings and criminal trials, developed at length in the opinion, were summarized as follows:

> In a criminal trial, the State is represented by a prosecutor; formal rules of evidence are in focus; a defendant enjoys a number of procedural rights which may be lost if not timely raised; and, in a jury trial, a defendant must make a presentation understandable to untrained jurors. In short, a criminal trial under our system is an adversary proceeding with its own unique characteristics. In a revocation hearing, on the other hand, the State is represented, not by a prosecutor, but by a parole officer with the orientation described above; formal procedures and rules of evidence are not employed; and the members of the hearing body are familiar with the problems and practice of probation or parole. The need for counsel at revocation hearings derives, not from the invariable attributes of those hearings, but rather from the peculiarities of particular cases.

411 U.S. at 789.

154. *Id.*

155. "Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observation of special parole restrictions." *Morrissey*, 408 U.S. at 480. In *Morrissey* the Court examined the nature of that conditional liberty in careful detail:

> The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. . . . Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in prison. He may have been on parole for a number of years and may be living a relatively normal life at the time he is faced with revocation. The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions.

Id. at 482 (footnotes omitted).

156. 411 U.S. at 789 (footnote omitted).

157. *Id.* at 789 n.12.

158. *Id.*

stands to lose only a conditional liberty: the liberty to remain free so long as he observes the conditions of his parole. He has previously been deprived of the full liberty that every citizen enjoys, at a trial where his guilt was determined and sentence passed in accordance with full due process protections, including representation by counsel. Thus, to the extent that *Gagnon* suggests that "[i]f the proceedings are informal in nature and the legal and factual issues generally raised at such proceedings are not complex . . . the minimum requirements of due process may be satisfied by evaluating the necessity of counsel on a case-by-case basis,"[159] as *Jolly* held, that suggestion applies only in the context dealt with in *Gagnon* and *Morrissey*—the situation in which defendant stands to lose something less than unconditional liberty. Whatever the requirements of due process when the defendant's right to remain unconditionally at liberty is not at stake, certainly in cases in which that right is threatened, due process requires a more careful analysis than the bare-bones utilitarian approach taken in *Jolly*.

Something more than a simple determination of the formality and complexity of the proceeding is required. Comparison of *Gault* and *Gagnon* suggests that two factors should be considered in determining whether a case-by-case or per se approach to appointment of counsel is permissible in a civil case in which imprisonment is possible: 1) the severity of defendant's potential loss of liberty and 2) the degree to which the civil proceeding functionally resembles a criminal trial. A third factor is necessary to balance the *Mathews v. Eldridge* equation: 3) the state's interest in committing the defendant to jail.

1) *Defendant's loss of liberty*: In civil contempt nonsupport cases a citizen unconditionally at liberty is committed to jail. The length of his sentence is indeterminate, and thus potentially unlimited.[160] *Argersinger* and other cases dealing with the right to counsel in criminal trials[161] express a longstanding concern with the procedural protection of personal liberty before imprisonment is imposed. That concern has led to the rule that a defendant in a criminal case cannot be imprisoned for even a single day unless he was represented by counsel at trial. There is no reason why the requirements of due process should be any less strictly observed in a civil than in a criminal case; nor is there any reason that the philosophy concerning imprisonment expressed in the criminal cases should not apply as well to imprisonment in civil cases in which defendant's loss of liberty is "equivalent regardless of the manner provided for its execution and despite the forum in which it is mandated."[162]

Applying those concerns to the fourteenth amendment analysis, the fact that a defendant unconditionally at liberty is to be imprisoned should itself

159. 300 N.C. at 91, 265 S.E.2d at 142.

160. N.C. GEN. STAT. § 5A-21(b) (Interim Supp. 1980): "A person who is found in civil contempt may be imprisoned as long as his civil contempt continues . . . ."

161. *See, e.g.*, Scott v. Illinois, 440 U.S. 367 (1979); Argersinger v. Hamlin, 407 U.S. 25 (1972); Terry v. Ohio, 392 U.S. 1 (1968); Gideon v. Wainwright, 372 U.S. 335 (1963).

162. People *ex rel.* Amendola v. Jackson, 74 Misc. 2d 797, 801, 346 N.Y.S.2d 353, 357 (Sup. Ct. 1973).

outweigh all other factors and require automatic appointment of counsel. The Supreme Court has never ruled that such a per se rule exists in civil cases involving imprisonment, but on the other hand the Court has never ruled that it does not exist, notwithstanding the interpretation of *Gagnon* advanced by the supreme courts of North Carolina and other states. But even barring such an absolute rule, the defendant's loss of unconditional liberty in civil contempt nonsupport cases is surely grievous enough to weigh heavily in the balance.[163]

Although the defendant is deprived of unconditional liberty, the argument can be made that this is a less grievous loss because his liberty is only conditionally taken away. That has been the usual rationale for denying procedural due process to defendants facing imprisonment for civil contempt, since all defendant need do to obtain his release is comply with the court order he has violated; he "carries the keys of [his] prison in [his] own pocket."[164] If defendant stubbornly refuses to unlock his own cell, that is entirely his own concern, and none of the state's; "it follows that if he does not cooperate to attain his release he is not truly being punished, but is doing some masochistic act which the State cannot control, and for which it is not responsible."[165]

Beyond a certain semantic cleverness, the "keys in his pocket" rationale is unjustified and obscures the underlying fact that defendant is, after all, sent to jail.[166] Moreover, unless defendant's refusal to comply is in fact due to stubbornness, he may not have the "keys in his pocket." If he lacks the means to comply, that will of course bar his commitment to jail;[167] but the determination of his ability to pay is itself made without the procedural safeguard of counsel.[168] Without the assistance of counsel, it is conceivable that the defendant will be unable to explain to the court's satisfaction why he is unable to comply with the support order, despite *Jolly*'s assertion that such explanations are "bookkeeping matters."[169]

---

163. *Jolly* does add, almost as an afterthought, that "[i]t is worth noting that the potential loss of liberty in such [parole or probation revocation hearings] cases is much more extensive than in nonsupport civil contempt cases." 300 N.C. at 93, 265 S.E.2d at 143. In terms of length of imprisonment, that may be true; what *Jolly* failed to recognize is that the imprisonment in a revocation case is not a punishment for the parole or probation violation being adjudicated, but rather a sentence previously imposed for the commission of a separate crime. Thus, the probationer or parolee is deprived only of the conditional liberty he has based on the state's guarantee that that criminal sentence will be suspended for so long as defendant honors the conditions of his parole or probation. *See Morrissey*, 408 U.S. at 480-82. The civil contemnor, on the other hand, is unconditionally at liberty and faces imprisonment as a result of the conduct being adjudicated; his deprivation of liberty is therefore a much more grievous loss.

164. 300 N.C. at 92, 265 S.E.2d at 142 (quoting *In re* Nevitt, 117 F. 448, 461 (8th Cir. 1902)).

165. R. GOLDFARB, THE CONTEMPT POWER 59 (1963). For a criticism of this rationale, see *id.* at 58-61.

166. *Id.* at 61.

167. N.C. GEN. STAT. § 5A-21(a)(3) (Cum. Supp. 1979); *see* Maggio v. Zeitz, 333 U.S. 56, 76 (1948).

168. *See* Comment, *The Coercive Function of Civil Contempt*, 33 U. CHI. L. REV. 120, 125 (1965).

169. 300 N.C. at 93, 265 S.E.2d at 143. *See, e.g.*, Houle and Debose, *The Nonsupport Contempt Hearing: Constitutional and Statutory Requirements*, 14 N.H.B.J. 165, 174 (1973):

> A very common situation in nonsupport cases arises when the court is calculating total support arrearages and, because of the bookkeeping of the probation department,

2) *Degree to which the nonsupport hearing functionally resembles a criminal trial*: In an ordinary civil suit, the State serves as a neutral arbitrator interested only in justice between the parties. Under the present statutory scheme for enforcement of support orders in North Carolina,[170] the State has a further, financial interest in pursuing the nonsupport action—an interest that is so great that it is not an exaggeration to say that the State, and not the custodial parent, is the real party in interest.

As a condition to receiving Aid to Families with Dependent Children (AFDC), the parent receiving the aid must assign to the state her right to child support from the father.[171] Her acceptance of AFDC aid "creates a debt, in the amount of public assistance paid, due and owing to the state by the responsible parent,"[172] the "responsible parent" being defendant. Moreover, the payment of public assistance to the custodial parent creates a duty for the county paying the funds to pursue the nonsupport action against the responsible parent,[173] and the county may by designated representative initiate such actions in its own right if the custodial parent neglects to do so.[174]

Thus, the state involvement in nonsupport actions is significant enough to make the nonsupport action the functional equivalent of a criminal trial. As noted, North Carolina may on its own initiative bring the action against defendant, just as it would initiate a criminal prosecution. It is also required to employ its own counsel[175] for these actions in what is essentially a prosecutorial role. The procedural deck is therefore stacked considerably against defendant in nonsupport actions in a way that is markedly different from the usual civil proceedings in which the State merely arbitrates a dispute between private parties. Here, North Carolina is not a neutral arbitrator but an interested participant, and its powers are marshalled on the side of the plaintiff. Perhaps in a different sort of civil case—a proceeding to determine paternity, for example, in which only property interests are at stake—such a procedural imbalance would be conscionable. But to allow a defendant to be imprisoned as a result of a civil proceeding in which the State played an essentially prosecutorial role, and at which defendant himself was not represented by counsel because he could not afford it, is an affront to any conception of "fundamental fairness."

3) *The State's interest in committing defendant to jail*: Balanced against defendant's loss of liberty is the State's laudable motive for imprisoning him. By committing defendant to jail, the State seeks to enforce his parental duty to support his child and to prevent the custodial parent, usually the mother, from

---

which does not note the level of a man's earnings week by week, charges him for weeks in which he may have had little or no income.

170. N.C. GEN. STAT. §§ 110-128 to -141 (Supp. 1979) (adopted in accordance with 42 U.S.C. § 654 (1976 & Supp. III 1979), which sets forth a "[s]tate plan for child support" that each state receiving federal funds for AFDC must enact as a condition of acceptance of those funds).

171. N.C. GEN. STAT. § 110-137 (Supp. 1979).

172. *Id.* § 110-135.

173. *Id.* § 110-138.

174. *Id.* § 110-130.

175. *Id.* § 110-135.

having to bear alone the costs of caring for the child. That the proceeds of the nonsupport action will go into the State's coffers rather than to defendant's children in no way diminishes the weight of the State's interest here, for the funds will eventually go to other needy children under the AFDC program. But automatic appointment of counsel for indigents in nonsupport actions would by no means prevent the State from pursuing such actions; it would only make them more expensive.[176]

All factors in the due process equation weigh in favor of a per se rule of appointment of counsel in civil contempt for nonsupport cases. Defendant in nonsupport cases faces imprisonment that deprives him of unconditional liberty, a loss that is different from the mere revocation of conditional liberty that justified the case-by-case approach to appointment in *Gagnon v. Scarpelli*. Comparison of *Gault* and *Gagnon* suggests by analogy to the sixth amendment rule in criminal cases that a per se rule of appointment is constitutionally required in all civil cases in which imprisonment of a defendant unconditionally at liberty is contemplated. But even in the absence of a per se rule, defendant's liberty loss is sufficiently grievous to outweigh the state's interest in imprisoning him without benefit of counsel. That conclusion is bolstered by the significant state involvement in nonsupport actions, which renders them the functional equivalent of criminal trials and makes it both more desirable that counsel be appointed and more likely that mistaken imprisonment will occur if defendant is not represented by counsel. Due process of law, apart from any sixth amendment considerations, mandates the automatic appointment of counsel for all indigent defendants in civil contempt actions for nonsupport. Certainly such a rule would impose an additional financial burden on the State of North Carolina. But that additional burden is not irreconcilable with the State's interest in enforcing child support agreements, and the State would be compensated for the additional expense by the knowledge that it was not only furthering the welfare of its needy children but doing so within the parameters of the Constitution.

176. Apparently there are no exact figures available on the number of civil contempt cases involving potential imprisonment of indigent defendants in North Carolina. Attorneys who briefed *Jolly* varied widely in their estimates of the cost of providing counsel in these cases, as might be expected. *Compare* Appellant's Reply to the Amicus Brief at 9 (less than $200,000 a year") *with* Amicus Curiae Brief at 17 ("undoubtedly staggering . . . could double the cost to the State [currently more than $4,000,000 per year to provide counsel for indigents in criminal trials, according to figures of the Administrative Office of the Court]").

Counsel for appellant suggested that the cost of providing counsel in nonsupport actions might be defrayed in part by the federal government, using funds collected in those same actions. Brief for Appellant at 25 n.7. Since the federal government currently reimburses the states for approximately 75% of the cost of prosecuting these actions, 42 U.S.C. § 655(a)(1) (Supp. III 1979), such an arrangement seems eminently fair. Expenditures from the fund are regulated, however, so that an amendment to the Social Security Act would be necessary to effect the reimbursement. *See id.* § 657(b) (1976).

2. Procedural Due Process

In *In re Hernandez*[177] the court of appeals held that G.S. 122-58.18 adequately protected the rights of a mentally ill person subject to an emergency custody order. Under G.S. 122-58.18 an emergency custody order may be issued if the respondent is found to be dangerous to himself or others, and if respondent is violent and requires restraint, and delay in taking him to a qualified physician for examination would likely endanger life or property."[178] Respondent in *Hernandez* had presented himself at the military police desk at Fort Bragg, claimed to be Jesus Christ, and stated that the Pope had sent him to get a permit to carry a weapon. Hernandez also claimed to be an undercover agent and demanded an automatic weapon. Respondent was taken to the Cumberland County Mental Health Center for examination. From the Mental Health Center respondent was transferred to the Cumberland County Law Enforcement Center where a deputy sheriff signed the petition and oath for involuntary commitment required by G.S. 122-58.18. On the basis of this petition a magistrate issued an emergency custody order confining respondent to Dorothea Dix Hospital. Eight days later the district court conducted a hearing persuant to G.S. 122-58.7.[179] At the close of the hearing respondent was committed for a period of ninety days.

On appeal, respondent challenged the district court's failure to grant a motion to dismiss. Respondent contended that the district court's interpretation of G.S. 122-58.18 was faulty in two respects: the court failed to require the petitioning officer to specifically state the facts supporting his belief that respondent was violent, and the court did not require that the officer witness any overt acts of violence before signing the commitment petition. Respondent claimed that both due process and a proper interpretation of legislative intent mandated that these requirements be met.[180]

The magistrate issuing the custody order is required to find by "clear, cogent, and convincing evidence" that the facts stated in the petition are true.[181] Respondent argued that this standard of proof is meaningless without a specific statement of facts upon which a magistrate may base his decision. Hernandez urged that due process, as well as an intelligent reading of the statute, required more of the petitioning officer than merely placing his signature on a "pre-printed oath."[182]

The court rejected this claim without stating what minimum evidentiary standard is required by due process. In reaching its decision the court noted several factors that mitigated against imposition of a strict standard. The use

177. 46 N.C. App. 265, 264 S.E.2d 780 (1980).

178. N.C. GEN. STAT. § 122-58.18 (1981).

179. *Id.* § 122-58.7.

180. Respondent did not contend that G.S. 122-58.18 expressly set forth these requirements, in fact respondent admitted that "on its face § 122-58.18 does not require a detailed statement of facts showing that the Respondent is violent and requires restraint." Respondent Appellant's Brief at 7.

181. N.C. GEN. STAT. § 122-58.18 (1981).

182. Respondent Appellant's Brief at 7.

of generalized statements by petitioning law enforcement officers was justified because most magistrates are laymen and because G.S. 122-58.18 is, by definition, only invoked in emergency situations. Under these conditions "[l]egal niceties must not be expected."[183]

While these factors may justify some informality in the proceedings they do not answer the claim that the petitioning officer should state specifically the facts upon which he bases his belief that respondent is violent. This additional requirement would be unlikely to prevent a law enforcement officer from effectively dealing with an emergency situation and could only aid the magistrate in determining whether the emergency custody order should be issued.

Respondent additionally urged that due process required a mechanism for review of the magistrate's findings. "The logical way for review to occur would be for there to be a requirement for a specific statement of alleged facts on the face of the petition, *including the facts supporting violence and requiring restraint*, lending itself to review by the District Court Judge."[184] The court of appeals rejected this argument, noting that a district court hearing must be provided within ten days, and that this hearing adequately protects respondent's rights.[185] The protection offered by this hearing was examined by a federal district court in *French v. Blackburn*.[186] In validating the hearing provisions, the court in *Blackburn* emphasized that respondent was given "at least two opportunities to be released prior to the hearing based upon medical examinations and the findings of a qualified examining physician."[187] While *Blackburn* does not justify the loose evidentiary standard accepted in *Hernandez*, the safeguards discussed by the court do lessen the potential damage that can be done under an emergency custody proceeding.

Respondent's second contention was that, even assuming the petition could be valid without a specific statement of facts, it should have been dismissed when it became clear that the petitioning officer did not have firsthand

183. 46 N.C. App. at 269, 264 S.E.2d at 782.

184. Respondent Appellant's Brief at 6 (emphasis in original).

185. 46 N.C. App. at 269, 264 S.E.2d at 782. The district court hearing is required by G.S. 122-58.7. It should be noted that the hearing is held to determine if the respondent should be involuntarily committed for the future, not to review the magistrate's initial determination. N.C. GEN. STAT. § 122-58.8 (1981). Thus, the hearing does not protect against an erroneous initial commitment, nor could it; therefore, it supports the proposition that the magistrate be presented with detailed allegations. A magistrate dealing with specific factual claims is less likely to issue an erroneous commitment order than one dealing with unsupported statements.

186. 428 F. Supp. 1351 (M.D.N.C. 1977), *aff'd mem.*, 443 U.S. 901, (1979). In *Blackburn* respondent had been initially committed under G.S. 122-58.3. Respondent did not challenge the initial commitment and the court did not deal with this part of the proceedings. *Blackburn*, then, does not justify the failure to require the petitioning officer to state specific facts. The decision in *Blackburn* is discussed in *Survey of Developments in North Carolina Law, 1977—Constitutional Law*, 56 N.C.L. REV. 843, 960-62 (1978).

187. 428 F. Supp. at 1355 (footnote omitted). In *Hernandez* respondent claimed that proceedings under G.S. 122-58.18 provided less protection than proceedings under the non-emergency provisions of G.S. 122-58.3 because respondent lost "the right afforded by N.C.G.S. § 122-58.3 et seq. to be examined by an impartial qualified physician in his community." Respondent Appellant's Brief at 6. The basis of this claim is not clear as G.S. 122-58.18 provides that respondent, once taken into custody, "shall be examined and processed thereafter in the same manner as all other respondents under this Article." N.C. GEN. STAT. § 122-58.18 (1981).

knowledge of any acts of violence.[188] The court was unwilling to accept this requirement because "[r]arely are law enforcement officers witnesses to acts of violence."[189] Nor was the court willing to require that respondent have committed any overt acts of violence before a district court would be justified in finding him "imminently dangerous" to others and order involuntary commitment.[190] The court reviewed the evidence in respondent's case and concluded that his commitment was supported by "clear, cogent and convincing evidence."[191]

While the facts in *Hernandez* may support respondent's commitment under G.S. 122-58.18, it is clear that the court's reading of the statute leaves open the possibility of abuse. Requiring that the petitioning officer state specific facts to support his petition would do much to solve this problem.

3. Fundamental Rights

The court of appeals refined the standards for involuntary sterilization under G.S. 35-43 in *In re Johnson*.[192] Although the court found that the order compelling respondent's sterilization was proper, it held that the state could not order sterilization solely on the basis of mental retardation. G.S. 35-43 provides for involuntary sterilization when "because of a physical, mental or nervous disease or deficiency which is not likely to materially improve, the person would probably be unable to care for a child."[193] The evidence presented to the jury[194] in *Johnson* established that respondent, a twenty-three year old female, had a Stanford Binet I.Q. of forty. Testimony by respondent's foster mother and an employee of the Department of Social Services described respondent as sexually active but unable to understand or use birth control methods.[195]

In examining the evidence on appeal the court recognized that the sterilization statute, although previously determined to be constitutionally valid,[196] lacked detailed standards for determining respondent's unfitness. In supplying these details, the court sought to protect respondent's fundamental constitu-

188. 46 N.C. App. at 270, 264 S.E.2d at 782. It was clear in *Hernandez* that the petitioning officer initiated the petition under the orders of his major and did not in fact know of any violent behavior on the part of the respondent. Record at 7-9.

189. 46 N.C. App. at 270, 264 S.E.2d at 783.

190. *Id.*

191. *Id.* at 271, 264 S.E.2d at 783. The "clear, cogent and convincing" standard must be met before the district court can order continued confinement. N.C. GEN. STAT. § 122-58.8(b) (1981). Additional facts developed at the hearing in *Hernandez* showed that respondent was carrying a knife in his luggage and that he was willing to use it. 46 N.C. App. at 271, 264 S.E.2d at 783.

192. 45 N.C. App. 649, 263 S.E.2d 805, *appeal dismissed*, 300 N.C. 373, 267 S.E.2d 686 (1980).

193. N.C. GEN. STAT. 35-43 (1976). G.S. 35-43 also provides for sterilization when "the person would be likely, unless sterilized, to procreate a child or children which probably would have serious physical, mental, or nervous diseases or deficiencies." *Id.* The court in *Johnson* did not deal with this aspect of the statute.

194. G.S. 35-44 provides for a trial de novo in superior court after a district court hearing. *Id.* § 35-44. The district court hearing is before a judge. *Id.* § 35-43. Either party may request a jury trial in superior court. *Id.* N.C. GEN. STAT. § 35-44 (1976).

195. 45 N.C. App. at 650-51, 263 S.E.2d at 807.

196. *Id.* at 652, 263 S.E.2d at 808 (citing *In re* Moore, 289 N.C. 95, 221 S.E.2d 307 (1976)).

tional right to procreate.[197] The State had to demonstrate a compelling interest to support a sterilization order in light of the fundamental nature of respondent's constitutional right.[198] From this framework, the court determined that the state must prove that respondent was mentally retarded or ill, that respondent had a physical, mental or nervous disease or deficiency, that the disease or deficiency was unlikely to improve, and that respondent would probably be unable to care for a child.[199] The court held that the State could not meet this burden by relying on a presumption of unfitness raised solely by the fact of retardation. However, "[t]he burden on the petitioner to show personality defects or traits of unfitness apart from retardation increases as the retardation ranges from severe to mild."[200]

To meet this burden the State may introduce evidence of respondent's morals, sexual activity, attitude toward birth control, and attitudes towards children. This evidence is admissible in determining whether respondent is fit to care for a child and whether her condition is likely to improve.[201]

The standards enunciated in *Johnson* should act to protect the interests of persons subject to involuntary sterilization, clarifying a statute that otherwise provides little guidance.

4. Effect of an Unconstitutional Statute

In *American Manufacturers Mutual Insurance Co. v. Ingram*[202] the North Carolina Supreme Court considered the effect of an unconstitutional statute, the North Carolina Health Care Liability Reinsurance Exchange Act.[203] After the major health care liability insurers withdrew from the malpractice insurance market in 1975, the legislature passed the Act, which prohibited a general liability insurer from writing any liability insurance in the state unless the insurer agreed to provide medical malpractice insurance.[204] The insurance companies immediately challenged the Act, and the state supreme court held that the Act violated the state constitution and the due process clause of the United States Constitution.[205] This decision impugned the validity of medical malpractice insurance binders issued under the statute, raising the question whether the court's determination of the statute's unconstitutional

197. 45 N.C. App. at 652, 263 S.E.2d at 808. The court cited Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); and Skinner v. Oklahoma, 316 U.S. 535 (1942) as establishing the right to procreate.

198. 45 N.C. App. at 652, 263 S.E.2d at 808.

199. *Id.* at 653, 263 S.E.2d at 808.

200. *Id.* at 653, 263 S.E.2d at 809. In *Johnson* respondent's retardation was classified as mild. *Id.* at 651, 263 S.E.2d at 807.

201. *Id.* at 654, 263 S.E.2d at 809.

202. 301 N.C. 138, 271 S.E.2d 46 (1980).

203. N.C. GEN. STAT. §§ 58-173.34 to .51 (Cum. Supp. 1979).

204. 301 N.C. at 139-40, 271 S.E.2d at 47.

205. Hartford Accident & Indem. Co. v. Ingram, 290 N.C. 457, 226 S.E.2d 498 (1976). The North Carolina Supreme Court held that the statute violated the equal protection and law of the land clauses of the state constitution, N.C. CONST. art. I, § 19, and the due process clause of the United States Constitution, U.S. CONST. amend. XIV, § 1.

status would take effect retroactively. In *American Insurance Co.*,[206] the court postponed this crucial question.

Plaintiff-insurance company issued a binder to defendant-medical clinic, conditioned upon the constitutionality of the Act.[207] The insurance company also indicated, however, that the medical clinic enjoyed full coverage regardless of the wording in that condition.[208] Later, the insurance company obtained a temporary restraining order preventing application of the Act to the company, pending the court's examination of the company's claim that the statute's unconstitutionality made the binder void when issued.[209] After the supreme court declared the Act unconstitutional,[210] but before the trial court considered the effect of that decision on the binder, third parties sued the medical clinic for malpractice arising from acts committed while the clinic was insured under the binder. The insurance company denied coverage based on its previous contention that a binder issued under an unconstitutional statute lacked validity.[211]

The supreme court refused to accept the insurance company's argument, rejecting the absolute retroactivity rule favored by the United States Supreme Court in *Norton v. Shelby County*[212] and recognized by the North Carolina Supreme Court in a series of similar cases.[213] Instead, the court adopted the good faith reliance approach to retroactivity presented by the United States Supreme Court in *Chicot County Drainage District v. Baxter State Bank*,[214] an approach later expanded by the North Carolina Supreme Court in *Roberson v. Penland*[215] when it ruled that the unconstitutionality of a statute provides no defense to an action based on liability created by a relationship voluntarily assumed pursuant to that statute.[216] Under this approach, the insurance company voluntarily assumed the contractual relationship of insurer.[217] By stating that the medical clinic enjoyed full coverage, the insurance company lost the benefit of the condition to the binder.[218] Consequently, the company agreed to insure the medical clinic regardless of the constitutionality of the Act.

The court carefully noted that *American Insurance Co.* did not decide the retroactivity of the decision that declared the Reinsurance Exchange Act unconstitutional. Regardless of the answer to that question, the court would

206. 301 N.C. at 153, 271 S.E.2d at 54.
207. *Id.* at 140-42, 271 S.E.2d at 47-48.
208. *Id.* at 142-43, 271 S.E.2d at 48-49.
209. *Id.* at 144, 271 S.E.2d at 50.
210. *See* note 205 and accompanying text *supra*.
211. 301 N.C. at 144-45, 271 S.E.2d at 49-50.
212. 118 U.S. 425 (1886).
213. *See* 301 N.C. at 147, 271 S.E.2d at 51.
214. 308 U.S. 371, 374 (1940) ("an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified").
215. 260 N.C. 502, 133 S.E.2d 206 (1963).
216. *Id.* at 505-06, 133 S.E.2d at 208.
217. 301 N.C. at 150, 271 S.E.2d at 53.
218. *Id.* at 150-52, 271 S.E.2d at 53-54.

guarantee the validity of any insurance binders voluntarily written under the Act, as opposed to those binders written involuntarily under coercion of the unconstitutional statute.[219] Nevertheless, the court acknowledged an important exception to a possible subsequent determination of retroactivity.

E. North Carolina Constitution

1. Abortion Funding

In *Stam v. State*[220] plaintiff sought a declaration that the action of the State of North Carolina and the Wake County Department of Social Services in paying for medically unnecessary abortions[221] violates State statutory and constitutional law. Plaintiff made the following allegations: 1) that a live human fetus is a "person" within the protection of article I, sections 1 and 19 of the North Carolina Constitution; 2) that State funding of medically unnecessary abortions violates article V, section 5 of the North Carolina Constitution; and 3) that the county's appropriation and expenditure of State and county funds for medically unnecessary abortions is "ultra vires" any power given to the county by any State statute.[222]

The North Carolina Court of Appeals had affirmed the decision of the Wake Superior Court granting summary judgment for the defendants on all three issues.[223] On appeal, the supreme court adopted the court of appeals' decision and reasoning on the first two of plaintiff's allegations, namely, that the implicated State action complies with article I, sections 1 and 19 and article V, section 5 of the North Carolina Constitution. It reversed on the third issue.[224]

The court of appeals had looked to the probable intent of the drafters of the State constitution and to United States Supreme Court interpretations of similar equal protection and due process language in the United States Constitution in order to determine whether a fetus should be included within the constitutional definition of "person."[225] The North Carolina Court of Appeals analyzed common and statutory law existing at the time the North Caro-

---

219. *Id.* at 153, 271 S.E.2d at 54.

220. 302 N.C. 357, 275 S.E.2d 439 (1981).

221. The State Abortion Fund, which provides state funds for abortions for indigents, was created by the North Carolina General Assembly, and is administered according to rules promulgated by the Social Services Commission. Money from the Fund is used to provide indigent women with abortions during the first twenty weeks of pregnancy. *See* Brief for Appellee, Stam v. State, 47 N.C. App. 209, 267 S.E.2d 335 (1980).

222. 302 N.C. at 358, 275 S.E.2d at 440.

223. Stam v. State, 47 N.C. App. 209, 267 S.E.2d 335 (1980).

224. 302 N.C. at 359, 275 S.E.2d at 441.

225. 47 N.C. App. at 213-17, 267 S.E.2d at 339-42.

N.C. CONST. of 1868 art. I, § 1 (1970) provides:

> *The quality and rights of persons.* We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.

Id. art. I, § 19 provides in part:

> *Law of the land; equal protection of the laws.* No person shall be taken, imprisoned, or

lina Constitution was drafted and concluded that these laws had never held a fetus to be a "person" in the complete sense prior to birth.[226] Criminal laws prohibiting abortion and property laws granting rights to unborn children were seen as protecting rights other than those of the child itself[227] or as being based on a condition precedent of live birth.[228] The court of appeals also relied on the United States Supreme Court's decision in *Roe v. Wade*,[229] which held that "person" within the fourteenth amendment due process clause does not include the unborn.

In addition to its historical analysis and survey of relevant Supreme Court cases, the court of appeals considered the legal and policy implications of holding an unborn fetus to be a "person" in the constitutional sense.[230] Under *Roe v. Wade* a woman has a due process right to choose abortion in the first trimester of pregnancy.[231] This right cannot be substantially infringed by any asserted interest of the father,[232] the mother's parents,[233] or the fetus itself.[234] If the court had held the fetus to be a legal "person," the fetus would be entitled to the due process and equal protection rights accorded other individuals under the state constitution.[235] The child's interest in "life, liberty, or property"[236] would then take precedence over the abortion rights of the mother, in contravention of *Roe v. Wade*.[237] Additionally, the court of appeals feared that protection of the child's interest would prevent any state assistance for abortions, even when necessary to save the life of the mother and to terminate pregnancies caused by rape or incest.[238]

Despite these noted reservations, the court of appeals stated in dictum that "[o]ur ruling in the present case in no way implies that the unborn child is to be accorded no rights at all. The General Assembly may, in recognition of

---

disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land.

226. 47 N.C. App. at 215, 267 S.E.2d at 340-41.

227. *Id.* at 215, 267 S.E.2d at 340.

228. *Id.* at 216, 267 S.E.2d at 341.

229. 410 U.S. 113 (1973).

230. 47 N.C. App. at 216-17, 267 S.E.2d at 341-42.

231. 410 U.S. at 163-64.

232. Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

233. Bellotti v. Baird, 443 U.S. 622 (1979).

234. Roe v. Wade, 410 U.S. at 159-60.

235. *See id.* at 156-7.

236. N.C. CONST. of 1868 art. I, § 19 (1970).

237. 47 N.C. App. at 217, 267 S.E.2d at 341.

A similar issue was raised in Charles v. Carey, 627 F.2d 772 (7th Cir. 1980). In *Charles* plaintiffs attacked the Illinois abortion statute on the ground that the preamble expressed an unlawful legislative purpose to prohibit abortion. The contested provision stated that "the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right of life from conception." ILL. REV. STAT. ch. 38, § 81-21 (1977). The court concluded that the statute did not express an unlawful purpose when read as a whole because a preceding provision of the preamble stated that "[i]t is the intention of the General Assembly of the State of Illinois to reasonably regulate abortion in conformance with the decisions of the United States Supreme Court of January 22, 1973." 627 F.2d at 779 (quoting ILL. REV. STAT. ch. 38, § 81-21 (1977)).

238. 47 N.C. App. at 217, 267 S.E.2d at 342.

the potentiality of life, continue to grant the rights and privileges which it chooses."[239] As a result, the court left open the option of legislative action to limit state abortion funding.[240]

Plaintiff's second contention in *Stam* was that the appropriation and expenditure of state tax monies for elective abortions violated article V, section 5 of the North Carolina Constitution.[241] The plaintiff argued that section 5 requires every act levying a tax to "state the special object to which it is to be applied."[242] Abortion funds are derived from taxes levied under chapter 105 of the North Carolina General Statutes. G.S. 105-1 provides that the purpose of revenues raised under the subchapter will be for the "necessary uses and purposes of the government and State of North Carolina. . . ."[243] The plaintiff argued that, as medically necessary abortions are not funded by the State Abortion Fund,[244] the appropriation of funds for unnecessary abortions could not be within the "necessary uses and purposes" language of G.S. 105-1.[245]

The court of appeals rejected this argument, stating that "it is clear that if funding for childbirth could be considered a 'necessary use and purpose of government,' abortion funding is equally so."[246] The opinion recognized a state interest in ensuring that if an indigent woman chooses abortion, her health is protected through her ability to obtain competent professional medical care.[247] State funding of elective abortions was also seen as advancing the legislative intent of ensuring low income women a meaningful opportunity to exercise their constitutional choice to terminate their pregnancies.[248]

The plaintiff's third contention in *Stam* was that Wake County's expenditure of state and county funds for elective abortions was without statutory authorization.[249] The court of appeals found that county expenditure of state funds was authorized by administrative rules enacted by the State Social Services Commission.[250] Authorization for the enactment of these rules was found in G.S. 143B-137, which permits the Department of Human Resources of which the Social Services Commission is a part, to make rules consistent with

---

239. *Id.*

240. This kind of state action has been held constitutional in a number of United States Supreme Court decisions. *See* Williams v. Zbaraz, 100 S. Ct. 2694 (1980) (Illinois); Harris v. McRae, 100 S. Ct. 2671 (1980); Maher v. Roe, 432 U.S. 464 (1977) (Connecticut); Beal v. Doe, 432 U.S. 438 (1977) (Pennsylvania). *See also* notes 250-52 and accompanying text *infra*.

The court's deferral to legislative judgment is in accord with the language of the United States Supreme Court in *Maher v. Roe* which states: "Indeed, when an issue involves policy choices as sensitive as those implicated by public funding of nontherapeutic abortions the appropriate forum for their resolution in a democracy is the legislature." 432 U.S. at 479.

241. 47 N.C. App. at 217, 267 S.E.2d at 342.

242. N.C. CONST. of 1868 art. V, § 5 (1970).

243. N.C. GEN. STAT. § 105-1 (1979).

244. *See* note 221 and accompanying text *supra*.

245. 47 N.C. App. at 218-19, 267 S.E.2d at 342.

246. *Id.*

247. *Id.* at 219, 267 S.E.2d at 343.

248. *Id.*, 267 S.E.2d at 342.

249. *Id.*, 267 S.E.2d at 343.

250. *Id.* Administrative rules governing the State Abortion Fund are adopted by the Social Services Commission. *See* note 221 and accompanying text *supra*.

state law if they are necessary to carry out the purpose of providing "services in the fields of general and mental health."[251] The state supreme court did not specifically address the issue of the county's expenditure of state funds, thereby apparently affirming the court of appeals.[252]

The supreme court reversed the court of appeals on the question of the county's statutory authority to levy taxes and appropriate local funds for elective abortions. The court of appeals had found statutory authorization for the scheme in the provisions of G.S. 53A-149(c)(30) and G.S. 153A-255.[253] The supreme court disagreed with this conclusion, stating "[a] grant to a county of the power to levy taxes must be strictly construed."[254] G.S. 153A-149(c)(30) was held to be limited by G.S. 153A-149(g) which provides in part that "[t]his section does not authorize any county to undertake any program, function, joint undertaking, or service not otherwise authorized by law."[255] G.S. 153A-255 was deemed insufficient to provide the necessary additional authority because the court believed its application limited to programs that provide the poor with the "basic necessities of life."[256] This limitation was based on the North Carolina's Supreme Court's holding in *Hughey v. Cloninger*,[257] which ruled that G.S. 153A-255 does not confer authority for the county to establish a school for dyslexic students. In *Hughey* the court stated that authorization for county programs under G.S. 153A-255 is limited to programs "of the type created in Chapters 108 and 111 of the General Statutes."[258] Programs of the type created in chapters 108 and 111 were limited to those which are "responsive to the needs of impoverished citizens who are unable to provide for the basic necessities of life."[259] While admitting that the decision in *Hughey*

---

251. N.C. GEN. STAT. § 143B-137 (1978). G.S. 143B-153, which creates the Social Services Commission of the Department of Human Resources, authorizes the commission to adopt rules and regulations "under and not inconsistent with the laws of the State necessary to carry out the provisions and purposes of this Article." *Id.* § 143B-153.

252. The supreme court opinion in *Stam* states:

> We have carefully examined the unanimous decision of the Court of Appeals as it relates to plaintiff's Assignments of Error Numbers 1 and 2. We conclude that the authorities cited, the principles of law enunciated, and the reasoning . . . are correct and fully support the result reached on the questions of law presented by these assignments of error. We therefore approve and adopt the decision insofar as it affirms the granting of summary judgment on these first two issues.

302 N.C. at 359, 275 S.E.2d at 441.

253. 47 N.C. App. at 222, 267 S.E.2d at 344. G.S. 153A-149(c)(30) permits a county to levy property taxes to provide for the general welfare "through the maintenance and administration of public assistance programs." N.C. GEN. STAT. § 153A-149(c)(30) (1978). G.S. 153A-255 states that "[e]ach county shall provide social services programs pursuant to Chapter 108 and Chapter 111 and may otherwise undertake, sponsor, organize, engage in, and support other social service programs intended to further the health, welfare, education, safety, comfort, and convenience of its citizens." *Id.* § 153A-255.

254. 302 N.C. at 360, 275 S.E.2d at 441.

255. N.C. GEN. STAT. § 153A-149(g) (1978).

256. 302 N.C. at 362, 275 S.E.2d at 442.

257. 297 N.C. 86, 253 S.E.2d 898 (1979).

258. *Id.* at 92, 253 S.E.2d at 902. Under chapter 108 medical services are limited to those "essential to the health and welfare of the recipients." N.C. GEN. STAT. § 108-60 (1978). Chapter 111 deals exclusively with aid to the blind. *Id.* §§ 111-1 to -47.

259. 297 N.C. at 93, 253 S.E.2d at 902. The *Hughey* court also stated that chapter 108 applies "to citizens who cannot afford adequate health care." *Id.*

turned on the fact that the school in question was not limited to a class of impoverished students,[260] the *Stam* court extended the holding to permit county funding only when a program provides the class of poor with basic necessities that they themselves are unable to provide.[261] With regard to elective abortion funding the court stated, "[w]e find it inconceivable that the legislature would have intended medically unnecessary abortions to be basic necessities of life."[262]

The supreme court derived further evidence of legislative intent from G.S. 17-707(21)—the predecessor to G.S. 153A-255.[263] G.S. 17-707(21), which was repealed in 1973, authorized counties to provide for the "maintenance of the poor."[264] According to the court, funding of elective abortions was not within the meaning of "maintenance."[265]

Finally, in support of its holding, the supreme court stated that the legislature would have specifically authorized counties to fund medically unnecessary abortions if this had been its intent. This conclusion was based on judicial recognition of the "widespread emotional and intellectual debate" over the legality of abortions.[266]

The supreme court's opinion in *Stam* strains to find a lack of statutory authorization for county abortion funding. G.S. 153A-255 clearly allows county social services to "undertake, sponsor, organize, engage in, and support . . . programs intended to further the health, welfare, education, safety, comfort, and convenience of its citizens."[267] Although *Hughey v. Cloninger* limits county funding under G.S. 153A-255 to programs "addressed exclusively to the problems of poverty,"[268] this would not appear to exclude funding of elective abortions for *indigent* women. As the court of appeals in *Stam* stated, "[t]he grant of power in [G.S. 153A-255] is sufficiently broad to permit the county to sponsor and support the program established by the State Abortion Fund through the levy of taxes and the expenditure of county funds."[269] The "basic necessities of life" argument, drawn from *Hughey*, appears overly nar-

260. *Id.* The court stated, "[i]n sum, the programs in Chapters 108 and 111 are addressed exclusively to the problems of poverty; whereas a school for dyslexic children is addressed exclusively to the treatment of a learning disability without regard to the financial status of those afflicted." *Id.*

261. 302 N.C. at 362, 275 S.E.2d at 442. Qualified programs were held to include nursing care, employment opportunities, and food stamps. *Id.*

262. *Id.* This holding seems to conflict with the reasoning of the court of appeals (later adopted by the supreme court) concerning plaintiff's allegation that state abortion funding was not within the "necessary uses and purposes" language of G.S. 105-1. *See* notes 243-48 and accompanying text *supra*.

263. Law of Aug. 14, 1868, ch. 20, § 8(24), 1868 N.C. Pub. Laws, Spec. Sess. 22 (repealed 1973).

264. *Id.* The statute further authorized counties "[t]o provide by tax for the maintenance, comfort and well-ordering of the poor." *Id.*

265. 302 N.C. at 363, 275 S.E.2d at 443. The court failed to specify what programs would be within the definition of "maintenance."

266. *Id.*

267. N.C. GEN. STAT. § 153A-255 (1978).

268. 297 N.C. at 92, 253 S.E.2d at 902.

269. 47 N.C. App. at 223, 267 S.E.2d at 344.

row and possibly excludes programs for the poor that are specifically authorized under chapter 108.[270]

The *Stam* decision is particularly significant in light of the increasing trend of state legislatures[271] to limit state abortion funding to those medically necessary procedures eligible for federal funding under the Medicaid Act.[272] Such funding limits are said to promote the state's interest in encouraging childbirth, while imposing no unconstitutional obstacle to a woman's recognized right to choose abortion.[273] Because *Stam* held that the State may continue to fund elective abortions without violating statutory or constitutional law, it is likely that the state legislature will continue to be a target for anti-abortion groups. Nothing in the supreme court's opinion would prevent a legislative limit on funding of abortions.[274]

2. Education

In *Sneed v. Greensboro City Board of Education*[275] the North Carolina Supreme Court held that a 1970 revision of the state constitution, which guaranteed "free public schools" as opposed to "public schools . . . wherein tuition shall be free,"[276] did not preclude the school board from requiring public school students to pay reasonable instruction, course, and use fees.[277] The state public school system has imposed modest fees continuously since 1868.[278] Furthermore, the 1868 state constitution and its subsequent revisions equated "free public schools" with tuition-free public schools.[279] Finally, the 1970 decision to revise the Constitution of North Carolina merely demon-

---

270. G.S. 108-59 and -60 authorize the county to levy taxes for payments to such health care providers as optometrists and dentists. N.C. GEN. STAT. §§ 108-59 to -60 (1978).

271. *See* note 240 and accompanying text *supra*.

272. *See* Medicaid Act, 42 U.S.C.A. § 1396 (1976 & Supp. 1980). In *Harris v. McRae* the Supreme Court held that the Medicaid Act does not require a participating state to include in its abortion funding plan any services for which a subsequent Congress had withheld federal funding. 100 S. Ct. 2671, 2684-85 (1980). Since 1976, Congress has limited the use of Medicaid funds for reimbursement of the cost of abortions by means of the Hyde Amendment. The current version of the Hyde Amendment, applicable for fiscal year 1980, provides:

> [N]one of the funds provided by this joint resolution shall be used to perform abortions except where the life of the mother would be endangered . . . or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service.

Pub. L. No. 96-123, § 109, 93 Stat. 923 (1979). *See* Harris v. McRae, 100 S. Ct. at 2680-81, for a historical summary of the Hyde Amendment.

273. Maher v. Roe, 432 U.S. 464 (1977).

274. *See* note 240 and accompanying text *supra*.

275. 299 N.C. 609, 264 S.E.2d 106 (1980).

276. *Compare* N.C. CONST. of 1868, art. IX, § 2(1) ("a general and uniform system of public schools, wherein tuition shall be free of charge") *with* N.C. CONST. of 1868, art. IX, § 2(1) (1970) ("a general and uniform system of free public schools").

277. Other states that have considered this issue have reached an opposite result. *E.g.*, Bond v. Public Schools, 383 Mich. 693, 178 N.W.2d 484 (1970) (per curiam) (new language in the 1963 Constitution providing for "a system of free public . . . schools" held to prohibit textbook or instructional fees).

278. 299 N.C. at 615, 264 S.E.2d at 111.

279. *Id.* at 613-14, 264 S.E.2d at 110-11.

strated a desire to eliminate the obsolete separation-of-the-races provision.[280] Thus, a system of free public schools requires the state to furnish only "the physical plant and personnel salaries"[281] necessary to maintain a tuition-free public educational system.[282] For students unable to afford the fees, the court held that procedural due process required the school board to give notice of its economic hardship fee-waiver policy to all students.[283]

KIMBERLY TAYLOR HARBINSON
THOMAS KIERAN MAHER
GREGORY M. MARTIN
WILLIAM MCBLIEF

280. *Id.* at 616, 264 S.E.2d at 112.
281. *Id.* at 617, 264 S.E.2d at 112.
282. The state legislature also requires the public schools to furnish free textbooks. N.C. GEN. STAT. § 115-206.12 (1978).
283. 299 N.C. at 617-19, 264 S.E.2d at 113-14.

V. CRIMINAL LAW

A. Criminal Conspiracy

In *Pinkerton v. United States*,[1] the United States Supreme Court held that a member of a criminal conspiracy is liable as a principal for all offenses committed by coconspirators in furtherance of the conspiracy. Although North Carolina courts have never expressly adopted the *Pinkerton* rule, recent cases have affirmed convictions apparently based on this theory of vicarious liability.[2] In *State v. Small*,[3] however, the North Carolina Supreme Court rejected the *Pinkerton* rule as a basis for substantive criminal liability in North Carolina, holding that involvement in a conspiracy to commit a crime does not make one liable for the actions of coconspirators.[4]

Defendant in *Small* allegedly hired two coconspirators to kill his wife. Defendant was not present when the act was carried out. The State argued that defendant was liable as a principal because he conspired with others to commit the murder. The trial court instructed the jury to find defendant guilty of first degree murder if it found that the crime had been carried out in furtherance of an agreement between defendant and the actual killers. The jury found defendant guilty and he was sentenced to death.[5] On appeal, the supreme court[6] rejected the theory of vicarious liability on which the conviction was based.

The supreme court observed that the *Pinkerton* rule obviated the distinction between the liability of a principal and the liability of an accessory before the fact to murder, as codified in G.S. 14-5 and 14-6.[7] A principal is present at the scene of the crime, while an accessory is not[8] and under the statutory provisions, an accessory before the fact to murder cannot receive the death penalty, whereas a principal to murder may be sentenced to death.[9] The court found that because defendant was as an accessory before the fact, the court could not expand the scope of accessorial liability beyond the statutory pre-

---

1. 328 U.S. 640 (1946).

2. *See* State v. Bindyke, 298 N.C. 608, 220 S.E.2d 521 (1975); State v. Maynard, 247 N.C. 462, 101 S.E.2d 340 (1958). In these cases defendants who were absent from the scene of the crime were held liable as principals on the basis of their participation in a conspiracy to commit the crime.

3. 301 N.C. 407, 272 S.E.2d 128 (1980).

4. *Id.* at 420, 272 S.E.2d at 136-37.

5. *Id.* at 412, 272 S.E.2d at 131.

6. Justice Huskins dissented without opinion.

7. 301 N.C. at 417, 272 S.E.2d at 134. N.C. GEN. STAT. § 14-5 (1969) provides, in relevant part: "Accessories before the fact . . . —If any person shall counsel, procure or command any other person to commit any felony . . . [he] shall be guilty of a felony . . . ."

N.C. GEN. STAT. § 14-6 (Supp. 1979), at the time the crime in *Small* was committed, provided, in relevant part, that "[a]ny person who shall be convicted as an accessory before the fact in either of the crimes of murder, arson, burglary or rape or a sex offense shall be imprisoned for life . . . ." In 1979 this section was amended to provide a maximum fifty years sentence. Law of June 4, 1979, ch. 760, § 5, 1979 N.C. Sess. Laws, 1st Sess. 859.

8. State v. Benton, 276 N.C. 641, 653, 174 S.E.2d 793, 801 (1970).

9. N.C. GEN. STAT. § 14-7 (1969).

scription.[10]

Apart from *Pinkerton*'s conflict with the statutory distinction between accessories before the fact and principals to murder, the North Carolina Supreme Court criticized *Pinkerton* for basing a conspirator's criminal liability for an act "less upon the circumstances of his personal participation than upon his presumed status as 'partner' in all actions which proximately result from the venture originally agreed upon."[11] The court was unwilling to sanction the use of a rule that would impose liability as a party to the substantive crime solely on the basis of participation in the agreement to commit the crime.[12]

Recent North Carolina Supreme Court cases had accepted a theory of vicarious liability by affirming the imposition of principal liability for substantive crimes solely on the basis of involvement in conspiracies to commit those crimes.[13] The *Small* court held, however, that these cases had misapplied their cited precedents.[14] Earlier precedents involved defendants who were present at the scene of the crime. Proof of their involvement in the conspiracy was introduced only to establish their intent to further the crime by their presence.[15] Although used as a rule of evidence,[16] rather than as a rule of substan-

10. 301 N.C. at 417, 272 S.E.2d at 134-35.

11. *Id.* at 415, 272 S.E.2d at 133-34. The court regarded this "stew of expanded criminal liability" as a "rather startling result." *Id.*

12. *Id.* at 420, 270 S.E.2d at 138. The court was not solely concerned with the *Pinkerton* rule's imposition of principal liability on one who otherwise would be liable only as an accessory before the fact. Neither principal nor accessorial liability could properly be imposed, said the court, solely on the basis of a defendant's involvement in a conspiracy. *Id.*

Another objection raised by the *Small* court was that *Pinkerton* dissolved the distinction between the crime of conspiracy and the criminal object of the conspiracy. In the *Small* court's view, this conflicted with previous holdings that the two crimes are separate offenses and separately punishable. *Id.* at 428, 272 S.E.2d at 141. This objection, however, does not appear to be an independent ground for the decision in *Small*.

The prior cases referred to by the court had held that the merger doctrine does not merge the offense of conspiracy into the substantive offense resulting from the conspiracy's furtherance. *Id.* at 428 n.14, 272 S.E.2d at 141 n.14. When proof of one offense is an essential element in another offense, the doctrine of merger operates to "merge" the offenses, and a defendant charged with both crimes may be convicted and punished only for one or the other. Ordinarily the doctrine does not merge conspiracy with its object, since the facts necessary to prove the conspiracy are not essential ingredients in proving the substantive offense. The *Pinkerton* rule, however, when applied to conspirators whose personal involvement in the substantive offense, standing alone, is insufficient to render them liable as parties to that crime, causes the conspiracy and substantive offenses to merge. For these defendants proof of involvement in the conspiracy is the *only* means of obtaining their convictions for the substantive offense, and therefore constitutes an essential element of that offense. Merger logically should apply in this situation because equating guilt of the conspiracy with guilt of the substantive offense results in an identity of offenses. A conviction for both would be a violation of double jeopardy. *See* 21 AM. JUR. 2d *Criminal Law* § 182 (1965). This result is not contrary to the court's earlier pronouncements that the two crimes are separate, since in those cases proof of involvement in the conspiracy was *not* an essential element of the substantive offense. Thus, the true basis for this objection would seem to be the court's antipathy toward the *Pinkerton* rule's equation of conspiratorial and substantive criminal liability.

13. *See* cases cited at note 2 *supra*.

14. 301 N.C. at 423-27, 272 S.E.2d at 138-40.

15. *Id.*

16. The court observed,

> The conspirator rule—the well established proposition that the acts and declarations of one conspirator, made or done in furtherance of or within the scope of the original conspiracy, may be imputed to other conspirators who were not present at the time—is a valid and useful *evidentiary* rule . . . . It means, in essence, that [the] acts and declara-

tive liability, the principle was worded broadly enough to permit its application in the later cases to defendants who were *not* present at the crime.[17] The *Small* court overruled these more recent cases.[18]

The significance of *Small* depends upon the reasoning behind the decision. One basis of the court's decision is the more lenient statutory provision for sentencing accessories before the fact to murder. This narrow holding goes no further than to say that the *Pinkerton* rule cannot be used to "expand the scope of accessorial liability beyond the legislative design."[19] It would not condemn the use of the *Pinkerton* rule where it would not have this effect. For example, if the rule were used merely to impose *accessorial* liability on a defendant, or if the legislative design *itself* were to expand the scope of accesorial liability (as it would if the legislature were to abolish the distinction between principals and accessories before the fact[20]), then this basis for rejecting *Pinkerton* would not apply.

The broader basis for *Small* strikes at the heart of *Pinkerton* by proscribing the imposition of liability for a crime *solely* on the basis of a defendant having agreed with others to commit the crime. The court criticized the emphasis that the *Pinkerton* rule gives to a defendant's presumed status as "partner" in the crime, as opposed to the actual "circumstances of his personal participation" in the substantive offense.[21] While it conceded that in most

---

tions of one coconspirator are *admissible* against all . . . . When one who so conspires is shown to have been present at the commission of the crime, contemplated by or a natural consequence of the original conspiracy, evidence of the conspiracy, including the conspiratorial acts and declarations of all the conspirators, may then be relevant to show . . . that he aided and abetted in the commission of the crime, or acted in concert with those who did, in which event he is substantively liable as a principal. Likewise, when the defendant-conspirator is shown to have been absent from the scene of the crime, evidence of the conspiracy may nevertheless be relevant to support that state's theory that the defendant participated as an accessory before the fact.

301 N.C. at 418-20, 272 S.E.2d at 135-36.

17. An example of the broadly worded principle can be found in State v. Smith, 221 N.C. 400, 20 S.E.2d 360 (1942): "[I]f a number of persons combine or conspire to commit a crime . . . each is responsible for all acts committed by the others in the execution of the common purpose which are a natural or probable consequence of the unlawful combination . . . .", *quoted in* 301 N.C. at 424-25, 272 S.E.2d at 139. This principle was applied in *Smith* to defendants present at the scene of the crime, but was cited in State v. Bindyke, 288 N.C. 608, 618-19, 220 S.E.2d 521, 528 (1975), to support the imposition of principal liability upon a defendant who was absent from the scene of the crime on the ground that defendant was involved in the conspiracy to commit the crime. 301 N.C. at 425, 272 S.E.2d at 139.

18. 301 N.C. at 421, 272 S.E.2d at 137.

19. *Id.* at 417, 272 S.E.2d at 134-35.

