Property Law

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New Developments for Federally Subsidized Housing Tenants in North Carolina

On July 12, 1985, the North Carolina General Assembly passed an Act establishing criminal penalties for recipients who obtain housing assistance[1] through fraudulent misrepresentation.[2] In addition, the Act provides that housing authorities may evict tenants from public housing[3] projects for failure to pay rent "without regard to personal fault on the the part of the tenant."[4] The new Act amends the Housing Authorities Law,[5] which was enacted as an enabling statute for local housing authorities (LHAs).[6] With the passage of these amendments, the North Carolina General Assembly has sent a strong message that it intends to protect the ability of North Carolina's housing authorities to ensure their financial stability by (1) providing them a specific and potent deterrent against fraud, and (2) insulating them against the recent judicial creation of a personal fault defense in housing authority tenant evictions for failure to pay rent.[7]

This Note examines the impetus behind the enactment of the amendments to the Housing Authorities Law and the amendments' implications for housing authority tenants across the state. It also explores certain ambiguities in the amendments that could lead to confusion in their application and that could result in a wider application of their provisions than intended. The Note concludes by suggesting an alternative defense for tenants threatened with eviction for failure to pay rent that does not conflict with the new provisions of the Hous-

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1. In this Note the term housing assistance refers to tenancy in the governmentally supplied rental housing for lower-income citizens subsidized under the federal public housing program. *See infra* note 3. The other major federally subsidized program for lower-income citizens, Section 8 Housing Assistance, is discussed *infra* at notes 45-49 and accompanying text.

2. Act of July 12, 1985, ch. 741, § 1, 1985 N.C. Sess. Laws 983, 983 (codified at N.C. GEN. STAT. § 157-29.1 (Supp. 1985)). The act was entitled "An Act To Prohibit Obtaining Housing Assistance By Misrepresentation And To Authorize Eviction of Tenants For Failure To Pay Rent." *Id.*

3. Public housing refers to the federally subsidized housing program established by the National Housing Act of 1937, ch. 896, 50 Stat. 888 (1937). The 1937 Act was revised and readopted by Congress in 1974 by Pub. L. No. 93-383, Title II, § 20(a), 88 Stat. 653 (1974) and is currently codified at 42 U.S.C. § 1437 (1982). Over 1.2 million housing units have been supplied through the public housing program. THE NATIONAL HOUSING LAW PROJECT, HUD HOUSING PROGRAMS: TENANT'S RIGHTS, ch. 1.3.1, at 1-10 (1981). For a description of the public housing program, see *infra* notes 14-25 and accompanying text.

4. Act of July 12, 1985, ch. 741, § 2, 1985 N.C. Sess. Laws 983, 984 (codified at N.C. GEN. STAT. § 157-29 (Supp. 1985)).

5. Act of May 11, 1935, ch. 456, 1935 N.C. Sess. Laws 771, *amended in part by* Act of July 12, 1985, ch. 741, 1985 N.C. Sess. Laws 983 (codified at N.C. GEN. STAT. §§ 157-1 to -70 (1982 & Supp. 1985)).

6. LHAs are municipal corporations that administer the federal public housing program. *See infra* notes 17-25 and accompanying text. In the "[f]inding and declaration of necessity" section of the Housing Authorities Law, the legislature found that "unsanitary or unsafe dwelling accomodations exist . . . throughout the state . . . constituting a menace . . . [and] cannot be remedied by the ordinary operation of private enterprise." N.C. GEN. STAT. § 157-2 (1982).

7. *See infra* notes 13, 66-97 and accompanying text.

ing Authorities Law and that is in accordance with existing federal regulations[8] governing public housing.

The act can be analyzed as two distinct parts. First, it adds a new subsection[9] to the Housing Authorities Law entitled "Fraudulent misrepresentation" which establishes criminal misdemeanor and felony penalties for those who fraudulently obtain housing assistance.[10] Second, it adds an additional subdivision to the main section of the Housing Authority Law that sets forth the circumstances under which a housing authority can terminate or refuse to renew a lease.[11] These additions track the basic language and intent of the applicable federal regulations governing tenant eviction from public housing.[12] Its significance lies in its annulment of the "personal fault" defense to an eviction for failure to pay rent created by the North Carolina Supreme Court in *Maxton Housing Authority v. McLean*.[13]

An understanding of the role of LHAs in federally subsidized housing is necessary to understand the scope and applicability of the new Act. In 1937 the landmark United States Housing Act[14] created the first national "low rent" public housing program.[15] Under the program the federal government provides subsidies to LHAs to build and develop rental housing units for lower income tenants.[16] LHAs are municipal corporations authorized under state enabling legislation[17] that own the housing projects and are responsible for their management and administration.[18]

As set forth in the United States Housing Act, the public housing program is administered on the federal level by the U.S. Department of Housing and

8. The relevant federal regulations governing public housing can be found at 24 C.F.R. §§ 912.1-.4, 913.101-.109, 941.101-.505, 966.1-.54 (1985).

9. N.C. GEN. STAT. § 157-29 (Supp. 1985).

10. *Id.* § 157-29.1.

11. *Id.* § 157-29.

12. *See infra* notes 62-64 and accompanying text.

13. 313 N.C. 277, 328 S.E.2d 290 (1985).

14. 42 U.S.C. § 1437 (1982). *See supra* note 3.

15. The purpose of the public housing program is "to provide decent, safe, and sanitary dwellings . . . for families of low income." 42 U.S.C § 1437a(1) (1982). For a description of income limits, see *infra* note 16. Public housing was originally described as a "low-rent" program, 42 U.S.C. § 1401 (1969), and was directed towards the "lowest-income" groups. *Id.* § 1402(2). These requirements were modified by the Community Development Act of 1974, Pub. L. No. 93-383, Title II, § 201(a), 88 Stat. 653 (1974) (codified at 42 U.S.C. § 1437 (1982)).

16. A "lower-income" family is defined as one whose "[a]nnual [i]ncome does not exceed 80 percent of the median income for the area, as determined by [the Department of Housing and Urban Development] with adjustments for smaller and larger families." 24 C.F.R. § 913.102 (1985). "Very low-income" families, those whose income does not exceed 50% of the area median, are now given a preference for public housing. *Id.*; *see* 42 U.S.C.A. § 1437n (West 1982 & Supp. 1985). Annual income is the "anticipated total income from all sources received by the Family head and spouse . . . and by each additional member of the Family" minus various statutorily allowed deductions. 24 C.F.R. § 913.106 (1985).

17. N.C. GEN. STAT. §§ 157-1 to -.70 (1982 & Supp. 1985); *see supra* note 6.

18. *See generally* 24 C.F.R. § 941.101(a) (1985) (outlining purpose of public housing and responsibilities of LHAs with reference to specific regulations affecting the operation and management of public housing projects); 42 U.S.C.A. § 1437a(c)(1), (2) (West 1982 & Supp. 1985) (defining "development and operation" with respect to public housing).

Urban Development (HUD).[19] However, a significant amount of authority and autonomy is vested in the LHAs.[20] The LHA is typically responsible for initiating the project and arranging for its siting and design. Furthermore, it has control over the project's daily operations, including staffing, maintenance and repair, tenant selection and eviction, and any legal action against tenants.[21] In recent years, however, federal regulations and judicial decisions protecting tenants' rights have put constraints on LHA management autonomy, particularly in the areas of tenant selection, eviction, and allowable rents.[22]

Federal funding for the capital cost of the housing projects is provided to the LHAs through an annual contributions contract (ACC)[23] with HUD. While limited operating subsidies are available from HUD,[24] LHAs are expected to meet their operating expenses with tenant rent receipts. The North Carolina Housing Authorities Law does not provide for any additional state financial assistance to the LHAs although cities in their discretion may make donations or loans to defray the LHAs' operating expenses.[25]

In recent years many LHAs across the country have experienced serious financial difficulties.[26] Although a variety of factors, including mismanagement and deteriorating housing stock, have contributed to their plight, many LHAs and some commentators have blamed the increasing tide of federal regulations and judicial decisions regulating tenant rents, admission, and eviction procedures as an additional source of financial instability.[27] Because these reforms often had financial implications and were not always accompanied by additional funding, they did have an impact on the ability of LHAs to be financially sound entities.[28]

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19. HUD was founded in 1965, Act of Sept. 9, 1965, Pub. L. No. 89-174, 79 Stat. 667 (1965) (codified at 42 U.S.C. §§ 3531-3539 (1982)), to administer federal programs designed to achieve the Congressional goal of a "decent home and suitable living environment for every American family." 12 U.S.C. § 1441 (1982).

20. The declaration of policy in the U.S. Housing Act of 1937 as amended states that, "consistent with the objectives of this chapter, [the policy is] to vest in local public housing agencies the maximum amount of responsibility for the programs." 42 U.S.C. § 1437 (Supp. 1985).

21. D. PHARES, A DECENT HOME AND ENVIRONMENT: HOUSING URBAN AMERICA 9 (1977)

22. *See infra* notes 60-61 and accompanying text.

23. 42 U.S.C. § 1437c (1982).

24. *See* 12 U.S.C. § 1715(2)(a) (1982). The operating subsidies available from HUD are limited and the amount distributed to each LHA is determined through a complex formula referred to as the Performance Funding System (PFS). *See* 24 C.F.R. § 990.109 (1985). The subsidy is limited and to the extent an LHA has higher operating expenses than the standard or lower revenues due to vacancies or rent default, the LHA's deficit may not be covered by the available HUD subsidies. *See id.*

25. N.C. GEN. STAT. § 157-43 (1982).

26. *See* R. KOLODNY, EXPLORING NEW STRATEGIES FOR IMPROVING PUBLIC HOUSING MANAGEMENT 65-68 (1979).

27. *See, e.g.*, OFFICE OF POLICY DEV. AND RESEARCH, U.S. DEP'T OF HOUS. AND URBAN DEV., PROBLEMS AFFECTING LOW RENT PUBLIC HOUSING PROJECTS: A FIELD STUDY 95 (1979) (survey of public housing managers elicited complaints that evicting problem tenants was difficult); Fuerst & Petty, *Public Housing in the Courts: Pyrrhic Victories for the Poor*, 9 URB. LAW. 496, 512 (1977) (criticizing what the authors termed "heavy-handed" judicial interference in the administration of federally subsidized housing).

28. *See, e.g.*, CONGRESSIONAL BUDGET OFFICE, UNITED STATES CONGRESS, FEDERAL SUBSIDIES FOR PUBLIC HOUSING: ISSUES AND OPTIONS 24, 24 (1983) (pointing out that federal regulation of LHA operations may add to LHA costs by "increasing the time spent in documenting compliance and by limiting flexibility in decisionmaking").

The impetus behind North Carolina's amendments to the Housing Authorities Law and their probable effectiveness is best assessed using this background. The amendments were the result of intense lobbying efforts by many state LHAs[29] and clearly were designed to assist them in their efforts to operate in a fiscally responsible manner and preserve their administrative autonomy. The amendments also were designed to help ensure that the limited resources of the LHAs[30] will be directed towards those tenants most in need and those tenants who are honest in reporting their income and prompt in paying their rent. Given these objectives and the fact the amendments did not require any financial support from the state, it is not surprising that the legislature was so amenable to passage of the act.[31]

The housing fraud provision of the act is essentially identical to the existing fraudulent misrepresentation state law governing receipt of Aid to Families with Dependent Children (AFDC) payments,[32] and to a lesser extent, the state laws governing receipt of Food Stamps[33] and Medicaid.[34] Under the provision any "provider or recipient"[35] of housing assistance payments who "willingly and knowingly and with intent to deceive makes a false statement or misrepresentation or who willfully and knowingly and with intent to deceive fails to disclose a material fact"[36] and as the result of these actions obtains or attempts to obtain housing assistance can be charged with a criminal offense.[37] An attempt to receive or the receipt of less than four hundred dollars worth of housing assistance fraudulently is a misdemeanor, while the receipt of over four hundred dollars worth of assistance fraudulently obtained is a Class I felony.[38]

There is little case law in North Carolina concerning the existing welfare fraud statutes for AFDC, Food Stamps, and Medicaid payments although prosecution in the federal district courts under federal fraud provisions is common.[39]

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29. Interview with Don Saunders, Managing/Housing Attorney, North Carolina Legal Services Resource Center, Inc. in Raleigh, North Carolina (Nov. 6, 1985). However, not all North Carolina Housing Authorities supported the Act. *See infra* note 52.

30. The National League of Cities estimates that only one-fifth of all lower income renter households are able to obtain any type of federal housing assistance. NAT'L LEAGUE OF CITIES, FEDERAL HOUSING ASSISTANCE: WHO NEEDS IT? WHO GETS IT? 19 (1985). This estimate should be compared with figures indicating that approximately 62% of all very low-income families live in inadequate housing or are subject to an excessive rent burden (rent payments exceeding 30% of income). THE PRESIDENT'S COMM'N ON HOUS., REPORT 10-11 & table 1.4 (1981).

31. The Act passed by a vote of 45 to 0 in the State senate and 80 to 13 in the State house. Vote tallies supplied by Legislative Library in Raleigh, North Carolina (March 28, 1986).

32. N.C. GEN. STAT. § 108A-39 (Supp. 1985). The AFDC program is codified at 42 U.S.C. §§ 601-615 (1982).

33. N.C. GEN. STAT. § 108A-53 (Supp. 1985). The Food Stamps program is codified at 7 U.S.C. §§ 2011-2029 (1982).

34. N.C. GEN. STAT. § 108A-64 (Supp. 1985). The Medicaid program is codified at 42 U.S.C. § 1396, Title XIX (1982).

35. N.C. GEN. STAT. § 157-29.1 (Supp. 1985).

36. *Id.*

37. *Id.*

38. *Id.*

39. Interview, *supra* note 29. The federal general fraud statute is codified at 18 U.S.C. § 1001 (1982). Specific federal statutes establishing criminal penalties for fraud in transactions with HUD are at *id.* §§ 1010, 1012.

In *State v. Bass*[40] a North Carolina Court of Appeals case concerning AFDC and food stamp fraud, the court stated that "the agency making the payments does not have to be deceived" by fraudulent misrepresentation to prosecute.[41] This language distinguishes the welfare fraud statutes from the broader state criminal statute and associated case law governing the obtaining of property by false pretenses. This crime requires that the defrauded party actually be deceived by the misrepresentation or omission of material fact.[42] In addition, the *Bass* court stated that "an employee of the agency . . . or the provider of the funds" can be charged with fraud under the welfare fraud statutes[43] and that restitution of the value of the benefits received also may be required provided that such restitution is related to the criminal act.[44] Given the similarity of the statutes, it is likely that the distinctions and statements made by the *Bass* court will apply with equal force to the housing fraud statute.

Although it is clear that a recipient or provider of housing assistance may be prosecuted under the statute, it is unclear whether the statute applies only to the public housing program because the term "housing assistance" is not defined. LHAs by definition administer the public housing program, but many LHAs across the state also administer the other major federal subsidized housing program commonly known as Section 8.[45] Section 8[46] is a program designed to enable low and moderate income tenants to rent existing units from private landlords by paying the landlord a subsidy that covers the gap between what the tenant can afford and the actual rent of the unit.[47] Under federal regulations, a public housing authority (PHA) or HUD is responsible for administering the housing assistance payments contract with a Section 8 landlord.[48] Despite the similarity in names, a PHA for the Section 8 program is not necessarily the same entity as a Public Housing LHA. LHAs are eligible, however, to act as Section 8 PHAs.[49]

To the extent that an LHA established under the general enabling provision of the state's Housing Authority Laws also acts as a Section 8 PHA, the ques-

40. 53 N.C. App. 40, 280 S.E.2d 7 (1981).

41. *Id.* at 44, 280 S.E.2d at 10.

42. *Id.*; *see* N.C. GEN. STAT. § 14-100 (1981). In State v. Cronin, 299 N.C. 229, 262 S.E.2d 277 (1980), the court discussed the requirements of a criminal fraud case, including the requirement that the defrauded party actually be deceived by the defendant. *Id.* at 242, 262 S.E.2d at 284.

43. *Bass*, 53 N.C. App. at 44, 280 S.E.2d at 10.

44. *Id.* at 41-42, 280 S.E.2d at 9-10.

45. Approximately 34 Public Housing LHAs across the state also administer the Section 8 assistance program. Interview with Doris Evans, Secretary of Assisted Management Branch, HUD Field Office in Greensboro, North Carolina (March 28, 1986). In North Carolina, there are approximately 42,436 housing units sudsidized under public housing and 38,946 housing units subsidized under Section 8 and other rental assistance programs. Information Sheets dated March 1985 supplied by HUD Field Office, Greensboro, North Carolina.

46. 42 U.S.C. § 1437f (1982).

47. *See* 24 C.F.R. § 882.106 (1985) (contract rents for Section 8 assisted units); *id.* § 813.107 (tenant share of contract rent). The actual rent for section 8 units is subject to HUD fair market rent limitations. *Id.* § 882.106.

48. *See* 24 C.F.R. § 882.116 (1985) (PHA responsibilities); *id.* § 882.121 (HUD administration).

49. 24 C.F.R § 882.102 (1985).

tion arises whether recipients of Section 8 benefits, who include the landlords who receive the rent subsidy as well as tenants, could be prosecuted under the Housing Fraud Act. Although there are structural differences between the two programs, there is no apparent reason why fraud under the two programs should be treated differently. Thus, reason would dictate that recipients of Section 8 housing assistance payments would be subject to the housing fraud statute. On the other hand, because the housing fraud law apparently only applies to LHAs established under the Housing Authorities Law, the application of the housing fraud statute to the recipients of Section 8 benefits would be inappropriate. This problem arises because not all Section 8 PHAs are LHAs covered by the statute. Although the problem could be resolved by judicial action, it would be preferable if the legislature clarified the scope of the law because courts are not always able to unravel accurately the complexities of the different federal housing programs.

An additional problem that may arise in the application of the housing fraud law relates to the "willfully, and knowingly and with intent to deceive"[50] element of the offense. Obviously, this is a question for the trier of fact to determine and it is one that exists in all allegations of fraud, but the nature of the housing programs may make fraud in the housing context more difficult to ascertain than in other contexts. For tenants, the opportunity for fraud lies primarily in the reporting of family income. Family income is statutorily defined, and it determines eligibilty for public housing tenancy as well as the rent that the family will pay for their unit.[51] The regulations relating to the proper determination of family income are complex and difficult for even the LHAs to unravel.[52] Because a mistake may be construed as fraud in the context of family income reports, it is crucial that LHAs provide the best possible instructions to tenants for completing the reports. Otherwise, innocent tenants could be burdened with criminal charges. LHAs also should develop clear and reasonable guidelines governing the definition of "family" because the presence of "overnight guests" often leads to disputes over whether the guest is in fact a family member and therefore a tenant whose income must be reported to the LHA.[53]

Once a person is convicted under the new housing fraud act, sentencing will depend on whether the conviction is for the misdemeanor or felony offense. The

50. N.C. GEN. STAT. § 157-29.1 (Supp. 1985).

51. *See supra* note 16.

52. James H. Colson, Chairman of the the Raleigh Housing Authority, stated in a letter to Richard Wright, the Chairman of the House Judiciary II Committee of the North Carolina State House of Representatives, regarding the then proposed housing fraud legislation that:

> [t]he computation of eligibility for housing assistance and the amount of assistance an applicant is eligible for has been complicated by the numerous law changes by Congress and regulatory changes by the Department of Housing and Urban Development (HUD). There have been changes to the point that HUD officials themselves have been unsure of how to do the computations.... [W]e feel that this Bill would have the effect of discouraging honest applicants from applying while having little or no impact upon the dishonest applicant.

Letter from James H. Colson to Richard Wright (May 30, 1985).

53. *See, e.g.*, NATIONAL HOUSING LAW PROJECT, *supra* note 3, chs. 14.2.2.4, 14.2.2.5 (1981) (ch. 14.2.2.4 discusses LHA enforcement of moral standards and ch. 14.2.2.5 discusses changes in family size).

more severe offense is a Class I felony,[54] which is punishable under the North Carolina criminal code by "imprisonment of up to five years or a fine or both."[55] Prior to the enactment of the Housing Fraud Act, an offender could have been charged with the state crime of obtaining property through false pretenses, a Class H felony, which has a maximum prison term of ten years.[56] The new law thus reduces the maximum possible prison term by five years.

As currently drafted, however, a misdemeanor conviction under the new law could result in a prison term of up to ten years, twice that permitted for the felony conviction. This bizarre result is possible because the housing fraud law does not specify the permissible punishment for the misdemeanor offense. Under the state criminal code, misdemeanors for which no specific statutory punishment is prescribed "shall be punishable by a fine [or] by imprisonment" of up to two years, or both.[57] Misdemeanor offenses that are "done in secrecy and malice, or with deceit or intent to defraud," however, are treated as Class H felonies with a maximum prison term of ten years.[58] Because "intent to deceive" is a necessary element of the housing fraud crime, it is clear that a literal reading of the misdemeanor punishment statute would allow a misdemeanor housing fraud conviction to be treated as a Class H felony despite the fact that a felony conviction for the same crime can only be treated as a Class I felony.

The second significant amendment contained in the Act is the introduction of permissible cause standards outlining certain circumstances for which an LHA can terminate or refuse to renew a rental agreement. Prior to the Act, no specific standards were mandated by the Housing Authorities Law.[59] LHAs, however, have not been entirely free to set their own policies regarding these matters since 1975 when the federal government instituted a set of "Lease and Grievance" regulations for LHAs and their tenants.[60] The institution of the lease and grievance regulations was prompted by a series of judicial decisions concerning the procedural rights of tenants in federally subsidized housing[61] and

54. N.C. GEN. STAT. § 157-29.1 (Supp. 1985).

55. *Id.* § 14-1.1(a)(9) (1982).

56. *Id.* § 14-100. Obtaining property by false pretenses is a Class H felony, *id.*, and is therefore "punishable by imprisonment up to 10 years, or a fine, or both." *Id.* § 14-1.1(a)(8).

57. *Id.* § 14-3(a).

58. *Id.* § 14-3(b).

59. N.C. GEN. STAT. §§ 157-1 to -70 (1982). The "Rental and tenant selection" provision of the Housing Authorities Law did not mention eviction prior to the enactment of the act. *Id.* § 157.29.

60. 40 Fed. Reg. 33,402 (1975) (codified at 24 C.F.R. §§ 966.1-.59 (1985)).

61. Initially, tenants in public housing had no rights beyond those afforded tenants at common law. The chain of decisions expanding their rights began in 1967 when a Public Housing tenant in Durham, North Carolina claimed that the LHA had violated the due process clause by terminating her lease without explanation. The case, Thorpe v. Housing Auth., 386 U.S. 670 (1967), was appealed through the North Carolina courts to the United States Supreme Court. The Supreme Court declined to rule on the merits of the case, citing instead a recently released HUD circular requiring that LHAs explain decisions to evict. *Id.* at 673-74. A concurring opinion written by Justice Douglas strongly suggested that due process requirements apply to public housing and extend beyond the basic notice procedures provided for in the federal regulations. *Id.* at 678-79 (Douglas, J., concurring). He suggested further that due process protects tenants from arbitrary eviction. *Id.*

Federal courts have expanded Justice Douglas' suggestions on due process. In Escalera v. New

the resultant regulations govern, among other matters, tenant eviction and lease renewal.