20. The decision in *Small* precipitated prosecutorial pressure for legislation to make possible the conviction as principals of persons who hire others to commit a felony but are not present at the commission of the crime. Senate Bill 62, introduced Jan. 30, 1981, would abolish the distinction between accessories before the fact and principals, thereby conforming the North Carolina approach to that of most states.

21. 301 N.C. at 415, 272 S.E.2d at 133-34. The basis for the court's objection to *Pinkerton*'s broad sweep is expressed in the following statement it quoted from a recent New York opinion: "[I]t is repugnant to our system of jurisprudence, where guilt is generally personal to the defendant . . . to impose punishment, not for the socially harmful agreement to which the defendant is a party, but for substantive offenses in which he did not participate." 301 N.C. at 427, 272 S.E.2d at 140-41 (quoting People v. McGee, 49 N.Y.2d 48, 58, 424 N.Y.S.2d 157, 162, 399 N.E.2d 1177, 1182 (1979)).

cases a conspirator's actual participation in the substantive crime will suffice to render him liable for the crime, at least as an accessory before the fact,[22] the court held that such liability cannot be imposed solely on the basis of one's status as a conspirator.[23]

The result reached in *Small* is sensible. If a defendant's actual participation in a crime falls short of implicating him as either a principal or an accessory before the fact, then there is no reasonable basis for holding him liable as a party to the crime. Conspiracy to commit murder is itself a felony punishable by up to ten years imprisonment,[24] and this seems adequate to deal with defendants whose sole involvement consists of having agreed with others to commit the crime.

B. Burden of Proof

The fourteenth amendment due process requirements relating to the burden of proof in criminal cases were considered in two cases this year. In *State v. Benton*[25] the supreme court considered the validity of a mandatory presumption. An argument between defendant and the deceased escalated into a gun battle. Defendant argued self-defense. Although the State's evidence did not show who first used a weapon, the prosecution relied upon the inference of unlawful killing which arises when proof that a death resulted from defendant's intentional use of a deadly weapon is offered.

Defendant argued that this presumption violated his due process rights, relying on the series of United States Supreme Court cases beginning with *In re Winship*.[26] These cases attempt to draw a line between elements that the State must prove beyond a reasonable doubt, and exculpatory or mitigating circumstances upon which the defendant may be required to bear the burden of proof. This line reflects the balancing of competing policies: society's judgment, which is reflected in the reasonable doubt standard, that it is preferable to acquit a guilty person than to convict an innocent one;[27] as against the

22. 301 N.C. at 420 & n.11, 272 S.E.2d at 137.

23. *Id.*

24. State v. Alston, 264 N.C. 398, 141 S.E.2d 793 (1965).

25. 299 N.C. 16, 260 S.E.2d 917 (1980).

26. 397 U.S. 358 (1970). This case established that the due process clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364. Subsequent Supreme Court cases have refined this concept. The State cannot shift the burden of proof to the defendant by conclusively implying an essential element of the crime absent negating evidence from the defendant. *See* Mullaney v. Wilbur, 421 U.S. 684 (1975) (invalidating Maine's conclusive presumption of malice aforethought upon proof of an unlawful and intentional killing). The State does not, however, have the burden of proof on every exculpatory or mitigating circumstance. *See, e.g.*, Patterson v. New York, 432 U.S. 197 (1977) (upholding New York homicide scheme under which the defendant could reduce murder to manslaughter by proving extreme emotional disturbance); State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907 (1980) (rejecting the argument that due process requires that the State, in a sentencing determination of whether to apply the death penalty, disprove any mitigating circumstances).

27. "I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

policies of not overburdening the task of prosecutors[28] and not discouraging legislatures and courts from providing affirmative defenses and mitigating circumstances.[29]

The North Carolina Supreme Court upheld the operation of the presumption. The court noted that although the presumption has the effect of shifting the burden of production to the defendant, with defendant's showing of self-defense the mandatory presumption disappears.[30] At that point the burden returns to the State, which must show unlawfulness beyond a reasonable doubt, although it may still rely on the permissive inference flowing from the elemental facts.[31] The court in *Benton* impliedly found that the inference was sufficient to find the unlawful killing beyond a reasonable doubt.[32]

Analyzed in terms of its underlying policies, the court's decision is, in theory, defensible. Requiring the defendant to come forward with some proof of self-defense does not seem to alter the current balance against convicting an innocent person since some proof of self-defense should be relatively easily obtained and offered by defendants with valid claims to the defense. Such a mechanism also fulfills the policy of not overburdening the prosecution by requiring it to negate a defense that might not be argued.

Whether this method fulfills the constitutional policies in practice, however, is open to doubt. Surely the defendant in *Benton* would view this shifting of burdens as a matter of semantics. The State's evidence of unlawfulness was ambiguous. No one testified that the defendant provoked the dispute or

---

28. " 'Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.' " Baker v. McCollan, 443 U.S. 137, 145 (1979) (quoting Patterson v. New York, 432 U.S. 197, 208 (1977)).

29. See, for example, Patterson v. New York, 432 U.S. 197, 207 (1977), in which the majority noted that the New York criminal code contained some 25 affirmative defenses which had to be established by the defendant. The opinion continued: "The Due Process Clause, as we see it, does not put New York to the choice of abandoning those defenses or undertaking to disprove their existence in order to convict of a crime which otherwise is within its constitutional powers to sanction by substantial punishment." In his dissent, Justice Powell argued that the prosecutor must bear the burden of persuasion beyond a reasonable doubt whenever the factor makes a substantial difference in punishment and stigma *and* has historically held that level of importance. New affirmative defenses would therefore not be affected. *Id.* at 228-230.

One method the states have used to attempt to satisfy these competing requirements is that of creating inferences that arise when the state establishes particular basic facts beyond a reasonable doubt. The Supreme Court has upheld such inferences, provided that they meet certain requirements. A permissive inference, one which allows, but does not require, the trier of fact to infer the elemental fact, will be upheld if there is a "rational connection" between the basic facts proved and the ultimate fact presumed, and the latter is "more likely than not to flow from" the former. *See* County Court v. Allen, 442 U.S. 140, 157 (1979). A mandatory presumption, under which the jury must, absent rebutting evidence from the defendant, find the elemental fact upon proof of the basic fact, subjects the statute to scrutiny "on its face." It will be invalidated unless the inference is sufficient for a rational jury to find the inferred fact beyond a reasonable doubt. *Id.* at 157-59.

30. A showing of self-defense negates the element of unlawfulness. State v. Hankerson, 288 N.C. 632, 651-52, 220 S.E.2d 575, 589 (1975), *rev'd on other grounds*, 432 U.S. 233 (1977).

31. The scheme in *Benton* is thus distinguishable from that which was invalidated in Hankerson v. North Carolina, 432 U.S. 233 (1977). In the pre-*Hankerson* scheme, the same presumption arose and remained until the defendant proved to the jury's satisfaction that he acted in self-defense. Here, only the burden of production is shifted to the defendant. Once that is met the prosecution must prove unlawfulness beyond a reasonable doubt.

32. *See* note 29 *supra*. Whether the inference is this strong is probably questionable enough to warrant at least some court discussion.

was the first to draw a gun. The defendant's evidence tended to show that the deceased was the first to fire, thus raising a valid claim of self-defense.[33] Although theoretically, the burden reverted back to the prosecution at that point, no new evidence of unlawfulness was produced. The effect in *Benton* was no different than if the burden had remained on the defendant to disprove unlawfulness. The problem, perhaps, is that the technical distinctions, reflecting conflicting and closely competing policies, are too finely drawn to be capable of explanation to a jury.

The issue raised in *State v. Trimble*[34] involved an even more direct confrontation with the issues underlying the *Winship* line of decisions. The defendant was convicted of violating G.S. 14-401,[35] which makes it unlawful to place poisoned food in a public area. The statute provides that it does not apply to certain poisonings aimed at insects, worms, and rats. The defendant argued that this exception constitutes an element of the offense and that the charge had to be dismissed since this element was not set forth in his arrest warrant.[36] The North Carolina Court of Appeals found that the exception is not an element of the offense but is instead a "hybrid" factor in determining criminal liability. It held that the prosecution would only be required to prove that the exception does not apply if the defendant initially, in a "nonfrivolous manner," puts forth evidence that the exception does apply.[37]

The initial issue is whether the exception in fact constitutes an element of the offense. G.S. 14-401 does not address this issue. It is arguable that the exception is, therefore, an element of the offense, which the state can not redefine as an affirmative defense and thereby shift the burden of proof to the defendant.[38]

The court, however, did not treat the exception as an affirmative defense. It only placed the burden of production on the defendant, which is clearly permissible under the federal due process analysis. In *Mullaney v. Wilbur*,[39] the United States Supreme Court noted: "Many states do require the defend-

33. Justice Exum, dissenting from the decision, argued that defendant's evidence that the deceased was the aggressor clarified the prosecution's evidence, which was ambiguous on this point. Therefore, he reasoned, the presumption of unlawfulness was destroyed and the trial judge should have granted the defendant's motion for a nonsuit. 299 N.C. 16, 26-29, 260 S.E.2d 917, 923-24 (1980) (Exum, J., dissenting).

34. 44 N.C. App. 659, 262 S.E.2d 299 (1980).

35. N.C. GEN. STAT. § 14-401 (1969).

36. Under G.S. 15A-924(a)(5), all elements of the offense charged must be set forth in the arrest warrant. G.S. 15A-924(e) and 15A-954(a)(10) require that, if the provisions of G.S. 15A-924(a)(5) are not met, and the failure is not with regard to a matter as to which an amendment is allowable, the charges must be dismissed. N.C. GEN. STAT. §§ 15A-924(a)(5), (e), 15A-954(a)(10) (1978).

37. 44 N.C. App. at 666, 262 S.E.2d at 303-04. The court found that the State, in any event, had proved the nonexistence of the exception beyond a reasonable doubt in this case. *Id.* at 667, 262 SS.E.2d at 304 (1980).

38. Responding to the argument that allowing the burden of proof to be placed on the defendant to show exculpating circumstances would lead to the states' labeling elements of offenses as affirmative defenses, the United States Supreme Court noted, "But there are obviously constitutional limits beyond which the States may not go in this regard." Patterson v. New York, 432 U.S. 197, 210 (1977).

39. 421 U.S. 684 (1975). *See* note 27 *supra*.

ant to show that there is 'some evidence' . . . before requiring the prosecution to negate this element . . . beyond a reasonable doubt . . . . Nothing in this opinion is intended to affect that requirement."[40]

Shifting the burden of production to the defendant of showing the applicability of an exception to a criminal statute was upheld by the Ninth Circuit Court of Appeals in *United States v. Rosenberg*.[41] The court upheld a doctor's convictions on twenty-seven counts of unlawfully distributing a controlled substance. The statute contained a number of exceptions but expressly noted that the burden of going forward with the evidence on any exception was on the defendant. The court observed that, because a number of statutes contain exceptions, without such a provision the government would be required to waste court time disproving arguments that the defendant might never make. In addition, the court noted, "[t]he important fact is that the quoted provision does not shift the burden of proof. Once a defendant presents a claim that he falls within the exception, the government must prove beyond a reasonable doubt that the accused does not fall within it."[42]

The court's analysis, however, is flawed in other respects. First, it is not clear that the court, as opposed to the legislature, is at liberty to put the burden of production on the defendant.[43] This is particularly questionable in North Carolina, where each element of the offense must be specified in the warrant.[44] The failure to require the allegation that the exception is not applicable in the arrest warrant may be crucial. For example, a defendant who does not know of the exception may admit that he has committed every element in the arrest warrant, waive his right to an attorney, and plead guilty to the charge. Arguably, the decision regarding what elements must be alleged in the arrest warrant should, therefore, be left to the legislature. The policies underlying *Winship* suggest that the shifting of the burden of production to the defendant should not be implied when the statute is ambiguous.

Second, since the effect of the court's analysis of the exception as a hybrid factor is the equivalent of having a permissive presumption of the nonexistence of the exception, the presumption should meet the constitutional requirements that a rational connection between the basic facts proved and the

---

40. 421 U.S. at 701-02 n.28 (1975). *See also* Justice Powell's dissent in Patterson v. New York, 432 U.S. 197, 230-31 (1977):

> The State normally may shift to the defendant the burden of production, that is, the burden of going forward with sufficient evidence "to justify (a reasonable) doubt upon the issue." . . . If the defendant's evidence does not cross the threshold, the issue—be it malice, extreme emotional disturbance, self-defense, or whatever—will not be submitted to the jury.

(Footnotes and citations omitted.)

41. 515 F.2d 190 (9th Cir.), *cert. denied*, 432 U.S. 1031 (1975). *See also* United States v. Collier, 478 F.2d 268, 273 (5th Cir. 1973).

42. 515 F.2d at 199.

43. The statute involved in *Rosenberg* expressly provided that the burden of production would be on the defendant. *See also* Patterson v. New York, 432 U.S. 197, 210 (1977): "[M]ore subtle balancing of society's interests against those of the accused have [*sic*] been left to the legislative branch."

44. *See* note 41 and accompanying text *supra*.

ultimate fact presumed exist, and that the latter is more likely than not to flow from the former.[45] Whether the presumption that the poison is not aimed at insects, worms, or rats arising from the placing of poisoned food in a public place meets these requirements should at least be addressed by the court.

Finally, the court's analysis does little to provide a basis from which one can determine if other exceptions or apparent elements will be treated as hybrid factors in the future. The court's test is to "ask what would be a 'fair' allocation of the burden of proof, in light of due process and practical considerations . . . ."[46] In view of the fine lines drawn by both the United States Supreme Court and North Carolina cases, and the tension between the underlying policies and practical considerations, what is "fair" may not be at all apparent until the applicable court opinion is handed down.

C. New Statute to Control Narcotics Traffic

On June 25, 1980, the North Carolina General Assembly ratified An Act to Control Trafficking in Certain Controlled Substances.[47] Section 1 of the Act, effective July 1, 1980, amends G.S. 14-17, which defines murder in the first and second degrees and sets the applicable punishment. The amendment specifies that murders caused by the unlawful distribution of opium will be considered murder in the second degree.[48] Section 2, effective March 1, 1981, further amends G. S. 14-17 to provide that anyone convicted of murder in the second degree shall be punished as a Class D Felon.[49]

The portion of the Act treating narcotics trafficking directly is Section 6. Effective July 1, 1980, it adds subsections (h) and (i) to G. S. 90-95. Subsection (h) provides that any person who sells, manufactures, delivers, transports, or possesses in excess of specified amounts of marijuana, methaqualone, cocaine, opium or heroin, is guilty of a felony known as trafficking in that particular drug. Further subdivisions set minimum and maximum penalties, depending upon the quantity and the substance involved. Subsection (h) also specifies that any person convicted under it must serve the applicable minimum prison term before either unconditional release or parole; unless the defendant has provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, coconspirators, or principals; was not sentenced as a committed youthful offender; and the sentencing judge notes this in the record. Finally, this subsection provides that sentences imposed pursuant to it

---

45. *See* note 29 *supra*.

46. 44 N.C. App. 659, 666, 262 S.E.2d 299, 303 (1980).

47. Law of June 25, 1980, ch. 1251, 1979 N.C. Sess. Laws, 2d Sess. 173 (amending N.C. GEN. STAT. §§ 14-17 (Cum. Supp. 1979) & 90-95 (1975)).

48. The amendment states:

> All other kinds of murder, including that which shall be proximately caused by the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium when the ingestion of such substance causes the death of the user, shall be deemed murder in the second degree . . . .

Law of June 25, 1980, ch. 1251, § 1, 1979 Sess. Laws, 2d Sess. 173.

49. *Id.* § 2. N.C. GEN. STAT. § 14-1.1(4) (Cum. Supp. 1979) provides that a Class D felony shall be punishable by imprisonment up to 40 years or a fine of up to $20,000, or both.

shall run consecutively. Subsection (i) provides that the penalties imposed in subsection (h) shall also apply to anyone convicted of conspiracy to commit any subsection (h) offense.[50]

Section 7, effective March 1, 1981, essentially duplicates section 6, but it does track the penalties into the new class felony system.[51] Section 7 also prescribes minimum sentences which are more severe than those required by section 6. Section 7, however, eliminates the section 6 requirement that a person must serve the applicable minimum prison term before unconditional release or parole.[52]

D. Jury Disagreement: Acceptable Instructions from the Trial Judge

In *State v. Lipfird*[53] the North Carolina Court of Appeals found no violation of G.S. 15A-1235[54] or coercion in additional jury instructions informing the jury that a disagreement would mean more court time consumed and another jury being called in a new trial.[55] The jury had deliberated for one hour and ten minutes and returned to court to inform the trial judge that some members of the jury believed they had insufficient evidence to make a decision.

Defendants contended that the instruction challenged in *Lipfird* was simi-

---

50. Law of June 25, 1980, ch. 1251, § 6, 1979 Sess. Laws, 2d Sess. 173.

51. *See* N.C. GEN. STAT. § 14-1.1 (Cum. Supp. 1979).

52. Law of June 25, 1980, ch. 1251, § 7, 1979 Sess. Laws, 2d Sess. 173.

53. 48 N.C. App. 649, 269 S.E.2d 723 (1980).

54. N.C. GEN. STAT. § 15A-1235 (effective July 1, 1978). The statute provides in pertinent part:

> (a) Before the jury retires for deliberation, the judge must give an instruction which informs the jury that in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty.
>
> (b) Before the jury retires for deliberation, the judge may give an instruction which informs the jury that:
>
> (1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
>
> (2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
>
> (3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
>
> (4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.
>
> (c) If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b) . . . .

55. 48 N.C. App. at 653-54, 269 S.E.2d at 726 (1980). The additional instructions included the following:

> I presume that you members of the jury realize what a disagreement means. It means, of course, that it will be more time of the court that will have to be consumed in the trial of this action again . . . .
>
> A mistrial, of course, will mean that more time and another jury will have to be called to hear the cases and this evidence again.

Id.

lar to one found prejudicial in *State v. Lamb*.[56] The court of appeals in *Lamb* held that under existing law it was error for the court to charge the jurors "that if they did not agree upon a verdict another jury might be called upon to try the case; that the State and defendants had a tremendous amount of time and money invested, and retrial involved a duplication of all the time and expense."[57] The *Lipfird* court, in finding no error, distinguished *Lamb* because the judge did not mention "inconvenience and expense."[58]

The charge given in *Lipfird* tracks almost verbatim the charge formerly approved in the Pattern Jury Instructions, N.C.P.I.—Crim. 101-40.[59] A virtually identical charge was reviewed by the North Carolina Supreme Court in *State v. Easterling*.[60] In *Easterling* the court acknowledged that although the charge would be acceptable under previous case law,[61] the legislature had enacted G.S. 15A-1235, which was now the "proper reference for standards applicable to charges which may be given a jury that is apparently unable to agree on a verdict."[62] In finding the charge constituted error, the *Easterling* court relied on the Official Commentary to G.S. 15A-1235, which states that the Criminal Code Commission deleted a provision previously sanctioned under North Carolina case laws that would have authorized the judge to inform jurors disagreeing on a verdict that "another jury may be called upon to try the case."[63] The court went on to hold, though, that the error was not prejudicial since there was no indication that the jury was in fact deadlocked in its deliberations or open to pressure from the trial judge.[64] The court concluded by cautioning the trial bench

> that our holding today is not to be taken as disapproval of the contrary result in *State v. Lamb* . . . *a case in which initial jury disagreement preceded the offending instruction*. . .
>
> It should be the rule rather than the exception that a disregard of the guidelines established in that statute will require a finding on

---

56. 44 N.C. App. 251, 261 S.E.2d 130 (1979).

57. *Id.* at 260, 261 S.E.2d at 135.

58. 48 N.C. App. at 656, 269 S.E.2d at 727.

59. In March 1980, N.C.P.I.—Crim. 101.40 was replaced with the following instruction:

> Your foreman informs me that you have so far been unable to agree on a verdict. The Court wants to emphasize the fact that it is your duty to do whatever you can to reach a verdict. You should reason the matter over together as reasonable men and women and to reconcile your differences, if you can, without the surrender of conscientious convictions. But no juror should surender his honest conviction because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict. I will let you resume your deliberations and see if you can reach a verdict.

60. 300 N.C. 594, 268 S.E.2d 800 (1980).

61. *Id.* at 606-07, 268 S.E.2d at 808. *See, e.g.*, State v. Alston, 294 N.C. 577, 594, 243 S.E.2d 354, 365 (1978), wherein the court stated the "general rule . . . that the trial judge may state to the jury the ills attendant upon disagreement including the resulting expense and that the case will in all probability have to be tried by another jury in the event that the jury fails to agree."

62. 300 N.C. at 608, 268 S.E.2d at 809.

63. *Id.* *See* N.C. GEN. STAT. § 15A-1235, Official Commentary (1978).

64. 300 N.C. at 609, 268 S.E.2d at 809. The court also noted the "charge itself makes clear that the trial court did not intend that any juror surrender his conscientious conviction or judgment and contains no such element of coercion as to warrant a new trial." *Id.*

appeal of prejudicial error."[65]

The court of appeals in *Lipfird* failed to heed the caution of the supreme court. Confronted with virtually identical language to that found erroneous in *Easterling*, the court of appeals concluded that the instructions were not erroneous. In this holding, the *Lipfird* court did not adequately distinguish *Easterling* since there was evidence in *Lipfird* of jury disagreement prior to the instruction.[66] Moreover, to distinguish *Lamb* on the basis that the judge did not mention "inconvenience and expense" is a semantic distinction that is formalistic rather than substantive. Furthermore, the court in *Lamb* also found error in informing jurors that another jury might be called upon to try the case,[67] as the judge instructed here. The holding in *Lipfird* once again clouds an important area of law in North Carolina previously clarified by case law and legislative proscription.

E. Felonious Intent

Two cases this year dealt with the element of felonious intent. In *State v. Brown*,[68] the North Carolina Supreme Court overturned Brown's conviction of robbery with a firearm and remanded the case for a new trial.[69] Brown was charged with breaking and entering a house and stealing, among other things, stereo equipment. Brown later met with the owner of the stereo and offered to sell it to him for $300.00. The owner refused and told Brown that the stereo was his. Brown returned with a gun and obtained the $300.00. Brown maintained that he had bought the stereo for $300.00, and regardless of whether the person was the true owner, he believed that he had a right either to the stereo or to the money.[70]

The issues on appeal related mainly to the essential element of felonious intent in robbery with a firearm.[71] The court, while holding that there was sufficient evidence to permit the jury to find felonious intent,[72] reversed on two related grounds. First, the court ruled that the trial judge erred in not instructing the jury on the lesser included offense of assault with a deadly weapon.[73] Since the defendant asserted a claim of right in the stereo, there

65. *Id.* (emphasis supplied).

66. 48 N.C. App. at 653, 269 S.E.2d at 725.

67. 44 N.C. App. at 260, 261 S.E.2d at 135. *See also* State v. Hunter, 48 N.C. App. 689, 269 S.E.2d 736 (1980) (court conceded that a reminder that the case would be retried if a verdict is not reached is contrary to the holding in *Easterling*).

68. 300 N.C. 41, 265 S.E.2d 191 (1980).

69. *Id.* at 54, 265 S.E.2d at 199.

70. *Id.* at 42-44, 265 S.E.2d at 193-94.

71. Felonious intent has been defined to be "the intent to deprive the owner of *his goods* permanently and to appropriate them to the taker's own use." *Id.* at 47, 265 S.E.2d at 196 (emphasis in original) (citations omitted).

72. *Id.* at 50, 265 S.E.2d at 197.

73. *Id.* The court reviewed the circumstances in which a judge must instruct on a lesser included offense. If the evidence discloses no conflict relating to the essential elements of the greater crime, it is not necessary to submit the lesser included offense. When there is conflicting evidence of the essential elements of the greater crime and evidence of a lesser included offense is also present, however, the trial judge must instruct on the lesser included offense even where there

was conflicting evidence regarding felonious intent and the defendant was entitled to a charge on the lesser included offense.[74] Secondly, the court held that the trial judge did not fully explain the law and apply it to the facts "so as to clearly bring into focus defendant's contentions and his theory of defense."[75]

Felonious intent was also at issue in *State v. Moore*.[76] Defendant's friend picked up a bag of money that had been dropped on a sidewalk and shared the proceeds with defendant and another friend. The North Carolina Court of Appeals, in upholding the conviction,[77] reviewed the concept of felonious intent in relation to found property. The court noted that "casually lost property may be the subject of larceny as well as that which is mislaid"[78] if the finder had "reason to believe the owner and his property could be brought together again."[79] Since, in this case, the depository bank's name was printed on the outside of the bag, and checks in the bag were made out to the true owner, the court reasoned that the finders had sufficient "clues" to believe that they could return the bag to its owner.[80] The court also noted that the felonious intent did not have to be present at the time the bag was first picked up: "[W]here a closed receptacle, container or pocketbook is found and the contents are not known until later, a finder may be guilty of larceny if a felonious intent is formed as soon as the contents are discovered."[81]

F. Defense of Habitation

In *State v. Hedgepeth*[82] the North Carolina Court of Appeals confirmed that a defendant is entitled to the benefit of an instruction on defense of habitation when he acted to prevent a forcible entry into his home.[83] Defendant ordered the deceased to leave his home after the deceased had threatened defendant's life. The deceased, a fugitive from Dorothea Dix Hospital, returned to the porch of the house, stuck his head in the door, and again threatened defendant's life. When the deceased stuck his head in the door a third time, the defendant shot him in the neck.

---

is no request to do so. An error is not cured by a verdict finding the defendant guilty of the greater crime. *Id.* This is well established in North Carolina. *See, e.g.*, State v. Hicks, 241 N.C. 156, 84 S.E.2d 545 (1954).

74. 300 N.C. at 50, 265 S.E.2d at 197.

75. *Id.* at 54, 265 S.E.2d at 199. The court also reversed the common law robbery conviction of Brown's codefendant Coffey. Although Coffey was at the scene of the alleged crime and was a friend of Brown's, the court found that there was no evidence that Coffey aided Brown or communicated an intent to aid him. Thus the state had failed to prove the necessary elements of aiding and abetting under North Carolina law. *See, e.g.*, State v. Scott, 289 N.C. 712, 224 S.E.2d 185 (1976). The court held, therefore, that Coffey's motion for judgment of nonsuit should have been granted. 300 N.C. at 56-57, 265 S.E.2d at 200-01.

76. 46 N.C. App. 259, 264 S.E.2d 899 (1980).

77. *Id.* at 261, 264 S.E.2d at 900.

78. *Id.*

79. *Id.* at 262, 264 S.E.2d at 900.

80. *Id.*, 264 S.E.2d at 900-01.

81. *Id.* at 263, 264 S.E.2d at 901.

82. 46 N.C. App. 569, 265 S.E.2d 413 (1980).

83. *Id.* at 572, 265 S.E.2d at 416.

The court of appeals found that the trial court erred in failing to charge the jury on defense of habitation. The doctrine of defense of habitation generally applies when one prevents a forcible entry into his home.[84] In applying the doctrine the court relied on *State v. McCombs*.[85] In *McCombs* the *Hedgepeth* court found one of the most compelling justifications for the defense of habitation: "the desire to afford protection to the occupants of a home under circumstances which might not allow them an opportunity to see their assailant or ascertain his purpose."[86]

The *Hedgepeth* court did not read *McCombs*, however, as limiting the defense to situations in which the identity or purpose of the assailant was unknown. Rather, it explained that the defense of habitation is a defense of person, and the fear experienced when a fugitive from a mental institution threatens to enter one's home and take the life of the occupant is no less real than if the assailant's identity and intention were unclear.[87]

G. Breaking and Entering; Larceny

In *State v. Bartlett*[88] the North Carolina Court of Appeals sustained convictions of felonious breaking and entering and misdemeanor larceny in the entry of a house, notwithstanding the owner's participation in the crime.[89] Defendant was attempting to enter a house illegally when the owner of the house arrived. Not realizing that he was dealing with the owner, the defendant told him that he was "going in the house all the time." He then proceeded to open the door with a knife, without opposition from the owner. Once inside the house, defendant took various items of personal property and divided them with the owner. After both men left the house, the owner excused himself and called the police. The owner testified that he did not stop the defendant "because I was afraid. He could have had one of my guns or a knife."[90]

The court held on appeal that the jury could conclude that defendant did not have the owner's permission to enter the house from the evidence that the owner was afraid defendant had a gun or knife.[91] An essential element of G.S. 14-54,[92] the applicable statute, is that the breaking and entering be done without consent. In *State v. Goffney*[93] the court confirmed the rule that "there is no burglary where the occupant of a house . . . takes active steps to aid the

84. *Id.*

85. 297 N.C. 151, 253 S.E.2d 906 (1979) (defendant shot at police officer, dressed in blue jeans and denim jacket, after he gained entry into the home; only the rules of self-defense applicable.)

86. 46 N.C. App. at 572, 265 S.E.2d at 416 (citing *McCombs*, 297 N.C. at 157, 253 S.E.2d at 910).

87. 46 N.C. App. at 572-73, 265 S.E.2d at 416.

88. 45 N.C. App. 704, 263 S.E.2d 800 (1980).

89. *Id.* at 705, 263 S.E.2d at 801.

90. *Id.*

91. *Id.*

92. N.C. GEN. STAT. § 14-54 (1969).

93. 157 N.C. 624, 73 S.E. 162 (1911) (defendant charged under statutory predecessor to G.S. 14-54).

suspect or to induce him to enter, . . . although he may intend to commit a felony in the house."[94] In *Goffney* the owner was deemed to have given his consent when he directed an employee to induce the defendant to enter his store to steal some goods, and then apprehended him. Likewise, in *State v. Boone*[95] the court, relying on *Goffney*, held that entry into a place of business through a door open to the public, during normal business hours, constituted consent.

H. G.S. 20-166: Failure to Stop and to Give Information in Connection with Automobile Accident

The North Carolina Court of Appeals had an opportunity to interpret G.S. 20-166[96] this year. In *State v. Gatewood*[97] defendant struck and killed a pedestrian with his car and then sideswiped another car. Defendant stopped, made sure that someone had called the police and an ambulance, and then disappeared until the early morning hours of the next day when he contacted the sheriff's department. Defendant was indicted on two counts.[98]

The first count charged defendant with violating G.S. 20-166(a) by failing to stop in connection with the accident. The court held that the trial judge acted properly in not submitting this count to the jury. Although defendant did leave the scene of the accident almost immediately, the court found his stopping the car sufficient to establish compliance with this section of the statute.[99]

The second count charged defendant with a violation of G.S. 20-166(c), which requires a person involved in an accident resulting in death or injury to give his name, address, license number and vehicle registration number to the person struck or the driver or occupants of any vehicle collided with, and to render reasonable assistance to anyone injured. This count was submitted to the jury and defendant was found guilty.[100] The court vacated this judgment, reasoning that the pedestrian was obviously dead and that defendant was therefore not required to attempt to give her the required information.[101] The court also held that although defendant was required to give certain informa-

94. *Id.* at 628, 73 S.E. at 164.

95. 297 N.C. 652, 256 S.E.2d 683 (1979).

96. N.C. GEN. STAT. § 20-166 (1978) imposes a duty upon a motor vehicle operator to stop in the event of an accident, give information, and render aid in certain circumstances. It also insulates a person who renders first aid from civil liability, absent wanton conduct or intentional wrongdoing.

97. 46 N.C. App. 28, 264 S.E.2d 375, *cert. denied*, 300 N.C. 559, 270 S.E.2d 112 (1980).

98. *Id.* at 29-30, 264 S.E.2d at 376-77.

99. *Id.* at 31, 264 S.E.2d at 378.

100. *Id.* at 31-32, 264 S.E.2d at 378.

101. *Id.* at 32, 264 S.E.2d at 379. The court cited State v. Wall, 243 N.C. 238, 90 S.E.2d 383 (1955) and State v. Coggin, 263 N.C. 457, 139 S.E.2d 701 (1965) for the proposition that the statute "does not require the doing of a vain or useless thing." 46 N.C. App. at 32, 264 S.E.2d at 378. The court did not reach the question of defendant's possible duty to render aid to a dead person. Though the indictment charged failure to render aid, the trial court did not instruct the jury on the charge, and defendant could not be again held in jeopardy on the same charge contained in the original indictment. *Id.* at 33, 264 S.E.2d at 379.

tion to the driver of the car he sideswiped and his failure to do so constituted a violation of G.S. 20-166(b), he was not so charged. Since no one in the car was injured, the court held that G.S. 20-166(c) did not apply.[102] The court concluded that although "the legislature may find it appropriate to amend G.S. 20-166(c) by expanding the duty of a driver who strikes a pedestrian by requiring him to give information to a witness at the scene or some proper person who arrives at the scene," the court could not read this duty into the existing statute.[103]

I. Judge's Role in Juvenile Delinquency Proceedings

The North Carolina Court of Appeals added to the due process protections afforded to juveniles in a delinquency proceeding this year.[104] In *In re Thomas*[105] the judge examined the witness for the State during the trial proceedings because the District Attorney was not present. The court, finding that the judge, at least technically, had assumed the role of prosecuting attorney, and that such a procedure would violate due process in adult criminal prosecutions, reversed the order and commitment.[106] The court distinguished the case of *In re Potts*,[107] which upheld the commitment of a juvenile in spite of the fact that the juvenile proceeding had taken place in the absence of the solicitor.[108] The court noted that the *Potts* record revealed that someone other than the judge had examined the witnesses.[109]

J. False Pretense

In *State v. Cronin*[110] the North Carolina Supreme Court construed the language "with intent to cheat or defraud" in G.S. 14-100, North Carolina's false pretense statute,[111] as requiring only an instruction that the defendant intended to deceive. Defendant was convicted of false pretense where the evi-

---

102. 46 N.C. App. at 33-34, 264 S.E.2d at 378-79.

103. *Id.* at 33, 264 S.E.2d at 379.

104. Although the United States Supreme Court has ruled that at least some of the protections of the 14th amendment due process clause apply to juvenile proceedings, it has not made clear which provisions might not be applicable. *See In re* Gault, 387 U.S. 1 (1967). The North Carolina Supreme Court, however, has stated: "[W]e doubt the validity of the proposition that any applicable provision might nevertheless be given less force or vigor in juvenile proceedings than in adult criminal prosecutions." *In re* Arthur, 291 N.C. 640, 644, 231 S.E.2d 614, 617 (1977).

105. 45 N.C. App. 525, 263 S.E.2d 355 (1980).

106. *Id.* at 526-27, 263 S.E.2d at 355-56. The court also noted that the trial judge did not make appropriate findings of fact as required by N.C. GEN. STAT. § 7A-285 (1969) (repealed 1979); *see also* N.C. GEN. STAT. § 7A-577(f) (Cum. Supp. 1979). "The conclusion that respondent was an undisciplined child should have been supported by findings of fact relative to the charges of breaking and entering and larceny." 45 N.C. App. at 527, 263 S.E.2d at 356.

107. 14 N.C. App. 387, 188 S.E.2d 643, *cert. denied*, 281 N.C. 622, 190 S.E.2d 471 (1972).

108. *Id.* at 393-94, 188 S.E.2d at 646-47.

109. 45 N.C. App. at 527, 263 S.E.2d at 356. *See* 14 N.C. App. at 393, 188 S.E.2d at 646.

110. 299 N.C. 229, 262 S.E.2d 277 (1980).

111. N.C. GEN. STAT. § 14-100 (1969). Since the statute was first enacted, it contained the phrase "intent to cheat or defraud." Ch. 11, § 2, 1811 N.C. Pub. Laws. The court of appeals attempted to distinguish prior interpretation of this phrase on the ground that the cases were decided prior to the 1975 amendment of the statute.

dence showed that he falsely stated that he had a mobile home worth $10,800 as security for a loan. In fact, the mobile home was fire-damaged and worth approximately $2,600. The court of appeals found the charge in error since an intent to deceive means "to cause someone to believe something that is false" and that an intent to "cheat or defraud" includes the intent to actually deprive someone of something of value.[112] The supreme court reversed, following a long-recognized interpretation of intent to "cheat or defraud" as an intent to deceive.[113] The court went on to hold that the crime of obtaining property by false pretenses pursuant to G.S. 14-100 should be defined as: "(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another."[114]

K. Pleas of No Contest

In *State v. Sinclair*,[115] the North Carolina Supreme Court addressed the issue of whether there was a sufficient finding of a factual basis to support a series of no contest pleas. The defendant was charged in fourteen indictments, each containing one count of forgery and one court of uttering a forged instrument. After jury verdicts of guilty on six of the indictments, which were consolidated for trial, the defendant pleaded no contest to the remaining eight indictments.[116] The North Carolina Court of Appeals had held that the state's evidence was insufficient to be submitted to the jury and reversed the judgment and sentence on the six convictions that went to trial.[117] The court of appeals, however, affirmed the convictions in the eight indictments to which the defendant pleaded no contest on the basis that an evidentiary hearing on the question of the voluntariness of the pleas was not required.[118] The North Carolina Supreme Court reversed, finding that there was no factual basis for the plea, as is required by G. S. 15A-1022(c). The court noted that at the time of the pleas the only factual basis upon which the judge could have relied was the jury verdicts of guilty on the indictments consolidated for trial. Since these convictions were overturned they could no longer provide an adequate factual basis.[119]

L. Other Cases

The supreme court and the court of appeals decided several minor cases in the criminal law area, addressing issues related to felonious possession of

112. 41 N.C. App. 415, 255 S.E.2d 240 (1979).

113. The court found that a majority of cases have followed the definition of the crime of false pretenses as set forth in State v. Phifer, 65 N.C. 321 (1871).

114. 299 N.C. at 242, 262 S.E.2d at 286.

115. 301 N.C. 193, 270 S.E.2d 418 (1980), *rev'g* 45 N.C. App. 586, 263 S.E.2d 811.

116. 301 N.C. at 194, 270 S.E.2d at 419.

117. 45 N.C. App. at 591-92, 263 S.E.2d at 815.

118. *Id.* at 593, 263 S.E.2d at 815-16.

119. 301 N.C. at 198-99, 270 S.E.2d at 421-22. The court also noted that the Transcript of Plea itself could not serve as the factual basis for the plea. *Id.* at 199, 270 S.E.2d at 421.

stolen goods,[120] common law robbery,[121] and double jeopardy.[122]

ELIZABETH A. MCNAMARA
DEBRA R. NICKELS
WILLIAM F. PATTERSON, JR.

120. In State v. Hicks, 44 N.C. App. 166, 260 S.E.2d 680 (1979), the North Carolina Court of Appeals arrested the defendant's conviction of felonious possession of stolen goods. The trial judge had submitted a possible verdict form to the jury which provided that they could find the defendant guilty if they had reasonable grounds to believe that "the property was stolen pursuant to a breaking or entering *or* that the property was worth more than $200." *Id.* at 167, 260 S.E.2d at 681 (emphasis added). The verdict that the jury returned recited that the defendant was found guilty of possession of stolen property. The court noted that the possible verdict form would allow the jury to convict the defendant without a finding that he knew or should have known that the property was stolen, and that the actual verdict returned by the jury did not show that they had in fact found this element. *Id.* Judge Hedrick, concurring, noted that the judge should have refused to accept the verdict, re-instructed the jury as to the proper possible verdicts, and directed the jury to retire and return with a proper verdict. *Id.* at 169, 260 S.E.2d at 682 (Hedrick, J., concurring).

121. In State v. Norwood, 44 N.C. App. 174, 260 S.E.2d 433 (1979), the North Carolina Court of Appeals upheld the defendant's conviction of common law robbery. The court held that the state's evidence showing that the defendant took $4.30 from the prosecuting witness was sufficient evidence of asportation, even though it was not shown that the defendant left her home with the money. *Id.* at 175, 260 S.E.2d at 434. This comports with the long-standing rule in North Carolina that holds that it is sufficient to establish asportation if it is shown that "the goods are removed from the place where they were, and the felon has for an instant the entire and absolute possession of them." State v. Jackson, 65 N.C. 305, 308 (1871).

122. The issue of double jeopardy was examined by the North Carolina Surpeme Court in State v. Revelle, 301 N.C. 153, 270 S.E.2d 476 (1980), and by the North Carolina Court of Appeals in State v. Mapp, 45 N.C. App. 574, 264 S.E.2d 348 (1980). In *Revelle*, the court held that defendant's convictions of felonious larceny, armed robbery, burglary and rape arising out of the same series of events did not place the defendant in double jeopardy. In *Mapp*, the court reached the same conclusion about convictions of second degree murder, child abuse and child neglect. In both cases the courts found each offense to be legally separate and distinct with different essential elements, and none of the offenses was deemed a lesser included offense of another.

VI. CRIMINAL PROCEDURE

A. Right to Be Informed of Right to Counsel

In *State v. Grimes*[1] the North Carolina Court of Appeals decided that a nonindigent criminal defendant has no constitutional right to be informed of his right to counsel.[2] Defendant was charged with driving under the influence of intoxicating liquor. He entered a plea of guilty and was sentenced to ninety days, suspended on conditions. Defendant, who was not indigent, failed to hire an attorney. He claimed that he had never been informed of his right to representation. Defendant moved for a new trial, arguing that because he had not been told that he had the right to hire an attorney, he could not knowingly and voluntarily have waived his right to do so by pleading guilty. Although the court was willing to assume that defendant had not been informed of his right to counsel, the motion for a new trial was denied. The court found that there was no authority in either the United States Constitution or relevant statutory law for requiring that a nonindigent expressly waive counsel before pleading guilty. The court additionally held that, even if such a right existed, failure to inform defendant of his right to hire a lawyer was harmless error absent some showing of prejudice.[3]

The court examined what it considered to be the relevant case law and concluded that no "case which we have been able to find holds that a nonindigent defendant must expressly waive his right to counsel before he may enter a plea on his own behalf."[4] The court buttressed this conclusion by reading G.S. 15A-1012(a) to stand for the proposition that only indigent defendants need expressly waive counsel. G.S. 15A-1012(a) provides that a "defendant may not be called upon to plead until he has the opportunity to retain counsel or, if he is eligible for assignment of counsel, until counsel has been assigned or waived."[5] Thus, a nonindigent defendant's statutory right is only to be provided with the opportunity to retain counsel, and failure to take advantage of this opportunity operates as an effective waiver. Only indigents must waive expressly their right to counsel.[6] The court did not consider it significant that the failure to retain counsel might be due to defendant's ignorance of his right

---

1. 47 N.C. App. 476, 267 S.E.2d 387 (1980).

2. The court considered this to be distinct from defendant's actual right to hire an attorney. *Id.* at 477, 267 S.E.2d at 387. The importance, and the validity, of this distinction is not clear from the opinion.

3. *Id.* at 478, 267 S.E.2d at 388. The prosecutor testified that the routine that always was followed included informing defendants of their right to engage counsel. The court did not consider it necessary to resolve the factual issue of whether this routine had been followed with Grimes.

4. 47 N.C. App. at 478, 267 S.E.2d at 388. The court's two-page opinion cites only Argersinger v. Hamlin, 407 U.S. 25 (1972) and State v. Lee, 40 N.C. App. 165, 252 S.E.2d 225 (1979).

5. N.C. GEN. STAT. § 15A-1012(a) (1978).

6. 47 N.C. App. at 478, 267 S.E.2d at 388. This distinction ignores the fact that the court must first determine if a defendant is indigent, a process which is sure to involve informing the defendant that he may hire an attorney if he has the funds, unless the trial judge takes a very cryptic approach to questioning defendant.

to do so.[7]

This aspect of *Grimes* is at odds with the standards governing an effective waiver of counsel enunciated by the United States Supreme Court in *Johnson v. Zerbst*[8] and with previous decisions of the North Carolina Court of Appeals. In *Johnson* the Supreme Court held that an effective waiver of a fundamental constitutional right ordinarily must be "an intentional relinquishment . . . of a known right."[9] Waiver of the right to counsel is a waiver of a fundamental constitutional right,[10] whether defendant is facing trial or is entering a plea of guilty.[11] A court's determination whether a purported waiver is effective should be based on the facts before it, including "the background, experience, and conduct of the accused."[12] For an appellate court to sustain a trial judge's finding of waiver "there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."[13]

Previous decisions by the North Carolina Court of Appeals did not deviate from these principles. In *State v. Pickens*[14] the court stated that an "accused is entitled as a matter of due process of law to be informed that he is entitled to counsel . . . and to court-appointed counsel if he is found to be indigent unless he understandingly and voluntarily waives counsel."[15] The clear import of this language is that every defendant, regardless of his financial status, is entitled to be informed of his right to representation. The *Grimes* decision did not consider *Pickens* in its search for support for defendant's claim.

The court also considered the more recent holding in *State v. Lee*.[16] In *Lee* defendant pleaded guilty to violating a support obligation. As in *Grimes*, the defendant in *Lee* was not indigent and had not been informed of his right to hire an attorney.[17] In *Lee* the court of appeals granted defendant a new trial on the grounds that his right to counsel had been violated. The court in *Grimes* distinguished *Lee* from Grimes' claim by focusing on the inability of the defendant in *Lee* to hire an attorney because he was a member of the armed forces, while Grimes had suffered no such impediment.[18] This distinction misreads *Lee* and ignores the requirement that a waiver of counsel be knowing and voluntary. The court in *Lee* emphasized that defendant had not

---

7. *See id.*
8. 304 U.S. 458 (1938).
9. *Id.* at 464.
10. Argersinger v. Hamlin, 407 U.S. 25 (1972); Johnson v. Zerbst, 304 U.S. 458 (1938).
11. Von Moltke v. Gillies, 332 U.S. 708, 721 (1948). *See also Argersinger*, 407 U.S. 25 (1972). Although *Argersinger* requires counsel only for defendants actually imprisoned, the court in *Grimes* did not base its decision on the inactive nature of defendant's sentence.
12. 304 U.S. at 464.
13. Boykin v. Alabama, 395 U.S. 238, 242 (1969).
14. 20 N.C. App. 63, 200 S.E.2d 405 (1973).
15. *Id.* at 65, 200 S.E.2d at 406.
16. 40 N.C. App. 165, 252 S.E.2d 225 (1979).
17. *Id.* at 170, 252 S.E.2d at 227-28.
18. 47 N.C. App. at 477, 267 S.E.2d at 388. It is not clear why this prevented defendant in *Lee* from hiring a lawyer.

been informed of his right to counsel in its finding that no waiver occurred.[19]

While this precise question has not been confronted in many jurisdictions, those decisions that have dealt with it insist that a defendant be informed of his right to hire an attorney.[20] The distinction in *Grimes* between the standards to be applied in determining the effectiveness of an indigent's waiver and those applied to waiver by a nonindigent is a novel one and is without support in previous North Carolina court decisions.[21] The *Grimes* court offered no justification for this distinction, and there would appear to be none to offer. A nonindigent who is unaware of his right to hire an attorney cannot be said to have waived knowingly and voluntarily his right to do so simply by failing to take advantage of that right. G.S. 15A-1012(a) should be read as requiring more than that the defendant be given adequate time in which to engage counsel; "opportunity" should be read as including the knowledge of one's right to do so. The decision in *Grimes* deprives defendant of a fundamental right in a situation where enforcing that right would not burden the state.[22]

The holding in *Grimes* also rested on the alternate ground that failure to inform defendant of his right to counsel was harmless error unless prejudice was demonstrated by defendant.[23] The court supported this holding by citing Justice Huskins' dissent in *State v. Hill*.[24] Justice Huskins' argument, assuming that it is valid, should not be applied in this context. Defendant in *Hill* was denied access to his attorney for one night while he slept off the effects of alcohol in jail. Justice Huskins urged that this amounted to harmless error. His lawyer could have done little or nothing for defendant that night and was given adequate time to prepare the case for trial.[25] This is not analogous to a situation in which a defendant pleads guilty without ever consulting an attorney. In the *Grimes* situation, not only could a lawyer benefit defendant but any damage done by denial of counsel is irreparable.

Reliance on Justice Huskins' dissent can be faulted at another level. Denial of the right to counsel should never be considered harmless error.[26] Although the Supreme Court has recognized that deprivation of some

19. 40 N.C. App. at 170, 252 S.E.2d at 228.

20. *See, e.g.*, Martin v. Warden, 234 F. Supp. 495, 496 (E.D. La., 1964); *cf.* Bement v. State, 91 Idaho 388, 422 P.2d 55 (1966) (statutory duty to inform indigent of right to have counsel includes duty to inform him that attorney will be compensated at public expense).

21. *See* State v. Lynch, 279 N.C. 1, 13, 181 S.E.2d 561, 569 (1971). The only effect of N.C. GEN. STAT. § 7A-450 (1969) (governing indigent's waiver of counsel) is to require that an indigent's waiver be in writing. This does not reduce the constitutional standard applied to nonindigents.

22. The importance of *Grimes* may be lessened by a current practice of a prosecuting attorney to inform defendants of their right to hire an attorney. 47 N.C. App. at 476, 267 S.E.2d at 387. However, as the facts in *Grimes* indicate, this routine may not always be followed.

23. *Id.* at 478, 267 S.E.2d at 388.

24. 277 N.C. 547, 178 S.E.2d 462 (1971).

25. *Id.* at 557-58, 178 S.E.2d at 469 (Huskins, J., dissenting).

26. Although the majority in *Hill* did not hold that denial of counsel was per se prejudicial, they did state that on the facts presented a finding of harmless error would be "to assume that which is incapable of proof." *Id.* at 554, 178 S.E.2d at 466. Proof of prejudice is equally impossible when defendant pleads guilty.

constitutional rights may only amount to harmless error, this is limited by the caveat that "some constitutional rights are so basic to a fair trial that their infringement can never be treated as harmless error."[27] The right to counsel is one such basic right.[28] The presence of counsel ensures that the defendant will receive a fair trial or plead in an intelligent manner. It is impossible to measure the prejudice that may result from denial of access to counsel.[29]

Although the court of appeals could have denied defendant's claim on the basis that his sentence was inactive, which would have prevented the sentence from every being activated,[30] it chose not to do so and instead set a dangerous precedent. The decision in *Grimes* is worthy of reconsideration, and the issues presented should be more carefully examined.

B. State's Withdrawal from Plea Bargain Agreement

In *State v. Collins*[31] the North Carolina Supreme Court held that the State can withdraw from a plea bargain agreement prior to a defendant's plea of guilty or other change in position constituting detrimental reliance on the agreement.[32] The United States Supreme Court had recognized the legitimacy of plea bargains in *Santobello v. New York*[33] by granting remedial relief to a defendant who pleaded guilty in reliance upon a plea agreement. The *Santobello* Court permitted specific enforcement of the plea bargain breached by the government subsequent to the defendant's guilty plea.[34] In *Cooper v. United States*[35] the Court of Appeals for the Fourth Circuit extended this principle to enforcement of a prosecutorial promise breached prior to any guilty plea or other detrimental reliance by a defendant. The court held that a defendant's right to enforcement of a breached plea agreement is not dependent on the law of contracts and may arise "on the basis alone of expectations reasonably formed in reliance upon the honor of the government in making and abiding by its proposals."[36] The North Carolina Supreme Court expressly rejected *Cooper* in refusing to enforce the broken prosecutorial prom-

27. Chapman v. California, 386 U.S. 18, 23 (1967).

28. *Id.* at 23 n.8 (citing Gideon v. Wainwright, 372 U.S. 335 (1963)).

29. *See* Note, *Harmless Constitutional Error: A Reappraisal*, 83 HARV. L. REV. 814, 820-21 (1970).

30. See note 11 *supra*. This was the focus of the arguments before the court, Brief for Defendant-Appellant at 11-15, and may have been the unspoken reason that the court held that any error was harmless.

31. 300 N.C. 142, 265 S.E.2d 172 (1980).

32. *Id.* at 148, 265 S.E.2d at 176.

33. 404 U.S. 257 (1971).

34. In *Santobello* the defendant pleaded guilty in reliance on a prosecutor's promise to make no sentence recommendation. At the sentencing hearing, another prosecutor unknowingly violated the plea agreement by recommending the maximum sentence. The Supreme Court held this to be a breach of the agreement and ordered the state court to grant relief of either vacatur of the guilty plea or specific performance of the agreement. *Id.* at 262-63. On remand, the state court ordered specific performance over the objection of the defendant, who sought vacatur. People v. Santobello, 39 A.D.2d 654, 331 N.Y.S.2d 776 (1972).

35. 594 F.2d 12 (4th Cir. 1979). *Contra*, Virgin Islands v. Scotland, 614 F.2d 360 (3d Cir. 1980) (rejected defendant's right to specific performance).

36. 594 F.2d at 18.

ise in *Collins*.[37]

In *Collins* defendant was charged with possession of both lysergic acid diethyliamide (LSD) and phencyclidine (PCP).[38] On January 17, 1979, the defendant and the State entered into the following written, signed plea agreement:

> Keith Collins is charged with possession of LSD, PCP, and marijuana, and he is willing to cooperate fully with the WSPD [Winston-Salem Police Department] in the giving of information and assistance to the WSPD which will lead to the arrest of known criminals. In return, the State will allow the defendant to plead guilty as charged in the Superior Court and will guarantee that he will not receive active time. That the defendant has three (3) months to perform tasks assigned to him by the WSPD to their satisfaction. The defendant agrees that he will not raise his speedy trial rights under Chapter 15. That the defendant's cases now pending in District Court will be dismissed under the pretext of an illegal search.
>
> s/ H. COLE, Ass. D.A.
> s/ W. GRAINGER, WSPD
> s/ B. ERVIN BROWN, II[39]

The signing parties were, respectively, an assistant district attorney, a representative of the arresting police department, and the defendant's attorney.

Later the same day, another assistant district attorney refused to honor the plea agreement. This assistant district attorney had initial responsibility within the district attorney's office for determining whether to enter into a plea bargain; he was in charge of the criminal docket for that month and usual office procedure required that he be consulted. Defendant's motion to dismiss for failure to honor the plea agreement was denied.[40]

The North Carolina Court of Appeals upheld the denial of the motion to dismiss.[41] The court could find "no basis in logic or fundamental fairness for the holding in *Cooper*."[42] Since the defendant had not changed his position to his detriment in reliance upon the agreement, the court ruled that the agreement was not enforceable.[43] Furthermore, under G.S. 15A-1023(b) the agreement could not become an enforceable contract until approved by the trial court.[44]

---

37. 300 N.C. at 148, 265 S.E.2d at 176.

38. *Id.* at 143. 265 S.E.2d at 173. Possession of these substances is a violation of N.C. GEN. STAT. § 90-95(a)(3), (d)(2) (1978).

39. 300 N.C. at 143, 265 S.E.2d at 173.

40. *Id.* at 143-44, 265 S.E.2d at 173.

41. State v. Collins, 44 N.C. App. 141, 260 S.E.2d 650 (1979).

42. *Id.* at 145, 260 S.E.2d at 653.

43. *Id.*

44. N.C. GEN. STAT. § 15A-1023(b) (1978) provides:

> Before accepting a plea pursuant to a plea arrangement in which the prosecutor has agreed to recommend a particular sentence, the judge must advise the parties whether he approves the arrangement and will dispose of the case accordingly. If the judge rejects the arrangement, he must so inform the parties, refuse to accept the defendant's plea of guilty or no contest, and advise the defendant personally that neither the State nor the

The North Carolina Supreme Court unanimously affirmed *State v. Collins*,[45] following the decisions of courts in other states.[46] The court likened a plea agreement to a unilateral contract in which one party becomes bound to the agreement only upon the other party's completion of performance.[47] The supreme court emphasized the alternative holding of the court of appeals that G.S. 15A-1023(b) requires trial court approval for plea bargains that include a recommended sentence.[48] Although the court carefully analyzed the *Cooper* decision, it elected to follow other jurisdictions without explaining why their reasoning should be preferred to that of the Fourth Circuit.[49] The court favored the position that contract principles should be the exclusive determinant of the law of plea bargaining. To justify its use of "analogous"[50] contract principles in deciding *Collins*, the court cited *United States v. McIntosh*,[51] a Fourth Circuit case decided after *Cooper*.[52]

In relying on *McIntosh* to support its decision, the court erred on two counts. First, *McIntosh* is not on point;[53] some other basis must be found to limit plea bargain law to the law of contracts. Second, even if *Collins* were analyzed under the principles of contract law, the prosecution's promise should have been enforced.[54]

Judge Phillips, the author of the majority opinion in *Cooper*, pointed out in a concurring opinion in *McIntosh* that the two decisions are "completely distinguishable."[55] *Cooper* involved the withdrawal of a specific proposal which the prosecutor had the authority to make.[56] In *McIntosh*, the court found that the proposal the defendant sought to enforce had not been made.[57] Moreover, the proposal allegedly was made by a state prosecutor who had neither actual nor apparent authority to bind the federal prosecutor.[58] The majority opinion in *McIntosh* also acknowledged that the issues of plea bargain content and authority for entering into a plea bargain were not presented

---

defendant is bound by the rejected arrangement. The judge must advise the parties of the reasons he rejected the arrangement and afford them an opportunity to modify the arrangement accordingly. Upon rejection of the plea arrangement by the judge, the defendant is entitled to a continuance until the next session of court. A decision by the judge disapproving a plea arrangement is not subject to appeal.

45. 300 N.C. at 150, 265 S.E.2d at 177.

46. *Id.* at 148, 265 S.E.2d at 176.

47. *Id.* at 149, 265 S.E.2d at 176.

48. *Id.*

49. The court merely stated, "We reject the holding in *Cooper* and elect to follow the decisions in other jurisdictions which we interpret to be consistent with *Santobello*." *Id.* at 148, 265 S.E.2d at 176.

50. *Id.* at 149, 265 S.E.2d at 176.

51. 612 F.2d 835 (4th Cir. 1979).

52. "[W]here the content and validity of a plea bargain are at issue . . . traditional precepts of contract and agency should apply." 300 N.C. at 148, 265 S.E.2d at 175-76 (quoting 612 F.2d at 837).

53. *See* text accompanying notes 55-61 *infra*.

54. *See* text accompanying notes 62-103 *infra*.

55. 612 F.2d at 837 (Phillips, J., concurring).

56. 594 F.2d at 19.

57. 612 F.2d at 836.

58. *Id.*

in *Cooper*.[59]

The *Collins* case, on the other hand, involved the same basic fact situation as *Cooper*: the government made a specific and unambiguous proposal to the defendant; it was made without reservation related to a superior's approval; its content was reasonable in context; and it was made by a prosecutor who had authority to enter into the agreement.[60] The bargaining went further than that enforced in *Cooper*, however. Unlike Cooper, Collins was able to communicate his assent to the government's proposal. The parties even signed a document enumerating the duties of each.[61] Since *McIntosh* is distinguishable from *Cooper*, and *Collins* involved the same factual situation (although more developed) as *Cooper*, *McIntosh* provides no authority for the court's refusal to follow the *Cooper* approach.

The *Collins* court's rejection of the plea bargain on a strict contract analogy also fails to withstand scrutiny. Assuming, arguendo, that either the *McIntosh* rationale or some other reasoning mandates a strict contract analogy as the exclusive determinant of the validity of a plea bargain, proper application of basic contract principles requires enforcement of the prosecutorial promise in *Collins*.[62] The parties entered into a written executory contract.[63] Such contracts are enforced routinely in commercial and other contexts.[64] Unless some failure to comply with the technical principles of the law of contracts can be shown, the plea bargain contract likewise should be enforced. The State argued that the agreement should not be enforced because it was a unilateral contract[65] dependent upon the defendant's prior performance and because it was conditional upon trial court approval.[66] Neither of these contentions can survive careful examination.

In rejecting *Cooper*, the supreme court elected to follow jurisdictions which hold that plea bargains are "not binding on the prosecutor, in the absence of prejudice to a defendant resulting from reliance thereon, until they receive judicial sanction."[67] The rationale is that if a defendant may withdraw from a plea bargain prior to his entry of a guilty plea, the prosecutor likewise

---

59. *Id.* at 837.

60. *Compare* 300 N.C. at 143, 265 S.E.2d at 173 *with* 594 F.2d at 19.

61. 300 N.C. at 143, 265 S.E.2d at 173.

62. Of course, the plea agreement cannot be fully enforced since it is subject to trial court approval. *See* note 44 *supra*. The analogy to contract principles discussed herein is meant to apply only to a contractual agreement between the prosecution and the defendant. Such a contract would bind both the prosecution and the defendant until the trial court either approves or rejects it, but would in no way affect the discretion of the trial court itself. *See* text accompanying notes 91-103 *infra*.

63. An executory contract is a contract in which a party binds himself to do or not to do a particular thing in the future. Whitt v. Whitt, 32 N.C. App. 125, 230 S.E.2d 793 (1977).

64. "All contracts to a greater or less extent are executory. When they cease to be, they cease to be contracts." S. WILLISTON, LAW OF CONTRACTS § 15 (3d ed. W. Jaeger 1959).

65. For a definition of a unilateral contract, see text accompanying note 47 *supra* and text accompanying notes 69-71 *infra*.

66. 300 N.C. at 149, 265 S.E.2d at 176.

67. *Id.* at 148-49, 265 S.E.2d at 176 (quoting People v. Heiler, 79 Mich. App. 714, 721-22, 262 N.W.2d 890, 895 (1977)).

should be able to withdraw from a plea agreement at that point.[68]

Such a theory assumes that all plea bargains are unilateral contracts in which the government makes a promise in return for defendant's act of pleading guilty. In a true unilateral plea bargain agreement, the consideration given for the prosecution's promise is not defendant's corresponding promise to plead guilty, but defendant's actual performance by so pleading.[69] Thus, the prosecutor agrees to perform if and when the defendant performs, but has no right to compel performance.[70] Before the defendant begins performance, the prosecutor may rescind his offer.[71]

In fact, not all plea bargains are unilateral contracts. Some, including the agreement in *Collins*, constitute bilateral contracts. In a bilateral contract, each party promises to perform.[72] The corresponding promises typically function as each party's consideration.[73] The parties in *Collins* signed a written, executory contract. The defendant promised to cooperate with the police department by providing information and assistance to lead to the arrest of criminals and further agreed to waive his right to a speedy trial.[74] In return, the State agreed to allow the defendant to plead guilty to some charges and agreed to dismiss others.[75] The State also guaranteed that the defendant would not be imprisoned.[76] Such an exchange of promises of future performance creates a bilateral contract.[77]

Under a bilateral contract, both parties are bound at the time the requisite return promise is made by the offeree.[78] Neither party can revoke his promise without breaching the contract. This principle applies equally in the context of plea bargains.[79] The prosecutor should be compelled to fulfill his promise and the defendant should be required to plead guilty. To determine whether the plea is voluntarily and intelligently given,[80] the defendant's entry into the executory contract can be treated as the act of pleading guilty.[81] An executory bilateral agreement to plead guilty thus would be valid and enforceable

68. 300 N.C. at 149, 265 S.E.2d at 176.
69. *See id.*
70. *Id.*
71. *Id.*
72. S. WILLISTON, *supra* note 64, at § 13.
73. *Id.* § 103.
74. 300 N.C. at 143, 265 S.E.2d at 173.
75. *Id.*
76. *Id.*
77. S. WILLISTON, *supra* note 64, at § 103.
78. *Id.* § 65.
79. *See* Westen & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 CAL. L. REV. 471, 525 n.189 (1978); *but see* Jones, *Negotiation, Ratification, and Rescission of the Guilty Plea Agreement: A Contractual Analysis and Typology*, 17 DUQ. L. REV. 591 (1978-79).
80. To be valid, guilty pleas must be voluntary, "knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748 (1970).
81. Under Boykin v. Alabama, 395 U.S. 238 (1969), a voluntary and intelligent waiver cannot be presumed from a silent record. In applying *Boykin*, courts have required the trial court to warn the defendant that he is waiving his constitutional protection and to inquire into the voluntariness and intelligence of the guilty plea. *See* Westen & Westin, *supra* note 79, at 525 n.189.

against a defendant if he entered into it intelligently and voluntarily, just as a defendant can be held to a guilty plea which he subsequently seeks to vacate.[82]

Even if the defendant cannot be compelled to fulfill his promise to plead guilty,[83] the agreement should be enforceable against the prosecutor. A viable argument might be advanced that a promise to plead guilty is unenforceable both under constitutional law[84] and under the contractual principle that it is contrary to public policy. Nevertheless, this argument does not lead to the conclusion that the defendant's promise is thus insufficient consideration to support the promise of the prosecution, or that there is a lack of mutuality.[85] A promise that is unenforceable under a rule of law may nevertheless still bind the other party.[86] The maker of such a voidable promise may enforce the promise of the other party.[87]

The second reason the supreme court gave for refusing to enforce the plea agreement was that the agreement was subject to trial court approval. The court accurately noted that plea bargains involving a recommended sentence must be submitted to the trial court under G.S. 15A-1023(b).[88] If the trial court rejects the agreement, it is void. The supreme court found this factor unnecessary to its decision.[89] In light of the court's misapplication of contract law, however, the effect of this statutory provision should be re-evaluated.

When some event, not certain to occur, must happen before a duty of performance can arise under a contract, that event is labeled a condition precedent.[90] A statute that must be complied with before duties of performance arise constitutes a condition precedent implied in law.[91] The effect of predicating performance of a contract on a condition is that once the condition is fulfilled the parties are bound to perform.[92] If the condition fails, the parties are excused from performance.[93] In the context of a plea bargain subject to G.S. 15A-1023(b), if the trial court approves the bargain, both the prosecutor and the defendant must perform their contractual duties. On the other hand, if the judge rejects the bargain, neither party is bound.

In *Collins* the trial court neither approved nor rejected the plea bargain

82. *See, e.g.*, United States v. Levine, 457 F.2d 1186 (10th Cir. 1972); Everett v. United States, 336 F.2d 979 (D.C. Cir. 1964). *See generally* Westen & Westin, *supra* note 79, at 525 n.189; J. BOND, PLEA BARGAINING AND GUILTY PLEAS 309 (1975).

83. *See* People v. Heiler, 79 Mich. App. 714, 262 N.W.2d 890 (1977), *cited in* 300 N.C. at 149.

84. *See* Jones, *supra* note 79, at 597-600.

85. Mutuality refers to an obligation held by each party to do an act in consideration of the other party's act or promise; neither party is bound unless both are bound. BLACK'S LAW DICTIONARY 1173 (rev. 4th ed. 1968).

86. Lumber Co. v. Corey, 140 N.C. 462, 467-69, 53 S.E. 300, 302 (1906) (plaintiff who had not signed a contract within the Statute of Frauds could still enforce the contract).

87. S. WILLISTON, *supra* note 64, at § 105.

88. 300 N.C. at 149, 265 S.E.2d at 176. For text of G. S. 15A-1023(b), see note 42 *supra*.

89. 300 N.C. at 149, 265 S.E.2d at 176.

90. Cox v. Funk, 42 N.C. App. 32, 255 S.E.2d 600 (1979) (contract subject to condition of closing a real estate transaction).

91. J. CALAMARI & J. PERILLO, CONTRACTS 388 (2d ed. 1977).

92. S. WILLISTON, *supra* note 64, at § 663.

93. *Id.*

agreement.[94] Instead, the State attempted to revoke its promise. By so doing, the state prevented the court from reviewing the agreement. The supreme court held that the lack of court approval made the contract null and void.[95] The supreme court confused the validity of a contract with the arising of a duty of performance.[96]

An executory contract is no less valid because it is subject to a condition.[97] The North Carolina Supreme Court so held in 1962, saying "[t]he fact that no duty of performance on either side can arise until the happening of a condition does not necessarily make the validity of the contract depend upon it happening."[98] Both parties are bound when they enter into the contract. If the condition is fulfilled, both parties must perform.[99] If the condition fails, both parties are excused.[100] If a party attempts to revoke his part of the agreement before the condition either occurs or fails, he has repudiated the contract.[101] In attempting to withdraw from the plea bargain agreement before the court could review it, the prosecution repudiated the contract in *Collins*.

Moreover, by withdrawing from the plea agreement, the prosecution prevented the condition from arising. One party's prevention of a condition excuses the condition.[102] The North Carolina Supreme Court ruled in *Barron v. Cain*[103] that a plaintiff could enforce a contract despite the failure of condition if the defendant's own acts interfered with the occurrence of the condition.[104] Applying that reasoning to the instant case, the prosecution's prevention of the trial court's review of the plea bargain should result in the plea bargain being held enforceable against the prosecution.

Had the supreme court properly applied contract law by requiring the enforcement of this plea bargain, the court would not have confronted the *Cooper* holding that constitutional protections for defendants involved in plea bargaining are broader than the law of contract. The court failed to find a contractual protection, misconstruing *McIntosh* to justify its decision that constitutional protections are no more expansive than those provided by the law of contract. In using an irrelevant case to justify its decision, the court also failed to evaluate the merits of the rejected doctrine.

---

94. The State dishonored the agreement on the same day it was made, before the trial court had an opportunity to review it. 300 N.C. at 143, 265 S.E.2d at 173.

95. *Id.* at 149, 265 S.E.2d at 176.

96. *See* text accompanying notes 98-100 *infra*.

97. S. WILLISTON, *supra* note 64, at § 666.

98. Harris and Harris Constr. Co. v. Crain and Denbo, Inc., 256 N.C. 110, 118, 123 S.E.2d 590, 596 (1962).

99. S. WILLISTON, *supra* note 64, at § 663.

100. *Id.*

101. J. CALAMARI & J. PERILLO, *supra* note 91, at 459.

102. *Id.* at 441-44. "When one says that the condition is excused one means that even though the condition did not take place, the plaintiff may recover on the contract provided he can show that he would have been ready, willing and able to perform but for the prevention." *Id.* at 441 n.70.

103. 216 N.C. 282, 4 S.E.2d 618 (1939).

104. *Id.* at 284, 4 S.E.2d at 620.

C. Jury Charges

1. Pressuring Deadlocked Jury

In *State v. Easterling*[105] the North Carolina Supreme Court interpreted G.S. 15A-1235(b)[106] for the first time since the statute went into effect on July 1, 1978. The court held that while the statute forbids the use of the "Allen charge"—a coercive charge used to pressure a deadlocked jury to reach a verdict[107]—a trial court which uses such instructions will not be reversed on appeal unless the defendant can prove that the charge was prejudicial.[108] The court did not establish guidelines for determining when a specific charge might be prejudicial.

In *Easterling* the defendant was tried for felony murder. The jury began its deliberations on a Friday afternoon; on Saturday morning the trial judge called the jury back to the courtroom, instructing them that a retrial would mean the selection of a new jury and the consumption of another week of the court's time.[109] The North Carolina Supreme Court noted that while instructions of this type had been approved by North Carolina courts,[110] the statute now provides the standard for charges that may be given to the jury.[111] The

105. 300 N.C. 594, 268 S.E.2d 800 (1980).

106. Before the jury retires for deliberation, the judge may give an instruction which informs the jury that:

> (1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
>
> (2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
>
> (3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
>
> (4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the purpose of returning a verdict.

N.C. GEN. STAT. § 15A-1235(b) (1978).

107. The United States Supreme Court approved the use of the Allen charge in Allen v. United States, 164 U.S. 492 (1896). For a summary of the history of the Allen charge, see State v. Lamb, 44 N.C. App. 251, 261 S.E.2d 130 (1979), *cert. denied*, 299 N.C. 739, 267 S.E.2d 667 (1980). The North Carolina Supreme Court reviewed the practice of pressuring deadlocked juries into reaching verdicts two months before the effective date of G.S. 15A-1235 in State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978). The court found that under North Carolina law an Allen charge was acceptable so long as the judge did not coerce a verdict or imply that the jurors in the minority should surrender their convictions to the views of the majority. *Id.* at 592-93, 243 S.E.2d at 364. The court held that there was no error in mentioning the time and expense a retrial would entail but declined to establish any guidelines for trial courts since the statute would provide the standard in the future. *Id.* at 596, 243 S.E.2d at 366.

108. 300 N.C. at 608-09, 268 S.E.2d at 809.

109. The trial judge instructed the jury as follows:

> Members of the jury, I realize what a disagreement means, and I presume you understand and realize what a disagreement means. *It means that there will be another week or more of the time of the Court that will have to be consumed in the trial of these actions again.* I do not want to force you or coerce you in any way to reach a verdict, but it is your duty to try to reconcile your differences and to reach a verdict, if it can be done, without any surrender of anyone's conscientious convictions.

300 N.C. at 606, 268 S.E.2d at 808 (emphasis supplied by court).

110. *See* note 107 *supra*.

111. Shortly after the *Easterling* opinion was filed the North Carolina Court of Appeals held that G.S. 15A-1235(b) did not limit the instructions a trial judge could give, so long as the charge

language of the statute sets out instructions that a trial court *may* give to a jury with respect to its duty to reach an agreement,[112] but it is ambiguous as to whether the "Allen charge" is acceptable.[113] The court considered the statute's legislative history for guidance and noted that the General Assembly had deleted part of the statute which allowed a trial court to inform the jury that a deadlock would cause additional expense in a retrial.[114] On the basis of this history, the court interpreted the statute to forbid the use of this type of instruction.[115]

The North Carolina Supreme Court then held that the trial court's charge was not reversible error. It established that a violation of G.S. 15A-1235(b) was not reversible per se;[116] defendant has the burden to prove that the error was prejudicial.[117] The court indicated that when faced with this type of error appeals courts should consider all the circumstances of the instruction and its probable impact on the jury.[118] Despite its own finding that there was no prejudice to defendant in the *Easterling* charge the court warned that "it should be the rule rather than the exception" that a violation of the statute requires a finding of prejudicial error.[119] This final caveat offers little guidance, though, because the court found the instructions in question to be within the exception, without giving any significant justification. The court

---

as a whole was not coercive. State v. Darden, 48 N.C. App. 128, 268 S.E.2d 225 (1980). It is presumed that the *Easterling* opinion, filed three weeks before the *Darden* decision, was not available to the court of appeals, as no mention of it was made in the latter court's opinion.

112. G.S. 15A-1235(b) provides, "Before the jury retires for deliberation, the judge may give an instruction which informs the jury that. . . ." N.C. GEN. STAT. § 15A-1235(b) (1978).

113. *See Survey of Developments in North Carolina Law—Criminal Procedure, 1977*, 56 N.C.L. REV. 843, 1020 (1978).

114. 300 N.C. at 608, 268 S.E.2d at 809. N.C. GEN. STAT. § 15A-1235 (1978), Official Commentary states:

> The Commission considered three possible approaches to the deadlocked jury:
> (1) the 'weak' charge set out in the A.B.A. Standards;
> (2) the 'strong' Allen charge traditionally used in the federal courts; and
> (3) the even stronger charges authorized under North Carolina case law.
> After much discussion, the Commission . . . deleted from its draft a provision previously sanctioned under North Carolina case law which would have authorized the judge to inform the jurors that if they do not agree upon a verdict another jury may be called upon to try the case.

115. 300 N.C. at 608, 268 S.E.2d at 809. The North Carolina Court of Appeals had reached the same conclusion in State v. Lamb, 44 N.C. App. 251, 261 S.E.2d 130 (1979), *cert. denied*, 299 N.C. 739, 267 S.E.2d 667 (1980). It reversed defendant's conviction, finding that the trial judge's repeated mention of the time and money involved in a retrial to the jury after they had failed to agree on a verdict was in violation of the statute.

116. 300 N.C. at 608-09, 268 S.E.2d at 809. The court expressly stated that its holding did not imply disapproval of State v. Lamb. In *Lamb*, the court of appeals found that an Allen charge was prohibited by the statue and reversed without considering the issue of prejudice to defendant. *Id.* (citing State v. Lamb, 44 N.C. App. at 260, 261 S.E.2d at 135).

117. 300 N.C. at 609, 268 S.E.2d at 809. The court cited N.C. GEN. STAT. § 15A-1443(a) (1978), which provides in pertinent part:

> A defendant is prejudiced by errors . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.

118. 300 N.C. at 609, 268 S.E.2d at 809.

119. *Id.* at 609, 268 S.E.2d at 810.

based its finding on three factors: (1) no disagreement among the jurors prompted the instructions; (2) no evidence existed that the jury was otherwise open to pressure; and (3) the charge, taken as a whole, was not coercive, especially since it informed the jurors that they should not surrender their convictions to the majority view.[120]

These factors do not provide clear standards for distinguishing the exceptional cases when the violation of the statute will not be subject to reversal. The first factor is illogical because G.S. 15A-1235(b) expressly refers to instructions to be given "[b]efore the jury retires for deliberation" as well as when it seems to the trial judge that the jury has been unable to agree.[121] The second factor supporting the finding of no prejudice is more vague. The court stated that the jury was not otherwise open to pressure from the trial judge.[122] It would seem that all juries are open to pressure from the judge, and it is hard to imagine circumstances more likely than a deadlock to make a jury especially impressionable.

The third basis for the court's decision was the content of the charge itself. The instructions were acceptable because they complied with the standards established by the supreme court before the passage of G.S. 15A-1235.[123] Since no more definite rules were established in *Easterling*, it appears that appeals courts can continue to use the common-law rule. This result could vitiate *Easterling's* holding that the statute forbids any mention to the jury of the time and expense of a retrial following the jurors' failure to agree. Defendants will have little protection from the harm which the legislature intended to prevent.

This result is illustrated by a court of appeals case following *Easterling*. In *State v. Hunter*[124] the jury returned to the courtroom less than one hour after retiring and informed the court that it had been unable to agree. The trial judge then instructed the jurors that they were not expected to agree immediately but that it was their duty to deliberate and reach a unanimous verdict. In the course of these instructions, the judge mentioned that the case would have to be retried if a verdict were not reached.[125] The court of appeals

120. *Id.*

121. N.C. GEN. STAT. § 15A-1235(b), (c) (1978). In State v. Darden, 48 N.C. App. 128, 268 S.E.2d 225 (1980), the North Carolina Court of Appeals drew the opposite conclusion, looking to the title of the section: "Length of deliberations; deadlocked jury." The *Easterling* court distinguished State v. Lamb on this ground alone and approved it, implying that prejudicial error occurs whenever an Allen charge is given to a disagreeing jury. 300 N.C. at 609, 268 S.E.2d at 809-10.

122. 300 N.C. at 609, 268 S.E.2d at 809.

123. "[T]he charge itself makes clear that the trial court did not intend that any juror surrender his conscientious conviction of judgment and contains no such element of coercion as to warrant a new trial." *Id.*

124. 48 N.C. App. 689, 269 S.E.2d 736 (1980). The court of appeals reviewed Allen instructions in another post-*Easterling* decision, State v. Darden, 48 N.C. App. 128, 268 S.E.2d 225 (1980), but held that the statute did not control. In State v. Jones, 47 N.C. App. 554, 268 S.E.2d 6 (1980), filed by the court of appeals on the same day *Easterling* was filed, an Allen charge similarly was found to be nonprejudicial under *Alston*, *see* note 107 *supra*, and *Lamb*.

125. The judge instructed the jury as follows:

First of all, let me point out, Members of the Jury, that it's not anticipated that all of you

conceded that this reminder probably violated the statute, citing *Easterling*, but it held that defendant had not shown prejudice.[126] The court relied on two factors: the reminder was followed by an almost verbatim recital of the instructions suggested by G. S. 15A-1235(b), and the charge given was hardly coercive, containing no reference to either the time or expense of a retrial. The court ignored the consideration that the Allen charge followed an initial disagreement by the jury—the factor stressed by the supreme court in *Easterling*. It is significant that the court of appeals used as a standard for determining whether or not to reverse the guidelines established by the supreme court before the statute was passed, ignoring *Easterling*.[127] By relying on the pre-statute standard to determine reversibility of violations of G.S. 15A-1235, the court returned to the common-law rule. It disregarded the supreme court's warning that a finding of prejudice should be the rule rather than the exception and ignored the one objective factor which *Easterling* established: that a charge to a deadlocked jury is more likely to be prejudicial. *Hunter* illustrates the probable impact of the *Easterling* decision—trial courts are forbidden to use the Allen charge but will not be reversed for doing so.

2. Power of Nullification

In *State v. Lang*[128] a jury was instructed that if it found the State had proven all elements of a crime beyond a reasonable doubt, then "it would be [the jury's] duty to return a verdict of guilty. . . ."[129] Defendant argued that the trial court erred in instructing the jury that it was required to return a guilty verdict because it violated the jury's nullification power—the power to

---

should be of the same opinion as to what your verdict in this case should be when you go into the jury room.

. . . .

If a verdict is not reached, of course, would [*sic*] mean that the case has to be retried, and I'm sure that . . . you can arrive at a verdict as well as anybody else could be expected to do if given the opportunity to do so.

And this reminder that it's your duty to consult with one another and to deliberate with a view to reaching an agreement as to what your verdict should be if an agreement can be reached without violence to any individual judgment. [*sic*.]

48 N.C. App. at 691, 269 S.E.2d at 737-38.

126. *Id.* at 693, 269 S.E.2d at 739.

127. The court of appeals used the test established in State v. Williams, 288 N.C. 680, 220 S.E.2d 558 (1975) to measure whether the instructions were prejudicial. 48 N.C. App. at 693, 269 S.E.2d at 739.

128. 46 N.C. App. 138, 264 S.E.2d 821 (1980). Two other cases of note in 1980 also dealt with jury instructions. The North Carolina Court of Appeals in State v. Harris, 46 N.C. App. 284, 264 S.E.2d 790 (1980), held that when a judge mentioned the beyond-a-reasonable-doubt burden fifteen times in his charge to the jury, no possible prejudice could remain from having informed the jury one time that the burden of proof meant showing "by . . . greater weight all of the essential elements of his guilt." In State v. Matthews, 299 N.C. 284, 261 S.E.2d 872 (1980), the North Carolina Supreme Court held that the judge does not have to repeat the elements of a crime when instructing a jury in a joint trial.

129. 46 N.C. App. at 148, 264 S.E.2d at 828. Instructions of this type are typical in North Carolina. *See* N.C. CONFERENCE OF SUPERIOR COURT JUDGES, N.C. PATTERN JURY INSTRUCTIONS FOR CRIMINAL CASES (1973).

acquit even when the verdict is contrary to the law and the evidence.[130] The court of appeals rejected defendant's argument.[131]

Defendant relied on a series of federal courts of appeals cases during the Vietnam War that recognized that the jury has a power of nullification.[132] It followed, according to defendant, that this power could not be denied in the jury instructions.[133] The court of appeals, however, held that *Sparf and Hansen v. United States*[134] was controlling.[135] There the United States Supreme Court held that it was the "duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence."[136]

The court failed to mention a fundamental difference between *Lang* and the Vietnam War jury nullification cases. Those cases recognizing the implicit power to nullify involved political issues—protests against the war.[137] The jury was viewed "as the conscience of the community" and was "permitted to look at more than logic."[138] In political trials there often is a great deal of community support for the defendant's action. Forcing a jury to convict a defendant under those circumstances could risk alienation of the jurors from the system.[139] In ordinary criminal trials, as in *Lang*,[140] however, there is no community support for such criminal violations.[141]

3. Submission of Lesser Included Offenses

As a general rule of law in North Carolina, the submission of a lesser included offense unsupported by the evidence is error favorable to the defend-

130. 46 N.C. App. at 148, 264 S.E.2d at 828. *See* Scheflin, *Jury Nullification: The Right to Say No*, 45 S. CALIF. L. REV. 168 (1972).

131. 46 N.C. App. at 148, 264 S.E.2d at 828.

132. *See* United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972); United States v. Simpson, 460 F.2d 515 (9th Cir. 1972); United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970).

133. 46 N.C. App. at 148, 264 S.E.2d at 828.

134. 156 U.S. 51 (1895).

135. 46 N.C. App. at 149, 264 S.E.2d at 828.

136. 156 U.S. at 102.

137. United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972) (trial of the D.C. Nine who broke into the Dow Chemical Co. office and destroyed its property in protest of its participation in the war); United States v. Simpson, 460 F.2d 515 (9th Cir. 1972) (defendant burned records at the local board of the Selective Service); United States v. Moylan, 417 F.2d 1002 (4th Cir.), *cert. denied*, 387 U.S. 910 (1968) (defendants entered a local board of the Selective Service and destroyed draft cards).

138. United States v. Spock, 416 F.2d 165, 182 (1st Cir. 1969). "A juror who is forced by the judge's instructions to convict a defendant whose conduct he applauds, or at least feels is justifiable, will lose respect for the legal system which forces him to reach such a result against the dictates of his conscience." Scheflin, *supra* note 130, at 183.

139. 417 F.2d at 1006. *But see* 473 F.2d at 1140-41 (Bazelon, J., concurring in part, dissenting in part).

140. Defendant was charged with kidnapping and assault with intent to commit rape. 46 N.C. App. at 139, 264 S.E.2d at 821.

141. *See* Scheflin, *supra* note 130, at 191. Scheflin notes, however, that even a typical criminal case may have social overtones, especially when there is a question of criminal responsibility. *Id.* at 193-94. *See also* Everett v. United States, 336 F.2d 969 (D.C. Cir. 1964).

ant and therefore not appealable.[142] In *State v. Ray*[143] the North Carolina Supreme Court had occasion to reexamine that rule and added an important caveat; the error is not favorable to the defendant as a matter of law where there is a reasonable possibility that the defendant would have been acquitted of the greater offense if the lesser offense had not been submitted to the jury. The error then is prejudicial, and the defendant is entitled to appeal.[144]

Defendant in *Ray* was tried on a first degree murder charge. All of the evidence presented at trial demonstrated that defendant intentionally shot the victim, and defendant's defense rested entirely on the theory that he acted in self-defense and defense of another.[145] At the close of the evidence the trial judge dismissed the charge of first degree murder and submitted to the jury alternative verdicts of second degree murder, manslaughter, involuntary manslaughter, and not guilty by reason of self-defense. He further instructed the jury that involuntary manslaughter is "the unintentional *killing* of a human being. . . ."[146] The jury found defendant guilty of involuntary manslaughter. Defendant appealed on the grounds that the charge of involuntary manslaughter was unsupported by the evidence and therefore was submitted erroneously to the jury. The court of appeals, relying on the rule mentioned above, affirmed the conviction.[147]

The supreme court reversed, finding that under these circumstances erroneous submission of the lesser offense was prejudicial to defendant.[148] First, the court noted that the definition of involuntary manslaughter given to the

142. *See* State v. Vestal, 283 N.C. 249, 195 S.E.2d 297, *cert. denied*, 414 U.S. 874 (1973) (defendant charged with first degree murder, convicted of manslaughter though evidence of manslaughter was lacking); State v. Stephens, 244 N.C. 380, 93 S.E.2d 431 (1956) (defendant tried for murder and convicted of manslaughter); State v. Roy, 233 N.C. 558, 64 S.E.2d 840 (1951) (defendant charged with rape, rape proved; verdict of assault with intent to commit rape); State v. Chase, 231 N.C. 589, 58 S.E.2d 364 (1950) (indictment for armed robbery, armed robbery proved; verdict of common law robbery); State v. Bentley, 223 N.C. 563, 27 S.E.2d 738 (1943) (defendant charged with assault with intent to kill using a deadly weapon, convicted of assault with a deadly weapon—an alternative not submitted to the jury by the trial court); State v. Robertson, 210 N.C. 266, 186 S.E. 247 (1936) (defendant charged with burglary, burglary proved; verdict of attempted burglary); State v. Quick, 150 N.C. 820, 64 S.E. 168 (1909) (defendant tried for second degree murder; defense of self-defense; convicted of voluntary manslaughter); State v. Matthews, 142 N.C. 621, 55 S.E. 342 (1906) (defendant indicted for first degree murder, convicted of second degree murder; affirmed despite defendant's claim that there was no evidence to support the verdict).

143. 299 N.C. 151, 261 S.E.2d 789 (1980).

144. *Id.* at 167, 261 S.E.2d at 799.

145. *Id.* at 152, 261 S.E.2d at 790-91. The only witnesses to the homicide were defendant and his brother. According to their testimony the victim had been drinking and had threatened defendant with a shotgun while defendant sat in his car parked in his own front yard. When defendant's brother attempted to intervene, the victim approached the house and fired through the front door, wounding the brother in the hand. Defendant testified that he then fired at the victim's legs. The victim then turned in defendant's direction, holding the pistol. Defendant, believing that he was about to be fired upon, shot twice at the victim. *Id.* at 153-57, 261 S.E.2d at 791-93.

The State offered an out-of-court statement allegedly made by defendant to a policeman at the time of the shootings. It might be inferred from this statement that defendant shot at the victim while the victim was retreating. *Id.* at 154-55, 261 S.E.2d at 792. There was no evidence to suggest that defendant unintentionally shot the victim.

146. *Id.* at 157, 261 S.E.2d at 793 (emphasis in original).

147. *Id.* at 152, 261 S.E.2d at 790.

148. *Id.* at 163, 261 S.E.2d at 797.

jury was incorrect, focusing at it did "on the presence or absence of an *intent to kill* rather than the presence or absence of an *intentional act*."[149] Moreover, because absolutely no evidence was presented in the case that would support a finding of involuntary manslaughter,[150] the submission of that charge was error. Also, under the facts of this case, that error was prejudicial to defendant. Given the trial court's erroneous definition of involuntary manslaughter,[151] the jury might well have concluded that defendant was guilty of that offense as defined. "In effect, the erroneous submission of the offense of involuntary manslaughter, coupled with the misleading definition of that offense by the trial court, may have short-circuited the jury's consideration of defendant's claim of self-defense."[152] The error therefore was prejudicial to defendant.[153]

In reaching that conclusion, the court distinguished North Carolina cases stating the general rule that erroneous submission of a lesser offense is harmless error.[154] In all of those cases the evidence was such that, had the lesser offense not been submitted, the jury would have convicted the defendant of the greater offense. The situation is quite different when there is a reasonable possibility that the defendant would have been acquitted of the greater offense had the lesser offense not been submitted to the jury. The defendant certainly is prejudiced in that event, and the general rule should not apply.

The exception stated in *State v. Ray* is compelling logically and is supported in the case law of other jurisdictions.[155] *Ray* is simply an express statement of what was implicit in the North Carolina cases stating the general rule that submission of a lesser included offense not supported by the evidence is not invariably error favorable to the defendant as a matter of law, and whether

149. *Id.* at 165, 261 S.E.2d at 798 (emphasis in original).

150. *Id.* at 159, 261 S.E.2d at 794.

151. Although the misleading definition of the lesser offense in this case contributed to the prejudice to defendant, it would not seem to be a necessary element of prejudicial error in every case because the jury's attention would be distracted by the submission of even a correctly defined lesser offense not supported by the evidence. Indeed, the court of appeals has applied *Ray* in a situation where there was no misleading definition of the lesser offense. In State v. Brooks, 46 N.C. App. 833, 266 S.E.2d 3 (1980), defendant was tried for second degree murder, claimed self-defense, and was convicted of involuntary manslaughter. Although there was no claim that the trial court incorrectly defined involuntary manslaughter, the court of appeals found that there was no evidence to support the lesser charge and reversed in reliance on *State v. Ray*.

152. 299 N.C. at 165, 261 S.E.2d at 798.

153. *Id.* at 167, 261 S.E.2d at 799. Justice Copeland, joined by Chief Justice Branch, dissented from this holding. The dissent found that the trial court's definition of involuntary manslaughter was correct, *id.* at 168-69, 261 S.E.2d at 800 (Copeland, J., dissenting), and that the jury reasonably could have weighed and rejected defendant's claim of self-defense as they were instructed, *id.* at 169-71, 261 S.E.2d at 800-01. Furthermore, the dissent urged that the decision was controlled by State v. Vestal, 283 N.C. 249, 195 S.E.2d 297, *cert. denied*, 414 U.S. 874 (1973), under which the submission of a lesser included offense not supported by the evidence is nonprejudicial error if there is sufficient evidence that the jury could have convicted the defendant of the greater offense. According to the dissent, whether the erroneous submission of a lesser offense is prejudicial is not a question of harmless error, but simply one of the sufficiency of the evidence to go to the jury on the higher offense.

154. 299 N.C. at 163-64, 261 S.E.2d at 797.

155. *See, e.g.*, Parham v. State, 135 Ga. App. 315, 217 S.E.2d 493 (1975); People v. Gajda, 87 Ill. App. 316, 232 N.E.2d 49 (1967); Martin v. Commonwealth, 406 S.W.2d 843 (Ky. Ct. App. 1966).

such error is harmless will depend on the particular facts of each case.[156]

4. Closing Argument

In *State v. Hardy*[157] the North Carolina Supreme Court declined to hold that remarks made by the prosecutor during closing argument to the effect that defendant had the burden of proving his innocence constituted prejudicial error. The court relied on the principle that closing arguments are within the trial court's discretion and will not be reviewed "unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury. . . ."[158] The remarks in question did not meet this standard. Any prejudice from the prosecutor's rhetorical question, "Can the defendant, based on this evidence, show you a valid conclusion of his innocence?" was found to have been cured by the trial judge's instruction that the jury should apply the law as the judge give it to them.[159] Similarly, the court noted that the prosecutor's statement that "[t]he word 'beyond' is an unnecessary appendage to the words 'reasonable doubt,' " was confusing when considered in isolation, but found that the closing argument as a whole did not misstate the law sufficiently to force the judge to instruct the jury to disregard it.[160]

D. Right to Speedy Trial

1. Preindictment Delay

In *State v. Davis*[161] the North Carolina Court of Appeals held that a defendant who seeks dismissal of charges against him for unreasonable preindictment delay, in violation of his due process rights under the fifth and fourteenth amendments,[162] must sustain a dual burden of proof.[163] In order to carry the burden of his motion to dismiss, the defendant must show both actual and substantial prejudice from the delay and that the delay was intentional on the part of the State to gain a tactical advantage over the defendant or impair his defense.[164]

Defendant in *Davis* sold narcotics to an undercover agent of the State Bureau of Investigation in April, 1978.[165] In order to protect a confidential

156. *See* 299 N.C. at 166, 261 S.E.2d at 798-99.

157. 299 N.C. 445, 263 S.E.2d 711 (1980).

158. *Id.* at 453, 263 S.E.2d at 717 (citing State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976)). For the other holding of *Hardy*, see notes 236-45 and accompanying text *supra*.

159. 299 N.C. at 453-54, 263 S.E.2d at 717.

160. *Id.* at 454, 263 S.E.2d at 717.

161. 46 N.C. App. 778, 266 S.E.2d 20 (1980).

162. In United States v. Marion, 404 U.S. 307, 320 (1971) the United States Supreme Court held that the sixth amendment's speedy trial clause does not apply to preindictment delay. Statutes of limitation, the Court said, provide the primary guarantee against the bringing of "stale" criminal charges, *id.* at 322, but the Court did recognize for the first time that unreasonable preindictment delay may violate the due process clause of the fifth amendment as well. *Id.* at 324. *See also* United States v. Lovasco, 431 U.S. 783 (1977).

163. 46 N.C. App. at 782, 266 S.E.2d at 23.

164. *Id.*

165. *Id.* at 779, 266 S.E.2d at 21.

informant[166] defendant's arrest was delayed so that he was not formally indicted until January, 1979, more than eight months after his offense.[167] Defendant moved to dismiss the case on the basis of the preindictment delay and produced evidence to show that the delay had prejudiced his case[168] but did not contend that the State intentionally had delayed the indictment with the motive of impairing his defense. The trial court dismissed the motion.

The court of appeals affirmed.[169] Although the court noted that there appeared to be some "dissonance" in the North Carolina cases[170] over this question, it held[171] that the issue is controlled by the United States Supreme Court decision in *United States v. Lovasco*,[172] where the Court held that "proof of prejudice is generally a necessary but not sufficient element of a due process claim, and . . . the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused."[173] Following *Lovasco*, *Davis* clearly sets forth for the first time in North Carolina the rule that a defendant must show both prejudice and an improper state motive[174] to support a motion to dismiss for unreasonable preindictment delay.

2. Speedy Trial Act

The North Carolina Court of Appeals decided two cases in 1980 that required interpretation of North Carolina's Speedy Trial Act[175] and clarified ambiguities in that statute not previously dealt with by the courts.

---

166. The sale of narcotics was part of an ongoing investigation in which the S.B.I. used a confidential informant who had been promised that, in order to prevent drug traffickers from connecting him with the investigation, any arrests resulting from the investigation would be delayed. *Id.*

167. *Id.*

168. In support of his motion defendant produced testimony of a Florida motel desk clerk which tended to show that defendant was in Florida at the time of the alleged offense. Because the motel had been sold on January 15, 1979, however, the witness was unable to produce records to substantiate her testimony. *Id.* at 779-80, 266 S.E.2d at 21.

169. *Id.* at 782, 266 S.E.2d at 23.

170. *Id.* at 780, 266 S.E.2d at 22. Defendant argued that State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976) and State v. Herring, 33 N.C. App. 382, 235 S.E.2d 88 (1977) are authority for a single-burden test in North Carolina. Both of these cases were decided prior to *Lovasco*, as the *Davis* court noted, 46 N.C. App. at 781, 266 S.E.2d at 22, and neither contains the definitive holding suggested by defendant. The following language in *Dietz* might be read to support a single-burden test: "We therefore hold that under the facts of this case, defendant has not demonstrated *either* intentional delay on the part of the State in order to impair defendant's ability to defend himself *or* 'actual and substantial prejudice' from the preindictment delay," 289 N.C. at 495, 223 S.E.2d at 362 (emphasis in original); but that language can be read just as easily to say that defendant had met neither prong of a two-part test. *Herring* merely quoted the above language, 33 N.C. App. at 385, 235 S.E.2d at 90, and added nothing to *Dietz*.

171. 46 N.C. App. at 781, 266 S.E.2d at 22.

172. 431 U.S. 783 (1977) (preindictment delay of eighteen months held not to violate due process where delay was in good faith and was not intended to prejudice defendant's case).

173. *Id.* at 790.

174. That is, intent to prejudice defendant's case. Investigative delay, on the other hand, is "fundamentally unlike delay undertaken by the Government solely 'to gain tactical advantage over the accused,'" *id.* at 795, and is permissible. *Lovasco* also notes that preserving the "cover" of an undercover informant is a proper motive for preindictment delay. *Id.* at 797 n.19, *cited in Davis*, 46 N.C. App. at 782, 266 S.E.2d at 23.

175. N.C. GEN. STAT. §§ 15A-701 to -704 (1978 & Cum. Supp. 1980).

In *State v. Ward*,[176] the court of appeals addressed the question of when the ninety-day statutory period[177] begins to run after criminal charges are dismissed without prejudice to the State for a violation of the Act—a question upon which the Act itself is silent. Defendant in *Ward* filed a motion to dismiss a charge of first degree murder because of violation of the Speedy Trial Act.[178] Granting the motion, the trial court dismissed the charge without prejudice to the State, and the State appealed the order.

Although the court dismissed the State's appeal,[179] it elected to treat the appeal as a petition for certiorari in order to reach the more important question the case presented—if the State can reindict defendant upon dismissal without prejudice, when does the ninety-day period under the Act begin to run in the second prosecution? In the face of the Act's silence upon this question, the court held that "where a criminal charge is dismissed without prejudice upon a defendant's motion under the Speedy Trial Act, the trial of the defendant upon further prosecution by the state must begin within [ninety days] from the date the order is entered dismissing the charge without prejudice."[180] In so construing the statute, the court intended to further the legislative policy of prompt disposition of criminal cases, and to avoid the manifest unfairness to the State that would result if the ninety-day period were held to run from the original start of the time period in the first action.[181]

In *State v. Boltinhouse*,[182] the court of appeals construed yet another ambiguity in the Act concerning the start of the time period for bringing defendants to trial. G.S. 15A-701(a1)(3) provides: "When a charge is dismissed, other than under G.S. 15A-703, or a finding of no probable cause pursuant to G.S. 15A-612, and the defendant is afterwards charged with the same offense," the time period under the Act begins to run from the last of the stated events[183] in connection with the original charge. Defendant in *Boltinhouse* argued that under this statute, when a finding of no probable cause is made and defendant subsequently is prosecuted for the same offense, the time period runs from the date of the original charge.[184] The court of appeals rejected this

176. 46 N.C. App. 200, 264 S.E.2d 737 (1980).

177. The time period is 120 days if the event from which it is measured occurred before October 1, 1980. N.C. GEN. STAT. § 15A-701(a)(1) (Cum. Supp. 1980).

178. Defendant was indicted on February 12, 1979, but his case was not brought to trial until the week of August 20, 1979, under an agreement between the solicitor and defendant's counsel. 46 N.C. App. at 201, 264 S.E.2d at 738.

179. Deciding a question of first impression in North Carolina, the court also held that the State has no appeal as a matter of right from an order dismissing charges without prejudice for violation of the Speedy Trial Act. *Id.* at 204, 264 S.E.2d at 740. Such an order does not bar further prosecution by the State nor finally dispose of the charge against the defendant, and therefore is not an appealable final order. *Id.*

180. *Id.* at 206, 264 S.E.2d at 741.

181. Such an interpretation would be unfair to the State because a large portion of the time period will ordinarily have passed before the motion to dismiss is filed. *Id.*

182. 49 N.C. App. 660, 272 S.E.2d 148 (1980).

183. N.C. GEN. STAT. § 15A-701(a1)(3) (Supp. 1979). The time period runs "from the date that defendant was arrested, served with criminal process, waived an indictment, or was indicted, whichever occurs last, for the original charge." *Id.*

184. 49 N.C. App. at 662, 272 S.E.2d at 149-50. Defendant in *Boltinhouse* was arrested on a charge of possessing stolen property on May 24, 1979, but a finding of no probable cause was

interpretation. Although the statute is ambiguous and "admittedly subject to the interpretation for which defendant contends," the court found that it is equally subject to the interpretation that a finding of no probable cause is a circumstance in which the period begins to run from the last of the listed items relating to the new charge.[185] The court adopted the latter construction and held that, when a finding of no probable cause is entered under G.S. 15A-612 and defendant subsequently is prosecuted for the same offense, the period of the Act begins to run from defendant's indictment[186] on the new charge rather than the original charge.[187] This construction was supported by reference to the legislative purpose expressed in G.S. 15A-612(b)[188] of permitting subsequent prosecution for the same offense after a finding of no probable cause has been entered; if the time period were to begin with reference to the original charge in such cases, subsequent prosecution would often be barred by the Act.[189]

E. Searches and Seizures

1. Warrantless Searches and Seizures

State v. Le Duc[190] tested fourth amendment restrictions against illegal searches and seizures in the circumstance of abandoned property. In *Le Duc* a resident noticed a trawler whose rigging and lines were not secured in the usual manner moored at a pier. Four days later, the resident called a sheriff, who boarded the boat. The North Carolina Court of Appeals held that this was permissible in light of the officer's responsibility for the safety of property and concern for the life and health of anyone on board.[191] Because the officer's initial boarding was amply justified by exigent circumstances,[192] the marijuana he found on board was admissible.

The officer then drove the boat to a Coast Guard station, where an intensive, warrantless search was performed, during which evidence of defendant's ownership of the boat was discovered. Although the court held that the "better course" would have been for the officers who conducted the search to have submitted their initial findings to a magistrate for a probable cause determination, no violation of defendant's fourth amendment rights occurred because he

---

entered on the charge on September 5, 1979. On September 24, 1979, defendant was indicted for felonious possession of the same property. His trial on that charge began on January 7, 1980—105 days after the September 24th indictment, but more than 120 days from his arrest on May 24, 1979. *Id.* at 661, 272 S.E.2d at 149.

185. *Id.* at 663, 272 S.E.2d at 150.

186. Or arrest, service of process, or waiver of indictment. *See* note 183 *supra*.

187. 49 N.C. App. at 663, 272 S.E.2d at 150.

188. "No finding made by a judge under this section precludes the state from instituting a subsequent prosecution for the same offense." N.C. GEN. STAT. § 115A-612(b) (1978).

189. *Id.*

190. 48 N.C. App. 227, 269 S.E.2d 220 (1980).

191. *Id.* at 239, 269 S.E.2d at 228. The court relied on United States v. Miller, 589 F.2d 1117 (1st Cir. 1978), *cert. denied*, 440 U.S. 958 (1979) (Coast Guard officers reasonably believing the situation an emergency boarded a boat and found marijuana debris and a marked navigational chart whose directions led to the discovery of a large cache of marijuana).

192. 48 N.C. App. at 239, 269 S.E.2d at 228.

had abandoned the vessel.[193] The court's standard for abandonment was based on the psychological factors of relinquishment:

> The issue is not abandonment in the strict property-right sense, but whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain reasonable expectation of privacy with regard to it at the time of the search.[194]

In concluding that defendant's vessel had been abandoned, the court pointed to its careless mooring, its open windows and doors, defendant's lack of notification to others of his identity or his intention to return, and his presence at the time in Florida, where he was later apprehended.[195] The court conceded that the officers could not have known this last fact but said that a court justifiably could consider it as evidence of abandonment under the District of Columbia Court of Appeals' decision in *Parman v. United States*.[196] The rationale behind the *Parman* rule is that one who abandons property has abandoned his fourth amendment rights in that property, just as a third party without fourth amendment rights of ownership or control in an item cannot object to its illegal seizure.

2. Searches Under Warrant

The question of the sufficiency of evidence pointing to probable cause for the issuance of a search warrant arose in two North Carolina Supreme Court cases, one of which dealt with staleness of evidence, the other with the seizure of evidence not named in the search warrant but seen by officers searching for the specified articles.

In *State v. Jones*[197] the court held that revelations by an accomplice to a murder supplied ample probable cause for a search warrant to issue for a hatchet and leather-welder's gloves used in that crime. The court rejected a charge that the five-month interval between the homicide and the search made the information in the accomplice's affidavit stale. Because the items sought were not incriminating in themselves and because they were of enduring util-

193. *Id.* at 240, 269 S.E.2d at 229.

194. *Id.*, 269 S.E.2d at 228-29 (quoting United States v. Colbert, 474 F.2d 174, 176 (5th Cir. 1973)). These factors also seem to be behind the court of appeals' decision in State v. Turgeon, 44 N.C. App. 547, 261 S.E.2d 501 (1980), where the defendant gave a briefcase containing incriminating evidence to a friend for safekeeping. The friend later turned it over to police officers on request and signed a statement indicating the voluntariness of the surrender. The court, holding the seizure valid, relied on State v. Woods, 286 N.C. 612, 213 S.E.2d 214 (1975), as precedent. In that case a wife, confronted in her home by officers requesting permission to search, voluntarily relinquished rings given to her by her husband and linking him to a crime. The *Woods* case and other cases dealing with the consent of a third person to search depend upon joint ownership or control of the premises or object searched. *See, e.g.*, Frazier v. Cupp, 394 U.S. 731, 740 (1968). The *Turgeon* court, however, did not examine the relationship between the defendant and his friend, presumably basing its decision upon the lessened expectation of privacy and assumption of risk in defendant's effective abandonment of the briefcase.

195. 48 N.C. App. at 241, 269 S.E.2d at 229.

196. 399 F.2d 559 (D.C. Cir.), *cert. denied*, 393 U.S. 858 (1968).

197. 299 N.C. 298, 261 S.E.2d 860 (1980).

ity,[198] a common-sense assessment[199] would lead a reasonably prudent magistrate to conclude that they were probably still on the identified premises.[200]

The admissibility of photographs and letters under the plain-view exception to the fourth amendment prohibition against unreasonable searches and seizures was examined in *State v. Williams*.[201] The photographs and letters were glimpsed inadvertently as officers, armed with a search warrant for heroin, searched in bedroom drawers for the drugs. The letters and photographs were seized after the heroin was found, when an officer seeking evidence of who resided in the trailer recalled seeing those items and confiscated them for that purpose. The North Carolina Supreme Court found the seizure specifically authorized by G.S. 15A-253[202] and by *Coolidge v. New Hampshire*,[203] which authorized the plain-view exception on similar facts.[204] Following the *Coolidge* model, the *Williams* court found that the officers were on the premises justifiably by virtue of a valid search warrant, that, having seen the letters inadvertently, they were not required to forget or ignore the fact that they had seen them, and that the possibility of the items' being subject to removal or destruction if not seized immediately, plus the fact that the officers did not seize the heroin and *then* initiate a search to prove ownership, contributed to the validity of the seizure.[205]

The question of the sufficiency of probable cause also arose before the North Carolina Court of Appeals in *State v. Sheetz*.[206] In *Sheetz* a court order requested by the sheriff's department, which authorized the examination of defendant's bank records and of business records in his shop, was based upon conclusory allegations "of irregularities which, if supported by evidence and found to be true, would constitute serious violations of the law on the part of the defendant."[207] Because the sheriff's request contained no recital of the underlying circumstances upon which a magistrate could conclude that probable cause existed,[208] the order was invalid and evidence obtained was therefore excluded from evidence.[209]

198. *Id.* at 305, 261 S.E.2d at 865.

199. *See* United States v. Brinklow, 560 F.2d 1003, 1006 (10th Cir.), *cert. denied*, 434 U.S. 1047 (1977).

200. 299 N.C. at 305, 261 S.E.2d at 865.

201. 299 N.C. 529, 263 S.E.2d 571 (1980).

202. N.C. GEN. STAT. § 15A-253 (1978) provides that items *not* named in a search warrant may be seized: "[I]f in the course of the search the officer inadvertently discovers items not specified in the warrant which are subject to seizure under G.S. § 15-242, he may also take possession of the items so discovered." An item is subject to seizure if it "constitutes evidence of . . . the identity of a person participating in an offense." *Id.* § 15A-242(4).

203. 403 U.S. 443 (1971).

204. "An example of the applicability of the 'plain view' doctrine is the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character." *Id.* at 465.

205. 299 N.C. at 532, 263 S.E.2d at 573.

206. 46 N.C. App. 641, 265 S.E.2d 914 (1980).

207. *Id.* at 648, 265 S.E.2d at 919.

208. *Id. See* State v. Campbell, 282 N.C. 125, 130-31, 191 S.E.2d 752, 756 (1972).

209. *See* Wong Sun v. United States, 371 U.S. 471 (1963).

3. Vehicle Searches

Three North Carolina Court of Appeals cases probed the validity of vehicle searches, one authorized by warrant, the others not.