The eviction standards set forth in the amendment are not substantially different from those in the existing federal lease and grievance regulations. Like the federal regulations, the Housing Authorities Law now states that an LHA

> shall not terminate or refuse to renew a rental agreement other than for a serious or repeated violation of a material term of the lease such as (i) failure to make payments due under the rental agreement . . . (ii) failure to fulfill the tenant obligations set forth in [the relevant federal regulation] . . . or, (iii) other good cause.[62]

The amendment departs from the federal regulations with the added condition that "[e]xcept in the case of failure to make payments due under a rental agreement, fault on the part of a tenant may be considered in determining whether good cause exists to terminate a rental agreement."[63] Although this condition appears to expand the concept of good cause,[64] its importance lies in its exclusion of all consideration of fault on the part of the tenant from any eviction proceeding stemming from nonpayment of rent. Thus, the amendment effectively overruled the North Carolina Supreme Court's decision in *Maxton* only a

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York City Hous. Auth., 425 F.2d 853, 860-66 (2d Cir. 1979), *cert. denied*, 400 U.S. 853 (1970), the United States Court of Appeals for the Second Circuit ruled that procedural due process applied to federally subsidized low-income housing and required eviction procedures more extensive than those set forth in the HUD circular. In another North Carolina case, Caulder v. Durham Hous. Auth., 433 F.2d. 998 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971), the United States Court of Appeals for the Fourth Circuit outlined the essential elements of due process in this context. These elements include the right to notice, the opportunity to confront and examine adverse witnesses, the right to be represented by counsel, and the right to a hearing before an impartial decision maker. *Id.* at 1004.

HUD responded to this series of decisions by promulgating the lease and grievance regulations in 1975. 24 C.F.R. §§ 966.1 to -.59 (1985). These regulations applied only to LHA owned projects, *id.* § 966.51, and governed, among other matters, procedural requirements and allowable reasons for tenant evictions. *Id.* §§ 966.1 to -.59. Under the new regulations, the scope of protection afforded to low-income tenants in other federally subsidized programs was still unclear. Extension of the due process eviction procedures to programs involving private landlords, such as Section 8, was considered impractical by some commentators. *See, e.g.*, Williams, *The Future of Tenant's Rights in Assisted Housing Under a Reagan Voucher Plan: An Analysis of Section 8 Existing Housing Cases*, 23 URBAN L. ANN. 3 (1982). The good cause requirement for eviction in these programs was first suggested in Joy v. Daniels, 479 F.2d 1236 (4th Cir. 1973), in which the United States Court of Appeals for the Fourth Circuit recognized that the interests of tenants in these programs also should be extended basic due process protection. *Id.* at 1241-42. This requirement was later incorporated into Section 8 regulations. *See* 24 C.F.R. § 880.607 (1985).

62. N.C. GEN. STAT. § 157-29 (Supp. 1985). The language quoted here is virtually identical to the federal regulations at 24 C.F.R. § 966.4(l)(1) (1985) (24 C.F.R. § 866.4(f) was redesignated at 24 C.F.R. § 966.4(f) in 1985). *See infra* note 99.

63. N.C. GEN. STAT. § 157.29 (Supp. 1985).

64. Good cause is a standard for eviction in 24 C.F.R. § 966.4(l)(1) (1985). From a strict reading of the language of the regulations, good cause as it is used in the regulations ("or for other good cause," *id.*) is a separate and distinct category of evictions for reasons other than nonpayment of rent or failure to fulfill tenant obligations set forth in the lease. Therefore, nonpayment of rent or failure to fulfill the tenant obligations set forth in the lease are presumably considered inherently good causes for a LHA to terminate a lease. Several courts, however, have utilized the good cause requirement to determine whether an eviction for undesirability—a violation of lease terms—was valid. *See infra* notes 89-92, 100-02 and accompanying text. The *Maxton* court appears to have been the first state or federal appellate court to apply the good cause standard to eviction for nonpayment of rent with reference to the personal fault of the tenant.

few months after its pronouncement.[65]

In *Maxton*, plaintiff, Maxton Housing Authority (Authority), sought to evict defendant who was a tenant in an apartment owned by the Authority.[66] Defendant was an unmarried women with three children whose only source of income was her AFDC check. Accordingly, defendant was not required to pay rent to the Authority and received a monthly utility allowance check of six dollars from the Authority.[67] In October of 1981 defendant married, and on the basis of her husband's income, the rent on her apartment increased to 171 dollars a month effective December 1981.[68] Defendant paid the new rent for December but not for January. In February the rent was lowered to 73 dollars a month because defendant's husband had been laid off.[69] Rent for February and March also was not paid and in late March the defendant and her husband separated.[70] Defendant's AFDC payments were not restored until late in June of 1982.[71] The water and sewer had been disconnected in late May for an unpaid bill of fourteen dollars and were not restored until June of 1982.[72]

The Authority instituted summary ejectment proceedings against defendant for failure to pay rent on March 11, 1982 and for nonpayment of utilities on July 20, 1982.[73] Judgment was entered for the Authority in both ejection proceedings[74] and they were appealed and consolidated for trial. The district court af-

65. The Act was enacted on July 12, 1985 approximately four months after the March 14, 1985 decision in *Maxton*. Act of July 12, 1985, ch. 741, 1985 N.C. Sess. Laws 983.

66. *Maxton*, 313 N.C. at 279, 328 S.E.2d at 292. Plaintiff in Maxton lived in a Section 8-New Construction unit owned by the Authority and not in the Public Housing Units also owned by the Authority. Record at 15, [Defendant's Exhibit No.1, Dwelling Lease] *Maxton*. Section 8-New Construction has a tenant subsidy mechanism similar to the larger Section 8-Existing Housing program, *see supra* notes 45-47 and accompanying text, but formerly provided additional federal funding for the construction of the units. Congress is no longer funding the construction of units under the program. *See* 42 U.S.C. § 1437f(a) (Supp. 1985).

The *Maxton* court did not seem to be aware of this distinction and treated the case as one involving Public Housing without making reference to any of the regulations specifically governing Section 8-New Construction. The court's confusion probably stemmed from the fact it is rare for LHAs to own Section 8-New Construction units. For the remainder of this Note, reference will be made both to the Public Housing regulations cited by the *Maxton* court and the equivalent regulations for Section 8-New Construction.

67. The federal lower-income housing subsidies generally include a reasonable utility allowance. If the tenant pays his or her own utilities this allowance can offset the tenant's rent payment, and if it is greater than the rent payment, the difference can be refunded directly to the tenant. *See* 24 C.F.R. § 813.108 (1985) (Section 8 programs); *Id.* § 913.108 (1985) (Public Housing).

68. *Maxton*, 313 N.C. at 278, 328 S.E.2d at 291. The defendant's rent was raised pursuant to 24 C.F.R. § 880.603(c)(2) (1985) which allows for interim rent adjustments on the basis of changes in family income. *See also id.* § 913.110(e) (1985) (Public Housing).

69. *Maxton*, 313 N.C. at 278, 328 S.E.2d at 291.

70. *Id.* There was evidence that when plaintiff attempted to speak with her husband about the unpaid bills, he assaulted her. After they separated, he also refused to pay court ordered child support. *Id.* at 282, 328 S.E.2d at 294.

71. *Id.* at 278, 328 S.E.2d at 291.

72. *Id.* at 278, 328 S.E.2d at 291-92.

73. *Id.* at 278, 328 S.E.2d at 292.

74. Maxton Hous. Auth. v. McLean, No. 82 CVM 1368 (Robeson Co. Magis. Ct., April 6, 1982); Maxton Hous. Auth. v. McLean, No. 83 CVM 3499 (Robeson Co. Magis. Ct., August 17, 1982).

firmed the eviction.[75] The court of appeals also affirmed, noting that defendant's lease provided that nonpayment of rent or utilities was a material noncompliance with the lease and grounds for lease termination.[76] A dissent by Judge Becton argued that the "doctrine of necessaries" precluded defendant's eviction because her husband should be responsible for the delinquent payments[77] and that defendant's eviction was contrary to the North Carolina legislative policy regarding public housing.[78] Judge Becton further noted that eviction of a tenant not at fault for nonpayment of rent was a violation of the "good cause standard" incorporated in the federal regulations governing eviction in public housing and that there must be a causal connection between the imposition of the eviction sanction and a public housing tenant's own misconduct.[79]

The North Carolina Supreme Court reversed the lower courts and ruled that defendant could not be evicted under the facts of the case.[80] Specifically, the *Maxton* court held that "in order to evict a tenant occupying public housing for failure to pay rent as called for in the lease, there must be a finding of fault on the part of the tenant in failing to make a rental payment."[81] The court emphasized that its holding applied only to leases between public housing authorities and their tenants.[82] Justice Meyer, joined by Justice Branch, dissented from the majority opinion, stating that the record showed good cause for the Authority's termination of the tenancy.[83]

The majority opinion incorporated the rationale of the second line of reasoning of Judge Becton's dissent. The court stated that the federal and state policy of providing low-income citizens with affordable, decent housing was dis-

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75. Maxton Hous. Auth. v. McLean, Nos. 83-CVD-632, 83-CVD-1482 (N.C. Dist. Ct., Robeson Co., June 20, 1983).

76. Maxton Hous. Auth. v. McLean, 70 N.C. App. 550, 551, 320 S.E.2d 322, 323 (1984), *rev'd*, 313 N.C. 277, 328 S.E.2d 290 (1985).

77. *Id.* at 554, 320 S.E.2d at 325 (Becton, J., dissenting). The "doctrine of necessaries" is a principle of family law that a husband is liable to his wife's creditors for necessaries furnished to his wife. 2 R. LEE, NORTH CAROLINA FAMILY LAW §§ 130, 132-33 (4th ed. 1980). The doctrine is rarely used today because virtually all states provide for civil and criminal actions for support and because courts commonly find that creditors have relied solely on the wife's separate credit. *See* Cole v. Adams, 56 N.C. App. 714, 289 S.E.2d 918 (1982) (husband not liable to creditors for necessaries provided on credit to his wife); *cf.* Presbyterian Hosp. v. McCartha, 66 N.C. App. 177, 310 S.E.2d 409 (1984) (wife not liable for debt of husband when hospital creditor intended to rely on the separate estate of husband), *disc. rev. denied*, 312 N.C. 485, 322 S.E.2d 761 (1985).

Necessaries are defined as those things essential to the wife's "health and comfort according to the rank and fortune of her husband." *Cole*, 56 N.C. App. at 715, 289 S.E.2d at 919-20 (quoting 2 R. LEE, *supra*, § 132, at 128). Because the rent increase was predicated solely on the income of the defendant's husband and the back rent was owed for a necessary—housing—it is certainly possible that the doctrine could apply to *Maxton*. The North Carolina Supreme Court, however, declined to address this possibility. *Maxton*, 312 N.C. at 279, 328 S.E.2d at 292. Even if the doctrine was held to apply to *Maxton*, it is not clear whether the liability of defendant's husband for the back rent would necessarily preclude defendant's eviction.

78. *Maxton*, 70 N.C. App. at 554-55, 320 S.E.2d at 325.

79. *Id.*

80. *Maxton*, 313 N.C. at 282-83, 328 S.E.2d at 293-94.

81. *Id.* at 280, 328 S.E.2d at 292.

82. *Id.* at 283, 328 S.E.2d at 294.