In *State v. Trapper*[210] a deputy sheriff, long suspicious of activities occurring on property in his neighborhood, followed a truck leaving that property and stopped it on the pretense of a routine license check.[211] Both license and registration were in order, but the officer detained the driver long enough for two other law enforcement officers to arrive and walk around the vehicle. The officers detected a strong odor of marijuana. The officers then obtained a search warrant. The affidavit for the warrant erroneously stated that the odor had been detected while the license check was being made.[212] The court held, however, that because the affidavit did not show on its face that the driver's license check was improper, the magistrate did not err in issuing the warrant. Hence, because the vehicle search was made pursuant to a valid warrant, the marijuana found in the truck was likewise validly seized.[213]

The court of appeals found that the officer's suspicions validated his detention of the driver of the truck under a number of United States Supreme Court decisions,[214] most notably *Terry v. Ohio*,[215] which held that a person may be detained for further investigation (in that case a search for weapons) by a law officer without a warrant and without probable cause to believe a crime has been committed if there is a reasonable suspicion which can be ar-

---

210. 48 N.C. App. 481, 269 S.E.2d 680 (1980).

211. The court distinguished this situation from that in Delaware v. Prouse, 440 U.S. 648 (1979), relied upon by defendant, wherein a random vehicle check led to the discovery of an ongoing crime. In *Prouse*, there was no reason to think the driver of the vehicle was violating any law at the time he was stopped, and the affidavit stated that the officer stopped the vehicle because he was not busy at the time. In *Trapper*, the affidavit was too ambiguous to establish on its face that the license check was improper. Further, decisions by the North Carolina Supreme Court and by the Fourth Circuit in State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973), and United States v. Kelley, 462 F.2d 372 (4th Cir. 1972), respectively, held vehicle stops under the pretense of license checks without reasonable suspicion of criminal activity to be constitutionally valid. *See Survey of Developments in North Carolina Law, 1978—Criminal Procedure*, 57 N.C. L. REV. 827, 1007-11 (1979).

212. In Franks v. Delaware, 438 U.S. 154, (1978), the Supreme Court held that a search warrant must be voided where a false statement in an affidavit is shown to have been made intentionally or in a reckless disregard for the truth and where the false material is necessary to the finding of probable cause. If the affidavit's remaining content is sufficient to establish probable cause, the warrant is valid. *Id.* at 171-72. The latter situation controlled the North Carolina Supreme Court's decision in State v. Louchheim, 296 N.C. 314, 250 S.E.2d 630 (1979). The court of appeals failed to discuss this issue in *Trapper*, looking instead only to the question of the license check, not to the issue of delay for the purpose of "sniffing out" probable cause. It is likely that the court's ruling on this issue was based on the test of G.S. 15A-978(a), which permits a defendant to challenge the validity of a search warrant by contesting the truthfulness of the testimony showing probable cause for its issuance. Truthful testimony is that which "reports in good faith the circumstances relied on to establish probable cause." N.C. GEN. STAT. § 15A-978(a) (1978). Under this broad criterion, the officer's imprecise recounting of the order of events might have been considered permissible.

213. 48 N.C. App. at 486, 269 S.E.2d at 683.

214. Dunaway v. New York, 442 U.S. 200 (1979); Delaware v. Prouse, 440 U.S. 648 (1979); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Terry v. Ohio, 392 U.S. 1 (1968).

215. 392 U.S. 1 (1968).

ticulated that a crime is being committed.[216] The *Trapper* court accepted as a sufficiently articulated, reasonable suspicion the facts that (1) the officer was experienced, (2) the coastal county was regularly used by smugglers, (3) the officer had seen a boat inexplicably grounded in the area, (4) he had been fired on while surveying the suspect property from the water, and (5) he had seen the truck leaving that property.[217]

The most bothersome aspect of the *Trapper* decision is whether the facts in that case constitute a reasonable, articulable suspicion that a crime is being committed. The cases cited in the court's decision do not clearly determine what is meant by that standard. In *Terry v. Ohio* the Supreme Court restricted its holding to a "narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual. . . ."[218] The Court warned that an "unparticularized suspicion or 'hunch' " was insufficient grounds for such a search. Only "specific reasonable inferences which he is entitled to draw from the facts in light of his experience" would suffice.[219] In *Sibron v. New York*[220] the Court described the standard for these inferences more precisely as "specific knowledge on the part of the officer relating the suspect to the evidence of crime."[221] Neither evidence of crime nor specific knowledge of crime was present in *Trapper*. Rather, the officer's experiences led to hunches about the possibility of some unspecified illegal activity going on in connection with the property in his vicinity. This is much less than is required by the fourth amendment guarantee against unreasonable searches and seizures.

The second North Carolina Court of Appeals case involving a vehicle search, *State v. Gauldin*,[222] concerned a straightforward application of the suitcase-rule exception to permissible automobile searches and seizures.[223] Officers stopped a vehicle on reliable information that it contained marijuana. Their search of a suitcase in the back of the car was not justified by the auto-

---

216. *Id.* at 27.

217. 48 N.C. App. at 486, 269 S.E.2d at 683.

218. 392 U.S. at 27. The Court's decision in United States v. Brignoni-Ponce, 422 U.S. 873 (1975), was similarly limited to its factual circumstances. In that case the Court allowed border patrols "to stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts," indicating that the vehicles contained illegal aliens. *Id.* at 884. Factors leading to such suspicions included proximity to the border, usual traffic patterns, a road's reputation for alien traffic, a driver's erratic or evasive behavior, the vehicle's appearance and size, and the appearance of the driver and passengers. *Id.* at 884-85. While a general suspicion of smuggling similarly was present in *Trapper*, no other fact or experience of the officer in that case pointed *particularly* to that crime being committed by the truck's driver.

219. 392 U.S. at 27.

220. 392 U.S. 40 (1968). The holding in *Sibron* also was confined to a weapons search. Because officers made no effort to explore for weapons but thrust their hands into Sibron's pockets to seize drug packets that they suspected were there, the "search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception—the protection of an officer by disarming a potentially dangerous man." *Id.* at 65.

221. *Id.* at 66-67. *See also* State v. Blackwelder, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

222. 44 N.C. App. 19, 259 S.E.2d 779 (1979), *cert. denied*, 299 N.C. 333, 265 S.E.2d 399 (1980).

223. *See* Arkansas v. Sanders, 442 U.S. 753 (1979) (holding that once a suitcase had been seized from defendant's automobile, it could not be searched without a warrant).

mobile-search exception to the fourth amendment warrant requirement because the exception does not apply when the car is under the control of the police officer. Furthermore, the automobile-search exception does not apply to luggage taken from automobiles.[224] The court also held that the officers' search was not justified by a plain smell doctrine because this novel doctrine would conflict with the objective of necessary searches being as limited as possible. "The sense of smell, unlike eyesight, does not always pinpoint what is being sensed and where the material is located."[225]

In a third court of appeals case, *State v. Greenwood*,[226] the odor of marijuana detected by an officer making a license check of a "suspicious individual"[227] was held sufficient as probable cause to search defendant's vehicle. The court acknowledged judicial controversy over whether the odor of marijuana is in itself adequate probable cause to search for the substance itself,[228]

---

224. 44 N.C. App. at 20-21, 259 S.E.2d at 780-81.

225. *Id.* at 22, 259 S.E.2d at 781. While smell cannot suffice as a "plain view" exception to the requisite warrant to search, it is permissible in the context of establishing probable cause. *See, e.g.*, State v. Trapper, 48 N.C. App. 481, 269 S.E.2d 680 (1980).

226. 47 N.C. App. 731, 268 S.E.2d 835 (1980).

227. *Id.* at 736, 268 S.E.2d at 838. The arrest in *Greenwood* presents the same questions of an arrest on the pretense of a routine license check as those in State v. Trapper. *See* note 211 *supra*. In *Greenwood*, an officer responded to a call about a suspicious person in a vehicle in a church parking lot. The officer approached the car, and asked defendant to roll down his window and present his driver's license. *Id.* at 732, 268 S.E.2d at 836. As in *Trapper*, the court in *Greenwood* held the warrantless arrest valid under the specific and articulable facts and rational inferences standard of Terry v. Ohio, 392 U.S. 1 (1968). The *Greenwood* opinion also cited State v. Thompson, 296 N.C. 703, 252 S.E.2d 776, *cert. denied*, 444 U.S. 907 (1979), where the North Carolina Supreme Court admitted that the *Terry* standard, reaffirmed in Adams v. Walker, 407 U.S. 143 (1972), to permit "[a] brief stop of a suspicious individual in order to determine his identity or to maintain the status quo momentarily while obtaining more information," 407 U.S. at 146, "clearly falls short of the traditional notion of probable cause, which is required for arrest." 296 N.C. at 706, 252 S.E.2d at 779. It is important to note, however, that the *Adams* facts, like those in *Terry*, were confined to a weapons search for the officer's self-protection. Neither *Thompson* nor *Greenwood* involved the officers' suspicion of weapon possession, but only the broader, looser criterion of reasonable suspicion that defendants could be engaged in or connected with criminal activity. *See id.* at 707, 252 S.E.2d at 779, and 47 N.C. App. at 737, 268 S.E.2d at 839. This is the precise problem presented by the officers' similarly unspecific suspicion in *Trapper*, although the presence of marijuana odor in *Greenwood* comes closer to legitimizing a search on these broader grounds than did the facts in *Trapper*.

228. *Compare* United States v. Mullin, 329 F.2d 295 (4th Cir. 1965) (odor of non-taxpaid whiskey valid basis on which to seek a search warrant, but not sufficient to justify search and seizure without a warrant); People v. Hilber, 403 Mich. 312, 269 N.W.2d 159 (1978) (even if it was reasonable to conclude that a person smoking marijuana would have unburned marijuana in his vehicle, a warrantless search was unjustified because it was unreasonable to conclude defendant had been the smoker); *and* State v. Schoendaller, 578 P.2d 730 (Mont. 1978) (officer approached defendant's vehicle, which was blocking traffic, smelled marijuana and incense, and searched vehicle. "Odor alone, absent evidence of visible contents, is [not] equivalent to plain view . . . ." *Id.* at 734.) *with* State v. Zamora, 114 Ariz. 75, 559 P.2d 195 (1977) (faint odor of marijuana detected by officer arresting defendant for speeding sufficient probable cause to search defendant's trunk); State v. Harrison, 111 Ariz. 508, 533 P.2d 1143 (1975) (where officer stopped car because rear tire was bouncing and smelled marijuana while examining tire, search of car was valid); *and* State v. Childers, 13 Or. 622, 511 P.2d 447 (1973) (when an officer smells marijuana in a vehicle, he has probable cause to believe a crime is being committed in his presence and probable cause to search for evidence of crime).

In other cases cited by the *Greenwood* court, probable cause to search was not based on marijuana odor alone. *See, e.g.*, United States v. Fortecha, 576 F.2d 601 (5th Cir. 1978); United States v. Garcia-Rodriguez, 558 F.2d 956 (9th Cir. 1977) (the detection of marijuana odor was accompanied by officers' observation of marijuana bricks in plain view); State v. Ballestros, 23

but held that "probable cause to search is established where, from surrounding circumstances, there exists at least a 'probability' that contraband substances are contained within the vehicle."[229] The court highlighted such circumstances in *Greenwood* as the officer's training in marijuana detection by odor, his recognition of that odor emanating from defendant's car, and the exigencies of the situation—where, had the officer left to get a search warrant, it would have been unlikely that the defendant and his car would have been in the lot when the officer returned.[230]

4. Searches Incident to Arrest

In *State v. Booker*[231] an officer, acting on a reliable informant's tip, approached defendant in a parking lot and told her of the information received and of the officer's right to search her purse for cocaine. Defendant refused to allow the search and resisted the officer, whereupon she was arrested for delaying an officer. Her purse was searched incident to that arrest.[232] The North Carolina Court of Appeals held that, where probable cause to arrest already existed, the officer was not compelled to place defendant formally under arrest before the search. Because of existing probable course, "the arrest had, for the purposes of constitutional justification, already taken place before the search had commenced."[233] This decision accords with that of the United States Supreme Court in *Peters v. United States*,[234] where an officer pursued a fleeing suspect, seized him by the collar, and searched him, finding burglar's tools. The personal search was upheld as incident to a valid arrest, probable cause to arrest and the physical apprehension of the defendant sufficing as announcement of arrest.[235]

Ariz. App. 211, 531 P.2d 1449, *cert. denied*, 423 U.S. 870 (1975) (officers' initial stop of van was justified by informant's tip that the car carried marijuana); United States v. Barron, 472 F.2d 1215 (9th Cir.), *cert. denied*, 413 U.S. 920 (1973) (drivers near border checkpoints obviously were attempting to evade officers). Yet the *Greenwood* court erroneously states that

> in most, if not all [of these latter cases], probable cause to search was grounded on the expertise and sound judgment of the investigating officer in assessing the probability that the odor detected [was] that of a contraband substance and that it [was] reasonable to assume that a search of the vehicle would reveal that substance.

47 N.C. App. at 741, 268 S.E.2d at 841. While the officers' expertise and judgment in detecting marijuana odor were certainly factors in these cases, neither such skills nor the odor itself provided sole probable cause to search. Indeed, in United States v. Strickland, 534 F.2d 1386 (10th Cir.), *cert. denied*, 429 U.S. 831 (1976), also cited in *Greenwood* as authority for marijuana odor as probable cause to search without a warrant, the court stated outright that odor *cannot* supply probable cause when an otherwise unjustified search is in progress. *Id.* at 1389.

229. 47 N.C. App. at 741, 268 S.E.2d at 841.

230. *Id.* at 742, 268 S.E.2d at 841-42.

231. 44 N.C. App. 492, 261 S.E.2d 215 (1980).

232. *Id.* at 492-93, 261 S.E.2d at 216. This act was suspect facially because a search incident to arrest may not precede the arrest nor serve as part of its justification. *See* Johnson v. United States, 333 U.S. 10, 16-17 (1948).

233. 44 N.C. App. at 493, 261 S.E.2d at 217 (quoting Peters v. New York, 392 U.S. 40, 67 (1968)).

234. 392 U.S. 40 (1968).

235. *Id.* at 67.

F. Informant's Identity

In *State v. Hardy*[236] the supreme court rejected a claim that G.S. 15A-978 requires the state to reveal the identity of an informant whose tip is used to establish probable cause in a warrantless arrest.[237] Defendant sought to suppress evidence seized after a warrantless arrest on the ground that there was no probable cause for the arrest. The court held that G.S. 15A-978 applies only to search warrants,[238] despite the plain language of subsection (b) which provides

> In any proceeding on a motion to suppress evidence . . . in which the truthfulness of the testimony presented to establish probable cause is contested and the testimony includes a report of information by an informant . . . the defendant is entitled to be informed of the informant's identity unless:
>
> (1) The evidence . . . was seized by authority of a search warrant or incident to an arrest with warrant; or
>
> (2) There is corroboration of the informant's existence. . . .[239]

This language seems to grant criminal defendants an absolute right to know an informant's identity except when either of the two exceptions applies. The Official Commentary reveals, however, that the legislature intended to restrict challenges to searches entered into with a search warrant.[240] In addition, subsection (c) provides that "[t]his section does not limit the right of a defendant to contest the truthfulness of testimony offered in support of a search made without a warrant."[241] The intent of this subsection, according to the Official Commentary, was "to make it clear that attacks upon the validity of probable cause for a search without a warrant are left to case law development."[242]

The court also found that defendant had no constitutional right to learn the identity of an informant at a probable cause hearing under *McCray v. Illinois*[243] and that the evidence in the record revealed probable cause for the arrest.[244] This holding is in line with past North Carolina decisions refusing to disclose an informant's identity even when the informant's tip is the only basis for the arrest.[245]

---

236. 299 N.C. 445, 263 S.E.2d 711 (1980).

237. *Id.* at 452, 263 S.E.2d at 716. For the other holding of *Hardy*, see notes 157-60 and accompanying text *supra*.

238. The court quoted from subsection (a) which refers to the "validity of a search warrant," N.C. GEN. STAT. § 15-978(a) (1978), and found that this was the only concern of the statute. 299 N.C. at 452, 263 S.E.2d at 716.

239. N.C. GEN. STAT. § 15A-978(b) (1978).

240. The Criminal Code Commission agreed with the Council of the American Law Institute's conclusion that " '[w]hen the witness (usually an officer) has given hearsay evidence by reporting what he has been told by an informant . . . the truth of the hearsay evidence so reported should not be open to challenge, as long as the officer's report of the hearsay evidence was an honest report.' " *Id.* § 15A-978, Official Commentary.

241. *Id.* § 15A-978(c).

242. *Id.* § 15A-978, Official Commentary.

243. 386 U.S. 300 (1967).

244. 299 N.C. at 452-53, 263 S.E.2d at 716-17.

245. *See, e.g.*, State v. Ketchie, 286 N.C. 387, 211 S.E.2d 207 (1975).

G. Defendant's Silence

In *State v. Lane*[246] the North Carolina Supreme Court ruled that a defendant's silence while in custody cannot be used to impeach his alibi given at trial. Even though defendant in *Lane* had not received his *Miranda* warnings, the court held that the use of his silence for impeachment purposes violated his privilege against self-incrimination.[247]

Defendant was charged with selling heroin to an undercover police officer. While the indictments were being read but before the *Miranda* warnings were given and interrogation began, defendant stated, "Hell, I sold heroin before, but I didn't sell heroin to this person."[248] No other statements were made. At trial defendant testified that he was out of town when he allegedly committed the crime. Other evidence corroborated his alibi. On cross-examination the assistant district attorney asked defendant if he had informed the police of this alibi.[249] Defendant objected to the questioning, but the court allowed the examination.[250]

Defendant argued that *Doyle v. Ohio*[251] prevented the State from impeaching him with his failure to tell his alibi to the police. In *Doyle* defendants were given their *Miranda* warnings when arrested and remained silent until trial. The United States Supreme Court held that when defendants were assured by the *Miranda* warnings that their silence would not be used against them, it would violate their right to remain silent to impeach them by questioning their silence.[252] Chief Justice Branch, writing for the North Carolina Supreme Court, rejected the argument that *Doyle* applied to the facts in *Lane*. The court reasoned that since defendant had not been advised of his *Miranda* rights he was not exercising his rights under the due process clause as applied in *Doyle*.[253]

The court recognized, however, that the right to remain silent attaches when a person is arrested.[254] The court then determined that defendant's silence did not amount to a prior inconsistent statement. Further, the court ruled that this error was prejudicial enough to warrant a new trial.[255] Since the cross-examination violated a constitutional right—defendant's privilege against self-incrimination—the State must show that it was harmless beyond a

246. 301 N.C. 382, 271 S.E.2d 273 (1980).
247. *Id.* at 384, 271 S.E.2d at 275.
248. *Id.* at 382, 271 S.E.2d at 274.
249. *Id.* at 382-83, 271 S.E.2d at 274.
250. *Id.* at 383, 271 S.E.2d at 274.
251. 426 U.S. 610 (1976).
252. *Id.* at 611.
253. 301 N.C. at 384, 271 S.E.2d at 275. In the same case, the North Carolina Court of Appeals applied *Doyle* to hold that the assistant district attorney's use of silence for impeachment purposes was unconstitutional. State v. Lane, 46 N.C. App. 501, 265 S.E.2d 493 (1980). The court held that while the *Miranda* warnings are an "easily recognizable signpost," *Doyle* should be extended to this case where the defendant was aware of his rights (because of previous arrests) and was relying on those rights (he stated at trial, "I wasn't going to make no statement"). *Id.* at 505-06, 265 S.E.2d at 496. *See also* note 259 *infra*.
254. 301 N.C. at 384, 271 S.E.2d at 275.
255. *Id.* at 387, 271 S.E.2d at 277.

reasonable doubt.[256] In this case, the State was trying to convince the jury that the alibi was an "after-the-fact creation," and since the alibi was crucial to the defendant's defense, the court found that it was likely that the impeachment "substantially contributed to his conviction."[257]

The court's recognition that the right to remain silent is guaranteed absent *Miranda* warnings is important, but by requiring the evidentiary test that the silence be unnatural,[258] the court diminished the significance of the case. The court was correct in noting that it may have been natural for the defendant to respond that he did not sell the drugs, but it should not be considered a possible relinquishment of his right to remain silent. A better approach would have been for the court to extend the *Doyle* holding to include in-custody silence even if *Miranda* warnings were not given.[259] Alternatively, the court could have adopted the view taken by the federal courts that silence at the time of arrest has a highly prejudicial effect but little probative value and therefore should not be admitted.[260] Only in cases where the defendant has waived his right of silence should courts analyze whether it was natural to mention a material circumstance in a prior statement.

In a second case, *State v. Haith*,[261] the North Carolina Court of Appeals

---

256. *Id.*

257. *Id.*

258. The *Lane* court said, "If the former statement fails to mention a material circumstance presently testified to, *which it would have beween natural to mention in the prior statement*, the prior statement is sufficiently inconsistent." *Id.* at 385, 271 S.E.2d at 275 (citing State v. Mack, 282 N.C. 334, 339-40, 193 S.E.2d 71, 75 (1975)). Thus, silence will be a prior inconsistent statement only if it is unnatural.

259. North Carolina courts have been reluctant to adopt this approach. In State v. Burnett, 39 N.C. App. 605, 251 S.E.2d 717, *cert. denied*, 297 N.C. 302, 254 S.E.2d 924 (1979), defendants were convicted of felonious larceny of photography equipment. While they were in custody, absent *Miranda* warnings, they remained silent. At trial they claimed they bought the equipment from a third party. The court of appeals ruled that the silence was admissible for impeachment purposes. In limiting *Doyle* to cases in which *Miranda* warnings were given, the court reasoned that since defendants had no assurance of their right to remain silent, it was not "unreasonable or unfair to expect" defendants to inform the authorities of the third party. *Id.* at 609, 251 S.E.2d at 720. Also, while the lower court in *Lane* applied *Doyle*, *see* note 253 *supra*, the supreme court rejected it.

The right to remain silent, however, is conferred by the Constitution, not by the *Miranda* warnings. *See* Jenkins v. Anderson, 100 S. Ct. 2124, 2134 n.1 (1980) (Marshall, J., dissenting). Therefore, if a defendant was interrogated and remained silent without being given his *Miranda* warnings, his silence should be inadmissible. While recognizing the possible distinction in *Doyle*, Justice Marshall, dissenting in *Jenkins*, felt that the highly prejudicial effect on defendant's privilege against self-incrimination compared with the low probative value of the evidence mandated that defendant's silence be excluded. *Id.*

260. The United States Supreme Court in United States v. Hale, 422 U.S. 171 (1975), ruled that "silence is so ambiguous that it is of little probative value." *Id.* at 176. Many factors may induce the silence, including *Miranda* warnings. *Id.* at 177. As a result, the court exercised its supervisory power over the federal courts and held that a defendant's post-arrest silence was not admissible. *Id.* at 181.

In State v. Love, 296 N.C. 194, 250 S.E.2d 220 (1978), the North Carolina Supreme Court appeared to be adopting the *Hale* approach. In holding that silence while in custody cannot be used for impeachment, the court equated a prior case which it deemed to be controlling, State v. Williams, 288 N.C. 680, 220 S.E.2d 558 (1975), with *Hale*. 296 N.C. at 202, 250 S.E.2d at 226. But in other cases, silence has been held admissible. *E.g.*, State v. Burnett, 39 N.C. App. 605, 251 S.E.2d 717, *cert. denied*, 297 N.C. 302, 254 S.E.2d 924 (1979).

261. 48 N.C. App. 319, 269 S.E.2d 205 (1980).

found that defendant's silence was admissible for impeachment purposes where defendant made a statement[262] while in custody with regard to the murder of his sister's boyfriend but did not state that he killed the deceased in self-defense. The court stated that the recent United States Supreme Court decision in *Jenkins v. Anderson*[263] was controlling.[264] In *Jenkins*, defendant contended that he killed the deceased in self-defense. On cross-examination he was asked why he waited two weeks before surrendering to authorities. The prosecutor, in his closing statement, implied that defendant would have spoken out if he had killed in self-defense.[265] The Court held that "[e]ach jurisdiction may formulate its own rules of evidence to determine when prior silence is so inconsistent with present statements that impeachment by reference to such silence is probative."[266] In this case "no government action induced petitioner to remain silent before arrest;" therefore, there was no fundamental unfairness.[267]

The *Haith* court applied *Jenkins* to the facts and held that the admissibility of defendant's silence did not violate the North Carolina Constitution.[268] Furthermore, the court noted that defendant had given up his right to remain silent since he had made a statement after being informed of his rights.[269]

The court was correct in ruling that defendant had given up his right to remain silent. As a result, however, it should have ruled on the admissibility of defendant's silence using typical evidentiary standards.[270] The court's reliance on *Jenkins* however, is misplaced.[271] Unlike the defendant in *Jenkins*, defendant in *Haith* was in custody, had been read his rights, and gave a statement which he tried to change on the stand.[272] *Jenkins*, on the other hand, dealt with pre-arrest silence where the silence was inconsistent with later testimony.[273]

---

262. Defendant made the following statement:

> Johnny came from around the corner saying he was going to get me. I then went into the house and got a .22 caliber pistol and came back out. He, Johnny, kept on running his mouth about he was going to get me, and he took off running and I shot at him one time and that was it. I then went back into the house. This statement is of my own free will and I have been advised of my rights, and I understand them. No pressure or coercion of any kind has been used against me.

Id. at 327, 269 S.E.2d at 210.

263. 100 S. Ct. 2124 (1980).

264. 48 N.C. App. at 328, 269 S.E.2d at 211.

265. 100 S. Ct. at 2125.

266. *Id.* at 2129. The holding in *Doyle*, where defendant was informed of his *Miranda* rights, is an exception. *Id.* at 2130.

267. *Id.* at 2130.

268. 48 N.C. App. at 328, 269 S.E.2d at 211.

269. *Id.*

270. Where a defendant has omitted a material circumstance in a prior statement, to determine if it is inconsistent, the court must determine if it would have been natural to mention it. *See* note 258 and accompanying text *supra*.

271. On the other hand, the court in *Lane* noted *Jenkins* but correctly stated that it did not apply. *Jenkins* dealt with pre-arrest silence, while *Lane* was a post-arrest case and within the "ambit of fifth amendment protections." 301 N.C. at 385, 271 S.E.2d at 275.

272. 48 N.C. App. at 328, 269 S.E.2d at 211.

273. 100 S. Ct. at 2130. The court should have relied on Anderson v. Charles, 447 U.S. 404

H. Suppression Hearing Statements

In *State v. Bracey*,[274] defendant moved to suppress a confession, claiming that he was on PCP when he made the statement. The motion was denied, and at trial defendant was asked, over his objections, if he used PCP. The North Carolina Court of Appeals ruled that this was a proper line of questioning.[275]

Defendant argued that *Simmons v. United States*[276] should control.[277] In that case defendant moved to suppress a suitcase that he claimed was the fruit of an unlawful search. The motion was denied, and defendant's statements of ownership made at the suppression hearing were introduced into evidence. The United States Supreme Court held this to be error, stating that a defendant should not have to give up his fifth amendment right against self-incrimination to assert his fourth amendment right against illegal searches and seizures.[278] In *Bracey*, defendant argued that if the state has the right to cross-examine him concerning matters that he testified to at the suppression hearing, he may be forced to give up his fifth amendment right against self-incrimination to suppress the confession.[279]

The court, however, distinguished *Simmons* on several grounds. First, in *Simmons* the statements were used directly against the defendant. Defendant in *Bracey*, on the other hand, was not questioned about his testimony at the suppression hearing, but only was asked whether he used PCP.[280] Also, the court stated that the information may have come from another source and that it should not be incompetent simply because defendant testified on a motion to suppress.[281]

I. Other Cases

The supreme court and the court of appeals made several other noteworthy decisions in the area of criminal procedure in 1980, most of them related to

---

(1980). *Charles* dealt with a situation similar to *Haith*, where defendant added a fact to his statement at trial which he did not include in his statement while under custodial interrogation. The court held that *Doyle* did not apply. "Each of two inconsistent descriptions of events may be said to involve 'silence' insofar as it omits facts included in the other version. But *Doyle* does not require any such formalistic understanding of 'silence,' and we find no reason to adopt such a view in this case." *Id.* at 409.

274. 48 N.C. App. 603, 269 S.E.2d 289 (1980).

275. *Id.* at 605-06, 269 S.E.2d at 291.

276. 390 U.S. 377 (1968).

277. 48 N.C. App. at 605, 269 S.E.2d at 290.

278. 390 U.S. at 394.

279. 48 N.C. App. at 605, 269 S.E.2d at 291.

280. *Id.* at 605-06, 269 S.E.2d at 291.

281. *Id.* at 606, 269 S.E.2d at 291.

trial practices.[282]

MARTHA H. HARRIS
JOAN AMES MAGAT
THOMAS KIERAN MAHER
JAN ALLEN MARKS
GREGORY M. MARTIN
JONATHAN DREW SASSER

282. The North Carolina Supreme Court held in State v. Avery, 299 N.C. 126, 261 S.E.2d 803 (1980), that jurors who answered "I don't believe I would" and "I don't think so" when asked whether they could vote to impose the death penalty could be excluded for cause. In State v. Powell, 299 N.C. 95, 261 S.E.2d 114 (1980), the supreme court held that in determining whether to grant defendant's motion for directed verdict, the trial court need not determine "that the evidence excludes every reasonable hypothesis of innocence," *Id.* at 101, 261 S.E.2d at 119. In State v. Goode, 300 N.C. 726, 268 S.E.2d 82 (1980), the supreme court held that it was an abuse of discretion for the trial judge to deny defense counsel's request for a recess at the close of the state's evidence to determine whether defendant should testify. In State v. Leonard, 300 N.C. 223, 266 S.E.2d 631 (1980), the supreme court held that the State may offer defendant's statement without making a preliminary examination into his mental competence if the statement was not made in response to custodial interrogation. In State v. Cole, 46 N.C. App. 592, 265 S.E.2d 507 (1980), the court of appeals held that police need a warrant to search a jacket found in the trunk of a car.

VII. EVIDENCE

A. Impeachment

1. Withholding Information

Chavis v. North Carolina[1] has generated much attention in state and national media in the last few years. After a series of appeals and collateral attacks in state and federal courts,[2] the Fourth Circuit Court of Appeals reversed the convictions of the "Wilmington 10"[3] in a habeas corpus action because the prosecutor withheld documents from the defense suitable for impeaching key state witnesses, thus violating defendants' constitutional right to confront the witnesses against them.[4]

On February 6, 1971, as the culmination of weeks of racial conflict, Mike's Grocery in Wilmington, N.C. was firebombed, and fire and police personnel were fired upon as they attempted to extinguish the blaze. Defendants were charged with, and convicted of, felonious burning and conspiracy to assault emergency personnel.[5]

The testimony of Allen Hall, directly incriminating defendants, was crucial to the state's case. Yet Hall's testimony was subject to attack on several grounds, most significant of which were inconsistencies between his prior statements and testimony at trial,[6] and potential bias because of special treatment accorded him by the prosecution.[7] Hall gave a short statement to police on May 30, 1971, and gave a second, more complete statement on February 18, 1971, after his conviction for participation in these crimes.[8] These two statements were furnished by the prosecutor to the defense in response to a motion to produce any statements made by potential witnesses. When he fur-

---

1. 637 F.2d 213 (4th Cir. 1980).

2. After the trial in Wilmington district court and a post-conviction hearing, defendants' convictions were affirmed in State v. Chavis, 24 N.C. App. 148, 203, 210 S.E.2d 555, 589 (1974), and certiorari was denied by the North Carolina and United States Supreme Courts. 287 N.C. 261, 214 S.E.2d 434 (1975) (appeal dismissed); 423 U.S. 1080 (1975). Judge Dupree of the Federal District Court for the Eastern District of North Carolina then reviewed the case and denied habeas corpus relief, from which this appeal to the Fourth Circuit was taken. 637 F.2d at 213-14.

3. The Wilmington 10 included defendants Benjamin F. Chavis, Connie Tindal, Willie Earl Vereen, Marvin Patrick, Anne Shepard Turner, Joe Wright, Wayne Moore, Reginald Epps, Jerry Jacobs, and James McKoy. 637 F.2d at 214 n.1.

4. Defense counsel presented many contentions as to why the Wilmington 10's constitutional rights were violated, many of which had a sharply contested factual basis. The court, however, based its decision only on those issues for which the facts were undisputed. *Id.* at 215. Issues excluded from consideration by the court included: the prosecutor's omission of fourteen names from the pre-trial witness list presented to defense counsel; the prosecution's use of testimony which it knew or had reason to know was perjured; the prosecution's pretrial exhibition of photographs of petitioners to key prosecution witnesses for identification purposes; the trial court's refusal to permit inquiry into the jury's racial attitudes and bias, and its refusal to conduct the *voir dire* examination of each potential juror out of the presence of jurors already chosen and other prospective jurors. *Id.*

5. *Id.* at 213.

6. *Id.* at 217-19.

7. *Id.* at 220-22.

8. *Id.* at 217. This statement was reduced to nine typewritten pages by the prosecutor, and Hall signed it under oath. *Id.*

nished these statements, the prosecutor represented that Hall had made no other statements. On cross-examination, however, Hall, in an attempt to explain away inconsistencies between his prior statements and his direct examination, referred to an "amended" version of his statement of February 18.[9] Defense counsel made five separate motions for production of this "amended" statement, and was opposed by the prosecutor, who stated that the corrections were made by him, for his use only, and part of work product.[10] These corrections were made during a series of interviews between Hall and the prosecutor. All motions for production were denied by the trial court.[11] It appeared later that many of Hall's claimed "amendments" did not exist, thus there was fertile ground for impeaching Hall if the defense could obtain the "amended" statements.[12]

Brady v. Maryland,[13] as refined and expanded upon in *United States v. Agurs*,[14] states the basic rule that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."[15] *Agurs* explains the test for materiality. If the material was specifically requested by the defense, and might have affected the outcome of the trial, its nonproduction is a denial of due process.[16] If the request was merely a general request for exculpatory documents, a stricter standard of materiality is mandated.[17] The *Chavis* court found that the "amended" statement had been specifically requested six times,[18] and that any work product privilege was waived by the prosecutor when his witness testified as to the subject matter covered by the privilege.[19]

The second document at issue was a psychiatric report prepared on Hall at Cherry Hospital in Goldsboro in October 1971 to determine his competency

---

9. *Id.* at 218.

10. *Id.* at 218 n.9.

11. *Id.* at 218-19. The trial court apparently agreed with the prosecutor's work product claim.

12. *Id.* at 219. One such inconsistency was the failure of Hall to place Mitchell, another witness, at the scene of the crime, but then testifying that Mitchell was present. Other inconsistencies included Chavis' supposed instructions on throwing firebombs, and Hall's whereabouts on February 6. *Id.*

13. 373 U.S. 83 (1963).

14. 427 U.S. 97 (1976).

15. 373 U.S. at 87.

16. 427 U.S. at 104.

17. *Id.* The court did not elaborate on what the stricter standard of materiality entailed.

18. 637 F.2d at 223.

19. *Id.* at 224. The *Chavis* court quoted United States v. Nobles, 422 U.S. 225 (1975):

> The privilege derived from the work product doctrine is not absolute. Like other qualified privileges, it may be waived. . . . Respondent, by electing to present the investigator as a witness, waived the privilege with respect to matters covered in his testimony. Respondent can no more advance the work product doctrine to sustain a unilateral testimonial use of work product materials than he could elect to testify in his own behalf and thereafter assert his Fifth Amendment privilege to resist cross-examination on matters reasonably related to those brought out in direct examination.

422 U.S. at 239-40 (citations and footnotes omitted).

to stand trial.[20] The prosecutor had failed to produce this report in response to a pretrial motion to produce all "scientific or medical, psychiatric or other reports which might tend to reflect on the credibility or competence of any of the prospective witnesses for the State."[21] Applying the *Agurs* test to the psychiatric report, the court concluded that it also had been specifically requested and that its contents clearly might have affected the jury's decision.[22]

A third error which the court found sufficiently prejudicial to require reversal was the refusal of the trial court to permit cross-examination of two witnesses, Allen Hall and Jerome Mitchell, on the special favorable treatment accorded them by the state in return for their testimony.[23] This special treatment, as found by the post-conviction court, consisted of lodging in hotel rooms and a cottage at Carolina Beach during the trial, rather than prison incarceration permitting small stakes card games with deputies, using money supplied by the deputies; concealing an attack by Hall on one of the deputies, transporting Hall's girlfriend from Asheville to Carolina Beach and giving a minibike to Mitchell.[24]

The court's holding that defendants' sixth amendment right to confrontation had been violated was grounded on the Supreme Court's decision in *Davis v. Alaska*.[25] In *Davis* the Court held that a defendant must be allowed to impeach a prosecution witness for bias because "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."[26] *Davis* recognized several limitations on these rights, including the witness' constitutional protection against self-incrimination or an attempt to harass, annoy, or humiliate the witness.[27] The *Chavis* court found none of these conditions to be present.[28] This appears consistent with accepted North Carolina law that the bias of a witness toward either parties or cause may be shown by influence, contributions, payment for testimony, and that cross-examination on bias should be as broad as possible.[29]

The *Chavis* decision is a clear-cut application of the rules set forth in *Davis* and *Brady v. Maryland*. It is puzzling that the case could have gone through so many reviews without reversal on these grounds. The North Carolina Court of Appeals did consider the concealment of Hall's amended statement and the limitation on cross-examination.[30] The court of appeals

20. 637 F.2d at 219-20.

21. *Id.* at 219-20. The report stated that Hall was a "borderline defective" and "[a]s to the charge of arson of a grocery store, he states that he did not participate in this, but he was present on the scene when the store was burned." *Id.* at 19.

22. *Id.* at 224. For the relevant portions of the pyschiatric report, see note 21 *supra*.

23. 637 F.2d at 225-26.

24. *Id.* at 221-22 & n.13.

25. 415 U.S. 308 (1974). *See also* Brady v. Maryland, 373 U.S. 83 (1963).

26. *Id.* at 316-17 (citing Green v. McElroy, 360 U.S. 474, 496 (1959)).

27. *Id.* at 320 (quoting Alford v. United States, 282 U.S. 687, 694 (1931)).

28. 637 F.2d at 226.

29. 1 D. STANSBURY, NORTH CAROLINA EVIDENCE § 45 (H. Brandis rev. 1973).

30. 24 N.C. App. 148, 210 S.E.2d 555 (1974).

believed that the answers of Hall to defense questions on his treatment by the prosecutor were properly excluded because they did not disclose bias and that exclusion was necessary to protect the witness.[31] The court at this point was only considering the housing provided Hall during the trial, and not other inducements which the trial court also excluded from questioning.[32] The Fourth Circuit chose to review a wider range of prosecutorial activities.

The court of appeals also considered the application of the *Brady* and *Davis* rules, as applied by the North Carolina Supreme Court in *State v. Gaines*,[33] to the concealment of the amended statement. The court held that it was not materially favorable to the defense, therefore its concealment was not prejudicial to defendants.[34] The statements were held nonmaterial for two reasons: (1) the amendments were not complete statements or sentences, and were "obviously meaningless to anyone" except the prosecutor;[35] and (2) Hall could not have known during the interviews what the prosecutor was writing, and so he could not have adopted the statements as his own.[36] However, it appears that Hall later adopted these statements in his testimony at trial, yet the court ignored the effect of this action. Hall was allowed to wiggle out of past inconsistencies by alleging the existence of the amended statement, which the defense had no way of disproving since the trial judge denied them access to the statements. The disparate application of *Brady* is apparently due to the Fourth Circuit's belief that nondisclosure of the document limited the impeachment of a crucial prosecution witness, thus constituting prosecutorial suppression of a material document favorable to the defense.

2. Impeaching the Defendant

Two North Carolina Supreme Court cases re-examined North Carolina's rule on impeachment of a defendant through questioning about prior acts of misconduct. The majority of jurisdictions limit this type of questioning to acts which have some relation to the character of the defendant for truth and veracity.[37] In North Carolina, however, "[a]ll kinds of disparaging facts may be elicited,"[38] subject only to four limitations: (1) the sound discretion of the trial judge; (2) the prohibition against questions asked about mere indictments or charges; (3) the requirement that the questioner be bound by the witness' answer; and (4) the mandate that questions be asked in good faith.[39]

---

31. *Id.* at 195, 210 S.E.2d at 583-84.

32. *Id.* at 194, 210 S.E.2d at 583.

33. 283 N.C. 33, 194 S.E.2d 839 (1973).

34. 24 N.C. App. at 183-84, 210 S.E.2d at 577-78.

35. *Id.*

36. *Id.* at 183-84, 210 S.E.2d at 578.

37. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 42 (2d ed. E. Cleary 1972). *See, e.g.* FED. R. EVID. 608(b). For a list of state jurisdictions adhering to this view, *see* Annot., 36 A.L.R. Fed. 564 (1978).

38. 1 D. STANSBURY, *supra* note 29, § 111, at 341.

39. State v. Phillips, 240 N.C. 516, 82 S.E.2d 762 (1954). All jurisdictions allow questioning about prior convictions, but the North Carolina rule of questioning about prior misconduct is not limited to misconduct which has been the subject of a conviction, and a witness may be asked whether he actually *committed* a crime. 1 D. STANSBURY, *supra* note 29, § 112.

In *State v. Leonard*[40] defendant was charged with the murder of her sister.[41] The trial court preliminarily ruled that questioning on prior homicides committed by defendant would be prohibited if she had been acquitted by reason of insanity. The prosecutor had a Police Information Network (PIN) report showing that defendant had been acquitted by reason of insanity in a prior homicide in Florida in 1973. Nevertheless, on cross-examination, the prosecutor questioned defendant about commission of the prior homicide[42] despite defense objections and requests for PIN reports. Four days later the trial defense counsel and the court were told that defendant had been found not guilty by reason of insanity in the prior homicide.[43] The court sustained the prosecutor's questioning under the theory that he may ask if defendant has committed an act of prior misconduct, but not whether he was accused, arrested or indicted. The court viewed the prior homicide as misconduct that would be a proper subject of good faith cross-examination.[44] Despite defendant's contention that the prosecutor concealed the exculpatory PIN report from the trial court and defense counsel, the appellate court stated that the report provided a sufficient basis for the prosecutor to question defendant about the prior killing. The court declined to extend the "good faith" rule to the prosecutor's failure to disclose the PIN report for three reasons. First, the prosecutor still could have questioned her about the Florida homicide as long as he did not ask if she had been arrested or indicted for it. Second, the only value the report had to defendant was to corroborate her testimony that she was never tried for the offenses because of her insanity. However, "[h]er state-

40. 300 N.C. 223, 266 S.E.2d 631 (1980).

In State v. Haywood, 295 N.C. 709, 249 S.E.2d 429 (1978), the court announced that North Carolina will admit declarations against penal interest as a valid exception to the hearsay rule. Codefendants were charged with assault in *Haywood*, and one defendant sought to have his codefendant's otherwise inadmissible confession admitted as a declaration against penal interest. Then Chief Justice Sharp, writing for the court, overruled many prior decisions in adopting the exception, but held that it would not apply to the present facts because exclusion was deemed not to be prejudicial to defendant. Furthermore, the trial judge relied on long-standing precedent in making his ruling. *Id.* at 721, 249 S.E.2d at 437.

State v. Honeycutt, 46 N.C. App. 588, 265 S.E.2d 438 (1980), seeks to clarify that the rule announced in *Haywood* is to be prospective only. The court in *Honeycutt* concluded that the changed rule was a mere change in evidentiary rules, affecting no vested right of defendant, thus did not rise to the magnitude of a constitutional reform which would mandate retroactivity. To give retroactive effect to a change in such a long-standing rule "could easily disrupt the orderly administration of our criminal law." *Id.* at 591, 265 S.E.2d at 440 (quoting the Attorney General). In declaring the prospective application of *Haywood*, the *Honeycutt* court apparently reached independently the same decision reached by then Chief Justice Sharp in *Haywood* when she declined to apply the changed rule to the facts of *Haywood*, but stated that the new rule would apply in cases thereafter. 295 N.C. at 721, 249 S.E.2d at 437. For a general discussion of *Haywood*, see Note, 15 WAKE FOREST L. REV. 375 (1979).

41. 300 N.C. at 225, 266 S.E.2d at 633.

42. *Id.* at 231, 266 S.E.2d at 637.

43. *Id.* at 237, 266 S.E.2d at 640. There was also a question concerning defendant's sanity in the present action. Defendant filed a pretrial motion suggesting her incapacity to proceed to trial, but she was certified competent after observation at Dorothea Dix Hospital. *Id.* at 226, 266 S.E.2d at 633. At trial, she entered a plea of not guilty by reason of insanity. *Id.* On appeal she urged that it was error for the trial court to deny her motion for a directed verdict of not guilty by reason of insanity, but the court rejected this, holding that she had failed to overcome the presumption of sanity. *Id.* at 234, 266 S.E.2d at 638.

44. *Id.* at 232, 240, 266 S.E.2d at 637, 641.

ment was not challenged in any way and there is no reason to believe that the jury did not accept it at face value."[45] Finally, the trial judge himself had not censured the prosecutor for failing to disclose the PIN report.[46]

There was a vigorous dissent, written by Justice Copeland, and joined by Justices Exum and Carlton, disputing the majority's analysis on two points. First, Copeland argued that this was not misconduct, since killing is not always wrongful. "Under our law and the mores of our society, killing is not categorically wrong. . . . When a question is put to a witness about some prior act for the purpose of impeaching his credibility, and the question does not show by its phrasing that the act was wrongful, an objection to it should be sustained."[47] The conduct must be morally or legally wrong to impeach the character of the defendant, but "[a]n insane person cannot be held accountable for his actions because, by definition, he knows not the difference between right and wrong."[48] Second, Copeland argued that in withholding this information from the court and defense counsel the prosecutor deliberately disregarded an instruction from the trial judge that no cross-examination on a prior killing would be allowed if there had been an acquittal by reason of insanity.[49] The prosecutor directly caused an error which prejudiced defendant because he incorrectly put before the jury information about a prior killing for which defendant was not legally responsible.[50]

Another case in which the court split on the use of questions about prior acts of misconduct to impeach a defendant is *State v. Royal*.[51] In *Royal* defendant was charged with armed robbery, burglary, and assault with intent to kill.[52] At trial, defendant was asked by the prosecutor whether he had, prior to the present charge, "kidnapped and robbed Mr. Robert Knowles of $1,125.00 on 24 May, 1979."[53] The prosecutor knew before questioning that

45. *Id.* at 241, 266 S.E.2d at 642.

46. *Id.* at 241-42, 266 S.E.2d at 642.

47. *Id.* at 243, 266 S.E.2d at 643 (Copeland, J., dissenting) (quoting State v. Purcell, 296 N.C. 728, 733, 252 S.E.2d 772, 775 (1979) (Exum, J., dissenting)). Justice Exum wrote a similar dissent in State v. Ross, 295 N.C. 488, 246 S.E.2d 780 (1978), which is discussed in *Survey of Developments in North Carolina Law, 1978—Evidence*, 57 N.C.L. REV. 1071-73 (1978).

48. 300 N.C. at 245, 266 S.E.2d at 644.

49. *Id.* at 245-46, 266 S.E.2d at 644-45.

50. *Id.* at 246, 266 S.E.2d at 645.

51. 300 N.C. at 515, 268 S.E.2d at 517 (1980).

52. *Id.* at 517, 268 S.E.2d at 520. There was also an issue whether a photographic identification of defendant by his victims was unduly suggestive. The court found no merit to this contention, since the victims immediately identified defendant's picture from a group of five photographs. *Id.* at 521, 268 S.E.2d at 522.

53. *Id.* at 529, 268 S.E.2d at 526. Additionally, the court had to consider whether certain leading questions by the prosecutor to his witness were reversible error. The court stated that the use of leading questions was within the discretion of the trial judge and would only be disturbed on appeal when there was an abuse of discretion. *Id.* at 526, 268 S.E.2d at 525. The factors controlling this discretion are set out in State v. Greene, 285 N.C. 482, 206 S.E.2d 229 (1974), which allowed leading questions when the witness is (1) hostile or unwilling to testify, (2) having difficulty understanding the questions, (3) testifying on subject matter of a delicate nature, (4) contradicting prior witnesses, (5) at the end of his memory, (6) giving preliminary testimony, (7) straying from the subject matter, or (8) is unlikely to testify truthfully without the use of questions best calculated to elicit the truth. *Id.* at 492-93, 206 S.E.2d at 236. After reviewing the

the prior charge had been dismissed for lack of probable cause.[54] The court held that this questioning was permissible to show prior acts of degrading conduct, and did not discuss whether the questioning was in good faith. Justice Exum, joined by Justice Carlton, dissented on the grounds that the questioning was not in good faith,[55] stating that although one may ask about prior acts of misconduct, a recent decision of the court, *State v. Williams*,[56] prohibited questions about mere charges that have not resulted in convictions. The prosecutor's knowledge that the charges had been dismissed for lack of probable cause indicates that he "must have been motivated by his desire to put before the jury the fact that defendant had been charged with an offense similar to the one for which he was being tried."[57] Thus, the question was not asked in good faith.

Justice Exum has consistently argued[58] against permitting cross-examination about prior charges of which the defendant was not convicted because of

---

Greene factors, the court concluded there had been no abuse of discretion. 300 N.C. at 526, 268 S.E.2d at 525.

54. *Id.* at 532, 268 S.E.2d at 528.

55. *Id.* at 532, 268 S.E.2d at 528. The questioning, at the very end of defendant's testimony, was as follows:

> Q. Did you not on the 24th of May, 1979, kidnap and rob one Robert Knowles of $1,125.00?
>
> MR. TAYLOR: Objection.
>
> COURT: Overruled.
>
> A. No, sir.
>
> REDIRECT EXAMINATION (By Mr. Taylor).
>
> I was charged with kidnapping and robbing Mr. Knowles. Mr. Knowles testified under oath that he could not identify me as the man who robbed him. He did testify to that and no probable cause was found in the District Court of Wayne County. The charges were dismissed. Those charges were brought against me after I was arrested on these charges.
>
> RECROSS EXAMINATION (By Mr. Jacobs).
>
> Mr. Knowles did testify that I looked like the man but he wasn't a hundred percent sure. He told the court that. He said he wouldn't stake his like on it. He didn't say I looked like the man. He said, the officer, Officer Stan Flowers brought him some photographs and said I had been charged with something that happened, was a suspect and he asked him to look at the photographs to recognize me. No, sir, he didn't say that I look like him.

Id. at 531, 268 S.E.2d at 528.

56. State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971). *Williams* was the case where North Carolina, with then Chief Justice Bobbitt writing the opinion, finally joined the majority of state jurisdictions in prohibiting questioning as to whether a defendant has been arrested, charged, or indicted for a particular crime. *Id.* at 672, 185 S.E.2d at 180. *Williams* left unchanged the rule that a defendant may be questioned on whether he has committed a certain act, if the question is otherwise correct. *Id.* at 675, 185 S.E.2d at 181.

57. 300 N.C. at 532, 268 S.E.2d at 528.

58. *See* State v. Leonard, 300 N.C. 225, 266 S.E.2d 631 (1980) (Copeland, J., dissenting, joined by Exum and Carlton, JJ.), discussed in notes 40-50 and accompanying text *supra*; State v. Herbin, 298 N.C. 441, 259 S.E.2d 263 (1979) (Exum, J., concurring); State v. Ross, 295 N.C. 488, 246 S.E.2d 780 (1978) (Exum, J., dissenting), discussed in note 47 *supra*.

Exum wrote in *Herbin*:

> When one has been tried for and acquitted of a particular crime that should end the matter for all purposes. A person so acquitted should not be required to defend himself against the charge in subsequent criminal proceedings in which he may become involved.

298 N.C. at 453, 259 S.E.2d at 271.

its highly prejudicial effect. "The jury reasons that a man who has previously been implicated in criminal activity is more likely than not to be guilty this time."[59]

Although the *Leonard* and *Royal* dissents concern the same subject matter, they are different in their approach. While in *Leonard* it was conceded that the conduct, homicide, had occurred, the question was whether such conduct was wrongful because of defendant's mental illness at the time. In *Royal* the issue was whether defendant ever committed the misconduct at all.[60] The information possessed by the prosecutors in both cases should have been sufficient to challenge the good faith basis of the questioning, yet the court found it was not. Thus, the combination of North Carolina's liberal impeachment rules about prior acts of misconduct[61] and the loose interpretation of the good faith rule[62] yields results which quite often are prejudicial to a defendant's right to a fair trial.

3. Impeaching the State's Witness[63]

Two North Carolina cases, *State v. Lovette*[64] and *State v. Moore*[65] reaffirmed the rule that a party may not impeach his own witness absent genuine surprise.[66] These cases illustrate why there is increasing dissatisfaction with

59. 300 N.C. at 533, 268 S.E.2d at 529.

60. The Fourth Circuit appears to have accepted Justice Exum's reasoning that questioning on prior misconduct cannot be in good faith when there is little or no evidence that the defendant has committed the act. The court reversed the North Carolina Supreme Court in the case of Watkins v. Foster, 570 F.2d 501 (4th Cir. 1978). At trial Foster was questioned about prior burglaries, even though the state had only minimal evidence that Foster had ever committed them. Even though Foster denied commission of the burglaries, the court of appeals believed the questions to be insinuating, detrimental to defendant's credibility, and not asked in good faith. For a discussion of both the appellate and state court decisions in *Watkins*, see *Survey of Recent Developments in North Carolina Law, 1978—Evidence*, 57 N.C.L. REV. 1074-77 (1979).

61. See notes 38 and 39 and accompanying text, *supra*.

62. See notes 45 and 46 and accompanying text, *supra*.

63. In State v. Austin, 299 N.C. 537, 263 S.E.2d 574 (1980), the supreme court rejected defendant's claim that N.C.R CIV. P. 43(b) which allows a party to impeach his own witness, should apply to criminal cases. The court extended the reasoning in several cases which held that the district attorney could not impeach state witnesses in a criminal case to defendants in criminal cases. *See* State v. Pope, 287 N.C. 505, 215 S.E.2d 139 (1975); State v. Anderson, 283 N.C. 218, 195 S.E.2d 561 (1973).

In *Austin*, defendant was charged with first degree burglary. 299 N.C. at 537, 263 S.E.2d at 574. Defendant sought to call an eight year old daughter of the family that lived in the house he was accused of trying to burglarize. Defendant had some information that the daughter had made statements to several persons that "there was no one in the house that night." The trial court refused to declare the child a hostile witness and refused to allow defendant to impeach the child by prior inconsistent statements. *Id.* at 538, 263 S.E.2d at 574-75. Because the defendant was not "suprised" by the girl's testimony, he failed to qualify for any exception to the anti-impeachment rule. 299 N.C. at 540, 263 S.E.2d at 575. *See generally* C. MCCORMICK, *supra* note 37, § 38 (the rule against showing prior statements of one's own witness, to aid in evaluating his testimony, is criticized as a serious obstruction to the ascertainment of truth).

64. 299 N.C. 642, 263 S.E.2d 751 (1980).

65. 300 N.C. 694, 268 S.E.2d 196 (1980).

66. The common law rule was that a party calling a witness vouched for his credibility, thus could not impeach the witness' testimony. C. MCCORMICK, *supra* note 37, § 38. Two exceptions to this rule are if the subject matter of the witness' testimony is a surprise to the calling party, and if the testimony is positively harmful to the calling party's theory of the case. *Id.* North Carolina ascribes to this view, requiring that a voir dire be held to determine whether the prosecutor has

that rule.[67]

In *Lovette*, a murder trial, the prosecutor called Clifford Johnson to the stand, who testified that he was with defendant after the murder took place but that defendant did not discuss the murder with him. The prosecutor claimed surprise, and moved to declare Johnson a hostile witness so that he might impeach him.[68] The North Carolina Supreme Court reversed defendant's conviction, holding that the prosecutor was not genuinely surprised, because he knew or had reason to know Johnson intended to repudiate his prior statements by his present testimony.[69] An investigating officer had stated on *voir dire* that Johnson informed him three weeks after giving his pretrial statement that he did not want to testify to what he had stated, and the district attorney learned of Johnson's reservations the following day in a meeting with the officer.[70]

In *State v. Moore*[71] the supreme court ruled that when a prosecutor knows beforehand that his witness intends to testify differently from her pretrial statements, he cannot impeach her. Other witnesses may not be used to impeach her testimony through statements made by her to them, under the guise of corroborating her testimony, when their testimony is not independently admissible.[72] The court followed earlier precedents in ruling that the prosecutor cannot impeach his own witness when there is no genuine surprise, and in this case no surprise was shown to exist at the *voir dire*.[73]

Most commentators no longer see any justification for a rule limiting impeachment of one's own witness.[74] This view was recognized by the federal

---

been genuinely surprised or misled by the testimony and if the testimony is positively harmful to his case. Both elements must be shown before he will be allowed to impeach his own witness' credibility. State v. Pope, 287 N.C. 505, 512-13, 215 S.E.2d 139, 144-45 (1975). *Pope* held that despite a witness' testimony, he remains the witness of the party calling him, and that neither surprise nor positive harm will automatically trigger the exception to the general rule. *Id.* at 512-13, 215 S.E.2d at 145. When the prosecutor, before the witness is called, knows or has reason to know the testimony will not be as he expects, there is no surprise, and the prosecutor will not be allowed to impeach the witness. *Id.* at 514, 215 S.E.2d at 145. *See* 1 D. STANSBURY, *supra* note 29, § 40.

67. *See* note 74 *infra*.

68. 299 N.C. at 645, 263 S.E.2d at 754.

69. *Id.* at 649, 263 S.E.2d at 756. The court followed the ruling of the *Pope* case, note 68 *supra*.

70. 299 N.C. at 649, 263 S.E.2d at 756. Johnson stated to Sink that his pretrial statement was true, "but that he did not want to testify due to the fact that it might get the three people some time and he did not want to be responsible for that." *Id.* Additionally, the court found that the evidence on cross-examination was incompetent anyway, since the judge had not limited consideration of the evidence to impeachment purposes only, and that the cross-examination was calculated to prove the truth of the prior statement. *Id.* at 650-51, 263 S.E.2d at 756-57.

71. 300 N.C. 694, 268 S.E.2d 196 (1980).

72. *Id.* at 697, 268 S.E.2d at 199. Defendant was charged with felonious burning of a dwelling house. The defendant's sister, Moore, testified that defendant did not set a couch in the house on fire. After claiming surprise, the prosecutor called one Baker to impeach Moore's testimony by testifying she told him her brother was setting the house on fire. *Id.* at 694-96, 268 S.E.2d at 198-99. Baker's testimony was substantively inadmissible because it was hearsay, and was not corroborative because it contradicted the sister's testimony.

73. *Id.* at 698-99, 268 S.E.2d at 200-01.

74. 1 A. MORGAN, BASIC PROBLEMS OF EVIDENCE 64 (1954). Professor Morgan says that the rule "has no place in any rational system of investigation in modern society. And all attempts to

court system when it adopted Federal Rule of Evidence 607, which allows an attack on the credibility of a witness by any party, including the party calling him.[75] By adopting a rule similar to the federal rule, North Carolina would allow more opportunities to elicit the truth at its trials, and would bring this means of impeachment into line with its other liberal impeachment rules.

B. Expert Testimony[76]

1. Opinion: Basis of Expert Testimony

In *State v. Franks*[77] the North Carolina Supreme Court held that a non-treating psychiatrist could state an opinion, based on observations and conversations with defendant, that defendant knew the difference between right and wrong and know the nature and quality of his acts.[78] Defendent in *Franks* confessed to a first degree murder and presented his own psychiatrist to testify to his insanity. Upon cross-examination, defendant's psychiatrist gave his opinion of defendant's legal sanity without the aid of a hypothetical question.[79] The *Franks* decision is significant in its extension of an exception to the hearsay rule beyond that articulated in several recent supreme court decisions.

The general rule in North Carolina is that an expert witness can testify on facts about which he has personal knowledge, without resort to a hypothetical question,[80] but he cannot base his opinion on hearsay evidence.[81] Statements made to an expert witness by a patient that are the basis of an expert's opinion run the risk of being excluded under this general rule. The court in *Penland v.*

---

modify or qualify it so as to achieve sensible results serve only to demonstrate its irrationality. . . ." *Id.*

75. FED. R. EVID. 607. North Carolina is at present studying the feasibility of adopting the Federal Rules of Evidence. For a case in which the inability to impeach may lead to a denial of due process under the fourteenth amendment, *see* Chambers v. Mississippi, 410 U.S. 284 (1973) (defense precluded from calling witness and then cross-examining him on a prior confession because of Mississippi's voucher rule).

76. In addition to the cases discussed in the text, several other cases decided by the supreme court involved expert opinion issues. In State v. Fulton, 299 N.C. 491, 263 S.E.2d 608 (1980), a prosecution for armed robbery and armed assault, the supreme court held that the trial court erred in permitting a police officer to give his opinion that the tread design in a photograph of shoe tracks found near the scene of the crime was the same as the design on defendant's shoes. The court reasoned that the jury was as qualified as the officer to draw the comparison. The error was found to be nonprejudicial because an F.B.I. agent trained in shoe track comparisons gave essentially the same testimony. *Id.* at 494-95, 263 S.E.2d at 608.

In State v. Hunter, 299 N.C. 29, 261 S.E.2d 189, a prosecution for rape, the supreme court held it was not error to permit a forensic serologist to testify in response to a hypothetical question that the blood types of defendant and complainant were consistent with the semen blood types found on complainant's clothing. *Id.* at 35-36, 261 S.E.2d at 193-94. *See also Fulton*, *supra*, in which the court held that it was not prejudicial to allow a forensic serologist to testify that blood found on defendant's tennis shoes was consistent with the victim's blood type and only 11% of the United States population had that blood type, since it was only weak probative evidence and its exclusion would not change the result of the trial. 299 N.C. at 495-96, 263 S.E.2d at 610-11.

77. 300 N.C. 1, 265 S.E.2d 177 (1980).

78. *Id.* at 9, 265 S.E.2d at 182.

79. *Id.* at 5-6, 265 S.E.2d at 180.

80. 1 D. STANSBURY, *supra* note 29, § 136, at 446. (H. Brandis rev. 1973 & Supp. 1979).

81. *See* Cogdill v. Highway Comm'n, 279 N.C. 313, 182 S.E.2d 373 (1971).

Coal Co.,[82] however, recognized an exception to the general rule, thus allowing a physician to give an opinion based wholly or in part on statements made to him by a patient if those statements were made in the course of professional treatment and with the purpose of effecting a cure, or during an examination made for the purpose of treatment and cure.[83] The reasoning behind this exception is that a patient would desire to tell the doctor the truth in order to further his own treatment.[84] Without a treatment motive in the patient, any desire that would have prompted the patient to tell the truth is absent, and the patient might be motivated to make self-serving statements in anticipation of litigation.[85] This distinction between statements made to a physician during treatment and those made during diagnosis for litigation creates great problems when applied to testimony by a psychiatrist who examines a defendant in order to give an opinion on defendant's legal sanity.[86]

The supreme court expanded this general exception in *State v. DeGregory*,[87] to encompass the nontreating psychiatrist's statements if they were based on official records and the psychiatrist's personal observations. The admissibility of the personal examination presented no problem to the court because it was firsthand knowledge of the psychiatrist. The official records were also a permissible basis for the psychiatrist's opinion because a "physician making a diagnosis must necessarily rely upon observations and tests performed by others and recorded by them; records sufficient for diagnosis in the hospital ought to be enough for opinion testimony in the courtroom."[88]

The *DeGregory* decision did not deal with an opinion based directly on conversations with a defendant, but the court did address this issue in *State v. Wade*.[89] In *Wade* the court allowed a psychiatrist to give his opinion on mental capacity in a criminal case based on personal knowledge, including conversations with the patient, although the conversations would not be independently admissible. The court indicated that to be admissible as a basis for an opinion the statements must be inherently reliable. In *Wade* the court found two indicia of reliability: (1) Defendant was sent to psychiatrist for treatment as well as diagnosis; and (2) The psychiatrist's examination was a "thorough, carefully designed attempt to gain an understanding of defendant's state of mind . . . conducted with professional safeguards."[90]

Franks differed from *Wade* because the psychiatrist in *Franks* had no

82. 246 N.C. 26, 97 S.E.2d 432 (1957).

83. *Id.* at 31, 97 S.E.2d at 436.

84. *See* State v. Bock, 288 N.C. 145, 162-63, 217 S.E.2d 513, 524 (1975).

85. *Id.*

86. This difficulty does not exist under the Federal Rules of Evidence. Rule 803(4) provides an exception to the hearsay rule for "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." FED. R. EVID. 803(4).

87. 285 N.C. 122, 203 S.E.2d 794 (1974).

88. *Id.* at 134, 203 S.E.2d at 802.

89. 296 N.C. 454, 251 S.E.2d 407 (1979).

90. *Id.* at 463, 251 S.E.2d at 412.

treatment motive. Defendant's psychiatrist testified, in response to a hypothetical question, that defendant suffered from chronic undifferentiated schizophrenia. On cross-examination, the psychiatrist stated his opinion that defendant knew the difference between right and wrong and that he did understand the nature and quality of his acts with reference to the murder. Defendant was found guilty and he appealed, claiming that since the psychiatrist was not treating him it was error for the court to allow the psychiatrist to give his opinion on cross-examination without the use of a hypothetical question.[91] The supreme court relied on the *Wade* test and held that the conversations were a permissible basis for the psychiatrist to state an opinion although the psychiatrist was not treating defendant.[92] Despite the absence of the first indicium of reliability—treatment—in *Franks*, the court, reciting the hortatory language of *Wade*, found that the second indicium, thoroughness of the examination, had been proved: "Dr. Harper was not a treating physician but he conducted thorough and professional examinations of the defendant. He took into account the entirety of what defendant said together with his own interpretation and analysis of it and the objective manifestations that accompanied it."[93] The *Franks* court held that the psychiatrist's opinion was properly admitted into evidence. Furthermore, it was proper for the psychiatrist to testify concerning the content of his conversations with defendant in order to show the basis for his opinion and diagnosis.[94]

The *Franks* extension of *Wade* to the nontreating psychiatrist must be read in light of the supreme court decision in *State v. Bock*.[95] In *Bock* the court excluded a psychiatrist's opinion based partially on conversations with a defendant charged with first-degree murder. The psychiatrist examined defendant in relation to defendant's claim that he could not remember the events of the crime, not that he was insane. The court found that since the psychiatrist was examining defendant not for the purpose of treating his amnesia, but for the purpose of testifying as a witness for defendant, the motive which ordinarily prompts a patient to tell his physician the truth was absent.[96]

The *Bock* court made no suggestion that the psychiatrist did not conduct a "thorough and professional examination." The distinction between *Wade*, *Franks* and *DeGregory* on the one hand and *Bock* on the other may be the practical realization that a psychiatrist has no alternative to conversation to form an adequate basis for an opinion on the mental capacity of a defendant. The *Wade* court noted, and the *Franks* court agreed, that "[c]onversation and its interpretation and analysis by a trained professional, is undoubtedly superior to any other method the courts have for gaining access to an allegedly

91. 300 N.C. at 6, 265 S.E.2d at 180.
92. *Id.* at 9, 265 S.E.2d at 182.
93. *Id.*
94. *Id.*
95. 288 N.C. 145, 217 S.E.2d 513 (1975).
96. *Id.* at 162-63, 217 S.E.2d at 524.

insane defendant's mind."[97] There appears to be no way a diagnosis could be made except through conversations and tests of a defendant. In this sense, the supreme court's expansion of the hearsay exception articulated in *DeGregory*, *Wade* and *Franks* could be viewed as mandated by necessity. Unlike the case of the insane defendant, the defendant in *Bock* may appear in court and testify to his loss of memory directly and the jury may be competent to judge his credibility.

The supreme court could avoid creating strained exceptions to the hearsay rule for psychiatric diagnosis by defining the conversations with the psychiatrist as nonhearsay. The North Carolina courts have defined hearsay as an out of court statement made for the truth of the matter asserted.[98] A statement made by a patient to a medical doctor about his physical condition, used by a doctor to form an opinion, is generally going to be introduced in evidence for the truth of the matter asserted by the patient. Similarly, in *Bock*, the statement of defendant to his psychiatrist about his amnesia would arguably be for the truth of the matter asserted. In contrast, statements made by a defendant to his psychiatrist manifesting the presence or absence of medical or legal insanity would probably not be for the truth of the matter asserted in the statements themselves.

The *Franks* court was presented with another evidentiary issue when defendant took exception to the trial court's refusal to allow defense counsel to question its psychiatrist by way of a hypothetical. Prior to the psychiatrist's examination at trial, defendant sought to introduce evidence of previous incidents in his life as part of a foundation for a hypothetical question put to his psychiatrist concerning the diagnosis of chronic undifferentiated schizophrenia.[99] The trial judge refused to allow the testimony and suggested that defendant must elicit the psychiatrist's opinion and then introduce evidence to explain the basis for the opinion. The supreme court in *Franks* found the trial court to be in error on this point because defendant may proceed through hypothetical questions even though the psychiatrist had personal knowledge and could testify in the form of an opinion.[100] The supreme court did not reverse the trial court's exclusion of defendant's evidence, however, because it was too remote in time to have any relevance to defendant's mental condition at the time of the crime.[101] This holding was supported, in the court's opinion, by *In re Will of Hargrove*,[102] in which the supreme court held that testimony from witnesses concerning a testator's capacity to write a will in 1906 was too remote and was improperly admitted when the witnesses first became acquainted with testator at times ranging from two to twenty years after execu-

97. State v. Wade, 296 N.C. at 463, 251 S.E.2d at 412, *quoted in* State v. Franks, 300 N.C. at 9, 265 S.E.2d at 182.

98. *See, e.g.*, Wilson v. Hartford Ins. Co., 272 N.C. 183, 158 S.E.2d 1 (1967).

99. 300 N.C. at 9-10, 265 S.E.2d at 182. Specifically, defendant sought to introduce evidence of his childhood school attendance, his father's drinking and an incident seventeen years prior to the crime when defendant cut his wrists. *Id.*

100. *Id.* at 10, 265 S.E.2d at 182-83.

101. *Id.* at 11, 265 S.E.2d at 183.

102. 206 N.C. 307, 173 S.E. 577 (1934).

tion of the will.[103]

Hargrove is distinguishable from *Franks* in at least two significant ways. First, the evidence sought to be introduced in *Franks* was prospective; incidents in the past were introduced to show mental condition in the present. Conversely, the evidence in *Hargrove* was retrospective; present observations were submitted to prove mental condition in the past. Second, in *Franks*, unlike *Hargrove*, the witness involved was an expert qualified to judge the relevance of past incidents to a present condition. Lay witnesses testifying on mental capacity to make a will, are, arguably, less able to form a relevant opinion based on a pattern of lifetime behaviors.[104] In summary, the *Franks* opinion extended and clarified the hearsay exception for diagnosis by a psychiatrist based on conversations with a defendant, but the court may have misapplied a precedent involving lay witnesses in ruling that certain past incidents were too remote to be relevant to a psychiatrist's opinion on defendant's sanity.

2. Opinion: Cross-Examination of Expert Witnesses

In a condemnation proceeding, the party seeking to introduce the value of other property as circumstantial evidence of the value of land sought to be condemned must lay a foundation showing that the property is comparable to the land that is the subject of the suit.[105] In *Duke Power Co. v. Winebarger*,[106] the supreme court reviewed the previous North Carolina cases setting out the permissible parameters of cross-examination of an expert value witness by testing his knowledge of property transactions in the area.

In *Winebarger* Duke Power sought to condemn a power line easement on respondent's land. During cross-examination of respondents' value witnesses, Duke Power's counsel repeatedly asked if the witnesses knew of particular sales of land. In each case, respondents' witnesses answered negatively. Duke Power's counsel then repeated the question, phrasing it to include the sale

103. *Id.* at 312, 173 S.E.2d at 580.

104. In addition to the issues discussed in text, defendant in *Franks* also objected to the trial court's refusal to allow defendant's psychiatrist to restate his opinion on redirect examination. The supreme court noted the defendant had no new material to bring out on redirect and merely sought to repeat testimony; the restatement was properly excluded. 300 N.C. at 12, 265 S.E.2d at 183 (citing Spivey v. Newman, 232 N.C. 281, 59 S.E.2d 844 (1950)).

Defendant also cited as error the trial court's refusal to exclude from evidence the state's psychiatrist's account of his conversations with defendant even though the trial court excluded the psychiatrist's opinion itself. The supreme court first found that the opinion of the state's psychiatrist should have been admitted under the same hearsay exception as that of defendant's psychiatrist. The conversations, on the other hand, should not have been admitted, in the court's judgment, since the only justification for allowing them was to show the basis of the psychiatrist's opinion. Evidently, the court was not willing to admit the basis of an opinion without the opinion itself, perhaps because of fear that the jury was not competent to reach its own conclusions on the conversations. In this case, however, the court found the admission of the conversations to be nonprejudicial because substantially the same information came into evidence when defendant testified and when defendant's confession was admitted. *Id.* at 15, 265 S.E.2d at 185.

105. *See* 1 D. STANSBURY, *supra* note 29, § 100.

106. 300 N.C. 57, 265 S.E.2d 227 (1980).

price per acre of the particular transaction.[107]

The supreme court held that while it was permissible to ask the value witnesses if they knew of a particular land sale, the impeachment purpose of cross-examination was satisfied when the witness answered negatively.[108] Any further inquiry that sought to elicit specific values of property dissimilar to the property that was the subject of the suit was at best surplusage, and at worst an attempt by the cross-examiner to get before the jury information which should be excluded from its consideration.[109] If the witness answers positively and states an erroneous sales price for the property, the cross-examiner should be bound by the witness' answer.[110] The *Winebarger* opinion breaks little new ground, but it is a clear statement of the permissible scope of cross-examination of a value witness.[111]

C. *Hearsay*[112]

1. Statements by Agent or Employee

There are two instances in North Carolina in which a statement of an agent to a third party may be admissible into evidence as an admission of the principal: (1) When the statement is spoken within the scope of the agent's authority to speak for his principal, and (2) When the statement relates to an act presently being done by the agent within the scope of his agency or employment.[113] In *Pearce v. Southern Bell*[114] the supreme court was faced squarely with the opportunity to reject this rule in favor of the interpretation in the Federal Rules of Evidence. Under the federal approach an agent's statements are admissible and are not hearsay when they are made by an agent or servant concerning a matter within the scope of his agency or employment

107. *Id.* at 59-62, 265 S.E.2d at 229-30. The initial question is permissible as the scope of the value witness' knowledge of values and sales prices of dissimilar properties in the area is relevant to the limited purpose of testing that witness's credibility and expertise. *Id.* at 66, 265 S.E.2d at 232.

108. *Id.* at 66, 265 S.E.2d at 232-33. Respondents objected to this line of questioning with the first value witness but failed to object to the same questions asked of the second witness. The court of appeals ruled that respondents waived their objections to the line of questioning by failing to object to the questions asked of the second witness. The supreme court reversed the court of appeals on this issue, finding Rule 46 (a)(1) and Appellate Rule (10) persuasive as they operate to preserve the continued effect of a specific objection, once made, to a particular line of questioning. *Id.* at 67-68, 265 S.E.2d at 233-34.

109. *Id.* at 66, 265 S.E.2d at 232.

110. *Id.* (citing Carver v. Lykes, 262 N.C. 345, 137 S.E.2d 139 (1964)).

111. *See also* State v. Johnson, 282 N.C. 1, 191 S.E.2d 641 (1972); Templeton v. Highway Comm'n, 254 N.C. 337, 118 S.E.2d 918 (1961); Barnes v. Highway Comm'n, 250 N.C. 378, 109 S.E.2d 219 (1959); Highway Comm'n v. Privett, 246 N.C. 501, 99 S.E.2d 61 (1957). The *Winebarger* court did not consider the trial court's error in permitting the line of questioning cured by the instruction to the jury telling them to consider the witnesses' testimony "relating to the sales prices of other properties" only insofar as it bore upon the witnesses' knowledge of values. 300 N.C. at 66, 265 S.E.2d at 233. The court felt that Duke Power's counsel persisted in the line of questioning to such an extent it pervaded the entire trial and could only have served to prejudice respondent's case. *Id.*

112. *See also* note 40 *supra*.

113. *See* 2 D. STANSBURY, *supra* note 29, § 169.

114. 299 N.C. 64, 261 S.E.2d 176 (1980).

and are made during the existence of the relationship.[115] The supreme court chose to reaffirm the existing North Carolina interpretation over the dissents of Justices Copeland, Exum, and Carlton.[116]

Plaintiff in *Pearce* tripped over anchor brackets left in a sidewalk when defendant removed a telephone booth a month before the accident. Plaintiff called defendant's offices and was connected with the service foreman for telephone booth maintenance. The foreman went to the scene of the accident and confessed negligence to plaintiff and informed plaintiff that "[w]e will take care of everything for you."[117] The trial court allowed the service foreman's statement into evidence and the supreme court held this to be error. Applying the traditional rule, the court concluded that there was no evidence that the service foreman had authority to speak on behalf of Southern Bell in handling negligence claims.[118] The second exception did not apply in the court's view because the "record did not indicate that the statements related to an act presently being done by the agent," rather, "they related to an accident that occurred an hour and a half earlier."[119]

The court's application of the traditional North Carolina rule is particularly harsh on the facts of *Pearce* and, indeed, the majority may have misapplied the North Carolina rule. The dissent disagreed with the majority's conclusion that there was no evidence to show the foreman's authority. The dissent pointed out that the foreman "was the man sent by Southern Bell to deal with both aspects of the emergency situation."[120] Judge Copeland also criticized the restrictive reading of the exception by the majority: "It has never been required that the agent be authorized to make the exact statements that he in fact made. Companies rarely, if ever, will authorize an agent to admit negligence or the facts that constituted negligence. The rule states simply, that to bind the principal, the agent must be authorized to speak; then, whatever he says during that speech will bind his principal."[121]

The dissent in *Pearce* also criticized the court's characterization of the second branch of the rule as tied to the *res gestae* exception to the hearsay rule rather than to the application of the substantive law of agency, which would hold the hearsay exclusion rule inapplicable because the agent's statement is considered as though made by the principal himself.[122] The three dissents to the majority opinion indicate that there is some dissatisfaction on the court

115. FED. R. EVID. 801(d)(2)(D).

116. 299 N.C. at 69, 75, 261 S.E.2d at 179, 182 (Copeland, J., dissenting).

117. 299 N.C. at 65, 261 S.E.2d at 177. "Plaintiff's evidence tends to show . . . [p]laintiff called Southern Bell, and one Rovert Rochelle, service foreman for telephone booth maintenance, promptly came to the location of the accident and in a conversation with plaintiff concerning the accident confessed negligence 'on their behalf' and informed plaintiff that someone from Southern Bell would contact him and furnish the name of a physician. Mr. Rochelle said: 'We will take care of everything for you.'" *Id.*

118. *Id.* at 68, 261 S.E.2d at 179.

119. *Id.* at 69, 261 S.E.2d at 179.

120. *Id.* at 71, 261 S.E.2d at 180.

121. *Id.* at 70, 261 S.E.2d at 179.

122. *Id.* at 72-73, 261 S.E.2d at 180. *See also* Note, *Evidence—Admissibility of an Agent's Declaration Against His Principal*, 44 N.C.L. REV. 1146 (1966); C. MCCORMICK, *supra* note 37, § 267,

with the North Carolina rule and that there is sentiment for overturning a long line of precedents in favor of the approach of the Federal Rules.

2. Statements of Future Intent

Long v. Asphalt Paving Co.,[123] decided by the North Carolina Court of Appeals, is primarily significant as a clear statement of the applicability of the hearsay rule to statements made by a decedent about intended business travel. The Court examined the admissibility of statements made by and about a decedent in a challenge to a finding by the North Carolina Industrial Commission that the decedent had died from an "accident arising out of and in the course of his employment."[124]

Decedent Long, president of Asphalt Paving Co., died in a plane crash in Florida.[125] The principal issue before the Commission was whether Long had been in Florida on a business trip connected with his employment with Asphalt Paving Co. Several pieces of evidence were challenged on hearsay grounds.

The first statement challenged on appeal was that of Terrell Weeks, who testified he observed Long and Martin walking around the woods of a soon-to-be-developed subdivision.[126] The second statement was related in testimony of a witness claiming that he heard Martin tell Long where asphalt could be obtained nearby.[127] The court of appeals decided that both of these statements were outside the definition of hearsay.[128] The first was conduct not intended as an assertion that they were on business,[129] and the second was not offered to prove the truth of what was said—where asphalt could be obtained—but to prove business was discussed.[130]

---

at 640 (criticizing the *res gestae* interpretation of the admissibility of an agent's statements as an "inadequate" theory).

123. 47 N.C. App. 564, 268 S.E.2d 1 (1980).

124. *Id.* at 566, 268 S.E.2d at 3. To be compensable under the North Carolina Workers' Compensation Act, the injury must be accidental and must arise out of and in the course of employment. N.C. GEN. STAT. § 97-2(6) (1979). Such "occurs while the employee is engaged in some activity or duty which he is authorized to undertake and which is calculated to further, directly or indirectly, the employer's business." 47 N.C. App. at 566, 268 S.E.2d at 3.

125. *Id.* at 565, 268 S.E.2d at 2.

126. *Id.* at 568, 268 S.E.2d at 4.

127. *Id.* at 569, 268 S.E.2d at 4.

128. *Id.* at 569-70, 268 S.E.2d at 4-5. Many definitions of hearsay abound. Perhaps the simplest is Stansbury's, stating that whenever an assertion other than that of the testifying witness is offered to prove the truth of the matter asserted, it is hearsay, and inadmissible. 1 D. STANSBURY, *supra* note 29, § 138. Stansbury also offers the definition frequently used in North Carolina courts: "Evidence, either oral or written, is called hearsay when its probative force depends, in whole or part, upon the competency and credibility of some person other than the witness by whom it is sought to produce it." *Id. See, e.g.*, Potts v. Howser, 274 N.C. 49, 161 S.E.2d 737 (1968). At most, however, a definition is but "a helpful starting point for discussion of the problems. . . ." C. MCCORMICK, *supra* note 37, § 246.

129. 47 N.C. App. at 569-70, 268 S.E.2d at 4-5. The definition of hearsay covers only conduct or statements asserted to prove the truth of the matter therein. *See* 1 D. STANSBURY, *supra* note 29, § 138. Here, the conduct of Long and Martin, in walking around the subdivision, could not be viewed as a positive assertion of anything, and certainly not a positive assertion that the motive for the trip was business. Therefore it was not covered by the hearsay rule.

130. 47 N.C. App. at 569-70, 268 S.E.2d at 4-5. Again, this statement was not offered to prove

The third statement was made by the decedent to his spouse the night before the trip, that he "had to go to Florida on business."[131] This was clearly offered to prove that he did go to Florida on business, and was clearly hearsay, since the declarant was not the witness. However, the court of appeals held this statement properly admissible under the exception to the hearsay rule for statements of a present intention to do a future act.[132] The court of appeals believed this statement met the two-fold test for admissibility as an exception to the hearsay rule articulated by the supreme court in *State v. Vestal*.[133] *Vestal* required a showing of necessity and a reasonable probability of truthfulness.[134] *Vestal* involved a similar trip and a prior statement by a decedent of his intended destination. The *Vestal* court held necessity was shown by proof of the death of the declarant.[135] Furthermore, the statement had a reasonable probability of truthfulness because "a man leaving his home, or his business establishment, for an out-of-town trip will, for domestic and business purposes, inform his family . . . as to his destination."[136] The *Long* court found that the test in *Vestal* was fully satisfied by the facts presented in *Long*. The continued use in *Long* of the test set forth in *Vestal* rather than the *res gestae* doctrine,[137] to determine the admissibility of a present statement of intention to do a future act is welcome.

---

the truth of what it asserted (*i.e.*, where to get asphalt). A statement "offered for any purpose other than to prove the truth of the matter asserted in the statement is not hearsay." *Id.* at 569, 268 S.E.2d at 4.

131. 47 N.C. App. at 570, 268 S.E.2d at 5.

132. *Id.* This exception arose from the doctrine of *res gestae*, which admitted statements made in connection with an act which was at issue. McCormick explains *res gestae* as "words which accompanied the principal litigated fact." C. MCCORMICK, *supra* note 37, § 288. Stansbury states that "there is no single *res gestae* rule," but that when words are closely connected with an act at issue, the words are admissible without examining the hearsay implications. 2 D. STANSBURY, *supra* note 29, § 158. The statement has to be closely related to the act both in time and meaning to fall under this doctrine, and this limits the admissibility of many statements under the *res gestae* exception. *Id.*

The *res gestae* rule has become much criticized. North Carolina recently expressed its disapproval of the confusion which the use of the phrase has generated. *See* State v. Hammonds, 45 N.C. App. 495, 263 S.E.2d 326 (1980). Stansbury recognizes that in the past it was helpful in getting evidence admitted, but that now it is relied upon to exclude evidence which is otherwise independently admissible. 2 D. STANSBURY, *supra* note 29, § 158. Most commentators criticize it as vague and imprecise, no longer needed for the purposes it once served. C. MCCORMICK, *supra* note 37, § 288. The modern justification for allowing a present statement of future intent to be admissible is that it describes a mental state otherwise hard to prove, and the declarant is dead or otherwise unavailable to testify. C. MCCORMICK, *supra* note 37, § 295. Stansbury notes that its reliability depends on many factors—the truthfulness of the present description, the continuing existence of the intention and the good faith of the declarant, and the occurrence or nonoccurrence of other future events. 2 D. STANSBURY, *supra* note 29, § 162.

133. 278 N.C. 561, 180 S.E.2d 755 (1971).

134. *Id.* at 582, 180 S.E.2d at 769.

135. *Id.* at 581, 180 S.E.2d at 769.

136. *Id.* at 582-83, 180 S.E.2d at 769.

137. *See* note 132 *supra*.

D. *Videotapes as Illustrative Evidence*[138]

Under North Carolina case law, photographs,[139] movies,[140] and videotapes[141] are not admissible as substantive evidence, but are admissible for the limited purpose of explaining or illustrating the testimony of a witness on facts that are relevant and material to the case.[142] This restriction, allowing the introduction of such an item as illustrative evidence only, has been severely criticized.[143]

In *State v. Jeffers*[144] the court of appeals applied the North Carolina rule and found the trial court's admission of a videotape as substantive evidence erroneous, but the court refused to overturn the trial court's result because the error was not prejudicial.[145] Defendant in *Jeffers* was charged with possession of a firearm by a felon. The State's evidence consisted primarily of a videotape, made through a one-way mirror, of defendant selling a .38 caliber revolver to an undercover "sting" operation and the testimony of the officers who ran the "sting".[146]

The trial judge allowed the admission of the videotape as substantive evidence over defendant's objection and instructed the jury that the videotape was substantive evidence.[147] The court of appeals noted some erosion of the illustrative evidence rule in two recent cases. In *State v. Foster*,[148] the supreme court upheld the admission of photographs of fingerprints as substantive evidence when shown by extrinsic evidence to represent the fingerprints

---

138. Several cases were decided by the supreme court on the admissibility of real or scientific evidence. *See, e.g.*, State v. Tate, 300 N.C. 180, 265 S.E.2d 223 (1980), in which the court upheld a trial court's exclusion from evidence of a marijuana identification test.

In State v. Fulton, 299 N.C. 491, 263 S.E.2d 608 (1980), the supreme court upheld the trial court's determination that the "chain of custody" of defendant's tennis shoes had not been broken even though the agent who received the shoes left them unattended for an hour in an unlocked private office and someone other than the agent carried the package to the mail pickup point after the agent had made the track comparisons. *Id.* at 497-98, 263 S.E.2d at 611-12. *See* note 76 *supra*.

139. *See* State v. Crowder, 285 N.C. 42, 203 S.E.2d 38 (1974), *modified*, 428 U.S. 903 (1976).

140. State v. Garnett, 24 N.C. App. 489, 211 S.E.2d 519, *appeal dismissed*, 287 N.C. 262, 215 S.E.2d 622 (1975).

141. State v. Johnson, 18 N.C. App. 606, 197 S.E.2d 592 (1973) (videotape is a motion picture and admissible under the same rule).

142. State v. Bass, 249 N.C. 209, 105 S.E.2d 645 (1958).

143. *See, e.g.*, C. MCCORMICK, *supra* note 37, § 214; 1 D. STANSBURY, *supra* note 29, § 34 (Prof. Brandis urges that the illustrative doctrine be given the death sentence. *Id.* at 99 n.23 (Supp. 1979)); Gardner, *The Camera Goes to Court*, 24 N.C.L. REV. 233, 245 (1946). The General Assembly amended chapter 8 of the General Statutes to remove this distinction. The newly enacted statue, effective October 1, 1981, provides that

> any party may introduce a photograph, video tape, motion picture, x-ray, or other photographic representation as substantive evidence upon laying a proper foundation and meeting other applicable evidentiary requirements. This section does not prohibit a party from introducing a photograph or other pictorial representation solely for the purposes of illustrating the testimony of a witness.

Law of May 26, 1981, ch. 451, § 1, 1981 Sess. Laws 470 (to be codified at N.C. GEN. STAT. § 8-92).

144. 48 N.C. App. 663, 269 S.E.2d 731 (1980).

145. *Id.* at 667, 269 S.E.2d at 734-35.

146. *Id.* at 664, 269 S.E.2d at 732-33.

147. *Id.* at 666, 269 S.E.2d at 734.

148. 284 N.C. 259, 200 S.E.2d 782 (1973).

accurately, and in *State v. Hunt*[149] the supreme court admitted into evidence a photograph of a shoe sole impression when the same safeguards were present.

Despite the evidence relaxation of the rule in these cases, the *Jeffers* court believed that the more recent supreme court decision in *State v. Davis*,[150] upholding the illustrative-substantive distinction, forced the court of appeals to recognize that the videotape was admissible for illustrative purposes only.[151]

Although the *Jeffers* court found the trial court erred in instructing the jury that the videotape was substantive evidence, the court found that it was not prejudicial enough to justify a new trial because the defendant failed to show a different result would have obtained with a different instruction; the jury also heard the uncontroverted testimony of the officers who viewed the sting operation while the videotape was being made.[152] In practical effect, the court of appeal's treatment of the illustrative-substantive distinction may obviate the need for maintaining the classification in most cases. The prerequisite of a proper foundation for the introduction of the videotape or photograph may in many cases such as *Jeffers* render any erroneous instruction—that the evidence is substantive—nonprejudicial.

E. Character Evidence:[153] *Rape Shield Statute*

In *State v. Fortney*[154] the North Carolina Supreme Court upheld the newly enacted rape shield statute against a claim that it violated defendant's constitutional right to confront the witnesses against him.[155] General Statute 8-58.6 provides that evidence of sexual behavior of a complainant is presumptively irrelevant unless it falls within one of five specific exceptions. Even then the defendant must submit his evidence in advance for an *in camera* review of its relevancy.[156]

---

149. 297 N.C. 447, 255 S.E.2d 182 (1979).

150. 297 N.C. 566, 256 S.E.2d 184 (1979).

151. 48 N.C. App. at 667, 269 S.E.2d at 734.

152. *Id.* at 668, 269 S.E.2d at 735.

153. In State v. Jones, 299 N.C. 298, 261 S.E.2d 860 (1980), the supreme court held evidence of previous involvement in certain crimes by defendant was properly admitted into evidence in a prosecution for first degree murder. The court recognized the "general rule that evidence of the commission of other crimes is not admissible to prove defendant's guilt of the crime for which he is on trial." *Id.* at 306, 261 S.E.2d at 866 (citing State v. Hight, 150 N.C. 817, 63 S.E.2d 1043 (1909)). But the court upheld the trial court's decision to admit the evidence under the motive exception to the general rule, finding that the evidence of prior criminal acts was admitted to show that defendant's motive for killing the deceased, his accomplice in the crimes, was his fear that the deceased was "talking too much" and would "tell them everything." 299 N.C. at 307, 261 S.E.2d at 866.

The supreme court noted that motive was "always a relevant fact, and evidence tending to prove it will not be excluded merely because it also shows the accused to have been guilty of an independent crime." *Id.* at 307, 261 S.E.2d at 866. *See also* State v. Williams, 292 N.C. 391, 233 S.E.2d 507 (1977); State v. McClain, 240 N.C. 171, 81 S.E.2d 364 (1954) (eight exceptions to the general rule of no admissibility discussed). *See generally* 1 D. STANSBURY, *supra* note 29, §§ 91 & 92.

154. 301 N.C. 31, 269 S.E.2d 110 (1980).

155. *Id.* at 34, 269 S.E.2d at 112.

156. N.C. GEN. STAT. § 8-58.6 (Cum. Supp. 1979). For a discussion of this statute see *Survey of Developments in North Carolina Law, 1977—Evidence*, 56 N.C.L. REV. 1069-75 (1978).

In *Fortney* defendant alleged that the complainant consented to sexual intercourse and oral sex. The trial judge excluded from evidence test results showing three different blood type groupings of semen found on clothing the complainant wore on the night of the attack.[157] The supreme court upheld the trial court's ruling on the evidence as well as the constitutionality of the statute, stating:

> G.S. 8-58.6 is nothing more . . . than a codification of this jurisdiction's rule of relevance as that rule specifically applies to the past sexual behavior of rape victims. As such the statute embodies a legislative recognition that [North Carolina Supreme Court] decisions . . . '[reject] the notion that all sexual behavior, however proved, has some intrinsic relevance in a sexual assault proceeding, and [require] a more specific showing of relevance before such behavior can be proved.'[158]

Building on this reasoning, the court dismissed defendant's constitutional challenge by noting there was no constitutional right to ask a witness questions that were irrelevant, that the statute is primarily procedural rather than substantive in its effect, and there were valid policy grounds, such as encouraging reporting of sexual assaults by victims, behind the legislature's enactment of the statute.[159]

EVAN KENT AUBERRY
MELEGIA LEE DANIELS, JR.

157. 301 N.C. at 33, 269 S.E.2d at 111.

158. *Id.* at 37, 269 S.E.2d at 113. The supreme court's statement is a bit generous in its view that previous North Carolina decisions excluded past sexual behavior as irrelevant. *See, e.g.*, State v. Satchell, 17 N.C. App. 312, 194 S.E.2d 51, *cert. denied*, 283 N.C. 260, 195 S.E.2d 692 (1973). *See generally* Burger, *Man's Trial, Woman's Tribulation*, 77 COLUM. L. REV. 1 (1977); Ordover, *Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity*, 63 CORNELL L. REV. 90 (1977).

159. 301 N.C. at 38-44, 269 S.E.2d at 113-17.

VIII. FAMILY LAW[1]

A. Separation Agreements

1. Dependent Covenants

In *Wheeler v. Wheeler*[2] the Supreme Court of North Carolina held covenants in a separation agreement to be dependent, a breach by one party excusing the nonperformance of the other. In *Wheeler* the parties had entered into a separation agreement in 1956.[3] Under the agreement the wife took custody of the children and the defendant was allowed to visit them at his option.[4] The husband was to pay specified amounts to the wife for alimony and child support and to relinquish certain personal property.[5] In 1975 the wife instituted suit against the husband, alleging that he had failed to pay alimony required by the contract.[6] The husband contended that his obligation to pay should be excused because the wife had breached the promise to allow him to visit his children.[7] The jury decided that the wife had breached the visitation provision of the agreement, but defendant's performance was not excused because he had waived the right to assert his visitation rights by failing to enforce them after 1964.[8]

The North Carolina Supreme Court sustained the judgment for the plaintiff[9] in an opinion largely devoted to a discussion of the legitimacy of applying the doctrine of waiver to a separation agreement. Scant attention was given to the departure from prior decisions implicit in the court's failure to inquire into the intention of the parties regarding the dependency of the promises contained in the agreement. The opinion merely recited that defendant's duty to pay alimony was "conditional,"[10] the agreement providing that payments be made only "so long as plaintiff observes and performs the conditions of this contract."[11]

Although previous cases have recognized that it would be possible for parties to a separation agreement to explicitly condition each party's obligation to fulfill their promises under the agreement upon the performance of the other spouse, until *Wheeler* courts have consistently refused to find that the

---

1. The North Carolina Supreme Court held in Flippen v. Jarrell, 301 N.C. 108, 270 S.E.2d 482 (1980), that a divorced mother who has custody of a child and provides at least one-half of his support has standing to sue for medical expenses and loss of the child's service in a negligence action. Traditionally the father has had the primary obligation to support and provide medical care for his children, and the mother has had a secondary support obligation. While there can be no double recovery, a parent with a secondary support obligation will not be barred from suit even though claims for loss of services and medical expenses arise out of the parental support duty.

2. 299 N.C. 633, 263 S.E.2d 763 (1980).

3. *Id.* at 634, 263 S.E.2d at 764.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at 635, 263 S.ES.2d at 764.

8. *Id.*

9. *Id.* at 642, 263 S.E.2d at 768.

10. *Id.* at 634, 263 S.E.2d at 764.

11. *Id.*

parties *intended* their covenants to be mutually dependent. In *Smith v. Smith*[12] the North Carolina Supreme Court held that a wife's breach of a clause promising not to "molest" or "speak disparagingly" of her husband was no defense in her action to enforce his promise to make support payments pursuant to the agreement, even though the preface to the separation agreement made clear that the promises were given in consideration of the mutual covenants and agreements of the parties.[13] In *Williford v. Williford*[14] the incorporation of the provisions in a separation agreement regarding visitation and alimony into the divorce decree was held insufficient to make them dependent.

Smith and *Williford* were distinguished by the *Wheeler* court on the ground that the agreements in the former cases did not specifically condition defendant's duty to pay alimony upon plaintiff's performance under the contract.[15] Yet the court failed to mention relevant dicta in cases in which the courts of North Carolina have been called upon to apply the law of other states to disputes involving separation agreements. Those cases contain language to the effect that the rule in North Carolina is to construe support provisions as being independent of visitation provisions in separation agreements.[16]

---

12. 225 N.C. 189, 34 S.E.2d 148 (1945). The Supreme Court of North Carolina articulated the elements necessary to support a finding that covenants in a separation agreement are mutual:

> (1) that it is not every violation of the terms of a separation agreement by one spouse that will exonerate the other from performance; (2) that in order that a breach by one spouse of his or her covenants may relieve the other from liability from the latter's covenants, the respective covenants must be interdependent rather than independent; and (3) that the breach must be of a substantial nature, must not be caused by the fault of the complaining party, and must have been committed in bad faith.

Id. at 197-98, 34 S.E.2d at 153 (citing 30 C.J., 1065; H & W, 845).

13. *Id.* at 190, 34 S.E.2d at 148.

14. 10 N.C. App. 451, 179 S.E.2d 114 (1971).

15. 299 N.C. at 642, 263 S.E.2d at 149.

16. In Laughridge v. Lovejoy, 234 N.C. 663, 68 S.E.2d 403 (1951), the court determined that it was not competent under the full faith and credit clause to adjudicate a claim for unpaid child support based on an Alabama divorce decree. *Id.* at 666, 68 S.E.2d at 404. In *dictum*, however, the court stated the majority rule regarding the relationship between visitation and support clauses:

> It seems to be the general rule that where the wife is awarded the custody of the child and the father is given the right to visit it, and the order requires him to make periodic payments for the support of the child, the order for such support will not be construed as being conditioned on the father's right of visitation which he may claim has been denied him.

Id.

In Cole v. Earon, 26 N.C. App. 502, 216 S.E.2d 422 (1975), the court of appeals, applying New York law to a separation agreement, held that "the wife's violation of visitation provisions in a separation agreement precludes her from maintaining against the husband an action to recover unpaid installments of support stipulated under such agreement." *Id.* at 503, 216 S.E.2d at 423. But the court indicated that a contrary result would have been reached had it been called upon to apply North Carolina law:

> In North Carolina the support provisions of the separation agreement are considered as being independent of the provisions relating to the husband's visitation rights, with the result that the wife's breach of her covenant not to interfere with the husband's visitation rights . . . does not excuse the husband from making the support payments in conformity with the separation agreement.

Id. (citing Williford v. Williford, 10 N.C. App. 457, 179 S.E.2d 114 (1971)).

Thus, the holding in *Wheeler* is unquestionably a tacit departure from established precedent. But *Wheeler* must be considered in light of considerations that consistently have been important to the courts of North Carolina in their interpretation of separation agreements. In order to determine whether a clause conditioning payments to a former spouse upon that spouse's performance under the contract will cover the covenants dependent the courts will examine two factors.

The first of these factors is the complexity that is superimposed upon the construction of a separation agreement when minor children are involved. This aspect was not a factor in *Wheeler* because the defendant did not stop paying alimony until the children of the marriage had reached majority.[17] But practitioners drafting and litigating separation agreements will have to evaluate the impact of *Wheeler* upon situations in which minor children are involved. The general maxim that a separation agreement is to be treated like any other contract[18] is limited by the court's inherent power to determine any issue involving the welfare of a minor child.[19] Provisions in a separation agreement for support, custody, and visitation are never final.[20] Any aspect of the agreement dealing with a minor child is subject to review by a court at any time for a determination whether adherence to that provision would be in the best interest of the child.[21]

A myriad of questions are raised when the covenants of a separation agreement that deal with minor children purport to be conditional. Suppose the supporting spouse in *Wheeler* had withdrawn child support payments instead of alimony in response to the custodial spouse's denial of visitation rights. Although some jurisdictions have held that a noncustodial parent who is denied visitation rights is justified in terminating support payments,[22] sanctioning such retaliatory behavior would be difficult to reconcile with the rule

17. Wheeler v. Wheeler, 299 N.C. at 635, 263 S.E.2d at 764.

18. Lane v. Scarborough, 284 N.C. 407, 409-10, 200 S.E.2d 622, 624 (1973); Church v. Hancock, 261 N.C. 764, 765, 136 S.E.2d 487, 491 (1963); Bowles v. Bowles, 237 N.C. 462, 465, 75 S.E.2d 413, 415 (1953).

19. Williams v. Williams, 261 N.C. 48, 134 S.E.2d 227 (1964); Fuchs v. Fuchs, 260 N.C. 635, 639, 133 S.E.2d 487, 491 (1963); Perry v. Perry, 33 N.C. App. 139, 234 S.E.2d 449 (1977).

20. Davis v. Davis, 269 N.C. 120, 127, 152 S.E.2d 306, 312 (1967); Hinkle v. Hinkle, 266 N.C. 189, 195, 146 S.E.2d 73, 77 (1966).

21. The court articulated both its power to decide matters regarding minor children irrespective of the terms of a separation agreement, and the standard to be used in making determinations regarding minor children, in Story v. Story, 221 N.C. 114, 116, 19 S.E.2d 136, 137 (1942):

> No agreement or contract between husband and wife will serve to deprive the court of its inherent as well as statutory authority to protect the interests and provide for the welfare of infants. They may bind themselves by separate agreement or by a consent judgment, . . . but they cannot thus withdraw children of the marriage from the protective custody of the court. . . . The child is not a party to such agreement and the parents cannot contract away the jurisdiction of the court which is always alert in the discharge of its duty toward its wards—the children of the state whose personal and property interests require protection. . . . In such the welfare of the child is the paramount consideration to which even parental love must yield and the court will not suffer its authority in this regard to be either withdrawn or curtailed by any act of the parties.

22. *See, e.g.*, Cole v. Earon, 26 N.C. App. 502, 503, 216 S.E.2d 422, 423 (1975); Annot., 95 A.L.R.2d 118, 155-62 (1964).

that the welfare of the child is to be the paramount consideration when resolving family disputes. The situation of a child who has been deprived of the company of one parent is in no way improved by a resulting reduction of financial assistance. Furthermore, a reduction in the income to the custodial parent is likely to have a deleterious effect on the child,[23] whether the terminated payments are alimony or child support. Because the potential conflict between "the central place of the law of contracts in interpreting separation agreements,"[24] and the doctrine that the best interest of the child supersedes any agreement made by the parents was not before the court in *Wheeler*, a supporting, noncustodial parent who is unjustly denied visitation rights confronts a dilemma. Clearly, after *Wheeler* he cannot wait until the child reaches majority to terminate the payments or he will be deemed to have waived the breach. If he stops paying immediately upon his former spouse's breach, he risks a holding that the best interest of the child controls and even explicit language in the agreement making the payment and visitation rights mutually dependent will not excuse his nonperformance. His alternatives are to withhold alimony and continue child support, the success of which will depend on whether the court recognizes the hardship that could befall the child as a result of such action,[25] or to petition the court for specific enforcement of the separation agreement, a remedy that was available prior to *Wheeler*.[26]

A second factor that has been of concern to courts interpreting separation agreements is that such agreements often entail multiple provisions, with each party undertaking several obligations and receiving several benefits. Separation agreements typically contain a property settlement, to be complied with at the time of the agreement, as well as continuing obligations including custody, visitation rights, and support payments. In the absence of specific language it is difficult to determine which terms should be held interdependent. The court in *Smith v. Smith*[27] was troubled by the inequity that would result from a holding that the breach of the nonmolestation clause by the wife allowed the husband to terminate support payments. By the terms of the agreement, those payments had been exchanged for more than visitation rights. She also gave up "support owed to her by him, as a matter of law, . . . her right of dower, and all other rights in this property acquired by marriage."[28]

---

23. Williford v. Williford, 10 N.C. App. 451, 456, 179 S.E.2d 114, 117 (1971). Conversely, if the supporting spouse ceases making agreed-upon payments, is the custodial spouse justified in refusing to allow visitation? Most courts that have considered this issue have held that the potential effectiveness of this tactic as a collection device is insufficient justification to satisfy the "best interest of the child" standard. Annot., 51 A.L.R.3d 520, 525-26 (1973).

In addition, North Carolina courts have held that a noncustodial parent has a "natural and legal right to visit his or her child," *In re* Custody of Stancil, 10 N.C. App. 545, 551, 179 S.E.2d 844, 848 (1971), which may be denied only if denial is for the welfare of the child. *Id.*; Griffin v. Griffin, 237 N.C. 404, 75 S.E.2d 113 (1953).

24. Wheeler v. Wheeler, 299 N.C. 633, 642, 263 S.E.2d 763, 768 (1980).

25. *See* note 13 and related text *supra*.

26. Moore v. Moore, 297 N.C. 14, 18, 252 S.E.2d 735, 739 (1979).

27. 225 N.C. 189, 34 S.E.2d 148 (1945).

28. *Id.* The promises in question were therefore held independent, despite the introductory sentence which referred to the agreement as consisting of "mutual covenants." *Id.*

In *Williford* the court also held that the executory provisions of a separation agreement could not be inferred as dependent, even when they were singled out by the parties to be incorporated into the divorce decree. It appeared to the court that part of the consideration for the husband's agreement to pay continuing support to the wife may have been her relinquishment of rights in the property settlement. Rather than involve itself in a *post hoc* determination of which clauses were *intended* to be dependent, possibly drawing into question property rights that had long been considered settled, the court held the covenants in question to be independent.[29]

The court in *Wheeler* avoided unraveling an intricate web of obligations in a separation agreement, some fully performed and some continuing, by holding that defendant had waived the breach. What then is the impact of *Wheeler* upon a defaulting spouse who attempts to rely on a clause conditioning his performance under the separation agreement upon that of his spouse? It appears that after *Wheeler* the court will no longer have the option of declaring such a general clause insufficient to render the covenants mutually dependent. Thus, a court seems to have only two routes available to avoid delving into a morass of covenants in order to determine which were intended to be independent. One route would be to declare that in the absence of specific language to the contrary, the executed portions of the separation agreement are considered to be independent from the executory portions. A general clause reciting dependence of covenants could therefore be construed as making the executory covenants mutual, in conformity with *Wheeler*, without disturbing the rights established in the property settlement. Although such a presumption seems to ignore the complexity inherent in most separation agreements, the approach has been taken by the North Carolina Supreme Court to render the task of interpreting consent decrees concerning separation and divorce manageable.[30]

Another approach would be to broadly interpret one of the elements of waiver articulated in *Wheeler*—that the nonbreaching party "intentionally waives his right to excuse or repudiate his own performance by continuing to perform or accept the partial performance of the breaching party."[31] If retention by the nonbreaching party of any benefits conferred by the property settlement were construed to be acceptance of partial performance, thus constituting a waiver, it is unlikely that it would be to the benefit of a nonbreaching party to use the other party's breach to excuse his own performance. One of the hidden traps of the *Wheeler* holding regarding dependent cove-

29. *Id.*

30. In White v. White, 296 N.C. 661, 252 S.E.2d 698 (1979), the Supreme Court of North Carolina was called upon to decide whether support and maintenance provisions in a consent judgment were independent and separable from the property division provisions. The issue arose when the wife moved to increase the periodic payments required in the consent judgment. The court did not have the power to modify the order if the support payments and the property division were meant to be consideration for each other. It was held that the support payments would be presumed to be independent and separable from the property settlement unless a contrary intention was manifested in the agreement.

31. Wheeler v. Wheeler, 299 N.C. 633, 639, 263 S.E.2d 763, 767 (1980).

nants would therefore be avoided, but it would be at the cost of rendering the decision a practical nullity.

In conclusion, the holding of *Wheeler* recognizing dependent covenants in a separate agreement raises more issues concerning the role of courts in interpreting separation agreements than it resolves. It is an attempt to deal with the custodial parent who denies the noncustodial parent access to the children. The court viewed the separation agreement primarily as a contract between two parties, governed according to ordinary contract rules.[32] However, the court was not required to consider two factors commonly involved in disputes involving separation agreements that are not susceptible to resolution according to general rules of contract law: the interests of minor children, and the consequences of invalidating the resolution of a complicated economic relationship involving both executed and executory provisions. Applying the holding of *Wheeler* in a case in which these factors are present will require more of the court than the application of basic contract principles. Yet the breadth of the decision, allowing a very general clause to import dependence to the covenants in a separation agreement, will make it difficult for courts to avoid its reach in the future.

2. Support Obligations[33]

The court of appeals in *Bradshaw v. Smith*[34] affirmed the trial court's judgment that a father's duty to support his child, pursuant to a valid separation agreement, survived his death.[35] The father had contracted to support his child until her majority, completion of high school, or discontinuance of her

---

32. *Id.* at 642, 263 S.E.2d at 768. The court noted:

> [D]efendant has contracted to pay alimony only so long as plaintiff "performs the conditions of the contract." Each party's respective duties are clearly interdependent, not independent, and defendant's duty to pay alimony existed only so long as plaintiff performed her duties under the contract. To argue that plaintiff's breach did not excuse defendant's duty to pay alimony is to ignore the clear language of the separation agreement and to overlook the central place the law of contracts has in interpreting separation agreements.

Id.