83. *Id.* at 284, 328 S.E.2d at 295 (Meyer, J., dissenting). *See infra* text accompanying notes 94-97 for the rationale of the dissent.

positive of the appeal.[84] The court did not examine this point in great detail, but its policy analysis appears to have been based more on the broad statements of social purpose incorporated into the state and federal housing legislative acts than on the actual structure of the public housing program.[85] As a result of this analysis, the court found that eviction of a blameless tenant would thwart the social objectives of public housing.[86] The court dismissed the relevancy of defendant's lease provisions providing for termination of the lease for nonpayment of rent or utilities. According to the court's analysis, federal regulations governing LHA leases did not provide for an automatic termination or right of reentry upon breach of conditions in the lease.[87] The court then looked to the good cause condition for terminating public housing tenancies and determined that the Authority did not have good cause to evict.[88]

The court found support for its conclusion that there was no good cause in *Tyson v. New York City Housing Authority*[89] and in *Hines v. New York City Housing Authority*.[90] Both cases involved a PHA's attempt to evict tenants for "non-desirability"[91] based on the criminal acts of the tenants' nonresident relatives. In *Tyson* the court stated that "[t]here must be some causal nexus between the imposition of the sanction of eviction and the plaintiffs' own conduct."[92] Applying this causal nexus test, the *Maxton* court determined that the "fault resulting in the failure to pay the rent and water fee [rested] upon" defendant's husband rather than defendant herself and that to evict on such evidence would indeed "shock one's sense of fairness."[93]

Justice Meyer's dissent in the *Maxton* decision criticized the majority opinion, stating that the grafting of a "fault" standard on the good cause requirement for eviction was "unnecessary and unwise."[94] The dissent also emphasized

84. *Maxton*, 313 N.C. at 279-80, 328 S.E.2d at 292.

85. *Id.* Although the court referred to both federal and state public policy underlying public housing, specific reference was made only to N.C. GEN. STAT. § 157-2 (1982), which sets forth the public policy underlying the Housing Authorities Law. For an example of the broad federal policy behind Public Housing and other federally subsidized low-income programs see *supra* notes 19-20. The court reasoned that because public housing is occupied by the poorest of the state's citizens, eviction of tenants for failure to pay rent would thwart the federal and state policy of providing housing to them under certain circumstances. The court did not inquire closely into the subsidy mechanism and funding for the Public Housing program, or examine any federal regulations governing the program except for 24 C.F.R. § 966.4(l)(1) (1984). *Maxton*, 313 N.C. at 281, 328 S.E.2d at 293. *See infra* note 99 and accompanying text for a description of this regulation and its Section 8-New Construction equivalent.

86. *Maxton*, 313 N.C. at 283, 328 S.E.2d at 294.

87. *Id.* at 281, 328 S.E.2d at 293. The court was partially correct in that the regulations do not mandate eviction for nonpayment of rent. They do, however, allow eviction for nonpayment of rent. *See infra* note 99 and accompanying text. In addition, the defendant's lease stated that grounds for termination of the lease included material noncompliance with its terms such as "nonpayment of rent beyond any grace period required by state law." Record at 16.

88. *Maxton*, 313 N.C. at 282, 328 S.E.2d at 293.

89. 369 F. Supp. 513 (S.D.N.Y. 1974).

90. 67 A.D.2d 1000, 413 N.Y.S.2d 733 (1979).

91. *Tyson*, 369 F. Supp. at 516; *Hines*, 67 A.D.2d at 1000, 413 N.Y.S.2d at 734. For an example of an undesirability clause, see *Tyson*, 369 F. Supp. at 520.

92. *Tyson*, 369 F. Supp. at 519.

93. *Maxton*, 313 N.C. at 283, 328 S.E.2d at 294.

94. *Id.* at 284-85, 328 S.E.2d at 294-95 (Meyer, J., dissenting).

that defendant's nonpayment of rent or utilities was a material noncompliance with the lease and grounds for eviction.[95] Furthermore, Justice Meyer pointed out that nonpayment of rent or utilities for whatever reason could result in unsanitary conditions in public housing complexes[96] and could lead to financial instability for LHAs. He also stated that the majority holding would be fundamentally unfair in that the limitations on the ability of an LHA to evict would cause hardship for those people on waiting lists for public housing who would comply with the lease provisions.[97]

The majority opinion in *Maxton* was a unique extension of the good cause requirement for eviction and was undoubtedly a compassionate response to the unfortunate plight of the defendant. The court was correct in considering whether the Authority had good cause to evict under the applicable federal regulations and case law. Yet its conclusion that plaintiff's nonpayment of rent was not good cause is questionable for several reasons. First, as the dissent emphasized, nonpayment of rent and utilities was a material noncompliance with the lease in question.[98] Although obliquely worded, federal regulations governing eviction in public housing clearly contemplate that nonpayment of rent is good cause for an LHA to terminate a lease.[99]

Second, there is no indication in the regulations governing public housing that there must be an element of personal fault before an LHA can evict a tenant for a serious violation of the lease. The only cases arguably supporting such a conclusion, *Tyson* and *Hines*,[100] are easily distinguished from *Maxton*. Both cases were concerned with eviction for a subjective cause—nondesirability—rather than eviction for the more objective act of nonpayment of rent. In *Tyson* the causal nexus test was closely linked to the first amendment right of association,[101] and in *Hines* the court was concerned only with the residency of the criminal relatives.[102] Thus, both courts ultimately decided tenants could not be

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95. *Id.* at 284, 328 S.E.2d at 294-95 (Meyer, J., dissenting).

96. *Id.*

97. *Id.* at 286, 328 S.E.2d at 296 (Meyer, J., dissenting).

98. *Id.* at 284, 329 S.E.2d at 294-95 (Meyer, J., dissenting)

99. Specifically, the lease and grievance regulations for Public Housing state:

> (l) *Termination of the lease.* The lease shall set forth the procedures to be followed by the PHA and by the tenant in terminating the lease which shall provide:
>
> (1) That the PHA shall not terminate or refuse to renew the lease other than for serious or repeated violation of material terms of the lease such as *failure to make payments due under the lease* or to fulfill the tenant obligations set forth in § 966.4(f) or for other good cause.

24 C.F.R. § 966.4(l)(1) (1985) (emphasis added).

Similar provisions are found in the regulations governing Section 8-New Construction, which state that a lease cannot be terminated except for:

> (i) Material noncompliance with the lease . . . . (ii) Material failure to carry out obligations under any State landlord and tenant act; or (iii) Other good cause. . . .
>
> . . . .
>
> nonpayment of rent . . . . beyond any grace period permitted under State law will constitute a material noncompliance with the lease.

Id. § 881.607.

100. *See supra* text accompanying notes 89-93.

101. *Tyson*, 369 F. Supp. at 520.

102. *Hines*, 67 A.D.2d at 1000-01, 413 N.Y.S.2d at 734.

characterized as undesirable on the basis of their nonresident relatives' acts. The causal nexus test was not satisfied because no grounds for eviction were present on the basis of the tenants' or resident family members' conduct.

In contrast, defendant's eviction in *Maxton* was directly related to her own conduct in not paying the rent. Therefore, a strong argument can be made that her eviction did satisfy the causal nexus test because nonpayment of rent is a valid ground for eviction.[103] The *Maxton* court's equation of personal fault with the causal nexus test is a questionable extension of the test, and it is one that other state courts have rejected. For example, in *Spence v. Gormley*[104] the Massachusetts Supreme Court ruled that a housing authority could evict tenants for the nondesirable acts of their resident husbands and sons despite the fact the tenants were not personally responsible for their families' conduct.[105] Admitting it a harsh result, the court justified its decision on the ground that a housing authority must consider the welfare and safety of all of its tenants.[106]

Similarly, housing authorities are expected to be financially sound entities and must operate within federal and state fiscal constraints to meet their federally mandated goal of providing decent affordable housing for low-income citizens. Given the lack of any additional funding to replace uncollected rent, the *Maxton* holding could have jeopardized the ability of North Carolina LHAs to meet this goal. Additionally, as Justice Meyer pointed out in his dissent, the nonpayment of utility bills can create unsafe conditions within a housing complex (for instance, if the tenant's water or electricity were to be cut off) that can endanger other tenants.[107]

In view of the preceding analysis, the North Carolina General Assembly was correct in annulling the personal fault defense for eviction for nonpayment of rent. The amendment to the Housing Authorities Law does not mean that personal fault can never be considered in the determination of good cause to evict; it is only eviction for nonpayment of rent or other payments due under the lease that is exempt from such a consideration.[108] Thus, the rationale and policy considerations expressed in *Maxton* may still be relevant when an LHA evicts a tenant for other reasons.[109]

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103. *See supra* note 99 and accompanying text.

104. 387 Mass. 258, 439 N.E.2d 741 (1982).

105. *Spence*, 387 Mass. at 272-73, 439 N.E.2d at 750; *see also* Lopez v. Henry Phipps Plaza South, Inc., 498 F.2d 937, 946 (2d Cir. 1974) (eviction of tenant for husband and son's criminal misconduct was distinguished from *Tyson* in that the husband and sons were residents of the household); *accord* Housing Auth. v. Bahr, 25 Or. App. 117, 548 P.2d 514 (1976).

The *Spence* court did not entirely abandon the concept of personal fault; it left open the possibility of a defense against termination of the lease when special circumstances indicate that the tenant "could not have foreseen the misconduct or was unable to prevent it by any available means, including outside help." *Spence*, 387 Mass. at 279, 349 N.E.2d at 753. In contrast, the *Maxton* court's defense was vaguely defined and potentially a much broader defense. Although defendant's control over her husband's actions was undoubtedly an issue in *Maxton*, the court did not suggest that she had any affirmative duty to either arrange for payment of the rent or terminate his residency in her apartment.

106. *Spence*, 387 Mass. at 270-72, 439 N.E.2d at 748-49.

107. *Maxton*, 313 N.C. at 284, 328 S.E.2d at 294-95 (Meyer, J., dissenting).

108. N.C. GEN. STAT. § 157-29 (Supp. 1985).

109. *See id.*

Despite the inability of housing authority tenants to raise the personal fault defense in nonpayment of rent evictions, there is another defense available that does not conflict with state statutes or with federal regulations. The amendment specifically states that the housing authority's ability to terminate or refuse to renew a lease because of nonpayment of payments due under the rental agreement is limited to instances in which the payments "were properly and promptly calculated according to applicable HUD regulations."[110] HUD policy guidelines[111] state that "the rent that the family is paying at any one time should be realistic in terms of the family's immediate circumstances."[112] When the rent is unrealistic, an interim rent reduction is available under HUD regulations.[113] If a housing authority tenant can show that his or her calculated rent was unreasonable given the circumstances[114] and that the Housing Authority did not adjust the rent promptly, the Housing Authority could not evict the tenant under the new amendment.

This result is equitable and provides a housing authority tenant with much of the protection the *Maxton* court attempted to provide without the overly broad restraints on eviction that could have been established by the personal fault defense. The examination of family circumstances in any particular case is likely to involve some consideration of personal fault,[115] but consideration will be limited to an examination of whether the circumstances warranted an interim rent reduction and if the payments due under the lease were correctly and promptly calculated. Although defendant's rent in *Maxton* was correctly adjusted on the basis of her husband's income and subsequent unemployment, the court could have found that her circumstances were so extreme as to have warranted an interim reduction in rent.[116] Such a finding could still result in a net loss of funds to the housing authority, but this loss presumably would be characterized as a reduction in allowable rent receipts rather than as uncollected rent which adversely reflects on the management abilities of the LHA.[117]

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110. *Id.*

111. Many of HUD's policies and directives are disseminated through the issuance of handbooks and other types of notices. Generally, these issuances are considered binding on nonfederal parties such as LHAs, particularly in the context of eviction. *See, e.g.*, Thorpe v. Housing Auth., 393 U.S. 268 (1969); Housing Auth. v. United States Hous. Auth., 468 F.2d 1 (8th Cir. 1972), *cert. denied*, 410 U.S. 927 (1973); Staten v. Housing Auth., 469 F. Supp. 1013 (W.D. Pa. 1979).

112. U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, THE PUBLIC HOUSING OCCUPANCY HANDBOOK, No. 7465.1, Rev. 4-4 (1978).

113. *See supra* note 62 and accompanying text.

114. *See, e.g.*, Baker v. Housing Auth. (Huntsville, Ala. Housing Hearing, July 16, 1979) (copy on file in the N.C.L. REV. office). In this decision the hearing officer found that the LHA's interim reduction in rent was not sufficiently prompt to deal realistically with "[the tenant's] serious situation of being laid off work due to a strike that was none of her doing." *Id.* In a letter dated Aug. 2, 1979, the Housing Authority notified Ms. Baker's attorneys of its intention to appeal the decision to the Board of Commissioners. *Id.*

115. *See Maxton*, 313 N.C. at 278, 328 S.E.2d at 291.

116. The Maxton Housing Authority received an order from the district court ordering it to recalculate the defendant's rent in May of 1982. Record at 15-16. The Authority never did this, contending that recalculation was unnecessary because rent was not being charged during the eviction proceedings. Defendant-Appellant's New Brief at 17, *Maxton*.

117. *See, e.g.*, Kurtz, *Poor Management, Maintenance by Local Agencies Cited by HUD*, Washington Post, Jan. 3, 1984, at A1, col. 3. According to the article, one major factor cited by HUD

In sum, the legislature's enactment of the amendments to the Housing Authority Law will have a noticeable effect on the rights of housing authority tenants across the state. From the tenants' perspective, the new legislation is a mixed blessing. They will be subject to specific criminal penalties for fraudulent misrepresentation resulting in the receipt of housing assistance and they will lose the personal fault defense for eviction established by *Maxton*. These criminal penalties will be less than those possible under the general criminal code, although it is likely that prosecution will be more frequent under the housing fraud act. The loss of the personal fault defense will be offset, however, by the amendment's requirement that housing authorities be unable to evict unless the rent was properly and promptly calculated according to HUD regulations. In addition, the amendment allows lack of fault on the part of the tenant to be considered in eviction proceedings not involving nonpayment of rent. Thus, the basic theory of *Maxton* may survive although its application will be limited.

North Carolina's housing authorities will clearly benefit from the new legislation. They have a new tool to ensure that the housing benefits they distribute will not be misdirected as the result of fraudulent misrepresentation. It is quite possible that the existence of the housing fraud statute will deter potential violators; when it does not, the statute will provide for a reasonable punishment, with the exception of the potential ten year term for the misdemeanor offense. Because the circumstances under which the housing authorities may evict are more carefully delineated, they are spared the specter of a host of delinquent tenants raising the *Maxton* defense while deficits mount. In return for these benefits the housing authorities should take extra care to ensure that housing authority tenants are carefully instructed on the application procedures and the information required for their eligibility to receive housing assistance payments because of the possibility of criminal prosecution if they make a mistake. In addition, the housing authorities should make every effort to ensure that tenant rent is calculated promptly and is reasonable in light of the tenant's family circumstances so that no tenant is needlessly forced into eviction proceedings for nonpayment of rent.

Finally, the general assembly should take action to clarify ambiguities in the legislation. In particular, the general assembly needs to delineate the scope of the housing fraud law by defining "housing assistance" so it will be clear whether Section 8 benefits are included in this definition. If so, the general assembly may need to transfer the housing fraud law to the general criminal statutes so that it can apply to Section 8 housing assistance administered by PHAs as well as that administered by LHAs. The potential inequities in the permissible punishment for misdemeanor and felony convictions should also be corrected.[118]

In theory, the new amendments will promote the just and efficient distribu-

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that contributed to the financial instability of LHAs was the failure to collect rent and to evict problem tenants. *Id.*

118. *See supra* notes 54-58 and accompanying text. This inequity should also be corrected for the AFDC, Food Stamps, and Medicaid state fraud provisions. *See supra* notes 32-34 and accompanying text.

tion of housing assistance and help ensure that North Carolina LHAs remain financially stable so they can carry out their federal and state mandated goals of providing decent and safe housing for lower-income citizens. The *Maxton* holding was not practical given the financial constraints facing the state's LHAs and the existing federal regulations governing tenant eviction. Nevertheless, the basic message that tenants who cannot pay their rent due to circumstances beyond their control should not be evicted can and should be heeded by the housing authorities to the extent the HUD policy guidelines require that family circumstances be considered in setting tenant rent. Courts and housing authorities also need to take special care to ensure that the housing fraud provisions are not used indiscriminately against tenants who justifiably may be confused by the regulations governing admission and rent certification in public housing. If these precautions are taken, the broad social objectives of the public housing program as well its regulatory and financial constraints can be advanced by the amendments to the Housing Authorities Law.

VALERIE G. CAMPBELL

Branch Banking & Trust Co. v. Wright—Creditors' Rights to Entireties Property Awarded to Nondebtor Spouse Upon Divorce

Married couples in North Carolina have long enjoyed the benefits of holding property as tenants by the entirety.[1] A form of joint ownership available exclusively to the marital unit, the entireties estate provides a haven from creditors of either spouse individually, and it is a convenient device for avoiding probate.[2] The vast majority of married property owners in North Carolina have chosen this form of ownership,[3] even though prior to 1983 the wife had no right to possession or profits arising from the estate.[4] Some commentators have suggested that the common-law entireties estate is an anomaly that should be abolished because of the injustice it works on creditors.[5] Yet in North Carolina the

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1. The tenancy by the entirety originated at common law as a result of the common-law fictional unity of husband and wife. Davis v. Bass, 188 N.C. 200, 203, 124 S.E. 566, 567 (1924).

2. One of the incidents of a tenancy by the entirety is the indestructible right of survivorship. On the death of one spouse, the estate passes to the survivor immediately and in whole. *Id.*; R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY § 5.5, at 213-14 (1984) [hereinafter cited as R. CUNNINGHAM]; 4A R. POWELL, THE LAW OF REAL PROPERTY § 623, at 695 (1982). The owner of an entireties estate is neither the husband nor the wife, but "that third person recognized by the law, the husband *and* wife." Bruce v. Nicholson, 109 N.C. 202, 205, 13 S.E. 790, 791 (1891). Therefore, in North Carolina, the estate cannot be defeated or encumbered except by the joint act of husband and wife. Neither spouse can impair the right of the other, if survivor, to the fee simple absolute. Duplin County v. Jones, 267 N.C. 68, 147 S.E.2d 603 (1966); First Nat'l Bank v. Hall, 201 N.C. 787, 161 S.E.2d 484 (1954); Davis v. Bass, 188 N.C. 200, 124 S.E. 566 (1924); P. HETRICK, WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA §§ 125-26 (1981) [hereinafter cited as J. WEBSTER]; 2 R. LEE, NORTH CAROLINA FAMILY LAW § 112 (4th ed. 1979).

For analyses of the tax consequences of holding property by the entireties, see 4A R. POWELL, *supra* § 623.1, at 706.1-.5; Starling, *The Tenancy by the Entireties in Florida*, 14 U. FLA. L. REV. 111, 148-50 (1961); Comment, *Real Property— Tenancy by the Entirety in North Carolina: An Idea Whose Time has Gone?*, 58 N.C.L. REV. 997, 1010-20 (1980).

3. An estimated 90% of homes owned by married couples in North Carolina are held by the entireties. R. LEE, *supra* note 2, § 112, at 37.

4. At common law the husband had the exclusive right to the control, use, possession, rents, income, and profits of entireties property, subject only to the "right of the [wife,] if survivor, to receive the land itself unimpaired. 'He cannot alien or encumber it, if it be a freehold estate, so as to prevent the wife, or her heirs, after his death, from enjoying it, discharged from his debts and engagements.' " Bynum v. Wicker, 141 N.C. 95, 96, 53 S.E. 478, 478 (1906) (quoting 2 KENT, COMMENTARIES ON AMERICAN LAW 132-33 (5th ed. 1844)). The husband's common-law right is described as the right to the full control and use of the land to the exclusion of the wife. West v. Aberdeen & R.R. Co., 140 N.C. 620, 621, 53 S.E. 477, 477 (1906). The husband's common-law right was abolished by N.C. GEN. STAT. § 39-13.6 (1984), which provides:

> (a) A husband and wife shall have an equal right to the control, use, possession, rents, income and profits of real property held by them in tenancy by the entirety. Neither spouse may bargain, sell, lease, mortgage, transfer, convey, or in any manner encumber the property so held without the written joinder of the other spouse.

Id.

5. For example, in Holton v. Holton, 186 N.C. 355, 119 S.E. 751 (1923), Chief Justice Clark suggested that the entireties estate is a "contradiction to our present legal thought and constitutional provisions" and that there should be "no superstitious sanction attached to its retention," because it was "created by judicial legislation by judges, in a barbarous age, who were not lawyers." *Id.* at 364, 119 S.E. at 755 (Clark, C.J., concurring). Clark would have held that N.C. GEN. STAT. § 41-2 (1984), which was enacted in 1784 and abolished the joint tenancy, impliedly abolished the tenancy by the entirety. Clark saw the estate as an "unjust and invalid exemption," in excess of the exemptions allowed by the North Carolina Constitution. *Id.* at 363, 119 S.E. at 755 (Clark, C.J., concur-

estate has survived and flourished.

Recently, the North Carolina Court of Appeals examined the common-law incidents of the entireties estate to resolve questions unforeseen at common law. In *Branch Banking & Trust Co. v. Wright*[6] the court examined the entireties estate in the context of an absolute divorce and equitable distribution proceeding, a situation unknown at common law. The court held that a creditor of a husband individually has a leviable interest in entireties property after an absolute divorce,[7] even when the whole of the entireties estate is awarded to the wife pursuant to an equitable distribution proceeding.[8] This Note analyzes *Wright* in light of the characteristics of the entireties estate in North Carolina and compares the court's resolution of the issue to the result reached in other jurisdictions. It rejects the court's conclusion that, between a decree of absolute divorce and an award of entireties property to the nondebtor spouse, the debtor spouse possesses an interest in the property to which a lien held by his or her creditor can attach.

In 1981 Billy Wright executed a deed of trust on the residence owned by him and his wife as tenants by the entirety to secure a forty-eight thousand dollar loan from Branch Banking and Trust.[9] His wife, Mary Wright, "neither signed nor consented to the note or deed of trust."[10] On May 5, 1982, the Wrights obtained an absolute divorce, and on May 6, 1982, the residence was awarded to Mary Wright in an equitable distribution proceeding.[11] The equitable distribution decree specified that " '[t]he husband shall have and hold the wife harmless for any additional deeds of trust allegedly made on the property

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ring). But, as Clark pointed out, the general assembly has consistently refused to abolish the estate, even though the North Carolina Supreme Court has repeatedly suggested that it do so. *Id.*; *see also* Bynum v. Wicker, 141 N.C. 95, 96, 53 S.E. 478, 478 (1906) ("This estate by the entirety is an anomaly, and it is perhaps an oversight that the Legislature has not changed it into a co-tenancy, as has been done in so many states."); Starling, *supra* note 2, at 111 ("[T]he tenancy has proved a trap for the unwary, a blessing for surviving spouses, a curse to heirs and creditors, and a source of endless litigation."); Comment, *supra* note 2, at 998 ("North Carolina should abolish or alter this outmoded estate.").

6. 74 N.C. App. 550, 328 S.E.2d 840, *petition for disc. rev. allowed*, 314 N.C. 662, 335 S.E.2d 321 (1985). The case was voluntarily dismissed. *See infra* note 17.

7. *Wright*, 74 N.C. App. at 553, 328 S.E.2d at 842.

8. *Id.* The North Carolina equitable distribution statute is codified at N.C. GEN. STAT. § 50-20 (1984 & Supp. 1985). Parties seeking a divorce have the option of asking the court to determine their respective property rights in accordance with § 50-20. Separate property, defined as "all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage," *id.* § 50-20(b)(2), is not subject to distribution by the court. *Id.* § 50-20(c). Section 50-20(c) directs the court to divide all marital property, defined as "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property," *id.* § 50-20(b)(1), equally between the spouses. However, if in the court's judgment an equal division is not equitable, the court is given broad power to divide the marital property "equitably." *Id.* § 50-20(c). Property held in a tenancy by the entirety clearly falls within the definition of marital property subject to distribution by the court.

9. *Wright*, 74 N.C. App. at 551, 328 S.E.2d at 841. North Carolina law in 1981 permitted Billy Wright to execute a valid mortgage on entireties property, although the mortgage was subject to automatic termination if Billy predeceased Mary. Such a mortgage would not have been valid if executed after January 1, 1983, because N.C. GEN. STAT. § 39-13.6 (1984) abolished the husband's common-law exclusive right to the control and enjoyment of an entireties estate.