33. In Williams v. Williams, 299 N.C. 174, 261 S.E.2d 849 (1980), the supreme court held that a spouse seeking permanent alimony may qualify as a dependent spouse even though she could maintain her accustomed of living by depleting her estate. The court determined that the legislature did not intend to require estate depletion when it listed "estates" in N.C. GEN. STAT. § 50-16.5 (1976) as one of the factors that may be considered in awarding alimony.

Williams illustrates that alimony must be awarded on the basis of the financial resources of the two parties in comparison to one another, considering the family's accustomed standard of living. The wife in *Williams* had an estate worth $761,975, with the husband's estate worth $870,165. She qualified as a dependent spouse, however, because her yearly income of $21,000 was insufficient to meet her accustomed expenses, and her husband's annual income was $116,660. She was a dependent spouse to the extent of the shortfall between her income and the cost of maintaining her at the family's accustomed standard of living. 299 N.C. at 187, 261 S.E.2d at 858.

The court of appeals, in Department of Social Services v. Skinner, 48 N.C. App. 621, 269 S.E.2d 678 (1980), held that a governmental agency of another state has standing to sue in North Carolina courts under the Uniform Reciprocal Enforcement of Support Act [U.R.E.S.A.], N.C. GEN. STAT. § 52A-8.1 (1976), when the agency has been assigned U.R.E.S.A. rights by an obligee in its state.

34. 48 N.C. App. 701, 269 S.E.2d 770 (1980).

35. *Id.* at 705-06, 269 S.E.2d at 752.

high school education, whichever event happened last, and also agreed to provide medical insurance for her during the same period. The agreement was silent on the effect of his death.[36]

The court noted that the common law duty to support a child ended with the parent's death, but that a parent can contractually bind his estate to support the child.[37] The court applied the rule of *Mullen v. Sawyer*,[38] which stated that a deceased father's intent to bind his estate may be inferred from several factors including a specified termination date and an obligation in excess of the common law duty to support.[39] The court found that the father in *Bradshaw* intended to bind his estate, because he specified the time of termination of the duty without mentioning termination at his death and agreed to provide medical insurance for the entire period, a duty not required under the common law.[40] Policy considerations such as easing the support burden of single parents and keeping families off of the welfare rolls support this decision.[41]

3. Resumption of the Marital Relationship

While it is clear that resumption of a marital relationship serves to terminate a separation agreement,[42] it is not always easy to determine what conduct constitutes a resumption. In *Hand v. Hand*[43] the North Carolina Court of Appeals held that the husband's moving back into the marital domicile for a two-week period did not void a separation agreement. The evidence about the purpose of his return was conflicting, as was the testimony on whether the parties had engaged in sexual intercourse during the time in question.[44] The court of appeals determined that the evidence of the parties' intention not to reconcile was sufficient to affirm the trial court's decision. Defendant was held to be in civil contempt for failure to comply with his payment obligation under the separation agreement.[45]

This decision represents an attempt to limit the development of a harsh trend in the case law that made any attempt at reconciliation potentially de-

36. *Id.* at 702, 269 S.E.2d at 751.

37. *Id.* at 703, 269 S.E.2d at 751.

38. 277 N.C. 623, 178 S.E.2d 425 (1971).

39. *Id.* at 630, 178 S.E.2d at 429. Two other factors considered significant in *Mullen*, but not present in *Bradshaw*, were the presence of language creating a lien on the father's property and special consideration in favor of the father. 48 N.C. App. at 705-06, 269 S.E.2d at 752.

40. 48 N.C. App. at 705, 269 S.E.2d at 752.

41. It appears that the court's decision is in line with those of the majority of the jurisdictions deciding the issue. *See* Annot., 18 A.L.R.2d 1126, 1131-33 (1951), and cases cited therein.

42. *In re* Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976); Tilley v. Tilley, 268 N.C. 630, 151 S.E.2d 592 (1966); State v. Gossett, 203 N.C. 641, 166 S.E. 754 (1932).

43. 46 N.C. App. 82, 264 S.E.2d 597 (1980).

44. The wife contended that the husband returned temporarily to help her care for their infant and that they did not engage in intercourse during the period when both occupied the marital domicile. *Id.* at 85, 264 S.E.2d at 598. The husband's evidence indicated that they had resumed living together and that they did have sexual intercourse during this time. *Id.*

45. *Id.* at 87, 264 S.E.2d at 600.

structive of a separation agreement.[46] In *In re Estate of Adamee*[47] the North Carolina Supreme Court had emphasized the importance of conduct creating the *appearance* that the parties had re-established marital ties.[48] The court believed that similar factors were involved in determining if the marital relationship had been resumed, whether the issue was the status of the separation agreement or the ability to obtain a divorce based upon length of separation.[49]

Evidence that a man and a woman have "held themselves out as husband and wife living together"[50] will defeat a divorce because of reluctance to depend on evidence that must " 'be sought behind the closed doors of the marital domicile' "[51] to prove separation. Thus, the thrust of *Adamee* was that the test for determining whether a husband and wife had resumed the marital relationship was whether they "held themselves out" to the public as husband and wife, rather than their subjective intent to re-establish their relationship.

The relevance of the intention of the parties to a determination of whether the marital relationship was resumed was also minimized in *Murphy v. Murphy*.[52] In that case the court held that a single act of sexual intercourse between separated spouses constituted a resumption of the marital relationship as a matter of law, thus the intent of the parties was irrelevant.[53]

Hand[54] is significant in that it represents an attempt by the court of appeals to resurrect the intention of the parties as a consideration relevant to finding whether they have resumed the marital relationship. The court in *Hand* acknowledged that certain language in *Adamee*, "standing alone, would indicate that the actual intention of the parties to resume their marital cohabitation is not relevant to determining a resumption of the marital relationship."[55] Nevertheless, the court concluded that this language was not binding because the court in *Adamee* had decided as a matter of law that the undisputed facts constituted a resumption of the marriage. The court declined to follow the trend indicated by the dicta in *Adamee* and the holding of *Murphy*, and decided that " '[t]he issue of the parties' mutual intent is an essential ele-

46. *See* notes 47-53 and related text *infra*.

47. 291 N.C. 386, 230 S.E.2d 541 (1976).

48. *Id.* at 391-93, 230 S.E.2d at 545-46.

49. *Id.*

50. *Id.* at 392, 230 S.E.2d at 546.

51. *Id.* (quoting Hava v. Chavigny, 147 La. 330, 331, 84 So. 892 (1920)).

52. 295 N.C. 390, 245 S.E.2d 693 (1978).

53. *Id.* at 395-97, 245 S.E.2d at 697-98. In her opinion Justice Sharp acknowledged that the decision in *Murphy* was contrary to that adopted by a majority of other states. *Id.* at 395, 245 S.E.2d at 697. The policy reasons for retaining the minority position involved a reluctance to allow parties to engage in sexual intercourse, an activity legitimated by the marital status, while failing to fulfill the duties imposed by that status. Thus, enforcing a separation agreement when it had been acknowledged that the parties had engaged in sex during the period of the separation would be to " 'sanction and approve, for all practical purposes, illicit intercourse and promiscuous assignation.' " *Id.* at 397, 245 S.E.2d at 698 (quoting State v. Gossett, 203 N.C. 641, 644, 166 S.E. 754, 755 (1932)). The essence of the majority opinion was summarized: "Severance of marital relations by a separation agreement and continued sexual intercourse between the parties are 'essentially antagonistic and irreconcilable notions.' " *Id.* (quoting from 1 A. LINDEY, SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 8, at 8-13 (1978).

54. 46 N.C. App. 82, 264 S.E.2d 597 (1980).

55. *Id.* at 86, 264 S.E.2d at 599.

ment in deciding whether the parties were reconciled and resumed cohabitation.' "[56]

4. Contractual Nature of Consent Decrees

An absolute divorce terminates all rights of the spouses "arising out of the marriage,"[57] including the right to support of a dependent spouse.[58] However, an obligation to make payments pursuant to a separation agreement is deemed to arise from the contract and thus survives an absolute divorce. In *Haynes v. Haynes*[59] the North Carolina Court of Appeals held that a right to receive support payments that is conferred by a consent decree is contractual in nature and therefore is not automatically voided upon absolute divorce.[60] Whether a support provision in a consent decree will survive an absolute divorce depends upon the intent of the parties.[61] In *Haynes* the language of the decree anticipated the possibility that the parties would obtain a divorce at some time in the future and did not include divorce as one of the events that would terminate the obligation to make support payments. The court held this language to be indicative of the parties' intent to continue the payments after the divorce.[62]

Defendant also argued that the decree, a court order enforceable by contempt, could not be contractual, thus it must arise from the marriage and be terminated upon divorce.[63] The court rejected this position, analogizing the consent judgment to an order for specific performance of a separation agreement. The separation agreement retains its contractual nature despite enforceability of the order for specific performance through contempt proceedings. A consent decree in which a husband agrees to provide support is to be accorded similar treatment.[64]

B. Paternity

1. Role of Presumptions

In reviewing a conviction of abandonment and nonsupport of a child, the

56. *Id.* at 87, 264 S.E.2d at 599 (quoting Newton v. Williams, 25 N.C. App. 527, 532, 214 S.E.2d 285, 288 (1975)).

57. N.C. GEN. STAT. § 50-11(a) (1976).

58. McCarley v. McCarley, 289 N.C. 109, 117, 221 S.E.2d 490, 495 (1976) (dictum).

59. 45 N.C. App. 376, 263 S.E.2d 783 (1980).

60. *Id.* at 382, 263 S.E.2d at 786.

61. *Id.*, 263 S.E.2d at 786-87.

62. *Id.*, 263 S.E.2d at 787. Because the intent was found to be present for the payments to continue even after absolute divorce, the court determined that the case of Bland v. Bland, 21 N.C. App. 192, 203 S.E.2d 639 (1974), was not controlling. In *Bland* the consent judgment stated that the husband's obligation to make support payments to the wife was to continue "until he is relieved therefrom by operation of law." The court determined the language of that clause to relieve the husband's estate of any duty to continue the payments, because the husband's duty to support terminated by operation of law upon his death. Thus, although *Haynes* demands that the intention of the parties control in interpreting consent decrees, inclusion of a clause like that contained in *Bland* could be construed to indicate that the parties intended for the payments to terminate upon divorce.

63. *Id.* at 383, 263 S.E.2d at 787.

64. *Id.*

North Carolina Supreme Court, in *State v. White*,[65] rejected the application of a conclusive presumption of paternity. The court held that to require defendant-husband to offer evidence of the physical impossibility of his fatherhood in order to rebut the presumption places upon him a burden of production so strict that, in effect, it unconstitutionally shifts the burden of persuasion to him.[66]

The evidence showed that defendant, husband of the mother, separated from her 265 days before the birth, and that the mother began living in open adultery with another man 262 days before the birth.[67] Thus, both men had access to the mother during the normal gestation period.[68] The trial court instructed the jury that unless defendant could prove he had no access to the mother during the normal gestation period, he was conclusively presumed to be the father.[69] Defendant, who provided no such proof, was found guilty of abandonment and nonsupport. The court of appeals affirmed the conviction, though it admitted that the conclusive presumption might be unconstitutional.[70]

The supreme court, relying on a series of United States Supreme Court decisions, distinguished permissive from mandatory presumptions.[71] The nature of the presumption is determined by careful examination of the instructions to the jury in light of how a reasonable juror might interpret them.[72] A permissive presumption permits, but does not require, the factfinder to infer the elemental fact[73] from proof of the basic fact. Since the inference is permis-

65. 300 N.C. 494, 268 S.E.2d 481 (1980).

66. *Id.* at 509, 268 S.E.2d at 490.

67. State v. White, 42 N.C. App. 320, 321, 256 S.E.2d 505, 506 (1979).

68. One series of North Carolina cases sets the normal gestation period at seven to ten months, another group finds it to be 280 days, and yet another notes that there is no agreement even among medical experts on the normal period. *See* 42 N.C. App. at 322, 256 S.E.2d at 507. Because the time periods were so close together, absent proof of the time of conception, either man could be the father regardless of the standard used to measure the gestation period.

69. 300 N.C. at 498, 268 S.E.2d at 484. The instructions described the definition of North Carolina's common law presumption of legitimacy. In civil cases, a child born in wedlock is presumed to be legitimate, that is, the child of the mother's husband. This presumption is rebuttable by proof that the husband could not have been the father due to impotence or nonaccess to his wife. Eubanks v. Eubanks, 273 N.C. 189, 197, 159 S.E.2d 562, 568 (1968). The confusion experienced by North Carolina courts, resulting in application to criminal proceedings of rules established for civil cases, is discussed in *Survey of Developments in North Carolina Law, 1979—Family Law*, 58 N.C.L. Rev. 1181, 1478-79 (1980).

70. 42 N.C. App. at 323, 256 S.E.2d at 507.

71. In Mullaney v. Wilbur, 421 U.S. 684 (1975), the Court dealt with a jury instruction which conclusively presumed malice aforethought absent proof by the defendant that he acted in the heat of passion. The Court concluded that the intrusion impermissibly relieved the prosecution of the burden of proving malice beyond a reasonable doubt. *Id.* at 704.

In upholding a New York statutory presumption, the Court in Ulster County Court v. Allen, 442 U.S. 140 (1979), distinguished mandatory and permissive presumptions in the context of due process rights. It reiterated its view that a presumption must not undermine the factfinder's responsibility at trial to find every elemental fact beyond a reasonable doubt. *Id.* at 156.

72. 300 N.C. at 506, 268 S.E.2d at 489. The principle that the exact words spoken to the jury by the trial judge are to be weighed in determining the nature of the presumption emerges from both Ulster County Court v. Allen, 442 U.S. 140 (1979), and Sandstrom v. Montana, 442 U.S. 510 (1979).

73. Elemental facts are those constituent parts of a crime which must be proved by the prosecution to sustain a conviction. In *White* the elemental facts are that defendant was the father and

sive in nature, defendant does not bear the burden of production—absent other evidence the inference will not support a finding of the elemental facts[74] beyond a reasonable doubt.[75] If, however, the instructions indicate that an inference must be drawn upon proof of the basic facts, then the presumption is mandatory in nature.[76] A mandatory presumption places upon defendant the burden to produce sufficient evidence to raise a factual issue on the existence of elemental facts.[77] Applying these principles to the language of the trial judge's instructions, the court determined that the state benefited from a mandatory presumption requiring the jury to find the issue of paternity against defendant absent proof that he could not be the father.[78] Thus, defendant's burden of production was so great that, in effect, he bore the burden of the nonexistence of an elemental fact.[79] Since the state was not, therefore, required to prove every element of the crime beyond a reasonable doubt, use of the presumption violated the due process clause of the fourteenth amendment.[80]

Though it found that the instructions to the jury placed too great a burden on defendant to rebut the mandatory presumption, the court nevertheless affirmed the conviction, holding that defendant was not prejudiced because he offered no evidence to counter the mother's evidence that she first missed menstruation while living with defendant.[81] An interesting dichotomy between criminal and civil paternity actions results from the decision in *White*. By showing that some other man could be the father a defendant could, absent other evidence by the state, defeat a finding of paternity in a criminal action.[82]

---

that he willfully abandoned and failed to provide adequate support for the child. *See* N.C. GEN. STAT. § 14-322 (1969).

74. Elemental facts are those which the jury can infer from basic facts. The basic facts in *White* are that defendant was married, that he and the mother had sexual relations, and that the mother first missed menstruation while living with defendant.

75. 300 N.C. at 506, 268 S.E.2d at 489.

76. *Id.* at 507, 268 S.E.2d at 489.

77. State v. Hankerson, 388 N.C. 632, 649-52, 220 S.E.2d 575, 583-89 (1975). The United States Supreme Court has not definitively determined the exact quantum of evidence that a defendant may be required to produce, within the dictates of due process, to rebut a mandatory presumption. It has spoken of "some evidence," Mullaney v. Wilbur, 421 U.S. 684, 701 (1975), but has cautioned against requiring a defendant to produce "considerably greater than 'some' evidence." Sandstrom v. Montana, 442 U.S. 510, 517 (1979).

78. 300 N.C. at 507-08, 268 S.E.2d at 490. The trial judge instructed the jury that "the only way the assumption of legitimacy may be rebutted is by evidence tending to show the husband could not have had access to the wife during the period of time referred to. *Id.* at 498, 268 S.E.2d at 484.

79. *Id.* at 509, 268 S.E.2d at 490.

80. The United States Supreme Court, in *In re* Winship, 397 U.S. 358 (1970), held the due process clause of the fourteenth amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364.

81. The evidence indicated that the mother first missed menstruation while she and defendant were living together, and before she began her relationship with the other man. The court held that the defendant thus bore the burden of producing evidence suggesting that either conception did not cause the missed menstruation or that some other man had sexual relations with the mother prior to that time. Since defendant did not produce such evidence, the court held that he was not prejudiced by the mandatory presumption. 300 N.C. at 510-11, 268 S.E.2d at 491.

82. The court expressly held that such a showing would constitute sufficient evidence to raise a factual issue and rebut the mandatory presumption. *Id.* at 509, 268 S.E.2d at 491. Once defend-

The same evidence, however, would not preclude a finding of paternity in a civil action, since the common law presumption that the husband is the father would not be rebutted.[83] Given the dual procedure it is preferable to allow this distinction to exist than to force a criminal defendant to disprove the state's case.

2. Equal Protection for Illegitimates

The court of appeals, in *Cogdell v. Johnson*,[84] held that G.S. 49-14(c)(1) discriminates against illegitimate children in violation of the equal protection clause of the fourteenth amendment.[85] The statute imposes a three year limitation on the commencement of civil actions to establish the paternity of a child born out of wedlock.[86] Establishment of paternity is a condition precedent to imposing on the father the duty to support the child.[87] Because a child born in wedlock is rebuttably presumed to be the child of the mother's husband,[88] a legitimate child generally is not burdened with having to establish paternity. An action for support of a legitimate child may thus be brought at any time during the child's minority,[89] while illegitimate children are placed at

---

ant raises the factual issue, the burden is on the state to prove the elemental fact beyond a reasonable doubt.

83. *See* note 69 *supra*. When the defendant in a civil paternity action is the husband of the mother, he is presumed to be the father of the child, absent proof that he could not possibly be the father. The public policies of promoting the family unit and ensuring legitimacy of children born of married parents favor placing the burden on the defendant-husband. When the putative father is not married to the mother, however, the state's interest in the family unit is not present. Proof of paternity beyond a reasonable doubt is required in civil cases by N.C. GEN. STAT. § 49-14(b)(1976), in furtherance of the state's interest in preventing fraudulent claims. *See* note 86 *infra*.

84. 46 N.C. App. 182, 264 S.E.2d 816 (1980).

85. *Id.* at 189, 264 S.E.2d at 821.

86. N.C. GEN. STAT. § 49-14 (1976 & Cum. Supp. 1979) states in pertinent part:

> (a) The paternity of a child born out of wedlock may be established by a civil action. . . . Such establishment shall not have the effect of legitimation. (b) Proof of paternity pursuant to this section shall be beyond a reasonable doubt. (c) Such action shall be commenced within one of the following periods: (1) Three years next after the birth of the child; or (2) Three years next after the date of the last payment by the putative father for the support of the child . . . .

87. "The duty of the father of an illegitimate child to support such child is not created by the judicial determination of paternity. That determination is merely a procedural prerequisite to the enforcement of the duty by legal action. The father's duty to support his child arises when the child is born." Tidwell v. Booker, 290 N.C. 98, 116, 225 S.E.2d 816, 827 (1976). *See* N.C. GEN. STAT. § 49-15 (1976).

88. "When a child is born in wedlock, the law presumes it to be legitimate, and this presumption can be rebutted only by facts and circumstances which show that the husband could not have been the father, as that he was impotent or could not have had access to his wife." Eubanks v. Eubanks, 273 N.C. 189, 197, 159 S.E.2d 562, 568 (1968).

This common law presumption of legitimacy (that the mother's husband is the father) may not be applied conclusively in a criminal nonsupport action. To do so would relieve the state of its burden of proving every element of the offense beyond a reasonable doubt. State v. White, 300 N.C. 494, 268 S.E.2d 481 (1980). For a discussion of *White* see notes 62-83 and accompanying text *supra*.

89. A parent's obligation to support his child continues throughout the child's minority. Wells v. Wells, 227 N.C. 614, 616, 44 S.E.2d 31, 33 (1947). There is no express limitation on the period within which an action for support may be commenced. *See* N.C. GEN. STAT. § 50-13.4 (1976 & Cum. Supp. 1979).

a disadvantage by the limitation of G.S. 49-14.

The United States Supreme Court has addressed the issue of discrimination against illegitimates and found a state law denying the right of support to illegitimate children while granting it to legitimate children violative of equal protection.[90] The Court recognized the problems inherent in proving paternity, but held that those problems cannot be made into an "impenetrable barrier that works to shield otherwise invidious discrimination."[91] Although classifications based on illegitimacy are not subject to strict judicial scrutiny, they must nevertheless be substantially related[92] and narrowly tailored[93] to permissible state interests. Since illegitimate children are entitled to the same right to support from their fathers as that afforded legitimate children, the question becomes whether the statute of limitations provided in G.S. 49-14(c) is substantially related to a state interest or whether it constitutes an impenetrable barrier to the enforcement by illegitimate children of their right to support.[94]

Jurisdictions that have considered the constitutionality of statutes similar to G.S. 49-14 have reached inconsistent results. Those upholding their statutes have determined that the statute of limitation is substantially related to the goal of preventing the litigation of stale and fraudulent claims.[95] The North Carolina court of appeals was not convinced by the reasoning of those decisions, and found that G.S. 49-14(c) does not bear a substantial relationship to those interests.[96]

The court discussed several bases for its holding. First, it reasoned that since a child is entitled to support from its father throughout his minority, a claim for such support can never be stale,[97] and noted that "[t]he purposes of Article 3 of Chapter 49 are manifestly to *enable* an illegitimate child to receive support from its biological father and prevent it from becoming a public

90. Gomez v. Perez, 409 U.S. 535 (1973).

91. *Id.* at 538.

92. Lalli v. Lalli, 439 U.S. 259, 265 (1978). *Accord*, Mitchell v. Freuler, 297 N.C. 206, 254 S.E.2d 762 (1979).

93. The Supreme Court in Matthews v. Lucas, 427 U.s. 495, 513 (1976), indicated that discriminatory classifications must be "carefully tuned to alternative considerations" to be valid. *See also* Trimble v. Gordon, 430 U.S. 762, 772 (1977).

94. The Supreme Court has never directly considered the constitutionality of a statute of limitation when applied to actions to establish paternity. There have been a number of decisions regarding other legal disabilities of illegitimates: Parham v. Hughes, 441 U.S. 347 (1979) (right to bring wrongful death action); Lalli v. Lalli, 439 U.S. 259 (1978) (right to inherit by intestate succession); Trimble v. Gordon, 430 U.S. 762 (1977) (right to inherent by intestate succession); Jiminez v. Weinberger, 417 U.S. 628 (1974) (entitlement to disability insurance benefits under the Social Security Act); New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973) (right to equal participation in welfare programs); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (right to recover worker's compensation benefits upon father's death); Stanley v. Illinois, 405 U.S. 645 (1972) (unwed father's right to custody upon death of children's mother); Levy v. Louisiana, 391 U.S. 68 (1978) (right to sue for wrongful death of mother).

95. *See* 46 N.C. App. at 186-87, 264 S.E.2d at 820, and cases cited therein.

96. 46 N.C. App. at 188-89, 264 S.E.2d at 820-21.

97. *Id.* at 188, 264 S.E.2d at 821. The court reasoned that to bar a child from asserting paternity is to bar it from receiving support from its natural father. *Id.* at 189, 264 S.E.2d at 821.

charge."[98] In *Joyner v. Lucas*[99] the court held that the statute of limitations of G.S. 49-14 is tolled when the putative father leaves the state.[100] To bar plaintiff's paternity action would lead to the anomalous result that a claim which would be barred by the statute because of staleness if the defendant remained in the state, would be allowed if he left the state and returned many years later.

Second, in determining that the need of the child manifestly outweighs the benefit provided by the statute of limitations, the court rejected defendant's claim that the statute of limitations is necessary to avoid fraudulent claims.[101] Recent advances in blood typing would permit defendant to disprove paternity if wrongfully accused. Requiring proof of paternity beyond a reasonable doubt[102] adequately protects against fraudulent claims and indicates that the three year limitation is neither necessary nor substantially related to furtherance of this state interest.

Finally, the court of appeals concluded that G.S. 49-14 is not tailored narrowly enough to its purpose.[103] The trial court in this case was able to find beyond a reasonable doubt that defendant was the child's father, but held that the three year statute of limitation barred the action.[104] Since the statute is not substantially related to any legitimate state interest, but merely presents an impenetrable barrier to illegitimates seeking support, it unconstitutionally discriminates against illegitimate children in violation of the equal protection clause.

C. Alimony

The North Carolina Supreme Court, in *Clark v. Clark*,[105] held that the income tax consequences of an award of alimony are to be considered by a trial court in determining the appropriate amount to award.[106] Alimony payments received by the wife because of a court decree are taxable income to the wife and deductible by the husband.[107] While G.S. 50-16.5(a) does not expressly include the income tax consequence as a factor to be considered,[108] the

98. *Id.* at 184, 264 S.E.2d at 818.

99. 42 N.C. App. 541, 257 S.E.2d 105, *cert. denied*, 298 N.C. 297, 259 S.E.2d 300 (1979).

100. *Id.* at 546-47, 257 S.E.2d at 109.

101. *See* 46 N.C. App. at 188-89, 264 S.E.2d at 821.

102. N.C. GEN. STAT. § 49-14(b), reprinted at note 86 *supra*.

103. 46 N.C. App. at 189, 264 S.E.2d at 821. Rather than focusing on rebuttable presumptions that might be created by the results of medically accepted blood tests, or the presence of the father's name on the child's birth certificate, the statute merely set an arbitrary time limit for suits by illegitimates.

104. 46 N.C. App. at 183, 264 S.E.2d at 818. The action was commenced when the child was ten years old. *Id.*

105. 301 N.C. 123, 271 S.E.2d 58 (1980).

106. *Id.* at 133, 271 S.E.2d at 66. This decision finds support in many other jurisdictions. *See generally* Annot., 51 A.L.R.3d 461 (1973).

107. I.R.C. § 71.

108. N.C. GEN. STAT. § 50-16.5(a) (1976 & Cum. Supp. 1979) states in pertinent part: "Alimony shall be in such amount as the circumstances render necessary, having due regard to the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case."

court determined that its language is broad enough to authorize such consideration. It cautioned, however, that tax consequences are in no way preeminent in the determination, but merely one factor for a court to consider.[109] Judicial consideration of this "tax bite" flows naturally from the principle that the amount of alimony to be awarded is a question of fairness and justice to all parties.[110]

D. Marriage Ceremony

In *State v. Lynch*[111] the North Carolina Supreme Court reversed a court of appeals holding that a marriage solemnized by a "minister" of the Universal Life Church, Inc. was valid under North Carolina law. Defendant was convicted of bigamy because he participated in two marriage ceremonies, the first of which was officiated by an individual who had obtained a certificate of ordination by sending ten dollars to the Universal Life Church, Inc., an organization which "will ordain anyone without question of his or her faith."[112] The supreme court held that defendant's motion for a nonsuit should have been granted.[113] The statutory definition of those qualified to perform a marriage ceremony[114] was not sufficiently broad to sanction "[a] ceremony solemnized by a Roman Catholic layman in the mail order business who bought for $10.00 a mail order certificate giving him 'credentials of minister' in the Universal Life Church, Inc."[115]

SUSAN HANEY BARTELS
ROBERT MITCHELL FORMAN

109. 301 N.C. at 133, 271 S.E.2d at 66.
110. Beall v. Beall, 290 N.C. 669, 228 S.E.2d 407 (1976).
111. 301 N.C. 479, 272 S.E.2d 349 (1980).
112. *Id.* at 481, 272 S.E.2d at 350.
113. *Id.* at 484, 272 S.E.2d at 352.
114. N.C. GEN. STAT. § 51-1 (1976) requires that a marriage be solemnized "in the presence of an ordained minister of any religious denomination, minister authorized by his church, or of a magistrate." Marriage by consent is not recognized in North Carolina. State v. Alford, 298 N.C. 465, 259 S.E.2d 242 (1979); State v. Samuel, 19 N.C. 177 (1836).
115. 301 N.C. at 488, 272 S.E.2d at 354.

IX. PROPERTY

A. Covenants

In *Smith v. Mitchell*[1] the North Carolina Supreme Court decided the efficacy of a preemptive right-to-repurchase clause in a deed.[2] A preemptive right clause is a direct restraint on alienability of land; therefore it is not favored in the law. Restraints on alienability that have been held void in North Carolina include restrictive covenants limiting a grantee's right to convey to a small group,[3] preventing alienation absolutely for a certain period of time,[4] and granting an absolute and permanent right of first refusal.[5] However, the court held that the preemptive right clause in this deed was valid and enforceable.[6]

In *Smith*, the original owner placed certain restrictive covenants expressly running with the land on a parcel of real property in 1967. One covenant required any future owner who wished to sell the land to first offer it to the original owner or his successors.[7] The covenant stated that the property was to be offered at a price no higher than the lowest price the current owner would accept from other purchasers and that the right of repurchase was limited in duration to the lifetime of the original owner plus twenty years.[8]

The heir of the original owner conveyed the property subject to the covenant to the defendant in 1974. In 1976 the defendant conveyed the property without honoring the preemptive right clause. The plaintiff, an heir of the original owner, brought an action for specific performance or alternatively for damages. The defendant alleged, and the trial court and court of appeals agreed, that any preemptive right of this nature was an impermissible restraint on alienation.[9] As authority for this position,[10] the defendant and court of

---

1. 301 N.C. 58, 269 S.E.2d 608 (1980).

2. A preemptive right requires that before property conveyed can be sold to another, it must first be offered to the conveyor or his heirs or other designated person. *See* 6 AMERICAN LAW OF PROPERTY § 26.64 (A. Casner ed. 1952); RESTATEMENT OF PROPERTY § 413 (1944). Although analogous, an option differs from a preemptive right; an option creates the power in the holder of the option to compel a sale of the land. *See* 6 AMERICAN LAW OF PROPERTY § 26.64. Because of the analogy between preemptive rights and options, the court stated that specific performance, often used in option situations, would be a suitable remedy here. 301 N.C. at 68, 269 S.E.2d at 614.

3. *See* Norwood v. Crowder, 177 N.C. 469, 99 S.E. 345 (1919).

4. *See* Welch v. Murdock, 192 N.C. 709, 135 S.E. 611 (1926).

5. *See* Hardy v. Galloway, 111 N.C. 519, 15 S.E. 890 (1892). *Hardy* was cited as authority for holding the restraints invalid in the cases cited in notes 3-4 and accompanying text *supra*.

6. 301 N.C. at 61, 269 S.E.2d at 610.

7. *Id.* at 59-60, 269 S.E.2d at 610. The clause stated:

> If any future owner of lands herein described shall desire to sell the lands owned by him, he shall offer the parties of the first part the option to repurchase said property at a price no higher than the lowest price he is willing to accept from any other purchaser. Parties of the first part agree to exercise said option or to reject same in writing within 14 days of said offer. This covenant shall be binding on the parties of the first part and their heirs, successors, administrators, and executors or assigns for as long as W. Osmond Smith, Jr. shall live and for 20 years from the date of his death unless sooner rescinded.

8. *Id.* at 60, 269 S.E.2d at 610. This provision was technically within the period allowed by the rule against perpetuities. *See* note 17 *infra*.

9. 301 N.C. at 60, 269 S.E.2d at 610.

10. *Id.* at 61, 269 S.E.2d at 611.

appeals relied on *Hardy v. Galloway*.[11] In *Hardy*, which was a 1892 decision, a vendor of realty attempted through a restrictive covenant in a deed to retain the right to repurchase the land when sold; the covenant did not specify any time or price limitations. The court held this to be an impermissible restraint on alienation.[12]

The North Carolina Supreme Court reversed the trial court decision in *Smith*, holding that *Hardy v. Galloway* did not prohibit all preemptive right clauses.[13] Rather, the latter case held void a preemptive right that did not limit the duration of the clause or specify a method of determining price.[14] The court held that preemptive right clauses that are limited in duration and specify some pricing mechanism will be valid and enforceable if they are reasonable.[15] A price will be deemed reasonable if it in some manner links the purchase price to the fair market value of the land or to the price the seller will accept from a third person.[16] A duration will be reasonable if it falls within the period covered by the Rule Against Perpetuities.[17] Since the clause in *Smith* met the reasonableness standard in both price and duration, it was held valid.

In reaching this result the court discussed the bases of the policy against restraints on alienation. This policy was rooted in the belief that the living members of a society must be able to control the wealth of that society if it is to be used efficiently.[18] The policy, however, was never absolute; indirect restraints have long been held valid.[19] Also, it conflicts with another strong common law policy that allows a property owner to convey his property subject to whatever conditions he desires.[20] This conflict has caused courts to allow direct restraints that are deemed reasonable but to disallow all others.[21] The *Smith* court found that the policy reasons for prohibiting these restraints was not violated by a preemptive right that was limited and reasonable in

11. 111 N.C. 519, 15 S.E. 890 (1892).

12. *Id.* at 523, 15 S.E. at 891.

13. 301 N.C. at 61, 269 S.E.2d at 611.

14. *Id.* at 64, 269 S.E.2d at 612. In *Hardy*, the deed contained a clause stating that the vendors retained for themselves and their heirs "the right to repurchase said land when sold"; it further stated that if vendee attempted to sell the land without compliance with the covenant, the deed was void. This clause was held void as an impermissible restraint on alienation. 111 N.C. at 519, 15 S.E. at 890.

15. 301 N.C. at 61, 269 S.E.2d at 611.

16. *Id.* at 66, 269 S.E.2d at 613. In adopting this standard, the court adopted the majority rule. *See* RESTATEMENT OF PROPERTY § 413 (1944).

17. 301 N.C. at 66, 269 S.E.2d at 613. This adoption of the Rule Against Perpetuities as the duration standard saves the court from tedious litigation over what is a reasonable time. *See* RESTATEMENT OF PROPERTY § 413 (1944). The Rule describes a period of twenty-one years plus some life in being at the creation of the interest. For a criticism of this application of the Rule to a right to repurchase, see Link, *The Rule Against Perpetuities in North Carolina*, 57 N.C.L. REV. 727, 807 (1979).

18. 301 N.C. at 62, 269 S.E.2d at 611.

19. For example, a vendor can convey a fee subject to a possibility of reverter or a condition subsequent. *Id.*

20. *Id.*

21. *See, e.g.*, Annot., 40 A.L.R.3d 920 (1971). The basic rationale in these cases is that the interference of a preemptive right with the policy of control of wealth is negligible. 301 N.C. at 62-63, 269 S.E.2d at 611.

terms of duration and price.[22]

Smith's recognition of the validity of preemptive rights has some important ramifications for property owners. The use of these clauses affords the owner an additional opportunity to plan the future of his land. He can insure for a limited time that the property will not be conveyed to certain purchasers or used for certain purposes. Also, purchasers will be more likely to submit to this kind of clause in a deed than to a separate option to repurchase requested by the original owner.

In *Beech Mountain Property Owners' Association, Inc. v. Seifart*,[23] the North Carolina Court of Appeals found affirmative covenants requiring the property owners to pay annual assessment charges insufficiently definite to be enforceable. Property owners in the Beech Mountain development purportedly were committed to being members of the property owners' association and to making "reasonable" annual payments for the maintenance of roads and recreational areas.[24] The court held that the covenants were not enforceable because they did not establish a standard by which a lot owner's liability could be measured and because they did not identify the property to be maintained.[25]

The decision is consistent with cases that hold restrictive covenants void unless they are clear and unambiguous.[26] Because there were no North Carolina cases on point, the majority relied on other states' decisions to support the *Beech Mountain* ruling.[27] *Petersen v. Beekmere, Inc.*[28], a New Jersey case, is especially convincing in arguing that a formula to calculate assessments must be included in the covenant if it is to be enforceable.[29] Arkansas' holding in *Kell v. Bella Vista Village Property Owners Association*[30] conflicts with *Petersen*, however. In *Kell* the court determined that because the property owners' association acts as a trustee for the benefit of the property owners, the owners have recourse in a court of equity to prevent any arbitrary action by the association. The court found this recourse in equity to be an adequate formula for determining assessments.[31]

---

22. The court also found that the policies behind the utilization of options were similarly applicable to preemptive rights. Options have long been valid and useful devices for disposition of property. *See* 301 N.C. at 63, 269 S.E.2d at 611. The court also analogized preemptive rights to the valid technique used by developers of placing restrictive covenants in deeds to control development of the property. *Id.*, 269 S.E.2d at 612.

23. 48 N.C. App. 286, 269 S.E.2d 178 (1980).

24. *Id.* at 287-88, 269 S.E.2d at 179-80.

25. *Id.* at 295-96, 269 S.E.2d at 183.

26. *See* Hullett v. Grayson, 265 N.C. 453, 144 S.E.2d 206 (1965); Hege v. Sellers, 241 N.C. 240, 84 S.E.2d 892 (1954).

27. *See* Petersen v. Beekmere, Inc., 117 N.J. Super. 155, 283 A.2d 911 (1971). Other cases have upheld covenants that contained formulas or stated amounts. *See* Nassau County v. Kensington Ass'n, 21 N.Y.S.2d 208 (Sup. Ct. 1940); Kennilwood Owners Ass'n v. Jaybro Realty & Dev. Co., 156 Misc. 604, 281 N.Y.S. 541 (Sup. Ct. 1935).

28. 117 N.J. Super. 155, 283 A.2d 911 (1971).

29. *Id* at 171-72, 283 A.2d at 921-22.

30. 258 Ark. 757, 528 S.W.2d 651 (1975).

31. *Id.* at 763, 528 S.W.2d at 655.

B. Rule Against Perpetuities

In *Joyner v. Duncan*,[32] the North Carolina Supreme Court applied two constructional techniques to uphold various class gifts against the Rule Against Perpetuities.[33] First, the court narrowly construed the class term "great-grandchildren" to exclude remote class members. Second, the court applied the presumption of early vesting[34] so that reaching a specified age merely indicated postponed enjoyment of a vested interest, rather than a condition precedent to vesting. The class gifts thus were able to meet the requirement that the maximum and minimum membership in the class be determined within the period of the Rule or the entire class gift fails.[35]

In interpreting the testamentary trust,[36] the court construed the first section of the trust to give a present life income interest to the testator's son.[37] In the second section, Edwin Duncan, Jr., and Jane Cannon Duncan, testator's grandchildren, received vested remainder income interests for life.[38] The court interpreted the third section of the trust as a class gift to testator's grandchildren with each grandchild to be paid $5000 at age twenty-five, $5000 at age thirty, $5000 at age thirty-five and $5000 at age forty.[39] The court construed the language to give the grandchildren a vested interest at birth subject to open with enjoyment postponed until the ages of twenty-five, thirty, thirty-five and forty; thus, the class gift was valid because the interests vested and the class closed within the perpetuity period.[40]

The court construed the fourth section of the trust to give to testator's great-grandchildren born of Edwin Duncan, Jr., and Jane Cannon Duncan a vested interest at birth in monetary gifts for their college education, subject to divestment if the great-grandchildren failed to make passing grades at college.[41] The court construed the trust language to set a condition subsequent to vesting, rather than a condition precedent.[42] Also, the court construed testator's intent to be that when testator used the term "great-grandchildren," he

32. 299 N.C. 565, 264 S.E.2d 76 (1980).

33. The Rule Against Perpetuities reads: "No devise or grant of a future interest in property is valid unless the title thereto must vest in interest, if at all, not later than twenty-one years, plus the period of gestation, after some life or lives in being at the creation of the interest." *Id.* at 568, 264 S.E.2d at 81. See note 66 *infra* for an additional definition.

34. *Id.* at 574, 264 S.E.2d at 84-85.

35. *Id.* at 573, 264 S.E.2d at 84.

36. In this action for declaratory judgment, the superior court judge validated the trust under the Rule Against Perpetuities. The supreme court granted discretionary review pursuant to G.S. 7A-31 prior to determination by the court of appeals. *Id.* at 568, 264 S.E.2d at 81.

37. *Id.* at 570-71, 264 S.E.2d at 82.

38. *Id.* at 571-72, 264 S.E.2d at 83.

39. *Id.* at 572-74, 264 S.E.2d at 83-84.

40. *Id.* at 575, 264 S.E.2d at 84-85. All of testator's grandchildren would have to be born not later than the death of testator's son plus any period of gestation. Because testator's son was the life in being and because the grandchildren's interests vested at birth, there was no perpetuity violation. *Id.* at 575, 264 S.E.2d at 85. "Subject to open" signifies in this instance that the class of remaindermen may be enlarged by the birth of additional grandchildren, in which event each vested share would be reduced proportionately.

41. *Id.* at 575-76, 264 S.E.2d at 85.

42. *Id.* at 576, 264 S.E.2d at 85.

was referring only to children born of Edwin Duncan, Jr., and Jane Duncan Miller and not to any child born of a later-born grandchild.[43] Because the two named grandchildren were lives in being and the interests of the great-grandchildren vested at birth, the interests of all great-grandchildren covered by the clause must vest, if at all, within the period prescribed by the Rule Against Perpetuities.[44]

Pursuant to sections five and six, each great-grandchild was to receive one-half of his interest in the trust remainder when he reached age twenty-five, and when the youngest great-grandchild reached age twenty-five and the grandchildren were deceased, final per capita distribution of all remainder interests to the great-grandchildren was to occur.[45] In sustaining this portion of the trust, the court held that testator's great-grandchildren born of Edwin Duncan, Jr., and Jane Duncan Miller had vested remainders at birth subject to open until the first great-grandchild reached age twenty-five.[46] In providing for one-half distribution at age twenty-five and final distribution at the stated termination occurrence, the court held that testator was prescribing the times when the vested interest could be possessed. In reaching this conclusion, the court applied the same construction of the term "great-grandchildren" as it had in section four, and the court showed the same preference for early vesting of interests with postponed enjoyment as it did in section three. Because the remainder vested at birth, the interest did not violate the perpetuities period because the named grandchildren were lives in being. Additionally, the class of great-grandchildren would close no later than the death of the survivor of the two named grandchildren, so both maximum and minimum membership would be determined within the period of the Rule.[47]

As recognized by the *Joyner* court, both maximum and minimum membership in a class must be determined within the perpetuities period.[48] This is in line with the established construction of class gifts.[49] In *Joyner*, the court's construction of the term "great-grandchildren" and its preference for early

---

43. *Id.* at 577-78, 264 S.E.2d at 86-87.

44. *Id.* at 578, 264 S.E.2d at 87.

45. *Id.* at 578-79, 264 S.E.2d at 87.

46. *Id.* at 580, 264 S.E.2d at 88.

47. *Id.* Also in section six, the trust provided for final distribution to each great-grandchild or the heirs of any deceased great-grandchild. This did not violate the Rule Against Perpetuities because these words did not create a contingency; the words merely denoted the inheritable quality of a vested remainder. *Id.* at 581, 264 S.E.2d at 88.

The court also noted that application of the "wait and see" doctrine would mean there were no perpetuities violations in the trust. Because of earlier holdings in the case, however, the court stated that application of the doctrine was unnecessary. *Id.* at 581-82, 264 S.E.2d at 88-89. The court has yet to apply the "wait and see" doctrine despite ample opportunities to do so. *See* Link, *supra* note 17, at 780.

48. 299 N.C. at 573, 264 S.E.2d at 84.

49. In order to avoid the Rule Against Perpetuities, the class gift must be certain to vest within lives in being plus twenty-one years, and it must cease to be subject to open within that time; otherwise, the entire gift fails. 3 L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 1265 (2d ed. 1956).

Apparently, no past North Carolina cases expressly state this class gift doctrine (also known as the "all-or-nothing rule" of Leake v. Robinson, 35 Eng. Rep. 979 (Ch. 1817)), although the doctrine has been recognized in the state by implication. *See* Link, *supra* note 17, at 771, 780.

vesting were necessary to validate the class gifts in the trust. If the court had not limited the term "great-grandchildren" to children born of the two named grandchildren the entire class gift would have been invalid.[50]

In limiting the term "great-grandchildren," the court used various rules of construction, such as giving effect to the presumed intent of testator and preferring a construction that produces a valid distribution.[51] Judicial construction can be a sensible way of avoiding unwarranted consequences caused by the conclusive presumption of fertility.[52] The use of this construction in *Joyner*, however, is questionable. Testator specifically made a gift in section three of the trust to his two named grandchildren and "any other child born to Edwin Duncan," thus indicating that he was aware of the possibility of after-born grandchildren. In addition, when testator executed his will his son was forty-six years old. It is debatable whether age forty-six is advanced enough to warrant a judicial construction that sidesteps the presumption that a man can have children as long as he lives. Finally, the *Joyner* court noted that when a will is subject to two constructions, one that results in a perpetuities violation and another than renders the will valid, the court should give preference to the latter.[53] From this premise, and from a study of the will and surrounding circumstances, the court based its construction of the term "great-grandchildren" on testator's presumed intent.[54] The problem with this analysis is that the term "great-grandchildren" as used in the trust appears to be unambiguous.[55] Given the approach taken in *Joyner*, it will be difficult to determine how far the court will go to find an expression open to alternate interpretations. The *Joyner* court may have found the term ambiguous simply to avoid a possible perpetuities violation.[56]

The second constructional technique used to uphold the trust in *Joyner* was the preference for early vesting. In *Joyner*, this presumption meant a constructional preference for no condition of survivorship to a certain age. In interpreting sections three, five and six of the trust, the court found the language gave a vested interest at birth with enjoyment postponed until certain ages.[57] If the court had determined that surviving to those ages was an im-

50. A great-grandchild born of an after-born grandchild could have a remote interest; his interest could vest beyond the perpetuities period because he could be born more than twenty-one years after a life in being at testator's death.

51. 299 N.C. at 576-78, 264 S.E.2d at 86-87.

52. T. BERGIN & P. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 216 (1966).

53. 299 N.C. at 576, 264 S.E.2d at 86 (citing Poindexter v. Wachovia Bank & Trust Co., 258 N.C. 371, 128 S.E.2d 867 (1963)). For a discussion of the application of this constructional preference in North Carolina, *see* Link, *supra* note 17, at 765-67.

54. 299 N.C. at 577-78, 264 S.E.2d at 86-87.

55. Testator expressly named the two grandchildren in section two where they were given life income interests. *Id.* at 571, 264 S.E.2d at 83. In the other sections of the trust, testator referred only to "grandchildren." The language is clear and appears on its face only to evidence an intent for separate distributions in separate trust sections.

56. The court limited its interpretation to the facts of the case. *Id.* at 578, 264 S.E.2d at 87.

57. *Id.* at 575, 580, 264 S.E.2d at 84, 88. The court also made use of the preference for early vesting in section four where it held that making passing grades in college was a condition subsequent (which will divest a vested interest) rather than a condition precedent to vesting. The court

plied condition precedent to vesting, the class gifts would have violated the Rule.[58]

The presumption in favor of early vesting has been widely accepted,[59] and findings of vested gifts with enjoyment postponed until a certain age are present in other North Carolina cases.[60] Given that the distinction between a contingent interest and a vested interest with enjoyment postponed is ultimately one of language, courts have considerable leeway to find a gift vested in order to save it from the Rule.[61] In *Joyner*, the court was not faced with any express survivorship condition and did not find in the trust any implied condition of survivorship to a certain age such that the presumption of early vesting was rebutted. Instead, in section three, the court found that the express language reinforced its presumption for a vested remainder. The accepted judicial construction of a gift to be "paid" at a certain age is that the interest created is a vested remainder with enjoyment postponed.[62] The court apparently held that the use of the phrase "to pay . . . $5000 as each grandchild shall reach the age" in section three came within this judicial construction.[63]

Joyner demonstrates the willingness of the North Carolina Supreme Court to utilize constructional techniques to save trusts from violating the Rule. Although limiting its construction of the term "grandchildren" to the facts, the court apparently evidences a desire to validate trusts where constructionally possible. While it is difficult to estimate the significance of *Joyner* on future cases, the court has demonstrated that it is capable of limiting the impact of the Rule.

---

cited to Elmore v. Austin, 232 N.C. 13, 59 S.E.2d 205 (1950) for the proposition that a condition subsequent construction is to be preferred unless the language forbids it. The language of section four not only does not forbid the construction, it appears to be framed in condition subsequent form. *See* 299 N.C. at 575-76, 264 S.E.2d at 85.

58. *Additional developments*: In Moore v. Hunter, 46 N.C. App. 449, 265 S.E.2d 884 (1980), the court of appeals considered what evidence of intent was necessary to rebut the presumption of definite issue under N.C. GEN. STAT. § 41-4 (1976). The court interpreted a devise to the testator's son "in fee unless he should die without leaving issue" as requiring only that the son survive his father, or not die without issue before his father. 46 N.C. App. at 456, 265 S.E.2d at 888. The court's holding was based on a desire for early vesting and on other provisions in the will that showed testator's intent to provide for his son in the event of his own death. *Id.* at 457-58, 265 S.E.2d at 889.

59. *See* 2 L. SIMES & A. SMITH, *supra* note 49, § 573.

60. Wachovia Bank & Trust Co. v. Taylor, 255 N.C. 122, 120 S.E.2d 588 (1961); Fuller v. Hedgpeth, 239 N.C. 370, 80 S.E.2d 18 (1954).

61. T. BERGIN & P. HASKELL, *supra* note 52, at 217.

62. *See* W. LEACH & O. TUDOR, THE RULE AGAINST PERPETUITIES § 24.19, at 61 (1957); T. BERGIN & P. HASKELL, *supra* note 52, at 135.

63. *See* 299 N.C. at 575, 264 S.E.2d at 83. The court noted Clobberie's Case, 86 Eng. Rep. 476 (1677), in which the construction regarding a gift "to be paid at a certain age" was first articulated.

The court's holding regarding sections five and six, while supportable, is less clear-cut. The court stated that the great-grandchildren's remainder interest is subject to no condition precedent other than the termination of the preceding life income interests, and therefore the interests vest at birth. 299 N.C. at 576, 264 S.E.2d at 88. The court apparently ignored the possibility that the trust language may contain a condition of survivorship to a certain age. Although the term "to pay" is present in section five, the entire phrase reads: "to pay upon each great-grandchild reaching the age of 25." This phrase appears more likely to connote surviving to the age of 25 as a condition precedent to vesting, which would cause the class gift to violate the Rule. The court obviously disagreed and relied on the presumption of early vesting.

In *Rodin v. Merritt*[64] the North Carolina Court of Appeals held that a contract for the sale of land that postponed the vesting of title until certain conditions[65] were met did not violate the Rule Against Perpetuities.[66] While recognizing that at first glance it appeared all of the conditions might not be performed within twenty-one years,[67] the court found that the conditions must be met, if at all, within a reasonable time.[68] In the transaction at issue, a reasonable time would not extend beyond twenty-one years.[69]

In reaching this conclusion, the court argued that the Rule Against Perpetuities has little relevance to commercial transactions.[70] The period of the Rule, lives in being plus twenty-one years, may be a fairly appropriate unit of measure for family settlements, but often lives in being cannot be related to commercial interests.[71] Also, parties to business dealings, unlike some family benefactors, usually have no desire to inhibit the alienability of property for generations.[72] Not only did this argument make it easier for the court to avoid a violation of the Rule, it also suggests that the court may be receptive to future arguments that other exceptions to the Rule should be created for commercial transactions.

C. Escheats and Abandoned Property

In 1980 the North Carolina General Assembly passed a new statute on escheats and abandoned property.[73] The new law, G.S. 116B, repeals the old escheats and abandoned property statute[74] and also substantively amends G.S. 28A-22.[75] In general, the new law carries forward the provisions of the repealed statute with respect to escheated property and the administration and

64. 48 N.C. App. 64, 268 S.E.2d 539 (1980).

65. Among the conditions were having the property rezoned and annexed to the city, obtaining approval for the desired development from the necessary governmental agencies, and filing the required subdivision plats. *Id.* at 66-67, 268 S.E.2d at 541.

66. The classic statement of the rule is by Gray: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." J. GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942). *See generally* Link, *supra* note 17.

67. 48 N.C. App. at 68, 268 S.E.2d at 542.

68. *Id.* at 71, 268 S.E.2d at 543. The court cited Scarborough v. Adams, 264 N.C. 631, 142 S.E.2d 608 (1965), for the proposition that in determining what is a reasonable time for performance, the parties' purposes and intentions must be taken into account.

69. 48 N.C. App. at 71, 268 S.E.2d at 543. There being no North Carolina law on point, the court relied upon several out-of-state cases, especially Wong v. DiGrazia, 60 Cal. 2d 525, 386 P.2d 817, 35 Cal. Rptr. 241 (1963).

70. 48 N.C. App. at 68, 268 S.E.2d at 542.

71. *See* Leach, *Perpetuities: New Absurdity, Judicial and Statutory Correctives*, 73 HARV. L. REV. 1318, 1321-22 (1960); Link, *supra* note 17, at 807.

72. *See* Note, *Rule Against Perpetuities: Application to a Lease to Commence Upon Completion of Building*, 47 CAL. L. REV. 197, 198 (1959).

73. Law of June 25, 1980, ch. 1311, § 1, 1979 N.C. Sess. Laws, 2d Sess. 225 (codified at N.C. GEN. STAT. § 116B (Interim Supp. 1980)).

74. N.C. GEN. STAT. § 116A (1979).

75. Law of June 25, 1980, ch. 1311, § 2, 1979 N.C. Sess. Laws, 2d Sess. 225 (codified at N.C. GEN. STAT. § 28A-22-9 (Interim Supp. 1980)). This amendment to G.S. 28A-22 allows the share of known but unlocated heirs to be turned over to the clerk of superior court before the final accounting; the clerk is required to pay this share over to the Escheat Fund if not claimed within five years of the final accounting.

uses of the Escheat Fund.[76] The major changes of the new statute are in the provisions dealing with abandoned property and with reporting and administrative procedures.

The abandoned property section begins with a definitions section[77] and then G.S. 116B-11 to -21 sets out a comprehensive list of when various categories of property will be presumed abandoned.[78] This list sets forth criteria such as length of time property must be held, what notice to the owner must be given, and what acts by the owner will rebut the presumption of abandonment. The list is much more comprehensive and specific than the provisions of the old statute.

The new statute effects changes in the administration of the abandoned property and the attendant procedural aspects. As in the old statute, the new provisions call for all abandoned property to be placed in the Escheat Fund under the control of the state treasurer.[79] The new Act places new notice and reporting requirements on holders and insurers of property presumed to be abandoned. Insurers holding such property must file a report on the property with the commissioner of insurance yearly before September 1st,[80] and the insurer must also mail a notice to the last known address of the owner of the property by May 1st.[81] Other holders of such property must file a report with the treasurer before March 1st [82] and must also mail a notice to the last known address of the owner before November 1st.[83] The costs of this notice may be deducted from the held property, if cash, or may otherwise be claimed against

76. *See* N.C. GEN. STAT. §§ 116B-1 to -4, -27, -36 (Interim Supp. 1980). There are some changes in the wording of some of the sections, but the overall effect remains almost the same.

77. *Id.* § 116B-10.