10. *Wright*, 74 N.C. App. at 551, 328 S.E.2d at 841.

11. *Id.*

by him without the consent and permission of the wife.' "[12] Billy Wright deeded the residence to Mary Wright and then defaulted on the loan payments. After Branch Banking and Trust sought to foreclose on the residence, Mary Wright instituted a declaratory judgment proceeding to establish her unencumbered ownership of the property.[13]

The superior court concluded that the bank had no interest in the entireties property.[14] On appeal the North Carolina Court of Appeals acknowledged that the lien created by the deed of trust could not have encumbered the entireties properties in any way as long as the parties remained married.[15] The court held, however, that the lien attached to the husband's undivided one-half interest at the time of the divorce on the theory that a divorce converts a tenancy by the entirety into a tenancy in common, giving each spouse an undivided one-half interest in the property.[16] The court concluded that "the estate of a tenancy in common of necessity intervenes between an absolute divorce and an award of title pursuant to equitable distribution," even if the divorce and the equitable distribution occur in the same proceeding.[17]

North Carolina is one of twenty jurisdictions in which the tenancy by the entirety has survived.[18] In North Carolina tenancy by the entirety retains many

12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 552, 328 S.E.2d at 841-42.
16. *Id.* at 553, 328 S.E.2d at 842.
17. *Id.* At the time the *Wright* case was instituted, Billy Wright could not be located in the United States. He had defaulted on his mortgage payments and absconded. However, Mary Wright's attorney learned of Billy's plans for a fishing trip near Morehead City and, before the case could reach the North Carolina Supreme Court, had Billy arrested there for contempt pursuant to a civil order of arrest. Billy was jailed until he posted bond in the full amount of the mortgage. Therefore, the suit was voluntarily dismissed. Telephone interview with David P. Voerman, attorney for defendant Mary Wright (April 9, 1986).
18. The tenancy by the entirety exists in only twenty jurisdictions: Arkansas, Delaware, the District of Columbia, Florida, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and Wyoming. R. CUNNINGHAM, *supra* note 2, § 5.5, at 211 n.3. Several states never recognized the tenancy by the entirety, finding it "repugnant to our institutions and to the American sense of justice to the heirs and therefore not the common law." *Id.*; *see also* 4A R. POWELL, *supra* note 2, § 621, at 684 (citing illustrative cases). Several western states that never recognized the estate presumably found it inconsistent with their community property systems, which afforded equality to women. *Id.* at 685 n.5; Comment, *supra* note 2, at 997 n.3. A few states have interpreted concurrent ownership statutes that do not mention the entireties estate or create a presumption in favor of tenancies in common as abolishing the entireties estate. R. CUNNINGHAM, *supra* note 2, § 5.5, at 211 n.3; 4A R. POWELL, *supra* note 2, § 621, at 684.1. Some states that no longer recognize the entireties estate have reasoned that the Married Women's Acts, which removed the common-law disabilities of married women and destroyed the fiction of spousal unity, eliminated the entireties concept. *See, e.g.*, Donegan v. Donegan, 103 Ala. 488, 490, 15 So. 823, 824 (1894); Poulson v. Poulson, 145 Me. 15, 18-19, 70 A.2d 868, 870 (1950).

Several jurisdictions have taken the position that the Married Women's Acts merely changed the incidents of the entireties estate so as to abolish the husband's exclusive right to the control and enjoyment of the land. Phipps, *Tenancy by Entireties*, 25 TEMP. L.Q. 24, 31 (1951). Only North Carolina, Massachusetts, and Michigan allowed both the estate and the husband's right to its control and enjoyment to survive the Married Women's Acts. *Id.* at 29-31. Thus, for many years, commentators recognized these three as the only states that recognized the entireties estate in its most perfect common-law form. *See, e.g.*, 4A R. POWELL, *supra* note 2, § 623, at 696; Phipps, *supra*, at 28-32; Reppy, *North Carolina's Tenancy by the Entirety Reform Legislation of 1982*, 5 CAMPBELL L. REV. 1 (1983); Comment, *supra* note 2, at 997. Michigan eliminated the husband's right to exclusive

of its common-law incidents. For example, any conveyance of real property to a husband and wife creates a tenancy by the entirety unless there is an express intent to create some other estate.[19] Furthermore, the common-law rule that an entireties estate cannot be created in personal property persists in North Carolina, even though the original justification for the rule, that a woman's personal property belonged to her husband after marriage, has no merit today.[20] The marital unit is the owner of the entireties estate; each spouse is "deemed to be seized of the whole, and not of a moiety or any undivided portion thereof."[21] Therefore, during the marriage neither spouse can sell or convey any part of the estate without the consent of the other.[22]

Perhaps the most important incident of the entireties estate is the right of survivorship. On the death of either spouse, the survivor immediately becomes the sole owner of the whole "by right of purchase under the original grant or devise and by virtue of survivorship—and not otherwise—because he or she was seized of the whole from the beginning, and the one who died had no estate which was descendible or devisable."[23] Divorce, however, destroys the right of survivorship. The spouses become tenants in common upon divorce pursuant to the common-law theory that an absolute divorce destroys the essential unity of

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control and enjoyment in 1975, MICH. STAT. ANN. § 26.210(1) (Callaghan 1984), and Massachusetts did the same in 1979, MASS. ANN. LAWS ch. 209, § 1 (Law. Co-op. 1981). North Carolina retained this common-law incident longer than any other state.

19. Davis v. Bass, 188 N.C. 200, 207, 124 S.E. 566, 568 (1924).

20. *See* Moore v. Greenville Bank & Trust Co., 178 N.C. 118, 100 S.E. 269 (1919) (explaining the reasoning behind the rule). The majority rule today allows tenancies by the entirety in personal property. R. CUNNINGHAM, *supra* note 2, § 5.5, at 215.

21. Davis v. Bass, 188 N.C. 200, 203, 124 S.E. 566, 568 (1924). *Davis* has been called the "Magna Charta on the estate by the entirety in North Carolina." R. LEE, *supra* note 2, § 112, at 36.

22. The husband's common-law exclusive right to the control, use, possession, income, rents, and profits did not include the right to encumber or convey the fee. Bynum v. Wicker, 141 N.C. 95, 96, 53 S.E. 478, 478 (1906). A conveyance by one spouse, however, may be deemed valid under the principles of agency or ratification. Air Conditioning Co. v. Douglass, 241 N.C. 170, 84 S.E.2d 828 (1967).

The doctrine of after-acquired title by estoppel is an exception to the rule that neither spouse alone can convey his or her interest in entirety property. *See* Hood v. Mercer, 150 N.C. 699, 700, 64 S.E. 897, 898 (1909) ("where the husband had conveyed land by deed with warranty without the joinder of the wife, and survived her, his grantee acquired title, but this was by way of estoppel").

North Carolina is in accord with the majority of jurisdictions in holding that neither spouse alone possesses an alienable interest in entireties property. 4A R. POWELL, *supra* note 2, § 623, at 700; *see, e.g.*, Newman v. Equitable Life Assur. Soc'y of the United States, 119 Fla. 641, 648, 160 So. 745, 748 (1935); Sawada v. Endo, 57 Hawaii 608, 614, 561 P.2d 1291, 1295 (1977); Hallmark v. Stillings, 648 S.W.2d 230, 236 (Mo. Ct. App. 1983). A minority of states allow one spouse to sell a one-half interest in the property for the joint lives of the husband and wife, as well as his or her right of survivorship. The purchaser becomes a tenant in common with the other spouse, but has no right to a partition and will lose all interest in the estate if the nontransfering spouse survives the transferring spouse. Moore v. Denson, 167 Ark. 134, 139, 268 S.W. 609, 611 (1925); King v. Greene, 30 N.J. 395, 412-13, 153 A.2d 49, 59-60 (1959); Hiles v. Fischer, 144 N.Y. 306, 315-16, 39 N.E. 337, 339 (1895); *see also infra* notes 70-83 and accompanying text (discussing the effect of this rule on creditor's rights). Tennessee and Kentucky courts have held that the only alienable interest in an entireties estate is the contingent right of survivorship. Hoffman v. Newell, 249 Ky. 270, 284, 60 S.W.2d 607, 613-14 (1933); Robinson v. Trousdale County, 516 S.W.2d 626, 632 (Tenn. 1974). In North Carolina the right of survivorship cannot be conveyed because it is "merely an incident of the estate, and does not constitute a remainder, either vested or contingent." Davis v. Bass, 188 N.C. 200, 205, 124 S.E. 566, 569 (1924).

23. Davis v. Bass, 188 N.C. 200, 204-05, 124 S.E. 566, 568 (1924).

husband and wife.[24]

The sole exception to the similarity between the North Carolina entireties estate and the common-law entireties estate concerns the husband's common-law right to all control and enjoyment of the land. This right included the right to possession, rents, profits, and income, to the exclusion of the wife.[25] At common law, the husband was entitled to use and control entireties property as if it belonged to him alone, limited only by his inability to encumber the fee. He could keep for himself any profits earned from the land.[26] He could execute a valid lease, easement, mortgage, or deed of trust on the entireties property, which would fail and be cancelled only if the wife survived him.[27] With the passage of North Carolina General Statutes section 39-13.6 in 1981, the wife's right to the control and enjoyment of the entireties estate was made equal with that of the husband.[28] The situation in *Wright* could not arise today because section 39-13.6 makes it impossible for either spouse alone to execute a valid lease, mortgage, or other transfer of entireties property.[29] Nevertheless, because the statue applies only prospectively, *Wright* raises an important and recurring issue.

During the marriage, only creditors of both spouses jointly can execute and levy on entireties property in North Carolina.[30] A creditor of one spouse individually cannot reach any *interest* in the estate. Prior to the passage of section

24. Divorce makes each spouse the owner of an undivided one-half interest as a tenant in common. Koob v. Koob, 283 N.C. 129, 140, 195 S.E.2d 552, 559 (1973); Lanier v. Dawes, 255 N.C. 458, 462, 121 S.E.2d 857, 860 (1961); Davis v. Bass, 188 N.C. 200, 207-08, 124 S.E. 566, 570 (1924); Holton v. Holton, 186 N.C. 355, 362, 119 S.E. 751, 754 (1923). This is the majority rule. 4A R. POWELL, *supra* note 2, § 624, at 708. It is questionable whether this rule is applicable when entireties property is awarded to one spouse. *See infra* notes 44-54 and accompanying text.

In Canada a divorce converts a tenancy by the entirety into a joint tenancy, on the theory that a joint tenancy is the estate that would have been created had the transferees not been married at the time of the conveyance to them. Glenn, *Tenancy by the Entireties: A Matrimonial Regime Ignored*, 58 CANADIAN B. REV. 711, 720-21 (1980).

25. Bynum v. Wicker, 141 N.C. 95, 96, 53 S.E. 478, 478 (1906).

26. The wife was not even entitled to an accounting of the income produced by the entireties property. North Carolina Bd. of Architecture v. Lee, 264 N.C. 602, 610, 142 S.E.2d 643, 649 (1965).

27. *See, e.g.*, First Nat'l Bank v. Hall, 201 N.C. 787, 161 S.E.2d 484 (1931) (husband may execute a valid mortgage, which will be cancelled if wife survives him); Johnson v. Leavitt, 188 N.C. 682, 125 S.E. 490 (1924) (husband may lease the property); Dorsey v. Kirkland, 177 N.C. 520, 99 S.E. 407 (1919) (husband may grant a right-of-way across the property to a railroad). In each case the encumbrance was automatically defeated if the husband predeceased the wife.

The husband was without power to execute a lease, mortgage, or other encumbrance that would impair the fee. For example, a husband alone could not relinquish the right to a negative easement. Moore v. Shore, 208 N.C. 446, 448, 181 S.E. 275, 277 (1935) (wife did not sign petition to remove a covenant specifying that lots in the subdivision were restricted to use for residential purposes; therefore, the covenant survived and defendant was prohibited from erecting a filling station in the neighborhood). Furthermore, although a husband could convey the right to possession for the husband's lifetime by way of grant to a third party, the grantee was not entitled to cut timber on the property, because the timber is a part of the fee. Bynum v. Wicker, 141 N.C. 95, 53 S.E. 478 (1906).

28. N.C. GEN. STAT. § 39-13.6 (1984).

29. *Id.*

30. L & M Gas Co. v. Leggett, 273 N.C. 547, 161 S.E.2d 23 (1968); Keel v. Bailey, 224 N.C. 447, 31 S.E.2d 362 (1944); Johnson v. Leavitt, 188 N.C. 682, 125 S.E. 490 (1924); Davis v. Bass, 188 N.C. 200, 124 S.E. 566 (1924); Holton v. Holton, 186 N.C. 355, 119 S.E. 751 (1923). The general rule in other states is that a creditor of one spouse can reach whatever interest the spouse is free to convey, which, according to the majority rule, is nothing. *See supra* note 22 and accompanying text.

39-13.6, however, creditors of the husband individually could reach the *rents and profits* of the estate after they were earned and severed from the fee.[31] Because section 39-13.6 does not address creditors' rights in the estate, the logical inference is that the rule shielding entireties property from the creditor of one spouse individually is left intact.[32]

The issue presented to the *Wright* court was one of first impression.[33] Never before had the North Carolina courts been called on to decide whether the common-law rule that an absolute divorce converts a tenancy by the entirety into a tenancy in common applies when entireties property is awarded to one spouse. The *Wright* court based its decision solely on the black letter of the common-law rule and the fact equitable distribution "follow[s]"[34] a decree of absolute divorce, thus leaving a gap within which the tenancy in common can intervene.[35] The court implied that it would have reached the same result if the property had been awarded as alimony rather than as part of an equitable distribution decree.[36]

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31. *See, e.g.*, Lewis v. Pate, 212 N.C. 253, 193 S.E. 20 (1937) (creditor of the husband can levy upon and sell crops raised on entirety property after the crops have been severed); Hodge v. Hodge, 12 N.C. App. 574, 183 S.E.2d 800 (1971) (judgment creditor of the husband can reach rental income from entireties property).

The creditor's right to reach the income from the property does not include the right to obtain possession of the property to produce income. Grabenhofer v. Garrett, 260 N.C. 118, 131 S.E.2d 675 (1963) (judgment creditor of the husband not entitled to rent out the entireties property to produce income); L.E. Johnson Produce v. Massengil, 23 N.C. App. 368, 208 S.E.2d 709 (1974) (receiver may be appointed to collect the rents and profits accruing from farmland held by the entireties, but receiver has no power to rent the farmland to produce income). Further, a creditor of the husband cannot have a transfer of entireties property set aside as fraudulent because it cuts off the possibility of future rents and profits. L & M Gas Co. v. Leggett. 273 N.C. 547, 161 S.E.2d 23 (1968). Thus, creditors of the husband can reach only the income that the husband voluntarily produces from entireties property.

This creates an inconsistency because creditors of the husband cannot reach his full interest in the entireties property. This illogical rule was established in Bruce v. Nicholson, 109 N.C. 202, 13 S.E. 790 (1891), partly in response to the Married Women's Property Rights Acts and the desire to protect women's property rights. Reppy, *supra* note 18, at 5-6. The North Carolina Supreme Court later explained its position by saying, "[I]t should be remembered that law and logic are not always the best of friends." Johnson v. Leavitt, 188 N.C. 682, 685, 125 S.E. 490, 492 (1924).

The courts have acknowledged one exception to the rule that creditors of the husband cannot interfere with his right to possession. A court may order that entireties property be rented or may award possession to the wife if necessary for alimony or child support, but the court may not order that the property be sold. Koob v. Koob, 283 N.C. 129, 195 S.E.2d 552 (1973); Holton v. Holton, 186 N.C. 355, 119 S.E. 751 (1923); Martin v. Martin, 35 N.C. App. 610, 242 S.E.2d 393 (1978).

32. At least one commentator has argued that creditors of either spouse individually should now be able to reach 50% of the earned rents and profits of the estate during the marriage. Reppy, *supra* note 18, at 8-9; *see also* J. WEBSTER, *supra* note 2, § 126 (Supp. 1985) (agreeing with Reppy).

33. *Wright*, 74 N.C. App. at 551, 328 S.E.2d at 841. The court stated that the "issues appear to be raised here for the first time." *Id.* Professor Lee has also questioned the validity, after divorce, of a mortgage executed by one spouse on entireties property in North Carolina. R. LEE, *supra* note 2, § 115, at 54 n.83. Another commentator has questioned whether divorce converts a tenancy by the entirety into a tenancy in common in equitable distribution states. R. CUNNINGHAM, *supra* note 2, § 5.5, at 214-15.

34. N.C. GEN. STAT. § 50-21(a) (1984).

35. *Wright*, 74 N.C. App. at 552-53, 328 S.E.2d at 841-42.

36. *Id.* at 553, 328 S.E.2d at 842. The court first found that the lien of the deed of trust attached to one-half of the property at divorce and then stated, "We find no authority for using the Equitable Distribution Act to defeat the rights of creditors." *Id.* This statement indicates that the court did not base its holding on the equitable distribution statute and that it would reach the same conclusion in a state that allows title to entireties property to be awarded as lump sum alimony.

If the entireties property had not been awarded to Mary Wright, the lien of the deed of trust would have attached to Billy Wright's one-half undivided interest upon divorce, based on the doctrine of after-acquired title by estoppel.[37] Although this precise issue has never been resolved in North Carolina, it is clear the estoppel doctrine operates to prohibit a husband or wife who acquires an individual interest in entireties property, either through divorce or the right of survivorship, from denying a grant made by that spouse alone while the property was held by the entireties. In *Harrell v. Powell*[38] a wife and husband jointly conveyed entireties property. It was later determined that the husband had been mentally incompetent for the purpose of transacting business at the time of the joint conveyance.[39] When the husband predeceased the wife, the North Carolina Supreme Court held that title passed to the prior grantee, even though the conveyance was in effect a conveyance from one spouse during marriage. The wife was estopped from denying the prior grant.[40] In *Willis v. Willis*[41] the husband conveyed a one-half interest in entireties property to his wife. The parties subsequently divorced. The supreme court held that the husband was estopped from claiming the one-half interest that he otherwise would have been entitled to upon divorce.[42] There is no reason why the *Willis* rule should not apply when the prior grantee is a third party creditor, as was the case in *Wright*.[43]

Under the law of *Harrell* and *Willis*, Branch Banking and Trust's lien should attach to any interest acquired by Billy Wright in the entireties property upon divorce. The *Wright* court held that the divorce decree gave Billy an undivided one-half interest in the entireties property as a tenant in common.

Although the conclusion that an absolute divorce converts a tenancy by the entirety into a tenancy in common even when the property is awarded exclusively to one spouse is not illogical, neither is it mandated by case law.[44] The cases establishing the rule do not address or even contemplate the award of property to one spouse; they merely establish a convenient rule for distributing entireties property after divorce.[45] In 1923 the North Carolina Supreme Court

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North Carolina did not allow an award of title to entireties property to the wife as alimony prior to the passage of the equitable distribution statute. *See, e.g.*, Koob v. Koob, 283 N.C. 129, 137-38, 195 S.E.2d 552, 558 (1973) (possession may be awarded to the wife, but the court has no power to order the property sold). *See supra* note 31. Other states, however, do allow such an award. *See infra* note 85 and accompanying text.

37. *See supra* note 22. In Hood v. Mercer, 150 N.C. 699, 700, 64 S.E. 897, 898 (1909), the court stated in dicta that a conveyance by a husband alone would pass title to the grantee if the husband later acquired title by right of survivorship.

38. 251 N.C. 636, 112 S.E.2d 81 (1960).

39. *Id.* at 637-38, 112 S.E.2d at 82.

40. *Id.* at 641, 112 S.E.2d at 85.

41. 203 N.C. 517, 166 S.E. 398 (1932).

42. *Id.* at 519, 166 S.E. at 399.

43. Other jurisdictions have so held. *See, e.g.*, Columbian Carbon Co. v. Kight, 207 Md. 203, 114 A.2d 28 (1955); Hohenrath v. Wallach, 37 A.D.2d 248, 323 N.Y.S.2d 560 (1971).

44. Commentators have questioned the applicability of the rule in this situation. *See supra* note 33.

45. *See, e.g.*, Koob v. Koob, 283 N.C. 129, 195 S.E.2d 552 (1973); Lanier v. Dawes, 255 N.C. 458, 121 S.E.2d 857 (1961); Davis v. Bass, 188 N.C. 200, 124 S.E.2d 566 (1924); Holton v. Holton, 186 N.C. 355, 119 S.E. 751 (1923).

wrote:

> [A]s an absolute divorce terminates the marriage and unity of persons just as completely as death itself, the 'natural and logical outcome' of . . . [absolute divorce] is that the tenancy by the entirety is severed and, this having taken place, each takes his or her proportionate share as tenant in common without survivorship.[46]

Arguably the rule is no longer needed when a court, using its statutory power, awards the property to one spouse. The "natural and logical outcome" of a divorce accompanied by an award of the entireties property to one spouse may not necessarily be the same as the "natural and logical outcome" of a divorce unaccompanied by such an award.

The distinction becomes clear when the award of the property and its effects are examined more closely. The *Wright* court regarded the award of the entireties property to the wife as a *transfer* of the husband's undivided one-half interest in the property.[47] The court, however, could have concluded that the property award more closely resembled a *complete termination or defeasance* of the husband's interest in the property.

In *Davis v. Bass*[48] the supreme court wrote of tenants by the entirety: "[E]ach is deemed to be seized of the whole."[49] Prior to divorce, each spouse owns the whole of the entireties estate, subject only to the other's right of survivorship.[50] Thus, one could argue that the superior court merely terminated the husband's possible right of survivorship by awarding the entire estate to Mrs. Wright.[51] As a result, the consequences of the property award would be the same as the consequences of the death of one spouse—that is, the "*legal* personage holding the estate [would be reduced] to an individuality identical with the *natural person*. The whole estate continues in the survivor the same as it would continue in a corporation after the death of one of the corporators."[52] After the husband's interest is terminated, the wife holds the estate by virtue of the original grant and the right of survivorship, not by virtue of a transfer of the husband's interest to her.[53] Under the "termination" approach, the wife holds the property free of the deed of trust.[54]

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46. Holton v. Holton, 186 N.C. 355, 362, 119 S.E. 751, 754 (1923) (quoting McKinnon v. Caulk, 167 N.C. 411, 413-14, 83 S.E. 559, 561 (1914)).

47. *Wright*, 74 N.C. App. at 553, 328 S.E.2d at 842.

48. 188 N.C. 200, 124 S.E. 566 (1924).

49. *Id.* at 203, 124 S.E. at 568.

50. *Id.*

51. For a list of the possible interpretations of the transfers involved when entireties property is awarded to the wife upon divorce, see Note, *Creditors' Rights—Tenancy By the Entirety—Extent of Judgment Lien Following Divorce Court—Award of Land to Nondebtor Spouse*, Brownley v. Lincoln County, 39 OR. L. REV. 194 (1960).

52. *Davis*, 188 N.C. at 203, 124 S.E. at 568 (quoting Stuckey v. Keefe, 26 Pa. 397, 399 (1856)). It could be argued that the award of the property was merely a removal of one of the incidents of the entireties estate, the husband's right of survivorship. *See* Note, *supra* note 51, at 195. Under this view, the court's action was neither a transfer nor a termination of an interest, but a removal of an incident.

53. *Davis*, 188 N.C. at 204-05, 124 S.E. at 568-69.