78. The list includes these categories of property and these requirements: deposits and funds of financial institutions if unable to locate owner and owner has not changed amount of deposit, corresponded in writing concerning deposit or indicated interest in deposit within five years; certified check or written instrument on which financial institution directly liable if owner has not negotiated instrument, corresponded in writing about it or indicated interest in it within ten years from date payable; traveler's check or money order if owner has not negotiated it, corresponded in writing about it or indicated interest in it within fifteen years from date payable, *id.* § 116B-12; funds due and payable held by life, fire, casualty or other insurance companies when not claimed within five years, *id.* §§ 116B-13 to -14; deposits, property, refunds held by utility if unclaimed for five years after termination of services to owner or due to owner, *id.* § 116B-15; dividends held by business association if not claimed or owner has not corresponded in writing about it within five years, *id.* § 116B-16; stocks if property distributable under dissolution of business association, financial institution, insurer or utility if unclaimed within six months after dissolution, *id.* § 116B-17; shares of stock not delivered following merger of corporations within two years, *id.*; property held in fiduciary capacity if owner has not changed principal, accepted payment, corresponded in writing or given other evidence of interest in it within five years, *id.* § 116B-18; salary, wages owing by business association if unclaimed within five years after date payable, *id.* § 116B-20; property not otherwise covered and held by court, public body, or state if not claimed within five years, *id.* § 116B-19; property not otherwise covered and held in ordinary course of holder's business with value of $500 or more if not claimed within five years, *id.* § 116B-21.

79. *Id.* § 116B-27. N.C. GEN. STAT. §§ 116B-27 to -30 contain the provisions for actual tender of the property to the treasurer and the effect of actual delivery to the treasurer.

80. *Id.* § 116B-29. The report must contain all properties being held as of the prior December 31st. The contents of the report are set out in G.S. 116B-29(b).

81. *Id.* § 116B-28(a). Publication of notice was sufficient under the old statute, but now direct mailing is required. The contents of the notice are set out in G.S. § 116B-28(c).

82. *Id.* § 116B-29. The report must include all property held on the previous June 30th.

83. *Id.* § 116B-28(b).

the Escheat Fund, but costs are limited to fifty cents per notice.[84] Anyone filing a report must certify that they have mailed the notices; failure to do so is a misdemeanor punishable by fine, and the owner can recover actual damages at law.[85] Each business association (including financial institutions and life insurers) holding presumptively abandoned property must certify on its tax return that it is holding this property.[86]

The treasurer will use these reports to compile a list of escheated and abandoned property valued at more than fifty dollars.[87] This list is to be delivered to the clerk of superior court by November 1st, and the treasurer will publish notification that these lists are available from the clerk of superior court.[88] Persons claiming an interest in the escheated or abandoned property may file a claim with the original holder of the property if possible; if the original holder is satisfied with the validity of the claim, he shall notify the treasurer who will return the property or its value.[89] If the claimant cannot contact the original holder, he may make a claim directly against the treasurer, who will make the determination of validity.[90]

The new statute enlarges the treasurer's powers over the escheated or abandoned property once the state's right to the property is established. The treasurer can refuse to accept property if he feels it is worthless or not in the public interest,[91] or he may destroy or otherwise dispose of valueless property.[92] Once property has been held by the state for three years the treasurer can sell it at auction.[93] The treasurer may elect to retain securities in which escheated funds can be invested,[94] and he can also retain historical property.[95] The statute does place some limits on the treasurer's use of the fund, including limits on the use of the fund as security for bonds[96] and the establishment of a minimum refund reserve balance.[97] The new law also gives the treasurer and commissioner of insurance certain new discovery powers, including the power to examine and compel production of records,[98] make regulations,[99] and hire

84. *Id.* § 116B-28(d).

85. *Id.* §.116B-28(e). A failure or refusal to file reports or falsification of reports is also punishable by fine and 12% interest pursuant to G.S. 116B-41.

86. *Id.* § 116B-49. This certification is not confidential, and it must be filed even though the business association does not have to file a tax return.

87. *Id.* § 116B-30(a).

88. *Id.* § 116B-30(a) to -30(b).

89. *Id.* § 116B-38(a).

90. *Id.* § 116B-38(a) to -38(b). There is no longer a seven year bar for claims on escheated or abandoned property. Also, the claims will be paid without interest.

91. *Id.* § 116B-31(c).

92. *Id.* § 116B-35(d).

93. *Id.* § 116B-35(a).

94. *Id.* § 116B-35(b)(1).

95. *Id.* § 116B-35(c).

96. *Id.* § 116B-36(d). The amount of bonds that can be secured by the Escheat Account is 10 times the amount held for credit in the Account.

97. *Id.* § 116B-36(f). The refund reserve minimum required to be kept in the Fund is $5,000,000. Any amount over $5,000,000 in the Fund is to be transferred to the Escheat Account; any amount over $35,000,000 in the Account is to be used for student loans.

98. *Id.* § 116B-39(a) to -39(d).

99. *Id.* § 116B-42.

experts to appraise property and perform other functions.[100]

D. *Wills, Trusts, and Estates*[101]

In *Thompson v. Soles*[102] the North Carolina Supreme Court held that when a deed contains a recital that the transferred property is an advancement of the transferee's interest in his parents' estates, there is sufficient evidence to go to the jury on the effect of the recital under a theory of equitable election. The court also held that plaintiffs are not entitled to go to the jury on the theory of equitable estoppel when there is no evidence of detrimental reliance.

---

100. *Id.* § 116B-47.

101. *Additional developments*: In Anderson v. Gooding, 300 N.C. 170, 265 S.E.2d 201 (1980), the North Carolina Supreme Court decided the sufficiency of notice by publication to creditors of an estate to present their claims. Starting on April 27th, 1977, the executor published the notice weekly for four successive weeks, as specified in G.S. 28A-14-1. N.C. GEN. STAT. § 28A-14-1 (Cum. Supp. 1979). If this notice had been sufficient, all claims not presented within six months of the initial date of publication would be time barred by G.S. 28A-19-3(a).

The court found this notice insufficient under G.S. 28A-14 because the notice did not name the final day on which claims would be timely, nor did it state that the final day for timely claims was six months from the date of first publication of the notice. 300 N.C. at 174, 265 S.E.2d at 204. Thus, when a claim was presented to the executor seven months after the initial publication, it was not barred by G.S. 28A-19-3(a). *Anderson* stands for the proposition that when an executor raises G.S. 28A-19-3(a) as a defense against claims on the estate, he must prove specific compliance with the notice provisions of G.S. 28A-14-1.

The North Carolina Court of Appeals dealt with the application of G.S. 28A-19-13 to claims against an insolvent estate in Rodgers v. Tindal, 46 N.C. App. 783, 266 S.E.2d 691 (1980). The decedent was indebted at the time of his death to the defendant for a purchase and rentals arising from a business deal. The defendant made purchases on credit from the estate with the result that she owed more to the insolvent estate than it owed her. Plaintiff brought an action to recover the defendant's debt to the estate. The defendant counterclaimed for her claim against the estate to be set-off against her debt to the estate.

The court of appeals, reversing the trial court, held this attempted set-off improper. Since the estate was insolvent, no counterclaim could be allowed that would give any general creditor undue priority. The debt owed to the estate must be paid *in toto*, and the proceeds then applied to a *pro rata* payment of all general claims against the estate. The fact that the defendant was both a creditor and a debtor of the estate was not determinative, because her debt to the estate arose after the decedent's death. The court found that allowing the set-off would contravene the intent of G.S. 28A-19-13, which forbids giving preference to any claims against an estate. *Id.* at 785-86, 266 S.E.2d at 693.

In Keener v. Korn, 46 N.C. App. 214, 264 S.E.2d 829 (1980), *cert. denied*, 301 N.C. 92, 273 S.E.2d 299 (1981), the court of appeals implied a devise of a life estate to the testator's wife because he had given her a life estate in his farming equipment but had provided for devising his real property "after [her] death." The court also implied a power in the wife to dispose of the property because the testator, in the devise of his land, devised only that property "remaining" at the wife's death. *Id.* at 217, 264 S.E.2d at 832. The general rule is that when land is conveyed with a power to dispose, the donee takes a fee, and any purported gift over is void. Carroll v. Herring, 180 N.C. 369, 371, 104 S.E. 893, 893 (1920). The exception to this rule lies when there is a life estate created by express terms. Under this exception, the devisee takes only a life estate, and his grantee has a fee. In *Keener* the court of appeals went a step further by implying the life estate, rather than requiring clear and express terms. 46 N.C. App. at 218, 264 S.E.2d at 832.

In O'Brien v. Reece, 45 N.C. App. 610, 263 S.E.2d 849 (1980), the court of appeals strictly construed the requirement in G.S. 41-2.1(a) that the right of survivorship in deposit accounts be expressly provided. N.C. GEN. STAT. § 41-2.1(a) (1976). The court held that a bank account signature card signed by two depositors did not expressly provide for the right of survivorship as required by the statute because the space on the card that gave effect to the survivorship provision was left unmarked. The court also held that the certificate of deposit could not qualify as a "separate instrument" providing for right of survivorship under G.A. 41-2.1(a) because it was not a signed writing as required by the statute.

102. 299 N.C. 484, 263 S.E.2d 599 (1980).

The father of plaintiffs and of defendant devised real property to his wife for life, remainder to his children as tenants in common. The mother of the children conveyed a tract that she owned in fee simple to defendant. The deed contained a recital that the conveyance was an advancement to defendant of his entire interest in his parents' estates.[103] Plaintiffs then sought a declaratory judgment that they owned in fee simple the property that had been originally devised to them and defendant as tenants in common.[104]

The doctrine of equitable election provides that a beneficiary under a will cannot take under the instrument if he also asserts a title or claim that is inconsistent with the same writing.[105] Although it is usually applied to wills, there is authority that the doctrine also applies to deeds.[106] The *Thompson* court held that if the fact recited in the deed is of the essence of the transaction, the doctrine of equitable election will bar the defendant from claiming ownership in the contested property.[107]

The decision's language is confusing. Estoppel by recital[108] is the doctrine that the court actually applied. As the court recognized, when a recital fact is of the essence of the agreement and it is the intention of the parties to make the fact the basis of the contract, the recital is effective to operate as an estoppel against the parties to the deed and their privies.[109] The statement of the test should end at this point because no purpose is served by mentioning the doctrine of election. Estoppel by recital is a hybrid of estoppel by deed and equitable estoppel. Estoppel by deed does not ordinarily apply to grantees.[110] Equitable estoppel does not apply when the party has been innocently silent,[111] which may or may not have been the situation in this case.[112] Estoppel by recital avoids these problems and accurately describes the doctrine that the court applied.

The court of appeals in *Moore v. Jones*[113] held that a wife could reach an *inter vivos* trust if she claimed under her statutory share rights in article 1 of

---

103. The transfer could not be an advancement under N.C. GEN. STAT. § 29-23 (1976) because the theory of advancement applies only in the case of intestacy. However, equity looks to the substance rather than the form of a transaction. *See In Re* Pendergrass' Will, 251 N.C. 737, 112 S.E.2d 562 (1960).

104. 299 N.C. at 485, 263 S.E.2d at 601.

105. *See* Rouse v. Rouse, 238 N.C. 568, 78 S.E.2d 451 (1953).

106. *See* Norwood v. Lassiter, 132 N.C. 52, 43 S.E. 509 (1903).

107. 299 N.C. at 490, 263 S.E.2d at 604.

108. *See* 28 AM. JUR. 2D *Estoppel and Waiver* § 19 (1966).

109. 299 N.C. at 486, 263 S.E.2d at 601-02 (citing Fort v. Allen, 110 N.C. 183, 14 S.E. 685 (1892)).

110. *See* 28 AM. JUR. 2D, *supra* note 108, at § 13.

111. *Id.* § 53.

112. If defendant did not know that the manner in which his mother attempted to transfer his interest was improper and he did not then intend to breach the agreement, estoppel cannot be applied. But if he had this knowledge or intent, it appears that his silence was misleading and that his mother relied to her detriment. Although the court found no detriment, the mother reduced her fee interest to a life estate, and the plaintiffs are her privies because they are donee beneficiaries. *See generally* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 2.3 (1973).

113. 44 N.C. App. 578, 261 S.E.2d 289 (1980).

G.S. chapter 30.[114] In permitting the wife to reach the trust, the court adopted the rule that when the husband's control is tantamount to retained ownership until his death, the trust will be viewed as part of the husband's estate in determining and satisfying the wife's share, though the unaffected portion of the trust corpus will still be distributed pursuant to the trust agreement.[115]

In *Moore*, plaintiff's husband established an *inter vivos* trust one year after they married, retaining a life estate in himself and the power to withdraw assets, change beneficiaries, and modify or revoke the trust agreement.[116] Twelve years later the husband died and the wife challenged the validity of the trust. The court found the trust valid under North Carolina law and noted that retaining a life estate and the power to revoke or modify does not invalidate a trust if it was not executed with the Wills Act formalities.[117] Here the court found a clear intention to create a trust, a trust res, active duties for the trustee and named beneficiaries; thus, it refused to find the trust invalid.[118] This approach rejected that taken by several other jurisdictions.[119] These jurisdictions examine the trust validity to determine if it gives so much control that the settlor has in reality made a testamentary disposition without complying with the Wills Act formalities. If the settlor has the requisite control, the trust is deemed invalid, and the wife is allowed to reach it to obtain her statutory share.[120] The North Carolina Court of Appeals' approach is the better one. The finding that the trust is valid allows the settlor to dispose of his own property, except for the portion given to his spouse under the statute.[121] By contrast, the other approach declares the whole trust invalid, and the property must pass under intestacy laws that may not reflect accurately the testator's original design.[122] The approach taken by the court of appeals also seems to give more protection to the surviving spouse[123] because courts seem more

---

114. N.C. GEN. STAT. § 30-1(a) (1976) specifies circumstances under which a spouse has a right to dissent. *Id.* § 30-3(a) provides that a surviving spouse

> shall take the same share of the deceased spouse's real and personal property as if the deceased had died intestate; provided, that if the deceased spouse is not survived by a child, children, or any lineal descendents of a deceased child or children, or by a parent, the surviving spouse shall receive only one half of the deceased spouse's net estate as defined in G.S. 29-2(5), which one half shall be estimated and determined before any federal estate tax is deducted or paid and shall be free and clear of such tax.

115. 44 N.C. App. at 583, 261 S.E.2d at 292.

116. *Id.* at 579, 261 S.E.2d at 290.

117. *Id.* at 580, 261 S.E.2d at 291 (citing Ridge v. Bright, 244 N.C. 345, 93 S.E.2d 607 (1956)).

118. 44 N.C. App. at 581, 261 S.E.2d at 291.

119. *See, e.g.*, Freed v. Judith Realty & Farm Prods. Corp., 201 Va. 791, 113 S.E.2d 850 (1960); *In re* Steck's Estate, 275 Wis. 290, 81 N.W.2d 729 (1957). For an extensive list of other jurisdictions which follow the same approach as the Virginia and Wisconsin courts, see Annot., 39 A.L.R.3d 14, 23 (1971).

120. *See* cases in note 119 *supra*.

121. 44 N.C.App. at 583, 261 S.E.2d at 292. The court notes that allowing the surviving spouse to dissent against the trust serves both the primary public policy of guarding against disinheritance of the surviving spouse and the secondary policy of favoring alienability of property *inter vivos*. *Id.* at 582-83, 261 S.E.2d at 292.

122. *See* cases in note 119 *supra*.

123. 44 N.C. App. at 583, 261 S.E.2d at 292. The court finds protection of the spouse to be the prevailing public policy as expressed through N.C. GEN. STAT. §§ 30-1, -3 (1976). *See* notes 114 & 121 *supra*.

likely to find the control necessary to allow the spouse to reach a portion of the trust.

The court of appeals also rejected a third approach, taken by some jurisdictions,[124] which invalidates *inter vivos* trusts that perpetrate a fraud upon the wife's rights, by noting explicitly that the record could not support any finding of fraudulent intent by the husband in this case.[125] The control test adopted by the court is also superior to the fraud test. It provides more protection for the spouse and also allows the husband to dispose of his property. Because of the difficulty of proving fraud the wife will get more protection under the rule adopted by the North Carolina Court of Appeals. The test also provides the husband with substantial power to dispose of his property since only if he has retained substantial control will the court allow the wife to reach it, and even then, the rest of the trust passes under his original scheme. Another advantage of the control test is that it is objective, with the court inquiring into the settlor's control of the property at his death, rather than asking what his intent was in establishing the trust.[126]

In *Wing v. Wachovia Bank & Trust Co.*[127] the North Carolina Supreme Court refused to presume that any omission or error in an attorney's will was intentional, and thus declined to fashion a special rule for members of the legal profession. Testator, an attorney, established an elaborate trust with the income divided into twenty equal shares and distributed to various family members. Three shares were given to the testator's two brothers and sister, and one share was given to his nieces and nephews. These shares were expressly limited to their respective lifetimes. The remaining sixteen shares were given to his great nieces and great nephews alive at his death, or born within the twenty-one years following his death. The great nieces and great nephews would eventually receive all of the trust income.[128] The will did not provide for the distribution of the trust corpus. While a gift of income without limitation to duration amounts to a gift of the principal,[129] the testator did provide that the trust would extend until the death of the great nieces and great nephews and no longer, thus providing for the eventual termination of the trust. The supreme court implied a gift of the trust principal to the great nieces and great nephews. The supreme court rejected the court of appeals' reliance on the presumption that the testator must have realized his omission because he was an attorney and focused instead on the intent of the testator as gathered

124. *See, e.g.*, Richard v. James, 133 Colo. 180, 292 P.2d 977 (1956); Smith v. Northern Trust Co., 322 Ill. App. 168, 54 N.E.2d 75 (1944). For a list of additional cases, see Annot., *supra* note 119, at 25-26.

125. 44 N.C.App. at 583, 261 S.E.2d at 292.

126. Some jurisdictions have also applied an illusory trust test, finding that the trust was so extensive that the trustee was a mere agent of the settlor or that the trust was used merely to mask ownership. While this test seems similar to the control approach taken by the court of appeals, the cases using the illusory trust approach imply that the illusion was to deprive the wife, combining elements of the fraud and control tests. *See* Annot., *supra* note 119, at 25-28.

127. 301 N.C. 456, 272 S.E.2d 90 (1980).

128. *Id.* at 460, 272 S.E.2d at 93-94.

129. *Id.* at 465, 272 S.E.2d at 97 (citing Poindexter v. Wachovia Bank & Trust Co., 258 N.C. 371, 128 S.E.2d 867 (1963)).

from the four corners of the will and on the presumption for complete testacy over partial intestacy.[130] The will contained several indications that testator did not intend his property to pass by intestacy. One clause, purporting to dispose of the bulk of his estate through the trust, demonstrated that testator did not intend a partial intestacy.[131] Other portions made clear that his overall plan was to benefit the great nieces and great nephews. He expressly limited the other beneficiaries' share to their lifetime, but did not make the same express restriction on the great nieces' and great nephews' share. He further provided that the great nieces and great nephews were to receive eventually all of the trust income. The supreme court also considered the fact that the testator made a class gift with a per capita distribution. To have the principal pass by intestacy would produce a contrary result by having the property pass per stirpes.[132]

In addition to the evidence that the testator wanted to benefit the great nieces and great nephews, the supreme court also considered the termination clause in light of the law at the time of the will.[133] The court found the clause was not meant to limit the beneficiaries' interests, but was designed to ensure the trust's validity by limiting its duration to avoid a violation of the Rule Against Perpetuities. With the termination clause viewed in light of this purpose, and with the evidence showing that the testator intended to benefit the great nieces and great nephews, the court considered the evidence so overwhelming that a contrary result was impossible; therefore the court implied the gift of the principal to the great nieces and great nephews.[134]

The decision to reject the stricter standard should provide little comfort to the legal profession because the court did note that a testator's intelligence and profession are still relevant to determining intent in a will.[135] In *Wing*, there was strong evidence of the testator's intent to negate any inference that the omission was intentional—evidence which will not always be present. The case is important as an example of the necessity for good draftsmanship.

---

130. 301 N.C. at 463, 272 S.E.2d at 95 (citing *In re* Will of Wilson, 260 N.C. 482, 133 S.E.2d 189 (1963); Little v. Wachovia Bank & Trust Co., 252 N.C. 229, 113 S.E.2d 689 (1960); Ferguson v. Ferguson, 225 N.C. 375, 35 S.E.2d 231 (1945)).

131. 301 N.C. at 464, 272 S.E.2d at 96.

132. *Id.* at 466-67, 272 S.E.2d at 97-98.

133. *Id.* at 465-66, 272 S.E.2d at 97. At the time of the execution of the will, North Carolina followed the minority rule, requiring that trusts for private purposes terminate within a life in being plus twenty-one years, so as not to violate the Rule Against Perpetuities. Mercer v. Mercer, 230 N.C. 101, 52 S.E.2d 229 (1949). North Carolina adopted the majority rule in 1952 in McQueen v. Branch Banking & Trust Co., 234 N.C. 737, 68 S.E.2d 831 (1952).

134. 301 N.C. at 467, 272 S.E.2d at 98.

135. *Id.* at 466, 272 S.E.2d at 97.

E. Mortgages and Deeds of Trust[136]

In *Tarkington v. Tarkington*,[137] the North Carolina Supreme Court held

136. *Additional developments*: In National Mortgage Corp. v. American Title Ins. Co., 299 N.C. 369, 261 S.E.2d 844 (1980) the North Carolina Supreme Court adopted the general rule that title insurance protects the insured only against defects or encumbrances of title that exist at the time the insured acquires title. The owners of a fee simple leased the tract to a developer. The lessor/owner agreed to subordinate its fee simple title to a lien of a deed of trust placed on the property by the lessee to acquire construction financing. A condition of this agreement was that funds secured by the lien would be used only for construction of improvements. The lessee/developer recorded this executed agreement on July 18, 1969, at 12:23 p.m. At 12:26 p.m., he also recorded a deed of trust in favor of National Mortgage Corp., from whom he had obtained financing. National Mortgage obtained title insurance insuring its deed of trust "as of the 18th day of July, 1969, at 12:26 p.m." *Id.* at 375, 261 S.E.2d at 846. The subordination agreement was breached by the lessee/developer's misappropriation of the funds that were disbursed *in toto* on July 24, 1969. This breach invalidated National Mortgage's lien, and it sought recovery from the insurer.

The supreme court held the loss was not covered by the insurance policy. The breach of the subordination agreement and the ensuing invalidation of the lien were not caused by matters in existence at the time the title policy was issued. Title insurance is retrospective only, covering defects affecting title that are in existence when the insured takes title. *Id.* at 374-75, 261 S.E.2d at 846-47. Since the loss of the lien was caused by actions subsequent to the insured taking title, the loss was not reimbursable. *Id.* at 376, 261 S.E.2d at 848.

In reaching this result the court cited no cases from North Carolina; however, this is the consistent position taken by other states. *See, e.g.*, Strass v. District-Realty Title Insurance Corp., 31 Md. App. 90, 358 A.2d 251 (1976); Butcher v. Burton Abstract Title Co., 52 Mich. App. 98, 216 N.W.2d 434 (1974); Mayers v. Van Schaik, 268 N.Y. 320, 197 N.E.2d 296 (1935).

In Seashore Properties, Inc. v. East Fed. Sav. & Loan Ass'n, 47 N.C. App. 675, 267 S.E.2d 693 (1980), the court of appeals interpreted N.C. GEN. STAT. § 45-21.16 (Cum. Supp. 1979) to mean that notice of hearing on foreclosure must be given to mortgagor but not to persons who eventually will have a right of ownership under a recorded management agreement. The statute was amended in 1977, Law of May 10, 1977, ch. 359, §§ 2-10, 1977 N.C. Sess. Laws 364, to comply with the due process requirements owed mortgagors, which were identified in Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975). 47 N.C. App. at 677, 267 S.E.2d at 694. Consequently, the term "record owner" used in G.S. 45-21.16 applies to present owners and mortgagors only. 47 N.C. App. at 677, 267 S.E.2d at 694.

In McCay v. Morris, 46 N.C. App. 792, 266 S.E.2d 5 (1980), the court of appeals refused to apply the doctrine of frustration to a contract to convey land with a clouded title. The court relied on the decision in Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975), which required that notice be given to a mortgagor or else the foreclosure would be voidable. In *McCay* seller could have removed the cloud, and the contract would have evidenced the parties' bargain. Frustration applies only when a radical change in conditions has occurred through the fault of neither party and consequently performance would be different from what the parties had contracted. 46 N.C. App. at 793-94, 266 S.E.2d at 7.

In *In re* Foreclosure of Burgess, 47 N.C. App. 599, 267 S.E.2d 915, *appeal dismissed*, 301 N.C. 90, 273 S.E.2d 311 (1980), the court of appeals found that under N.C. GEN. STAT. § 45-21-16(d) (Cum. Supp. 1979), a clerk of court may find a valid debt and a right to foreclose even when there is a dispute over the amount of the debt. The purpose of the statute is to satisfy minimum due process requirements of notice and hearing, and determination of the amount of debt is beyond the scope of the hearing. 47 N.C. App. at 603-04, 267 S.E.2d at 918. The court also noted that the parties were not deprived of due process since they could utilize N.C. GEN. STAT. § 45-21.34 (1976) to enjoin the sale. These statutes were passed in 1975 after a federal district court found that the prior statutory procedure lacked the rudiments of due process. *See* Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975). For a discussion concluding that these statutes and early cases interpreting them do not give the type of hearing contemplated by *Turner*, see *Survey of Developments in North Carolina Law, 1978—Property*, 57 N.C.L. REV. 827, 1104-07 (1979).

In Kavanau Real Estate Trust v. Debnam, 299 N.C. 510, 263 S.E.2d 595 (1980), the supreme court interpreted N.C. GEN. STAT. § 45-21.38 (1976), an antideficiency judgment statute, to apply only in cases involving sales of real property. The statute, therefore, is not a bar to an in personam suit and money judgment on a purchase money note securing assignment of a leasehold interest since a lease is considered personal property.

137. 301 N.C. 502, 272 S.E.2d 99 (1980).

that a presumption of a resulting trust exists in favor of a wife who furnished the consideration for a purchase of realty deeded to her and her husband as tenants by the entirety, even when both husband and wife signed a note and deed of trust for the balance of the purchase price, and the husband made some of the monthly payments.[138] The court stated that the trial court erred in holding that the husband's financial obligation and payments on the note overcame the presumption, because a resulting trust is created, if at all, at the time of execution of the deed.[139]

Unlike the presumption in favor of the wife, a resulting trust does not arise in favor of the husband who provides similar consideration. Instead, a gift to the wife of an entirety interest is presumed.[140] In light of this distinction and the changes in property law relating to wives since the presumption's origin, the court of appeals, in dicta, had questioned the propriety of the presumption in contemporary marriages.[141] The supreme court, while stating that some jurisdictions have abolished the trust presumption,[142] held that the present case offered no compelling reason to change the long-standing rule.[143]

F. Adverse Possession

Two cases decided by the court of appeals, *Stone v. Conder*[144] and *Allen v. Morgan*,[145] involved the application of G.S. 1-38[146] to situations of adverse possession under color of title.[147]

In *Stone v. Conder* the court faced the issue of whether the defendant had adversely possessed the land in question under color of title for seven years, as required by G.S. 1-38(a).[148] The plaintiffs' father had owned a life estate in the property, with the plaintiffs the designated remaindermen. In 1950, plaintiffs' father conveyed what purportedly was a fee simple by a deed containing a metes and bounds description that corresponded with a recorded partition

138. The wife paid a down payment of $19,800 from her own funds toward the purchase price of $36,000. *Id.* at 503, 272 S.E.2d at 100.

139. 301 N.C. at 506, 272 S.E.2d at 102.

140. Honeycutt v. Citizens Nat'l Bank, 242 N.C. 734, 89 S.E.2d 598 (1955).

141. 45 N.C. App. 476, 480, 263 S.E.2d 294, 297 (1980).

142. 301 N.C. at 506, 272 S.E.2d at 101-02. *See* Hogan v. Hogan, 286 Mass. 524, 190 N.E. 715 (1934); Emery v. Emery, 122 Mont. 201, 200 P.2d 251 (1948); Peterson v. Massey, 155 Neb. 829, 53 N.W.2d 912 (1952).

143. 301 N.C. at 506, 272 S.E.2d at 101-02.

144. 46 N.C. App. 190, 264 S.E.2d 760, *cert. denied*, 301 N.C. 105 (1980).

145. 48 N.C. App. 706, 269 S.E.2d 753 (1980).

146. N.C. GEN. STAT. § 1-38 (Cum. Supp. 1979).

147. Color of title refers to the situation where the vendee has actually taken a purported title to the property through the transaction, but the title is defective in some way.

148. N.C. GEN. STAT. § 1-38(a) (Cum. Supp. 1979) states:

> When a person or those under whom he claims is and has been in possession of any real property, under known and visible lines and boundaries and under color of title, for seven years, no entry shall be made or action sustained against such possessor by a person having any right or title to the same, except during the seven years next after his right or title has descended or accrued, who in default of suing within that time shall be excluded from any claim thereafter made; any such possession, so held, is a perpetual bar against all persons not under disability: Provided, that commissioner's deeds in judicial sales and trustee's deeds under foreclosure shall also constitute color of title.

plat.[149] When this conveyance was made, the vendor showed the vendee the boundaries that were marked by steel stakes at least eighteen inches high and which conformed with the recorded plat. The vendee was in continuous possession for twenty-six years[150] and then conveyed the land to the defendant.

From the time of purchase, the defendants listed the property in their name and paid all taxes assessed against it. They encumbered the property with a deed of trust, and made improvements.[151] The defendants also subdivided and sold lots, with the deeds being duly recorded. When new houses were being constructed on these lots, the plaintiffs brought this action of ejectment and cancellation of the deed of trust.[152]

Although some of the plaintiffs had been on the property several times after 1950, the defendants and their predecessors had maintained uninterrupted hostile possession of the land under a claim of right for twenty-nine years.[153] However, the youngest plaintiff-remainderman had only come of age in 1964,[154] so the twenty year adverse possession statute was inapplicable.[155] The defendant had the burden of showing superior title by adverse possession,[156] and did this by showing adverse possession under color of title for a period of seven years.[157] Defendant additionally had to demonstrate actual possession of the real property,[158] and did this by invoking the prima facie evidence provisions of G.S. 1-38(b) and (c).[159] These sections provide that if the property in question has visibly and distinctively marked boundaries,[160] and a map of the property prepared by a survey has been recorded, then the listing and paying of property taxes on the realty shall constitute prima facie evidence of possession of the property.[161] Since the defendant

149. 46 N.C. App. at 191, 264 S.E.2d at 761. The plaintiff's father had received only a one tenth remainder. The land was partitioned after the previous life tenant died; a surveyor was hired who surveyed the property and drew up a plat that was recorded with the register of deeds in 1949.

150. The vendee planted saplings that matured during his tenancy; he cut firewood and had a conspicuous garden on the land; and he went upon the property often to protect it. *Id.* at 192, 264 S.E.2d at 761-62.

151. *Id.* at 193, 264 S.E.2d at 762.

152. *Id.* at 190, 264 S.E.2d at 760-61.

153. The plaintiffs had never before brought their claim to any official attention. Although at least one of the plaintiffs had been to the property several times to cut Christmas trees and rake pinestraw and claimed he had never seen anyone on the property, this was not enough to interrupt any possession. *Id.* at 199, 264 S.E.2d at 765.

154. *Id.* It is an established rule that a statute of limitations cannot begin to run against a minor during minority. *See* Lovett v. Stone, 239 N.C. 206, 79 S.E.2d 479 (1954). The period of adverse possession is in effect a statute of limitations, and thus adverse possession did not begin to run until the remainderman reached majority. 46 N.C. App. at 199, 264 S.E.2d at 765.

155. The plaintiffs seemed to have premised their case on the defendants' not having actual possession for the twenty year period. *Id.* at 196, 264 S.E.2d at 764.

156. *Id.* The plaintiffs had demonstrated legal title pursuant to N.C. GEN. STAT. § 1-42 (1969).

157. This seven year possession under color of title is contained in G.S. 1-38. Here, of course, defendant acted under color of the title he took from plaintiffs' father.

158. The elements of adverse possession are set out in Mizzel v. Ewell, 27 N.C. App. 507, 219 S.E.2d 513 (1975).

159. N.C. GEN. STAT. § 1-38(b)-(c) (Cum. Supp. 1979).

160. The boundary markers must be clearly visible and at least 18 inches high. *Id.* § 1-38(b).

161. *Id.* G.S. § 1-38(c) states that maps made and recorded before Oct. 1, 1973, shall qualify if

established prima facie possession which plaintiff was unable to rebut, judgment was for the defendant.[162]

Allen v. Morgan[163] concerned the application of G.S. 1-38 to the adverse possession of a lappage.[164] Defendants had occupied the lappage pursuant to a quit-claim deed[165] and claimed adverse possession under claim of title for seven years when plaintiff sought their ejectment. In lappage situtaions, the general rule is that the junior grantee need not show the boundaries of the lappage to be visible on the ground.[166] However, the claimants must offer proof fitting the description in the deed for the land it covers and also must prove actual adverse possession within the lines of the lappage as contained in the description in the deed.[167] In this case, the defendants were unable to prove that they actually possessed the area described in their quit-claim deed.[168] Since the plaintiff established legal title[169] and no adverse possession was proved, the case went for the plaintiff.[170]

G.S. 1-38, though seldom used, gives a putative landowner a means of protecting his land. By establishing visible and distinct boundary markers of the correct height and by recording a surveyor's map of the property, a landholder can demonstrate prima facie actual possession. Proof of actual possession always turns on the nature of the property, and this possession can be difficult to prove. The method provided in the statute can be less burdensome than other attempts to prove actual possession. *Allen v. Morgan*, however, demonstrates that G.S. 1-38 will not always be effective in proving actual possession.

---

the map can be proved to conform to the boundary lines on the ground and in the recorded instruments of conveyance.

162. 46 N.C. App. at 191, 264 S.E.2d at 761. The court of appeals affirmed the judgment of the trial court. *Id.* at 200, 264 S.E.2d at 766. The defendant had not possessed the land for seven years, but since his predecessor had possessed the land under the same boundaries, the defendant could tack his possession to that of his predecessor in privity.

163. 48 N.C. App. 706, 269 S.E.2d 753 (1980).

164. A lappage occurs when a deed under which one person claims covers an area that another party claims under a grant. Here plaintiff established a connected claim of title to a grant from the State to his predecessor. *Id.* at 707, 269 S.E.2d at 753.

165. *Id.* Defendants alleged that they had maintained open, notorious and adverse possession since they received their deed in 1948, and that they occupied the land "under known and visible boundaries conforming with the description in their deed." *Id.*

166. *Id.* at 709, 269 S.E.2d at 754. *See* Price v. Tomrich, 275 N.C. 385, 394, 167 S.E.2d 766, 772 (1969).

167. 48 N.C. App. at 709, 269 S.E.2d at 754-55.

168. *Id.* Plaintiffs offered several family members as witnesses. However, none of the witnesses could establish the area they possessed on a map of the entire area. They were unable to correlate the description in their deed to landmarks on the property. *Id.* at 707-08, 269 S.E.2d at 754.

169. The plaintiff made a prima facie showing of legal title by showing a connected chain of title back to the original grant. *Id.* at 708, 269 S.E.2d at 754. *See* Mobley v. Griffin, 104 N.C. 112, 10 S.E. 142 (1889).

170. 48 N.C. App. at 709, 269 S.E.2d at 755. The trial court had found that twenty years of adverse possession had been demonstrated by the defendants and decided for them. The court of appeals reversed. *Id.*

G. Eminent Domain

In *Board of Transportation v. Terminal Warehouse Corp.*[171] the North Carolina Supreme Court held that a noncompensable injury to property values, resulting from enactment of valid traffic regulations, will not be regarded as compensable merely because some property was taken. The court also ruled that the reasonable use doctrine adopted by North Carolina in *Pendergrast v. Aiken*[172] does not govern the rights of private landowners in condemnation proceedings.[173]

A portion of defendant's land was condemned as a part of a project to relocate a federal highway. After the relocation, defendant's land was left on a cul-de-sac, rather than fronting the highway, and this inhibited access to his trucking terminal. The use of the trucking terminal was also hindered by flooding due to the diversion of a creek and construction of a drainage system by the plaintiff.[174]

In disallowing recovery for changing the access to the defendant's property, the court relied on the police power of the state to change traffic patterns,[175] and the settled rule that as long as these changes do not foreclose reasonable access to the roadway from abutting property, no compensation need be made.[176] The court correctly rejected the defendant's argument that this rule should not apply because his property was also taken, noting that they had rejected this same argument[177] in *Barnes v. State Highway Commission*.[178] A different rule would have resulted in the inequitable situation in which all landowners whose access had been restricted would suffer injury, but only those who coincidentally had property taken would obtain damages.

In reversing the court of appeals' application of the reasonable use doctrine to condemnation proceedings, the supreme court recognized that the purpose of the rule was to encourage orderly utilization of water by private landowners, not public entities, and it thus had no application in this case.[179] The court further recognized that the injury was a taking[180] of property for

171. 300 N.C. 700, 268 S.E.2d 180 (1980).

172. Pendergrast v. Aiken, 293 N.C. 201, 209-10, 236 S.E.2d 787, 792 (1977), defined the rule of reasonable use as allowing "each landowner to make reasonable use of his land even though, by doing so, he alters in some way the flow of surface water thereby harming other landowners. Liability is incurred only when this harmful interference is found to be unreasonable." (citations omitted) *See generally* 5 R. CLARK, WATERS AND WATER RIGHTS § 453 (1972 & Supp. 1978); Aycock, *Introduction to Water Use Law in North Carolina*, 46 N.C.L. REV. 1 (1967); Note, *Real Property—Disposition of Diffused Surface Waters in North Carolina*, 47 N.C.L. REV. 205 (1968).

173. 300 N.C. at 705-06, 268 S.E.2d at 183-84.

174. *Id.* at 701-02, 268 S.E.2d at 181-82.

175. *Id.* at 703-04, 268 S.E.2d at 182-83.

176. *Id.* at 703, 268 S.E.2d at 182. In Wofford v. State Highway Comm'n, 263 N.C. 677, 140 S.E.2d 376, *cert. denied*, 382 U.S. 822 (1965), the court ruled that valid traffic regulations which change traffic patterns and cause circuity of travel and inconvenience will not be compensable so long as there is a reasonable access to the highway. The injury is one shared with the general public.

177. 300 N.C. at 703, 268 S.E.2d at 182-83.

178. 257 N.C. 507, 126 S.E.2d 732 (1962).

179. 300 N.C. at 705-06, 268 S.E.2d at 183-84.

180. *Id.* at 706, 268 S.E.2d at 184.

public use, and just compensation must be made.[181]

In *Terminal Warehouse* the court went further than it needed by recognizing this damage as a taking. It could have allowed recovery based strictly on the measure of compensation for lands actually taken, which includes "how the use of the land taken results in damage to the remainder."[182] By finding this damage a taking, the court is allowing all landowners with physical damage caused by the state to recover, as was the law before this issue was confused by *Pendergrast*.[183] Again, the court adopted the most equitable rule by allowing recovery based on actual injury and not on whether a taking was involved.

H. Landlord-Tenant

In *Davis v. McRee*[184] the North Carolina Supreme Court held that, in determining whether an agreement renewing a lease incorporates the option to purchase provision of the original lease, it is proper to examine all relevant circumstances to ascertain the parties' intent. Also, the court held that only rent payments made during the term of the second agreement can be counted in computing the amount due on the purchase price when there are two separate leases rather than one that has been continued.

The parties entered into a lease agreement for the period from January 31, 1972 to January 31, 1974. The agreement contained an option to purchase that permitted the rental payments to be applied against the purchase price. The lessee continued in possession of the property following the expiration date of the lease and continued to make rent payments. On August 13, 1974, the parties added a clause to the first agreement that provided only that the lease would extend from January 31, 1974 to January 31, 1976. The lessee later decided to exercise his option.[185]

The supreme court decided that the purchase option had been incorporated into the second agreement because both parties' actions demonstrated that they thought it was part of the agreement.[186] It chose to construe the contract by ascertaining the parties' intent from the relevant circumstances rather than by adopting the majority position.[187] The widely accepted rule is that if the subsequent agreement refers to and continues the original lease, the option is extended. If the subsequent agreement merely continues the tenancy, the option is not extended.[188] The court found the rule more confusing than

181. *Id.* (citing Eller v. Board of Educ., 242 N.C. 584, 89 S.E.2d 144 (1955)).

182. Board of Transp. v. Brown, 34 N.C. App. 266, 269, 237 S.E.2d 854, 856 (1977), *aff'd per curiam*, 296 N.C. 250, 249 S.E.2d 803 (1978).

183. *See* State Highway Comm'n v. Phillips, 267 N.C. 369, 148 S.E.2d 282 (1966); State Highway Comm'n v. Yarborough, 6 N.C. App. 294, 170 S.E.2d 159 (1969).

184. 299 N.C. 498, 263 S.E.2d 604 (1980).

185. *Id.* at 499-500, 263 S.E.2d at 605.

186. *Id.* at 502, 263 S.E.2d at 607. The lessee had exercised the option, and the lessor had begun to have the deed of purchase drafted.

187. *Id.* at 502, 263 S.E.2d at 606.

188. *See* 49 AM. JUR. 2d *Landlord and Tenant* § 383 (1970); Annot., 15 A.L.R.3d 470, 473-74 (1967).

helpful.[189]

The court also held that only rent payments made during the term of the second agreement can be counted in computing the amount due on the purchase price.[190] It reasoned from the language of the second agreement that the term extended from January 31, 1974 through January 31, 1976, made it a separate lease from the first one.[191] Therefore, the first estate terminated upon the expiration of the term, and rent payments made during that term are not relevant to the second lease.[192] It is ironic that when addressing the first issue the court rejected the majority position of construing the lease by looking to the agreement's language and instead chose to examine all relevant circumstances, but when addressing the second issue, the court looked solely to the agreement's language without further attempting to ascertain the parties' intent.

In *Couch v. ADC Realty Corp.*[193] the court of appeals refused to infer a right to terminate a lease for nonpayment of rent, and thereby avoided barring the operation of G.S. 42-33. The statute provides:

> If, in any action brought to recover the possession of demised premises upon a forfeiture for the nonpayment of rent, the tenant, before judgment given in such action, pays or tenders the rent due and the costs of the action, all further proceedings in such action shall cease.[194]

The statute has no application if the lease permits the lessor to terminate upon failure to pay rent.[195] The court's holding is consistent with other cases that hold that unless there is an express provision for a forfeiture in a lease, a breach of covenant does not work a forfeiture.[196]

---

189. 299 N.C. at 502, 263 S.E.2d at 606.

190. *Id.* at 503, 263 S.E.2d at 607.

191. *Id.*

192. *Id.*

193. 48 N.C. App. 108, 268 S.E.2d 237 (1980).

194. N.C. GEN. STAT. § 42-33 (1976). The statute further provides that "where there is a definite time specified for the payment of rent, even though the lease is silent as to forfeiture for nonpayment, upon the tenant's failure to pay all past due rent within ten days from demand therefor the lessor may re-enter and dispossess the tenant." J. WEBSTER, REAL ESTATE LAW IN NORTH CAROLINA § 216 (1971) (footnotes omitted). However, G.S. 42-33 still protects the tenant if he tenders payment before judgment.

195. *See* Tucker v. Arrowood, 211 N.C. 118, 189 S.E. 180 (1937).

196. *See* Morris v. Austraw, 269 N.C. 218, 152 S.E.2d 155 (1967); Brewington v. Loughran, 183 N.C. 558, 112 S.E. 257 (1922).

I. Procedure[197]

In *Coastal Ready-Mix Concrete Co. v. Board of Commissioners*[198] the North Carolina Supreme Court defined the scope of judicial review of town board decisions on applications for conditional use permits. The court limited judicial review to reviewing for errors in law, ensuring that statutory procedures are followed, guaranteeing appropriate due process rights of a petitioner, ensuring that the decisions rest on competent, material and substantial evidence in the record, and ensuring "that decisions are not arbitrary and capricious."[199]

The decision cleared up an ambiguity concerning North Carolina judicial review. A 1974 decision held that administrative agency review statutes then in force were applicable to municipal decisions regarding issuance of conditional use permits.[200] The current North Carolina Administrative Procedures Act,[201] however, provides judicial review only for agency decisions,[202] from which the decisions of local municipalities are expressly exempt.[203] Despite this apparent change, the court relied on a long tradition of judicial review of town zoning ordinances[204] to hold that the scope of judicial review in the Administrative Procedures Act is highly pertinent to judicial review of town board decisions and to itemize provisions nearly identical to those in the Act.[205]

J. Family Settlement Agreements

The North Carolina Court of Appeals in *Holt v. Holt*[206] held that a family settlement agreement that required the later execution of real estate deeds was a partially executed agreement to convey realty and thus barred by the Statute of Frauds. The decision followed from the court's recognition that a family settlement agreement concerning a real estate conveyance is subject to

197. *Additional developments*: In Texfi Indus., Inc. v. City of Fayetteville, 301 N.C. 1, 269 S.E.2d 142 (1980), the supreme court held that notice published once a week for four consecutive weeks in which the area to be annexed was described by metes and bounds fulfills the requirements of due process since it is reasonably calculated to appraise all interested parties of the pendency of action, (*see* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950)), even when all parties to be annexed are commercial entities. 301 N.C. at 9, 269 S.E.2d at 148. For a discussion of the constitutional aspects of this case and the annexing of commercial areas, see this *Survey—Constitutional Law*, notes 56-84 and accompanying text *supra*.

198. 299 N.C. 620, 265 S.E.2d 379 (1980).

199. *Id.* at 626, 265 S.E.2d at 383. The court held that the superior court and court of appeals failed to follow these appropriate standards in reversing the town board's denial of a permit. The court then examined the evidence and sustained the town board's denial.

200. Humble Oil & Refining Co. v. Board of Alderman, 284 N.C. 458, 470, 202 S.E.2d 129, 137 (1974). *See also* Jarrell v. Board of Adjustment, 258 N.C. 476, 480, 128 S.E.2d 879, 883 (1963).

201. N.C. GEN. STAT. § 150A (1979).

202. *Id.* § 150A-50.

203. *Id.* § 150 A-2(1).

204. *See, e.g.*, Lee v. Board of Adjustment, 226 N.C. 107, 37 S.E.2d 128 (1946); *In re* Pine Hill Cemeteries, Inc., 219 N.C. 735, 15 S.E.2d 1 (1941).

205. *See* 299 N.C. at 625-26, 265 S.E.2d at 382-83.

206. 47 N.C. App. 618, 267 S.E.2d 711 (1980).

the Statute of Frauds, as is a partially executed contract to convey realty.[207]

The court also limited to agreements concerning the interests of minors the rule that a family settlement agreement needs as a condition precedent the existence of an emergency not contemplated by the testator. In so doing, it effectively narrowed the holding in *O'Neil v. O'Neil*,[208] which originally expressed the condition precedent requirement without limiting it to agreements involving minors.[209] The court in *Holt* restricted *O'Neil* to its factual context—agreements affecting interests of minors.[210]

The *Holt* court was correct in limiting *O'Neil*. The supreme court in *O'Neil* cited two cases as support for its broad language, but both of the cases state the need for the existence of an emergency as a means of protecting the interests of infants.[211] In justifying the need for a special condition precedent for agreements affecting minors, the *Holt* court apparently was concerned that the interests of minors may be materially affected by settlement agreements.[212]

WILLIAM DEAN JOHNSON
PATRICIA WIGGINS NYSTROM
DONALD BRIAN PERSONETTE
HERMAN SPENCE III

207. *Id.* at 620, 267 S.E.2d at 713. The court of appeals found that a jury question was presented in determining the application of the Statute of Frauds to the specific agreement. If a jury were to believe the defendant's version that the agreement was to deny probate of a codicil, probate only the will, and then execute deeds to complete the transaction, such that one defendant would receive a larger share, the agreement would be voided by the Statute of Frauds as a partially executed agreement to convey realty. If, however, the jury believed the plaintiff's version that the agreement was to deny probate of a codicil and probate only the will with plaintiff and defendants sharing equally in the realty, the agreement would be valid as a fully executed agreement and not subject to the Statute of Frauds. *Id.*

208. 271 N.C. 106, 111, 155 S.E.2d 495, 499 (1967).

209. *See* 6 STRONG'S NORTH CAROLINA INDEX 3d § 33.1 (1977); Annot., 29 A.L.R.3d 8, 37 (1970).

210. 47 N.C. App. at 621, 267 S.E.2d at 714.

211. 271 N.C. at 111, 155 S.E.2d at 499 (citing Rice v. Wachovia Bank & Trust Co., 232 N.C. 222, 59 S.E.2d 803 (1950); Redwine v. Clodfelter, 226 N.C. 366, 38 S.E.2d 203 (1946)).

212. *See, e.g.*, Redwine v. Clodfelter, 226 N.C. 366, 370, 38 S.E.2d 203, 206 (1946).

X. TAXATION[1]

A. Ad Valorem Taxation: Exemption of State-Owned Property[2]

In *In re University of North Carolina*,[3] the North Carolina Supreme Court held that property owned by the State is exempt from ad valorem taxation regardless of the purpose for which the property is held.[4] Orange County and the towns of Chapel Hill and Carrboro attempted to tax certain property owned by the University of North Carolina (UNC), a state agency. The North Carolina Property Tax Commission determined that several parcels were receiving commercial use and thus were subject to taxation pursuant to G.S. 105-278.1, which provides for exemption of State-owned property only if it is used wholly and exclusively for public purposes.[5] The superior court affirmed the Commission's decision.[6]

The supreme court reversed, holding that the North Carolina Constitution expressly exempts property belonging to the State without any use limitation.[7] The decision expressly overruled a line of cases holding to the contrary.[8] The public purpose requirement was first mentioned in 1876 in *Atlantic and North Carolina Railroad Co. v. Commissioners of Carteret County*.[9] Because the State owned two-thirds of the railroad's stock in that case, the railroad argued that a corresponding amount of its property was tax exempt. The *Atlantic* court rejected this rationale, concluding that the constitutional exemption applies only to "property of the State held for State purposes."[10]

The court rejected the *Atlantic* holding as binding precedent on the public purpose issue because there the State had no title to the taxed property, so the

---

1. North Carolina courts also decided several other tax issues in 1980: Keener v. Korn, 46 N.C. App. 214, 264 S.E.2d 829, *cert. denied*, 301 N.C. 92, 273 S.E.2d 299 (1980) (payment of attorney's fees not required to extinguish tax lien under G.S. 105-374, which applies to taxing units, not private citizens); *In re* Assessment of Tax, 46 N.C. App. 631, 265 S.E.2d 461 (1980) (laundry machines in apartment complexes operated by the complex management are a business operated for profit and subject to the G.S. 105-164.4(4) sales and use tax even though the machine owners do not have to purchase a privilege license); Stam v. State, 47 N.C. App. 209, 267 S.E.2d 335, *motion to dismiss appeal denied*, 301 N.C. 95, 273 S.E.2d 300 (1980) (appropriation and expenditure of state tax revenues for funding of elective abortions is not in violation of article V, § 5 of the North Carolina Constitution). For further discussion of the *Stam* case, see this *Survey—Constitutional Law*, *supra*.

2. For the history of property exemptions in North Carolina, see generally Coates, *The Battle of Exemptions*, 19 N.C.L. REV. 154 (1941). *See also* R. Sentell, *Caesar Confronts Caesar: Local Government Property Taxation and Local Government Property*, 31 MERCER L. REV. 293 (1979) (analysis of Georgia's exemptions).

3. 300 N.C. 563, 268 S.E.2d 472 (1980).

4. *Id.* at 565, 268 S.E.2d at 474.

5. N.C. GEN. STAT. § 105-278.1(b)(1) (1979).

6. 300 N.C. at 563-64, 268 S.E.2d at 473.

7. N.C. CONST., art. 5, § 2(3) ("Property belonging to the State, counties, and municipal corporations shall be exempt from taxation . . . .").

8. 300 N.C. at 570, 268 S.E.2d at 476 (overruling Winston-Salem v. Forsyth County, 217 N.C. 704, 9 S.E.2d 381 (1940); Warrenton v. Warren County, 215 N.C. 342, 2 S.E.2d 463 (1939); Benson v. Johnston County, 209 N.C. 751, 185 S.E. 6 (1936); Board of Financial Control v. Henderson County, 208 N.C. 569, 181 S.E. 636 (1935)).

9. 75 N.C. 474 (1876).

10. *Id.* at 476.

public purpose requirement was mentioned only in dictum. Therefore, the court reasoned, later decisions based on the *Atlantic* public purpose requirement had a faulty foundation.[11]

Instead, the court adopted the reasoning of a second line of cases decided almost simultaneously with the *Atlantic* holding.[12] In *Town of Andrews v. Clay County*[13] and *Weaverville v. Hobbs*[14] the court emphasized the clear and unambiguous language of the constitution, which left "no room for judicial construction."[15] Similarly, the court determined that by imposing a public purpose requirement in G.S. 105-278.1 the legislature exceeded its authority, because of the conflict between the statute and the constitution.[16]

By examining the circumstances and reasoning of *Atlantic* rather than relying solely on *Town of Andrews* and *Weaverville* as precedent, the court was able to reach a well-founded conclusion. As the court recognized, a public purpose requirement should become law only through an amendment to the constitution.[17] Left unclear, however, is whether the court's waiver of the public purpose requirement extends to counties and municipal corporations. The court emphasized that taxation of State property by a local entity is unjustified because the authority to tax is derived from the State.[18] When one local entity seeks to tax another this dilemma disappears. Nevertheless, the constitutional provision in question refers to counties and municipal organizations as exempt bodies.[19] Furthermore, the State was not involved in three of the four cases overruled, giving force to the conclusion that the elimination of the public purpose doctrine applies to local entities. Upon the appropriate factual situation, the court should extend the exemption to the other governmental bodies specified in the constitution.

B. Ad Valorem Taxation: Preferential Assessment for Agricultural Use[20]

For a corporation to qualify its land for a preferential agricultural use valuation its principal business must be agriculture, forestry, or horticulture.[21] The North Carolina Court of Appeals, in *W. R. Company v. North Carolina*

---

11. 300 N.C. at 570, 268 S.E.2d at 476.

12. Though the court twice reversed the *Atlantic* decision in the 1930's, changes in the makeup of the court, not wavering views of individual judges, was the major factor. Coates, *supra* note 2, at 177.

13. 200 N.C. 280, 156 S.E. 855 (1931).

14. 212 N.C. 684, 194 S.E. 860 (1938).

15. 300 N.C. at 570-71, 268 S.E.2d at 477 (citing Town of Andrews v. Clay County, 200 N.C. 280, 282, 156 S.E. 855, 856 (1931)). The intent of the 1868 constitutional convention with respect to requiring a public purpose is uncertain. Coates, *supra* note 2, at 178.

16. 300 N.C. at 572-73, 268 S.E.2d at 478.

17. *See id.* at 572, 268 S.E.2d at 478.

18. *Id.* at 576, 268 S.E.2d at 480.

19. *See* note 7 *supra*.

20. See generally Henke, *Preferential Property Tax Treatment for Farmland*, 53 ORE. L. REV. 117 (1974); Comment, *Farmland Preservation Techniques: Some Food for Thought*, 40 U. PITT. L. REV. 258 (1979).

21. N.C. GEN. STAT. § 105-277.3 (1979).

Property Tax Commission,[22] enumerated several criteria for making the determination of what activity constitutes a corporation's principal business, noting that gross income is not the sole factor.[23]

Plaintiff, a corporation, purchased 600 acres of farmland in 1967. During the next ten years it sold 250 acres for $4.4 million, retaining the remainder as farm and woodland. Farming operations on the remaining land produced $32,000 in income in this same period. Plaintiff applied for a present-use valuation, which would have reduced the appraisal from over two million dollars to under $300,000. Both the Board of Equalization and the Property Tax Commission denied this change. The trial court reversed on the basis that plaintiff's principal business was not sale of land for development but commercial production of agricultural products.[24]

The court of appeals reinstated the Commission's holding because the facts supported the latter's conclusion that the corporation's principal business was the sale of land.[25] After considering the positive and negative effects of preferential tax treatment for agricultural property, the court analyzed the legislative history of the North Carolina provision with respect to corporations. Although corporations were specifically excluded when the legislation was first enacted in 1973,[26] a 1975 amendment modified the requirements under G.S. 105-277.2(4) to include corporations whose principal business is agriculture and whose owners are actively engaged in agriculture.[27] The court thought that this expansion was intended to permit "family corporations" to qualify for the preferential treatment because of an increase in corporations for estate planning purposes.[28] And in 1980 the legislature postponed consideration of a bill that would have permitted any corporate entity to obtain a present use assessment. These factors led the court to conclude that the legislature's intent was restrictive with regard to qualification of corporations.[29]

Because the term "principal business" had not been interpreted before in this context or the context of a similar statute, the court looked to dictionary definitions. Because "principal" means "most important," the court reasoned that there could be but one principal business.[30] To decide what activity is the corporation's principal business, the court held that gross income is the major criterion, though net income, annual receipts and disbursements, the corporation's purpose as stated in its charter, and the corporate function as related to

22. 48 N.C. App. 245, 269 S.E.2d 636 (1980).

23. *Id.* at 260, 269 S.E.2d at 644.

24. *Id.* at 246-53, 269 S.E.2d at 637-41. The property had been in continual use as a farm since 1935. *Id.* at 251, 269 S.E.2d at 639.

25. *Id.* at 262, 269 S.E.2d at 645-46.

26. Law of May 23, 1973, ch. 709, § 1, 1973 N.C. Sess. Laws, 1st sess. 1054 (codified as amended at N.C. GEN. STAT. § 105-277.2(4) (1979)).

27. Law of June 24, 1975, ch. 746, § 1, 1975 N.C. Sess. Laws, 1st sess. 1007 (codified at N.C. GEN. STAT. § 105-277.2(4)(b) (1979)).

28. 48 N.C. App. at 258-59, 269 S.E.2d at 643-44.

29. *Id.* at 259, 269 S.E.2d at 644.

30. *Id.* at 259-60, 269 S.E.2d at 644.

its stated purpose also merit consideration.[31]

The court supported the Commission's decision on the basis of several factors. Over 99% of gross income resulted from real estate transactions. Moreover, because of the continuous sales of real estate, which occurred in all but one year of plaintiff's existence, the actual corporate function was to sell land.[32] The court also noted that the corporate charter mentioned real estate sales and development but not agricultural activities.[33]

One of the strongest criticisms of preferential tax treatment for agricultural lands is that it provides a windfall tax shelter for land speculators.[34] By allowing family farm corporations to qualify under G.S. 105-277.2(4) the legislature left an opening for corporate land developers to qualify. Rather than examine only the use of the land in question,[35] the court of appeals sensibly looked beyond the farming operations and made a logical interpretation of the principal business requirement.

One issue that requires further clarification in this area is whether the owners of a corporation personally must be engaged in agricultural operations on the specific property, or must merely be operating any farming property in order to meet the statutory requirement[36] that they be "actively engaged" in farming activities. The statute is unclear with respect to this issue. The Property Tax Commission in *W.R. Company* recognized that the owners had operated farms for many years, but pointed out that the owners were not active in actual cultivation of the crops on the particular land in question.[37] The court of appeals, however, noted that because the corporate owners had individual interests in other farms, the land would qualify in this respect.[38] To resolve this conflict in a manner consistent with the intent to restrict preferential treatment to farming families, the legislature should require the corporate owners actually to farm the land for which a present use valuation is sought. At present, the statutory requirement that the corporate owners be "actively engaged"[39] in farming activities gives too much leeway for corporate land speculators to qualify for preferential assessments never intended for them.

C. *Estate Taxation: Deductibility of Decedent's Debts*

In *In re Kapoor*[40] the North Carolina Court of Appeals held that life

31. *Id.* at 260, 269 S.E.2d at 644.
32. *Id.* at 261, 269 S.E.2d at 645.
33. *Id.* at 262, 269 S.E.2d at 645.
34. *See generally* Henke, *supra* note 20, at 122-24.
35. Use is the overriding consideration in classification of land for preferential valuation in at least one state. *See* Comment, 7 FLA. ST. L. REV. 571 (1979) (criticizing holding in Roden v. K & K Land Mgmt., Inc., 368 So. 2d 588 (Fla. 1978), as rendering ineffective a statutory provision to restrict speculators from qualifying for preferential treatment).
36. *See* N.C. GEN. STAT. § 105-277.2(4)(b) (1979).
37. 48 N.C. App. at 251-52, 269 S.E.2d at 640-41.
38. *Id.* at 261, 269 S.E.2d at 645.
39. *See* N.C. GEN. STAT. § 105-277.2(4)(b) (1979).
40. 47 N.C. App. 500, 501, 267 S.E.2d 418, 419, *cert. granted*, 301 N.C. 90, 273 S.E.2d 296 (1980).

insurance proceeds are not "debts of the decedent," and are not deductible from the North Carolina estate tax return even though the decedent had obligated himself to maintain a life insurance trust and had paid all necessary premiums. *Kapoor* is the first interpretation of "debts" as used in G.S. 105-9(4)[41] and conflicts with the determination of deductibility made by the Internal Revenue Service in this instance.[42]

Pursuant to a separation agreement, decedent obligated himself to maintain a life insurance trust for his wife and children. The executor of his estate included the policy proceeds, which had been collected by the trustee, on both the state and federal returns, although the federal taxes paid on the proceeds were later refunded. The superior court ordered a refund of the state taxes.[43]

In reversing, the court of appeals relied on the dictionary definition of debt as "something owed" from one person to another.[44] It concluded that what decedent owed was a life insurance trust maintained in full force and effect. Once the premiums were paid, the contractual obligation was fulfilled and thus, the court reasoned, no debt existed at the time of death.[45] The court noted that the language of the North Carolina statute does not parallel that used in the federal statute and that there were no indications of legislative intent to have the state provision reach identical results.[46]

Without further facts, it is difficult to determine to what extent, if any, the court's result differs from the one that should be reached under federal law. A recent federal revenue ruling holds that where insurance proceeds are payable pursuant to a divorce decree issued by a court with the power to determine a settlement of all property rights, I.R.C. section 2053(a)(4) allows a deduction.[47] A claim founded upon a property settlement alone does not appear to satisfy this requirement. Alternatively, should the claim be enforceable against the decedent's estate and be founded on a bona fide agreement for full consideration in money or money's worth, the amount may be deducted under section 2053(c).[48] As the court's opinion did not indicate whether there was a divorce decree or any consideration paid, one can only speculate on the rationale for the I.R.S. refund.

The court of appeals took a narrow view of decedent's obligation, concluding that he was required merely to maintain the trust with no personal obligation to pay the face amount of the policy. Despite the federal refund and the court's apparent acceptance that the state and federal provisions differ,[49] the court's interpretation may actually be in accordance witih accepted federal analysis. On a factual situation that would justify a federal deduction,

41. N.C. GEN. STAT. § 105-9(4) (1979).
42. 47 N.C. App. at 501, 267 S.E.2d at 419.
43. *Id.* at 500, 267 S.E.2d at 419.
44. *Id.* at 501, 267 S.E.2d at 419.
45. *Id.*
46. 47 N.C. App. at 501, 267 S.E.2d at 419.
47. Rev. Rul. 76-113, 1976-1 C.B. 276.
48. Gray v. United States, 541 F.2d 228 (9th Cir. 1976).
49. *See* 47 N.C. App. at 501, 267 S.E.2d at 419.

it is hoped, however, that the North Carolina courts will recognize such obligations as a debt of the decedent. Generally, the applicable state and federal statutes are similar enough that considerations of judicial and administrative efficiency would be served best if the state courts interpreted G.S. 105-9(4) in accordance with the federal provisions.

ROBERT LYMAN DEWEY

XI. TORTS

A. Damages

The court of appeals in *Thompson v. Kyles*[1] recognized for the first time in North Carolina the propriety of a per diem argument when used to calculate damages for pain and suffering, if there is a showing that plaintiff was in continuous pain.[2] The per diem or fixed formula argument uses a mathematical equation to derive the amount of compensation that should be awarded to a plaintiff. The period that the plaintiff is in pain is broken into small units of time: weeks, days, hours or minutes. Then a relatively small monetary value for pain and suffering is applied to each unit. Through mathematical computation a total value for pain and suffering for the entire period is derived.[3]

The North Carolina Supreme Court previously has ruled that a per diem argument is improper when the plaintiff was not in continuous pain. In *Jenkins v. Hines Co.*[4] the court reversed the superior court's decision to allow a per diem argument, but did so solely because the evidence did not show that the plaintiff was in continuous pain and therefore "the argument of plaintiff's counsel . . . was without factual or legal justification and was prejudicial to defendant."[5] The court noted, however, that under North Carolina law counsel are given wide latitude and have the right to argue law as well as fact.[6]

Per diem arguments have been the source of much controversy. The leading case against the use of these arguments is *Botta v. Brunner*.[7] The New Jersey court held that per diem arguments impermissibly invade the domain of the jury and that compensation cannot be measured in small units of time.[8] Other courts have expressed a fear that the mathematical formula arguments produce an illusion of certainty that will lull the jury into an easy acceptance of counsel's arguments.[9] The opponents of per diem arguments further contend that the arguments actually are mere speculation on the part of plaintiffs and that counsel are giving their opinion without a basis in fact and without supporting evidence.[10] Possibly underlying all of these considerations is the fear that per diem arguments unfairly favor the plaintiff and that their use will

---

1. 48 N.C. App. 422, 269 S.E.2d 231, *cert. denied*, 301 N.C. 239, — S.E.2d — (1980).

2. *Id.* at 424-25, 269 S.E.2d at 233. The court properly limited the application of the per diem argument to cases in which there is evidence of continuous pain. *See* notes 4-5 and accompanying text *infra*.

3. *See* 3 A.L.R. 4th 940 (1981).

4. 264 N.C. 83, 141 S.E.2d 1 (1965).

5. *Id.* at 91, 141 S.E.2d at 7. Plaintiff testified that her hand felt "drawn up" or tight, but that the only discomfort was the feeling of being drawn. She also said that it did not interfere with her rest at night. *Id.*

6. N.C. GEN. STAT. § 84-14 (1975 & Supp. 1979): "In jury trials the whole case as well of law as of fact [*sic*] may be argued to the jury." *See also* 12 J. STRONG, N.C. INDEX *Trial* § 11, at 368 (3d ed. 1977).

7. 26 N.J. 82, 138 A.2d 713 (1958).

8. *Id.* at 103-04, 138 A.2d at 725. Plaintiff's counsel asked the jury if fifty cents an hour for damages would be too high.

9. *See* Caley v. Manicke, 24 Ill. 2d 390, 182 N.E.2d 206 (1962); Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958).

10. *See* Henne v. Balick, 51 Del. 369, 146 A.2d 394 (1958); Botta v. Brunner, 26 N.J. 82, 138

result in excessive verdicts. When a small value, often as low as one cent, is suggested as the compensation for a minute of pain and suffering, it appears quite reasonable. However, if that value is multiplied by the minutes that the plaintiff will be in pain if he or she lives to his or her life expectancy, the total compensation can become quite large.[11]

Jurisdictions that favor the per diem arguments view the mathematical formula as a proper inference drawn from the evidence and useful as an aid to the jury.[12] In fact, some courts prefer this evidence instead of a blind guess or random figure that a jury may derive without any practical consideration.[13] There are also safeguards to the excessive verdict because a court has the power to reduce an award that is deemed too high.[14] Further, the judge can instruct the jury about the weight and emphasis that it should place on such arguments. Proponents argue that defendant as well as plaintiff can present a per diem argument to the jury, thereby offsetting any advantage plaintiff may gain by suggesting an amount or method to determine damages.[15]

The court of appeals observed that many jurisdictions oppose per diem arguments because of the difficulty in determining a value for pain and suffering and because the threshold of pain varies among individuals.[16] However, the court recognized that the jury must use some criteria to establish the amount of the award for damages and will usually take into account the very factors that the opponents of per diem arguments are trying to avoid. Therefore, the court reasoned that a plaintiff who has been in continuous pain should have the right to argue that the jury consider the amount of pain and suffering plaintiff experienced during specific units of time comprising the entire period.[17]

While per diem arguments may not be the ultimate or ideal solution to the difficult problem of awarding damages for pain and suffering, they do pro-

---

A.2d 713 (1958); Harper v. Bolton, 239 S.C. 541, 124 S.E.2d 54 (1962); Crum v. Ward, 146 W. Va. 421, 122 S.E.2d 18 (1961).

11. *See* Affett v. Milwaukee & Suburban Trans. Corp., 11 Wis. 2d 604, 614, 106 N.W.2d 274, 280 (1960). This argument is effective if the jury only returns an award for a certain amount per unit of time. This, however, is not the case. While counsel may suggest applying a small value per unit of time, at some point the jury will have to arrive at a total amount of compensation. Although the initial value may seem reasonable, it will soon become apparent to the jury that the total award may not be reasonable. Indeed, if the value that counsel suggests is too large when computed into the total award, the tactic may have a negative effect on the jury.

12. *See* Beagle v. Vasold, 65 Cal. 2d 166, 417 P.2d 673, 53 Cal. 2d 129 (1966); Higgins v. Hermes, 89 N.M. 379, 552 P.2d 1227, *cert. denied*, 90 N.M. 8, 558 P.2d 620 (1976).

13. *See* Imperial Oil v. Drlik, 234 F.2d 4, 11 (6th Cir. 1956). "We are more concerned with the result, reached by a reasonable process of reasoning and consistent with the evidence, than we are with which one of several suitable formulas was actually used by the juror or judge." *Id.*

14. Plaintiff may also alienate a jury if the award suggested is unreasonably high. *See* note 11 *supra*.

15. Although defendant can argue in the alternative, he is still at a disadvantage. It is difficult for defendant to argue reasonably that a seemingly small amount per small unit is excessive. Defendant can argue that the entire award would be too large. This approach, however, would not suggest an alternative but would focus the jury's attention on the amount of damages. This focus may or may not work to defendant's advantage.

16. 48 N.C. App. at 424, 269 S.E.2d at 233.

17. *Id.* at 425, 269 S.E.2d at 233.

vide some guidelines that may be helpful to the jury. The per diem arguments recognized by the court merely deal with reducing the measurement of the period that the plaintiff is in pain to small units of time. This method may enable the jury to make a more realistic assessment of damages.[18]

B. Loss of Consortium

In *Nicholson v. Hugh Chatham Memorial Hospital, Inc.*[19] the North Carolina Supreme Court recognized a spouse's cause of action against a negligent third party for loss of the other spouse's consortium, as long as the claim is joined with any suit the other spouse may institute to recover for personal injuries. This case reverses a longstanding bar to recovery[20] and places North Carolina solidly within the mainstream of states on the issue.[21]

Nicholson closes a peculiar chapter in tort law development in this state. Until 1921, only husbands could sue for loss of consortium.[22] In that year, however, the supreme court in *Hipp v. E.L. duPont de Nemours & Co.*[23] ruled that a wife had standing to sue for loss of her husband's consortium. The wife's cause of action was abruptly removed four years later in *Hinnant v. Tidewater Power Co.*[24] Twenty years later, in *Helmstetler v. Duke Power Co.*,[25] the court remedied the unequal treatment of spouses by removing the husband's cause of action. Therefore, the court in *Nicholson* has returned to the position it espoused almost seventy years earlier.

Nicholson arose when plaintiff's husband was injured as the result of alleged negligent treatment by defendant physician and hospital. The trial court dismissed the complaint for failure to state a claim and the court of appeals affirmed.[26]

The supreme court reversed, concluding that policy considerations now compelled a revision of the law.[27] The effect of *Hinnant* and *Helmstetler*, the court noted, was to "strip both spouses of a right to recover for what can be a very real injury to the marital partnership."[28] These prior cases thus contra-

---

18. The smaller units may be more comprehensible to the jury than an abstract idea of pain for a great number of years.

19. 300 N.C. 295, 266 S.E.2d 818 (1980).

20. *See* text accompanying notes 24 & 25 *infra*. As recently as 1978, the supreme court had refused to consider the issue. *See* Cozart v. Chapin, 35 N.C. App. 254, 241 S.E.2d 144, *cert. denied*, 294 N.C. 736, 244 S.E.2d 154 (1978).

21. Thirty-five other states allow recovery for loss of consortium. *See* Annot., 36 A.L.R.3d 900 (1971 & Supp. 1980), and cases cited therein.

22. The husband's common law cause of action against a negligent third party for loss of consortium of the wife was based on the services that the wife owed to him. The wife, however, was viewed as his social and legal inferior; "she could not require him to work for her, and she had at least no common law remedy for deprivation of his society, intercourse and affections." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 125, at 894 (4th ed. 1971).

23. 182 N.C. 9, 108 S.E. 318 (1921).

24. 189 N.C. 120, 126 S.E. 307 (1925).

25. 224 N.C. 821, 32 S.E.2d 611 (1945).

26. Nicholson v. Hugh Chatham Memorial Hospital, Inc., 43 N.C. App. 615, 259 S.E.2d 586 (1979).

27. 300 N.C. at 296-97, 266 S.E.2d at 819.

28. *Id.* at 300, 266 S.E.2d at 821.

dict the modern policy of extending liability to allow compensation to those injured by the wrongful acts of others. The *Nicholson* court further criticized the assumption in *Helmstetler* that recovery by the injured spouse for his or her personal injuries was sufficient compensation for the spouse suffering loss of consortium. That assumption ignored the deprivation of sexual gratification to the "uninjured" spouse and the loss of the possibility of children, the court observed.[29] Also, the court noted that *Hinnant* and *Helmstetler* were inconsistent with cases recognizing a cause of action for loss of a husband's or wife's consortium due to the intentional acts of third parties.[30]

The court further reexamined and rejected the reasoning in *Hinnant*.[31] It concluded that the double recovery feared by the *Hinnant* court could be prevented by compelling joinder of one spouse's claim for loss of consortium with any suit the other spouse may have instituted to recover for personal injuries. Joinder is required in several jurisdictions, the court noted, and this requirement appropriately recognizes that the injury is to the marriage itself.[32]

Finally, in response to defendants' objection that the matter should be left to the legislature, the court observed that the cause of action for loss of consortium had been judicially created and then removed. By reversing *Hinnant* and *Helmstetler*, the court simply restored the cause of action it had abolished decades earlier.[33]

---

29. *Id.* at 301, 266 S.E.2d at 821.

30. *Id. See* Bishop v. Glazener, 245 N.C. 592, 96 S.E.2d 870 (1957) *and* Knighten v. McClain, 227 N.C. 682, 44 S.E.2d 79 (1947) (recognizing recovery for loss of spouse's consortium due to intentional acts of third parties).

31. The *Nicholson* court identified four major considerations underlying the decision in *Hinnant* to remove the wife's cause of action: (1) The *Hinnant* court implied that the married women's legislation of the nineteenth century had not changed the historic inability of married women to sue; (2) The court in *Hinnant* assumed that consortium included a services factor, and that any attempt to separate that factor from society, companionship, and affection was impossible; the court implied that society and companionship were impossible to measure; (3) The court held that the wife's damage was too remote a consequence of defendant's negligence to have been proximately caused by that injury; if permitted, the court feared that the cause of action also might be extended to parents, employers, and other third parties; and (4) The court feared double recovery. 300 N.C. at 299-300, 266 S.E.2d at 820-21.

Unlike the implication in *Hinnant*, the *Nicholson* court found that the married women's legislation was intended "to remove common law disabilities against women and to equalize the rights of husbands and wives." *Id.* at 301, 266 S.E.2d at 822.

Second, the court observed that the presumption in *Hinnant* that service covered loss of consortium ignored the definition given to consortium in intentional torts cases at the time. Moreover, the court continued, such a presumption was inaccurate, since at common law, service was only one severable aspect of consortium. *Id.* at 302, 266 S.E.2d at 822.

Third, the idea that damages to the wife were too remote to measure was "no longer sound legal principle," the court asserted. *Id.* Experience with the state's wrongful death statute, N.C. GEN. STAT. § 28A-18-2(b) (1976), had demonstrated that courts and juries were able to measure damages for loss of consortium. *Id.*

Finally, the *Hinnant* court's fear of proximate cause and double recovery could have been resolved by means less drastic than barring the action altogether, the *Nicholson* court concluded. By expanding the definition of consortium to include sexual intercourse, the *Nicholson* court effectively limited recovery to one's spouse. *Id.* at 303, 266 S.E.2d at 822.

32. *Id.* at 304-05, 266 S.E.2d at 823.

33. *Id.* at 304, 266 S.E.2d at 823.

C. *Lessor's Liability*

In North Carolina, if a third party is injured while in non-public areas of leased premises as the result of any defective condition in the premises, the injured party generally may seek redress from the lessee but not from the lessor.[34] A long accepted exception to this general rule is that liability may be extended to the lessor if he knowingly demises the premises in a ruinous condition.[35]

In *Boyer v. Agapion*[36] the court addressed the question whether the beginning of each new term in a month-to-month tenancy should be treated as a new lease, for the purpose of determining whether lessor had knowingly demised premises in a ruinous condition. In *Boyer*, plaintiff was injured on August 22 while falling on a defective step at a private residence. The residence was leased under a month-to-month tenancy, the period beginning on the first day of each month. Plaintiff sued lessor for damages alleging that lessor was liable since the defective condition was present on the first day of the rental period and was known, or should have been known, to lessor.

In examining the question of whether continuation of a month-to-month tenancy imposes the same liability on lessors as does an actual reletting, the court noted that there is a split of authority among the jurisdictions that have considered the issue. Missouri and Illinois courts answer the question affirmatively,[37] while Washington courts refuse to impose liability.[38] The North Carolina court concluded that the Restatement (Second) of Property § 17.1[39] adequately deals with this split of authority and adopted the Restatement approach. Accordingly, a lessor is subject to liability for injuries to third parties when the lessor allows a periodic tenancy to continue into the next period, and at the beginning of the next period the leased premises are in a ruinous condition. However, the lessor of premises for private use is subject to liability to third parties only if the lessee does not know or have reason to know of the defect and the lessor both knows or has reason to know of the defect and is

---

34. *See* Clarke v. Kerchner, 11 N.C. App. 454, 460-61, 181 S.E.2d 787, 791 (1971).

35. Wilson v. Dowtin, 215 N.C. 547, 550, 2 S.E.2d 576, 577 (1939); *see* Floyd v. Jarrell, 18 N.C. App. 418, 197 S.E.2d 229 (1973).

36. 46 N.C. App. 45, 264 S.E.2d 364 (1980).

37. *See* Borman v. Sandgren, 37 Ill. App. 160, 161 (1890); Griffith v. Lewis, 17 Mo. App. 605, 613 (1885).

38. *See* Ward v. Hinkleman, 37 Wash. 375, 381, 79 P. 956, 959 (1905).

39. RESTATEMENT (SECOND) OF PROPERTY § 17.1 (1977). This section provides in pertinent part:

> (1) A landlord who conceals or fails to disclose to his tenant any condition, whether natural or artificial, which involves unreasonable risk of physical harm to persons on the leased property and which exists when tenant takes possession, is subject to liability to the tenant and others upon the leased property with the consent of the tenant or his subtenant for physical harm caused by the condition after the tenant has taken possession, if:
>
> (a) the tenant does not know or have reason to know of the condition or the risk involved; and
>
> (b) the landlord knows or has reason to know of the condition, realizes or should realize the risk involved, and has reason to expect that the tenant will not discover the condition or realize the risk.

cognizant that the lessee will not discover the defect. Thus, the lessor is liable to third parties only to the same extent he is liable to the lessee.

The court in *Boyer* concluded that defendant lessor was not liable since 1) plaintiff was a third party injured on leased premises not held open for public use, 2) the lessee had the opportunity to be cognizant of the defect, and 3) lessor had reason to expect that lessee would be cognizant of the defect.[40]

Boyer places a new burden on the lessor of month-to-month tenancies. For the lessor of premises for private use, however, that burden is arguably of more theoretical significance than of practical importance since the lessor can reasonably expect the lessee residing on the premises to be cognizant of any defects which develop during the preceding period.

D. Liability Without Privity

In 1980 North Carolina continued to expand the scope of liability of architects and structural engineers for the negligent performance of their professional duties. The North Carolina Court of Appeals considered three cases presenting variations of the basic issue of whether a party without privity may recover damages for economic loss and/or injury to property resulting from the negligent performance of contractual obligations.[41] In *Browning v. Maurice B. Levien & Co.*[42] the court held that when an architect agreed with a lending agency to certify stages in the construction of an apartment complex, the architect could reasonably foresee that the borrower-owner of the complex might rely on the architect's certification.[43] In *Stanford v. Owens*[44] the court ruled that, even in the absence of privity of contract, a cause of action in negligence could be brought against a structural engineer who conducted soil tests, the results of which were relied on in the subsequent construction of a building on the property.[45] In *Quail Hollow East Condominium Association v. Donald J. Scholz Co.*[46] the court held that it is reasonably foreseeable that an architect's faulty design or supervision of construction of a condominium may bring harm to the homeowner.[47] These three cases augment the court's 1979 decision in *Davidson and Jones, Inc. v. New Hanover*[48] which abolished the privity

40. 46 N.C. App. at 50-51, 264 S.E.2d at 367-68.

41. Quail Hollow East Condominium Assoc. v. Donald J. Scholz Co., 47 N.C. App. 518, 268 S.E.2d 12, *cert. denied*, 301 N.C. 527, 273 S.E.2d 454 (1980); Stanford v. Owens, 46 N.C. App. 388, 265 S.E.2d 617, *cert. denied*, 301 N.C. 95, 273 S.E.2d 300 (1980); Browning v. Maurice B. Levien & Co., 44 N.C. App. 701, 262 S.E.2d 355, *cert. denied*, 300 N.C. 371, 267 S.E.2d 673 (1980).

42. 44 N.C. App. 701, 262 S.E.2d 355 (1980).

43. *Id.* at 705, 262 S.E.2d at 358.

44. 46 N.C. App. 388, 265 S.E.2d 617 (1980).

45. *Id.* at 401, 265 S.E.2d at 625.

46. 47 N.C. App. 518, 268 S.E.2d 12 (1980).

47. *Id.* at 525, 268 S.E.2d at 17.

48. 41 N.C. App. 661, 255 S.E.2d 580 (1979). Architect, pursuant to a contract with the property owner, designed the building that plaintiff, general contractor, was constructing. During construction there was damage to an adjacent building that was also owned by property owner. Property owner refused to make payments for plaintiff's work, and plaintiff sued. Property owner counterclaimed against plaintiff. Plaintiff filed a third party complaint against the architect, with whom he had no contract, seeking indemnity for any liability he might incur under the counter-

requirement in architect liability.

In *Browning*[49] plaintiffs, members of a limited partnership, obtained a loan for the construction of an apartment complex. The lending agency contracted with defendant, an architect, to inspect the construction at the time of each progress payment request and to certify that progress was in accordance with the construction plans and specifications. The building contractor defaulted on the loan agreement. Plaintiffs sued defendant asserting that defendant had been negligent in certifying that $900,000 worth of work had been performed by the contractor when, in fact, it had not been performed. The jury found the defendant had been negligent and plaintiffs contributorily negligent, and awarded plaintiffs only a nominal sum. Plaintiffs appealed.

On appeal, defendant argued that the trial court erred in failing to dismiss the action because defendant's contract for overseeing the construction was with the lending agency, not with the plaintiff, and therefore there was no privity of contract between plaintiff and defendant. In remanding for a new trial because of an improper charge to the jury relative to contributory negligence, the court stated it believed that "it is the law that an architect who contracts to perform services is liable for damages proximately caused by his negligence to anyone who can be reasonably foreseen as relying on that architect's performing his services in a reasonable manner."[50] The court emphasized that the services performed were required by the contract, and distinguished the case at hand from the 1979 case of *McKinney Drilling Co. v. Nello L. Teer Co.*[51] in which the alleged negligently performed services were in excess of the contractual commitment. The court's holding continued the theme set forth in *Davidson*,[52] that is, that the only apparent limit on an architect's liability for breach of the duty of due care is foreseeability.

In *Stanford*[53] plaintiff purchased land from seller. At the time of purchase plaintiff knew that portions of the land had been filled to raise it to an acceptable grade; seller knew plaintiff intended to build a specific type of restaurant. Seller contracted with defendant engineering corporation to conduct a subsurface examination of the tract. Defendant reported that the tract was of sufficient quality to support a building of the type that plaintiff proposed to construct. Subsequent to receiving the report plaintiff constructed the building, which cracked within a short time because of the subsidence of the land. The trial court dismissed plaintiff's claim against defendant because of lack of privity of contract. The court of appeals held that plaintiff did have a valid claim for negligence against defendant and concluded that such a hold-

---

claim. The court held that an architect may be liable to a general contractor not in privity for "economic loss foreseeably resulting from breach of an architect's common-law duty of care in the performance of his contract with the owner." *Id.* at 667, 255 S.E.2d at 584.

For further discussion of *Davidson*, see *Survey of Developments in North Carolina Law, 1979—Torts*, 58 N.C.L. REV. 1181, 1564 (1980).

49. 44 N.C. App. 701, 262 S.E.2d 355 (1980).

50. *Id.* at 704-05, 262 S.E.2d at 358.

51. 38 N.C. App. 472, 248 S.E.2d 444 (1979).

52. *See* note 48 *supra*.

53. 46 N.C. App. 388, 265 S.E.2d 617 (1980).

ing was "consistent with the trend of abolishing the privity requirement in cases with factual situations similar to that in *Davidson*."[54]

In *Condominium Association*[55] defendant architect, pursuant to a contract with a general contractor, was allegedly responsible for preparing plans and specifications as well as for supervising and administering the construction of a condominium complex. The underground water pipe system serving the complex was faulty. Plaintiff, a homeowner's association, sought damages for economic injury resulting from the substandard condition of the water system. The court of appeals overturned the trial court's grant of summary judgment in favor of defendant, who sought dismissal because of the absence of privity. In so doing the court stated that "[i]t is obvious that any architect's involvement in residential construction is intended to affect the ultimate consumer-purchaser in that the buyer anticipates and expects sound construction and solid workmanship."[56] Because of the foreseeability that a defect in design or negligence in supervision may result in harm to the homeowner the court held that plaintiff had a valid claim of breach of the duty of due care despite the lack of privity. Furthermore, the court refused to distinguish between injury in the form of economic loss and injury in the form of property damage, and concluded that the form of the loss did not affect the applicability of the general rule that, in factual situations such as these, the plaintiff lacking privity can seek redress.[57]

E. Negligence of Common Carriers

By denying discretionary review in *Wesley v. Greyhound Lines, Inc.*,[58] the North Carolina Supreme Court declined to resolve a decades-old conflict over the proper duty of care owed by common carriers to their passengers. The court of appeals had ruled that the trial judge did not err in instructing the jury that a bus company owed a passenger "the highest degree of care" in foreseeing the imminence of a criminal assault by an intruder.[59] The lower court implicitly had called on the supreme court to clarify North Carolina law in this area.[60]

Plaintiff in *Wesley* was sexually assaulted by an intruder in the restroom of defendant's bus station. Defendant argued that the proper standard of care in this circumstance was ordinary or due care. The court of appeals noted that at least three standards of care had been recognized previously by the supreme court: (1) In *Britton v. Atlanta & Charlotte Airline Railway*,[61] the supreme court imposed a duty on the carrier to protect passengers from violence by fellow passengers or intruders, when by the exercise of proper care, the carrier

54. *Id.* at 401, 265 S.E.2d at 625.
55. 47 N.C. App. 518, 268 S.E.2d 12 (1980).
56. *Id.* at 525, 268 S.E.2d at 17.
57. *Id.* at 526; 268 S.E.2d at 17.
58. 301 N.C. 239, — S.E.2d — (1980), *denying cert. to* 47 N.C. App. 680 S.E.2d 855.
59. 47 N.C. App. at 694-95, 268 S.E.2d at 864-65.
60. *Id.* at 695, 268 S.E.2d at 865.
61. 88 N.C. 536 (1882).

could have foreseen and prevented the violent acts. (2) In *Daniel v. Petersburg Railroad*[62] the supreme court used the "highest degree of care" verbalization. (3) Purportedly overruling *Daniel*, the supreme court in *Hollingworth v. Skelding*[63] stated that the carrier's duty was to provide for the passengers' safe conveyance. Since these standards were first expressed, the supreme court apparently has cited—without explaining its inconsistency—different combinations of the three in carrier negligence cases.[64]

The court of appeals pointed out that the conflicting standards of care used by the supreme court had been identified as early as 1939, when a commentator called for corrective action to make the standard consistent.[65] Concluding that it was "for the Supreme Court to determine which rule will govern,"[66] the court of appeals in *Wesley* affirmed the trial court's decision, stating that the trial judge had utilized instructions in accord with at least two of the existing standards.[67]

The majority of American jurisdictions hold that a common carrier owes the highest degree of care to its passengers consistent with the practical operation of its business. Notwithstanding this general rule, the majority of courts also hold (1) that passengers are to be protected from only those dangers that are reasonably foreseeable; and (2) that the carrier owes passengers only an ordinary duty of care to protect them from harmful acts of third persons not under the carrier's control.[68] Many North Carolina decisions appear to agree with the majority positions.[69] Yet, as the court of appeals recognized, the supreme court's conflicting verbalizations of the duty of care create doubt;[70] and, as one author noted, "it seems that we would secure more uniform verdicts, and have fewer appeals, if the supreme court would definitely and finally put its stamp of approval on one consistent group of words which could be confidently used by trial courts in cases involving this question."[71]

F. Workers' Compensation[72]

The court of appeals ruled for the first time in North Carolina that the

62. 117 N.C. 408, 23 S.E. 327 (1895).

63. 142 N.C. 246, 55 S.E. 212 (1906). In 1939 the supreme court relied on *Hollingsworth*, ordering a new trial when the trial court instructed the jury as in *Daniel*. Perry v. Sykes, 215 N.C. 39, 200 S.E. 923 (1939).

64. *See, e.g.*, cases cited in 47 N.C. App. at 693-94, 268 S.E.2d at 864.

65. *Id.* at 694-95, 268 S.E.2d at 864-65, citing Note, *Torts-Negligence-Common Carriers-Degree of Care Owed Passengers*, 17 N.C.L. REV. 453, 457-58 (1939).

66. 47 N.C. App. at 695, 268 S.E.2d at 865.

67. *Id.*

68. *See* 14 AM. JUR. 2d *Carriers* §§ 916, 921, 1071, 1072 (1964 & Supp. 1980), and cases cited therein. *See also* Annot., 77 A.L.R.2d 504 (1961).

69. *See, e.g.*, Leake v. Queen City Coach Co., 270 N.C. 669, 155 S.E.2d 161 (1967); Harris v. Atlantic Greyhound Corp., 243 N.C. 346, 90 S.E.2d 710 (1956); Smith v. Camel City Cab Co., 227 N.C. 572, 42 S.E.2d 657 (1947); White v. Chappell, 219 N.C. 652, 14 S.E.2d 843 (1941); Pruett v. Southern Ry., 164 N.C. 3, 80 S.E. 65 (1913).

70. 47 N.C. App. at 692, 268 S.E.2d at 864.

71. Note, *Torts-Negligence-Common Carriers-Degree of Care Owed Passengers*, 17 N.C.L. REV. 453, 458 (1939).

72. In another case construing the North Carolina Workers' Compensation Act, the North

dependent of a deceased worker is entitled to the worker's benefits under the Workers' Compensation Act,[73] even though the worker died from an unrelated cause before filing a claim for compensation.

Wilhite v. Liberty Veneer Co.[74] dealt with a serious disfigurement claim filed pursuant to G.S. 97-31(22).[75] The court noted that G.S. 97-31(22) does not require that a disfigurement claim be filed before the death of the covered worker to constitute compensation to which the worker was "entitled," within the meaning of G.S. 97-37.[76] The court held that this interpretation would allow the dependent of the deceased worker to collect compensation for the worker's disfigurement.[77] Since the worker died before the healing period was completed, the court ruled that compensation would have to be based on a medical estimate of the extent of permanent disfigurement the decedent would have suffered if he had lived until the end of the healing process.[78] The court also ruled that the compensation should be deemed "unaccrued" since no lump sum award had been made prior to the worker's death. Therefore, under G.S. ch. 97 the compensation would pass to decedent's dependents rather than his estate.[79]

In determining whether the deceased worker's dependent should be allowed to recover when a claim had not been filed before the worker's death, the court noted the split in decisions in the jurisdictions that have been confronted with this problem.[80] The *Wilhite* court recognized that under North

---

Carolina Supreme Court held that recovery for death claims under workers' compensation are no longer limited to a maximum of $80.00 per week. Andrews v. Nu-Woods, Inc., 299 N.C. 723, 264 S.E.2d 99 (1980). In 1977 plaintiff's spouse suffered a fatal injury by accident arising out of his course of employment. Decedent was earning a weekly wage of $420.28. Relying on G.S. 97-38, defendant employer argued that plaintiff's recovery was limited to a maximum of 66 2/3% of the average weekly wages but not more than $80.00. The court ruled that G.S. 97-29, as amended by Law of April, 1974, 1973 N.C. Sess. Laws, 2d Sess. 234, supersedes G.S. 97-38 and clearly establishes maximum weekly benefits for all sections of the Workers' Compensation Act including benefits for total incapacity and death. Thus, maximum weekly benefits are no longer limited to $80.00 per week as specified in G.S. 97-38.

73. N.C. GEN. STAT. ch. 97 (1979).

74. 47 N.C. App. 434, 267 S.E.2d 566 (1980). The North Carolina Supreme Court granted discretionary review. 301 N.C. 106, 273 S.E.2d 312 (1980). The Supreme Court's decision will not only decide this particular case, it will also have a major impact on Bridges v. McCrary Stone Services, Inc., 48 N.C. App. 185, 268 S.E.2d 559 (1980). *Bridges* dealt with facts similar to those in *Wilhite*, and the court relied on *Wilhite* in its decision.

75. N.C. GEN. STAT. § 97-31(22) (1979) sets a ten thousand dollar limit for compensation for serious bodily disfigurement that is not compensable under any other subdivision of ch. 97, excluding "disfigurement resulting from permanent loss or permanent partial loss of use of any member of the body for which compensation is fixed in the schedule contained in this section." Decedent suffered second- and third-degree burns in an accident during the course of his employment. He later died of a heart attack that was unrelated to his injuries.

76. Where injured employee dies before total compensation is paid.—When an employee receives or is entitled to compensation under this Article for an injury covered by G.S. 97-31 and dies from any other cause . . . payment of the unpaid balance of compensation shall be made: First, to the surviving whole dependents . . . in lieu of the compensation the employee would have been entitled to had he lived.

N.C. GEN. STAT. § 97-37 (1979).

77. 47 N.C. App. at 439, 267 S.E.2d at 569.

78. *Id.* at 437, 267 S.E.2d at 568.

79. *Id.* at 438, 267 S.E.2d at 569.

80. *Id.* at 438-39, 267 S.E.2d at 569. It should be noted that both of the cases that the court

Carolina law, when a covered worker dies of an unrelated cause, recovery by his dependents would be allowed if the claim had been filed prior to the worker's death, even though no award had yet been made.[81] The court ruled that the extension of this principle to the present case in which no claim had been filed prior to the worker's death would be consistent with G.S. 97-37.[82]

The court did not clearly address defendant's argument that the worker was no longer "entitled" under G.S. 97-37 to a recovery for disfigurement after his death. Defendant argued that recovery for disfigurement is compensation for diminution of future earning capacity and that after the worker is deceased his earning capacity cannot be diminished further.[83] Therefore, the worker should only collect compensation for loss of earning capacity from the date of the disfigurement until his death. There is some merit to this argument, especially in light of the court's emphasis on the loss of earning capacity as the basis for disfigurement damages.[84] The issue is whether disfigurement compensation is compensation for disability or for a permanent injury. "Disability", as defined by G.S. 97-2(9), means the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."[85] If the compensation for disfigurement is determined by the loss of earning capacity and is viewed as a disability payment, it would seem as though the worker's dependent is not entitled to payment after the worker's death unless the payment is vested.[86]

The problem with defendant's interpretation is definitional. While the court often refers to the loss of earning capacity as a basis for calculating compensation for disfigurement, the statute does not use this criterion.[87] Loss of

---

cited as opposed to extending the benefits can be distinguished from *Wilhite*. Flynn v. Asten Hill Mfg. Co., 34 Pa. Commw. Ct. 218, 383 A.2d 255 (1978) dealt with a statute that directed that disability was deemed to begin on the date the claim was filed. Since the worker died before the claim was filed, there was no disability on that date and therefore no cause of action. Frederico Granero Co. v. Workmen's Comp. Appeal Bd., 48 Pa. Commw. Ct. 252, 409 A.2d 1187 (1980) allowed the widow to recover because the worker died within two weeks of his injury without being released from the hospital. The court refused to extend the right of recovery to all cases in which the claim had not been filed before the worker's death. This refusal, however, was dictum.

81. *See* Inman v. Meares, 247 N.C. 661, 101 S.E.2d 692 (1958). Also, in Butts v. Montague Bros., 204 N.C. 389, 168 S.E. 215 (1933), the court allowed the dependent to recover even though the initial claim was denied and the covered worker died before the appeal was final.

82. *See* note 76 *supra*.

83. 47 N.C. App. at 437, 267 S.E.2d at 568.

84. *See id.* at 436, 267 S.E.2d at 567. North Carolina courts have often focused on the loss of earning capacity as the major determination of serious disfigurement. *See* Ashley v. Rent-A-Car Co., 271 N.C. 76, 84, 155 S.E.2d 755, 761 (1967); Davis v. Sanford Constr. Co., 247 N.C. 332, 336, 101 S.E.2d 40, 43 (1957); Branham v. Denny Roll & Panel Co., 223 N.C. 233, 236, 25 S.E.2d 865, 868 (1943); Stanley v. Hyman-Michaels Co., 222 N.C. 257, 266, 22 S.E.2d 570, 576 (1942).

85. N.C. GEN. STAT. § 97-2(9) (1979). While the deceased was recovering from his injuries and until his death he apparently was receiving temporary disability payments. 47 N.C. App. at 435, 267 S.E.2d at 567.

86. *See* Inman v. Meares, 247 N.C. 661, 101 S.E.2d 692 (1958). Moreover, if the compensation is for total incapacity, the payments continue only during the worker's lifetime. N.C. GEN. STAT. § 97-29 (1979).

87. The court has held that N.C. GEN. STAT. § 97-31 (1979) provides compensation regardless of loss of earning capacity. *See* Perry v. Hibriten Furn. Co., 296 N.C. 88, 249 S.E.2d 397 (1978); Crawley v. Southern Devices, 31 N.C. App. 284, 229 S.E.2d 325 (1976); 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).

earning capacity may be used by the courts and the Commission in determining the amount of the compensation for disfigurement, but it should not be controlling.[88] Moreover, the confusion surrounding the term "disability" may be clarified by G.S. 97-37. The fact that G.S. 97-37 allows compensation to continue past the worker's death from unrelated causes supports the inference that the compensation for injuries included in G.S. 97-31 are not disability payments that should continue only during the worker's lifetime.[89] This interpretation would indicate that the compensation for disfigurement would more properly be labelled an award for a permanent injury rather than an award for a permanent disability. In other words, even if loss of earning capacity is being used to determine the amount of the compensation, the award is for the serious disfigurement and not for the diminution of earning capacity that would accompany a disability

Applying this analysis, the worker was "entitled" to compensation as soon as he was injured, and therefore his dependent should receive his compensation under G.S. 97-37. If the court did not allow the dependent to file the claim, it would be imposing an arbitrary cut-off for the benefits allowed under G.S. 97-37.[90] The problem in this case is compounded because the worker did not complete the healing period that is used to ascertain the extent of his disfigurement. The court properly recognized that this factor should not bar the dependent's receipt of the deceased worker's compensation.[91] To hold otherwise would defeat the purpose of G.S. 97-37.

Once the court determined that the worker was entitled to compensation, it had to decide if the worker's dependent or his estate would receive the payment. The court held that since the amount of the lump sum payment had not been determined prior to the worker's death, the compensation was not accrued, and therefore the worker's dependents were entitled to the payment pursuant to G.S. 97-37.[92]

G. Other Cases

In *Pierce v. Piver*,[93] the North Carolina Court of Appeals held that a cause of action exists against a doctor who, attempting to sterilize a woman, improperly performs a bilateral tubal ligation allowing a subsequent preg-

88. In Watts v. Brewer, 243 N.C. 422, 424, 90 S.E.2d 764, 767 (1956), the court held that the fact that the worker was earning the same salary after he lost his eye could not be grounds to deny compensation.

89. The court has allowed compensation for both partial incapacity and disfigurement at the same time. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965). Also, in Anderson v. Northwestern Motor Co., 233 N.C. 372, 64 S.E.2d 265 (1951), the court held that the worker must prove the disability in order to receive compensation *unless* the injury is within G.S. 97-31.

90. A contrary ruling would allow the dependent to recover if the worker filed the claim and was killed as he was leaving the office, but would deny the dependent recovery if the worker was killed on his way to file the claim.

91. 47 N.C. App. at 437, 267 S.E.2d at 568.

92. *Id.* at 438, 267 S.E.2d at 568-69.

93. 45 N.C. App. 111, 262 S.E.2d 320, *appeal dismissed*, 300 N.C. 375, — S.E.2d — (1980)(mem.).

nancy. Significantly, plaintiff had included in her damages claim the cost of raising the child until emancipation. The concurring judge expressed concern that the majority opinion would permit recovery for that element of damages.[94]

The majority identified plaintiff's claim as one for remedial medical malpractice, based on negligence and breach of contract; the court noted that a similar cause of action had been recognized in Florida,[95] Minnesota,[96] and Tennessee.[97] In these cases, however, recovery was not allowed for the cost of raising the child. Moreover, since the supreme court dismissed the appeal in *Pierce* because of a settlement by the parties,[98] resolution of the issue of recovery for costs of raising the child must await future developments.

The North Carolina Court of Appeals acknowledged, in dictum, that since a hospital owes many duties directly to patients, it may be sued on a theory of corporate negligence for breach of those duties.[99] The court determined[100] that among those duties, were: inspection of credentials of hospital physicians,[101] provision of suitable equipment,[102] promulgation of rules for safe storage and use of medications,[103] inspection of equipment,[104] and refusal to obey a doctor's obviously negligent or dangerous instructions.[105] The theory of corporate negligence for breach of these duties provides a basis for liability separate from the doctrine of *respondeat superior*, the court concluded.[106]

---

94. 45 N.C. App. at 113, 262 S.E.2d at 322 (Wells, J., concurring).

95. *See* Jackson v. Anderson, 230 So. 2d 503 (Fla. App. 1970).

96. *See* Martineau v. Nelson, 311 Minn. 92, 247 N.W.2d 409 (1976).

97. *See* Vaughn v. Shelton, 514 S.W.2d 870 (Tenn. App. 1974).

98. *See* 300 N.C. 375, — S.E.2d — (1980) (mem.) (dismissing defendant's appeal).

99. Bost v. Riley, 44 N.C. App. 638, 262 S.E.2d 391, *cert. denied*, 300 N.C. 194, 269 S.E.2d 621 (1980).

100. 44 N.C. App. at 647, 262 S.E.2d at 396.

101. *See* Robinson v. Duszynski, 36 N.C. App. 103, 243 S.E.2d 148 (1978).

102. *See* Starnes v. Charlotte-Mecklenburg Hosp. Auth., 28 N.C. App. 418, 221 S.E.2d 733 (1976).

103. *See* Habuda v. Rex Hosp., Inc., 3 N.C. App. 11, 164 S.E.2d 17 (1968).

104. *See* Payne v. Garvey, 264 N.C. 593, 142 S.E.2d 159 (1965).

105. *See* Byrd v. Marion Gen. Hosp., 202 N.C. 337, 162 S.E. 738 (1932).

106. 44 N.C. App. at 647, 262 S.E.2d at 396. Examining the facts in *Bost*, the court noted that plaintiff's decedent, who had been injured in a bike accident, was admitted to defendant hospital and diagnosed and treated by defendant doctor. The patient recovered partially but suffered a relapse. Defendant partners of the doctor then cared for the patient and performed additional surgery. The patient responded poorly and was transferred to another hospital, where he eventually died. Plaintiff sued the first hospital and three doctors for negligence. The trial court directed a verdict for the hospital; the jury returned verdicts for the doctors. *Id.* at 639-41, 262 S.E.2d at 392-93.

The court noted that plaintiff's evidence tended to show that the hospital's rule about keeping patient progress notes had been violated by the doctors, and that the doctors were not disciplined by the hospital. This evidence could show a violation of a duty owed to the patient, the court observed, but plaintiff had offered no evidence to show that the hospital's breach of duty contributed to the patient's injuries or death. Plaintiff did not allege that the hospital had hired the doctors, so the doctrine of *respondeat superior* was inapplicable. Finally, since no evidence had been introduced to show that the hospital had failed to use reasonable care in the employment of defendant doctors, the court concluded that the directed verdict in favor of the hospital was correct. *Id.* at 648, 262 S.E.2d at 397.

In a case of first impression, the North Carolina Court of Appeals rejected an employee's cause of action against her supervisor for negligently making job performance reports to her employer.[107] The court noted that if this cause of action were allowed, it would burden supervisors and reduce business efficiency by discouraging frankness in work reports.[108]

In another case of first impression, the North Carolina Court of Appeals ruled that an individual partner has privity to sue a seller for personal injuries that result from a breach of warranty on goods purchased by the partnership with partnership funds.[109] Since a partner can be sued personally for nonpayment or other breach of contract for purchase of the goods, he is thus privy to the contract, the court reasoned.[110]

The court of appeals also ruled that the county health department can use the doctrine of sovereign immunity as a defense to an action for negligence.[111] Although the court indicated a distaste for the doctrine, it stated that the application of sovereign immunity to public health care is not a new extention of the doctrine. Moreover, the court expressed its belief that any modification of the doctrine must come from the General Assembly.[112]

In *Koury v. John Meyer of Norwich*[113] the court of appeals questioned the

107. Osborne v. Walker, 48 N.C. App. 627, 269 S.E.2d 281 (1980).

108. *Id.* at 629, 269 S.E.2d at 282. It is possible that the court treated this case too lightly. The court ruled that since plaintiff was an employee at will and could be discharged from her employment regardless of whether her work was satisfactory, she suffered no harm. While this may be true, plaintiff may have suffered an injury if she was discharged *solely* because of the negligently-made job performance reports. Moreover, the court ignores any possible future injury that plaintiff may suffer if she is subsequently refused employment because of the job performance reports and related discharge from the position.

109. Barnes v. Campbell Chain Co., 47 N.C. App. 488, 267 S.E.2d 388 (1980). Plaintiff's eye had been injured by a defective cable sold to plaintiff's partnership by defendant. The trial court dismissed the complaint, but the court of appeals reversed. The court of appeals noted that a partner cannot sue in his own name alone and for his own benefit on a cause of action accruing to the partnership, citing Threadgill v. Faust, 213 N.C. 226, 230, 195 S.E. 798, 800 (1938). But here, the court concluded, the claim was not one accruing to the partnership. 47 N.C. App. at 489, 267 S.E.2d at 389. The court stated that, except possibly for intentional torts, it would be against public policy to allow all partners to recover for the personal injuries to one partner. The right to recover should belong to the partner personally injured, the court reasoned. *Id.*

110. 47 N.C. App. at 490, 267 S.E.2d at 390. Defendant further argued that the partner should be considered an employee of the partnership. Thus, plaintiff would be unable to sue the seller for breach of warranty because of lack of horizontal privity required by N.C. GEN. STAT. § 25-2-318 (1965 and Cum. Supp. 1979). *See also id.*, N.C. Comment (1965). The court dismissed this argument, pointing out that a partner is not an employee of the partnership. Therefore, plaintiff was in effect a purchaser and, consequently, he had direct contractual privity. 47 N.C. App. at 490, 267 S.E.2d at 390.

111. Casey v. Wake County, 45 N.C. App. 522, 263 S.E.2d 360, *cert. denied*, 300 N.C. 371, 267 S.E.2d 673 (1980). Plaintiff went to the family planning clinic of the Wake County Health Department seeking contraceptive aid. She was fitted with an intrauterine device that she claims led to severe injuries, due to the negligence of the clinic. The court held that the act of prescribing and dispensing contraceptives without charge is not proprietary in nature and therefore the health department could assert the doctrine of sovereign immunity as a defense.

112. *Id.* at 523, 263 S.E.2d at 361, citing Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

113. 44 N.C. App. 392, 261 S.E.2d 217, *cert. denied*, 299 N.C. 736, 267 S.E.2d 662 (1980). Koury's company had been sued by John Meyer of Norwich for failure to pay debts. During the trial against the company, which ended in a mistrial, Koury gave false testimony under oath thereby attempting to perpetrate a fraud. Upon discovering the perjured testimony Meyer amended its complaint, joined Koury as an additional party, and moved for an order that Koury

constitutionality of North Carolina's prejudgment arrest statute on the grounds that it violates the due process and equal protection clauses of the fourteenth amendment to the federal constitution.

R. JOYCE BURRISS GARRETT
JOHN D. HARTNESS, JR.
LEIGH MARTIN WILCO

be arrested. After a hearing Koury was arrested. Koury's subsequent motion to dismiss the complaint for failure to state a cause of action was granted. He then sued Meyer for false imprisonment, malicious prosecution and abuse of process. According to the court the latter two charges were properly dismissed on summary judgment. The pivotal issue in the false imprisonment charge was whether, at the time of the pre-judgment arrest, there was probable cause for the arrest.

Causes for which a defendant in a civil action may be subjected to prejudgment arrest are specified in G.S. 1-410. This statute, which has been operational for over a hundred years, authorizes civil arrests when an action is brought to recover damages for fraud. Acknowledging that Koury's activities in the first trial constituted fraud within the intent of G.S. 1-410(4) the court held that there was probable cause for Koury's arrest. In dictum, however, the court stated that there is a serious question whether G.S. 1-410 violates the due process and equal protection clauses of the fourteenth amendment to the federal constitution despite the fact that the statute is within the ambit of the North Carolina constitutional provision against imprisonment for debt "except in case of fraud." *See* N.C. CONST. art. 1, § 28.