54. Although a husband could execute a valid mortgage on entities property prior to January 1, 1983, if he later died leaving the wife surviving him, the mortgage "was *ipso facto* cancelled and the

Concededly, the "termination" approach ignores the literal import of the common-law rule that a tenancy in common results when tenants by the entirety divorce. The situation in *Wright*, however, was not contemplated when the common-law rule was developed.[55] Moreover, an award of entireties property by the court, whether pursuant to an equitable distribution or as lump sum alimony, serves the same function that the common-law rule served—it divides entireties property between the spouses upon divorce. It is duplicative and illogical to use both. Because the common-law rule is no longer needed when a court has statutory authority to distribute marital property "equitably," the statute should be viewed as a replacement for the common-law rule.

It is true that the status of the entireties property between May 5, 1982, the date of the divorce decree, and May 6, 1982, the date of the equitable distribution decree, is uncertain under the "termination" approach. Practically, however, this one-day gap is merely a legal fiction; parties apply to the courts for a divorce and equitable distribution of marital property to be effective at the same time.[56] The *Wright* court ruled that Mary and Billy Wright each owned an undivided one-half interest in the entireties property between May 5, 1982, and May 6, 1982.[57] Despite the literal accuracy of this conclusion under the common-law rule, no one would argue that either party could have conveyed his or her interest to a third party during the period between divorce and equitable distribution. The general rule is that creditors can reach only those interests that their debtors are free to convey;[58] nonetheless, the *Wright* court held that the creditor's lien attached during this time period.[59]

The question whether the common-law rule that divorce converts a tenancy by the entirety into a tenancy in common when the property is awarded to one spouse has rarely been litigated. In *Hillman v. McCutchen*[60] the Third District Court of Appeal of Florida held that the length of time between the divorce and the award of entireties property is irrelevant. The court held that title to one-half of the entireties property vested in the husband as a tenant in common, if only for the " 'twinkling of an eye,' " between a divorce decree and an award of the property to the wife.[61] Therefore, the court allowed a mortgage executed by the husband alone to attach to a one-half undivided interest in the property. The court characterized the transaction as a transfer rather than as a termination of the husband's interest, adopting reasoning similar to that espoused in

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entire estate was vested in the survivor." First Nat'l Bank v. Hall, 201 N.C. 787, 789, 161 S.E. 484, 485 (1931). *See supra* notes 25-27 and accompanying text.

55. *See supra* text accompanying notes 38-43.

56. N.C. GEN. STAT. § 50-20 (1984 & Supp. 1985) is titled "Distribution by court of marital property upon divorce."

57. Apparently the *Wright* court would hold that each spouse owned an undivided one-half interest in the property for a moment of time if the divorce and the equitable distribution were effectuated in the same proceeding. *Wright*, 74 N.C. App. at 553, 328 S.E.2d at 842.

58. R. LEE, *supra* note 2, § 116, at 61.

59. *Wright*, 74 N.C. App. at 553, 328 S.E.2d at 842.

60. 166 So. 2d 611 (Fla. Dist. Ct. App. 1964).

61. *Id.* at 613.

Wright.[62]

Two other Florida district courts of appeal later rejected the *Hillman* decision.[63] After a thorough consideration of the issue, the Second District Court of Appeal of Florida in *Liberman v. Kelso*[64] declined to follow the *Hillman* reasoning on the ground that the conveyance of the entireties property to the wife was a termination or defeasance of the husband's interest that had the same legal effect as if the husband had died.[65] The *Liberman* court emphasized that a court should not be prohibited from awarding the full and complete title to property to one spouse at the time of divorce, even though a Florida statute expressly provided that divorce converted a tenancy by the entirety into a tenancy in common.[66]

Similarly, in *State Department of Commerce v. Lowery*[67] the First District Court of Appeal of Florida held that a conveyance of entireties property pursuant to a divorce terminated the husband's interest in the estate so that the lien of the husband's creditor could not reach the entireties property.[68] Although the North Carolina courts are not bound by the decisions of the Florida courts in *Liberman* and *Lowery*, the logic of these cases is persuasive.

The Oregon Supreme Court and a lower New Jersey court also have considered the issue presented in *Wright*.[69] Although both of these courts, like the court in *Wright*, held that a prior creditor of a husband individually acquired an interest in entireties property awarded to the wife upon divorce, the cases are distinguishable from *Wright* because of differences in state law governing the incidents of entireties property.[70]

In New Jersey a creditor of one spouse can force an involuntary sale of

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62. *Id.* The *Hillman* court reasoned that, although the lower court awarded the property as lump-sum alimony, it could have ordered the property sold and the money paid as alimony. Therefore, the *Hillman* court saw the lower court's decree as a "short-circuit" of a judicial sale process. *Id.*

63. Liberman v. Kelso, 354 So. 2d 137 (Fla. Dist. Ct. App. 1978); State Dept. of Commerce v. Lowery, 333 So. 2d 495 (Fla. Dist. Ct. App. 1976).

64. 354 So. 2d 137 (Fla. Dist. Ct. App. 1978).

65. *Id.* at 139.

66. *Id.*

67. 333 So. 2d 495 (Fla. Dist. Ct. App. 1976).

68. *Id.* at 496-97. In both *Liberman* and *Lowery* the creditor was the holder of a judgment lien against the husband.

It is possible to distinguish *Wright* from the Florida cases. In the latter cases, the divorce and the property settlement were accomplished in single dissolution proceedings. However, the *Wright* court made clear that its decision would be the same in the event of a single proceeding. *Wright*, 74 N.C. App. at 553, 328 S.E.2d at 842.

Liberman and *Lowery* are distinguishable from *Hillman* on the grounds that in the former cases the separation agreements, which were entered into before the divorce proceedings and which both specified that the entireties property was awarded to the wife, were incorporated into the divorce decree. In *Hillman* the court awarded the property as lump-sum alimony. It could be argued that the separation agreements tentatively disposed of the property before the divorce, thus leaving no gap within which the tenancy in common could intervene. The *Liberman* and *Lowery* courts, however, did not adopt this argument, and the *Liberman* court indicated that its decision should apply in the *Hillman* situation as well. *Liberman*, 354 So. 2d at 139.

69. Interchange State Bank v. Riegel, 190 N.J. Super. 139, 462 A.2d 198 (1983); Brownley v. Lincoln County, 318 Or. 7, 343 P.2d 529 (1959).

70. *See infra* text accompanying notes 71-83.

entireties property during marriage to reach the debtor-spouse's one-half interest, and any interest so acquired is subject to defeasance only if the nondebtor spouse becomes the survivor.[71] In addition, the creditor is entitled to reach the debtor-spouse's right of survivorship.[72] In *Interchange State Bank v. Riegel*[73] the creditor executed on a judgment and levied on the husband's one-half interest prior to the divorce decree. The court held that the divorce resulted in the termination of the creditor's potential right of survivorship and made permanent the creditor's one-half interest as a tenant in common, because that interest was no longer subject to defeasance by the death of the debtor-spouse.[74] In essence, except for removing the possibility of defeasance of the one-half interest, the divorce decree gave the creditor no interest it did not already have. This analysis is inapplicable in North Carolina because in North Carolina a creditor of one spouse cannot reach any interest in the estate during marriage.[75]

The decision reached by the Oregon Supreme Court in *Brownley v. Lincoln County*[76] also occurred in a jurisdiction that is more favorable to creditors of a tenant by the entirety than is North Carolina.[77] Like New Jersey, Oregon allows creditors of one spouse to foreclose on the debtor-spouse's full interest during marriage.[78] In fact, the Oregon entireties estate has been described as a "tenancy in common with an indestructible right of survivorship," rather than a true tenancy by the entirety.[79] The *Brownley* court, however, did not base its decision solely on Oregon's policy of favoring creditors. Rather, the court stated:

> [S]ince it is accepted theory that a tenancy by the entirety is converted into a tenancy in common where no award of the spouse's share is made, it seems reasonable to us that the award be viewed as the equivalent of a transfer by the court of the spouse's share in the estate rather than as a judicial defeasance which cuts off the spouse's interest in the same manner that death would do so.[80]

It is not surprising that the Oregon court came to this conclusion, given the background of Oregon cases that establish a policy of favoring creditors of a tenant by the entirety.[81] North Carolina, however, is at the opposite end of the spectrum with regard to creditors' access to entireties property; in North Caro-

71. Interchange State Bank v. Riegel, 190 N.J. Super. 139, 143-44, 462 A.2d 198, 200 (1983).

72. *Id.*

73. 190 N.J. Super. 139, 462 A.2d 198 (1983).

74. *Id.* at 144, 462 A.2d at 200.

75. *See supra* notes 30-32 and accompanying text.

76. 218 Or. 7, 343 P.2d 529 (1959).

77. Professor Powell notes that "[t]he transition away from the traditional form of the tenancy by the entirety has gone furthest in Arkansas, New Jersey, New York, and Oregon," and cites *Brownley* to support this proposition. R. POWELL, *supra* note 2, § 623, at 703 & n.32.

78. *See, e.g.*, Ganoe v. Ohmart, 121 Or. 116, 254 P. 203 (1927); Korfine v. Cole, 121 Or. 76, 252 P. 708 (1927); Howell v. Folsom, 38 Or. 184, 63 Pac. 116 (1900).

79. 4A R. POWELL, *supra* note 2, § 623, at 703; *accord Brownley*, 218 Or. at 10, 343 P.2d at 531.

80. *Brownley*, 218 Or. at 16, 343 P.2d at 533-34.

81. For an outline of the Oregon cases that "reveal an increasing acquiescence to the demands of the creditor" of one tenant by the entirety, see Note, *supra* note 51, at 194.

lina a creditor cannot reach *any* interest in the property during the marriage.[82] Given these underlying distinctions, the Oregon and New Jersey decisions are not persuasive in North Carolina. Moreover, state law that favors the creditor does not change the fact an award of entireties property to one spouse upon divorce may amount to a termination, rather than a transfer, of the other spouse's interest.[83]

Because the common-law rule that a tenancy by the entirety is converted into a tenancy in common upon divorce should not apply when the property is awarded to one spouse,[84] a lien held by the creditor of a debtor-spouse should not attach to entireties property awarded to the nondebtor-spouse as alimony or pursuant to a separation agreement. However, for two reasons, the argument that the lien should not attach is even stronger when the property is awarded pursuant to the North Carolina equitable distribution statute.[85]

First, a termination of one spouse's interest is more consistent with the philosophy of North Carolina General Statutes section 50-20 than is a transfer of the interest. Prior to the adoption of the North Carolina equitable distribution statute, property of the husband could be awarded to the wife as alimony, which was regarded as an "allowance made for the support of the wife out of the estate of the husband."[86] The equitable distribution statute abandons the concept of husband and wife holding separate estates and adopts in its place a "concept of marriage as a partnership, a shared enterprise to which both spouses make valuable contributions, albeit in different ways."[87] The notion of a transfer of one spouse's separate interest does not comport with the philosophy underlying equitable distribution because the statute does not regard the spouses as ever having held "separate" interests in marital property.[88]

A second factor suggesting that a lien of a creditor of one spouse individually should not attach to entireties property when that property is awarded to the other spouse pursuant to equitable distribution is the broad discretion afforded to the courts under section 50-20. The statute provides that "[i]f the court determines that an equal division is not equitable, the court shall divide the marital property *equitably*."[89] This broad equitable power allows the court

82. *See supra* notes 30-32 and accompanying text.

83. *See supra* notes 47-54 and accompanying text.

84. *See supra* notes 44-54 and accompanying text.

85. In *Hillman* the property was awarded to the wife as lump-sum alimony. In *Liberman* and *Lowery* the properties were awarded pursuant to the incorporation of separation agreements into the divorce decrees. *See supra* note 68. In *Brownley* and *Interchange State Bank* the awards were made pursuant to equitable distribution statutes. *Interchange State Bank*, 190 N.J. Super. at 142, 462 A.2d at 199; *Brownley*, 218 Or. at 13, 343 P.2d at 532.

In North Carolina an award of entireties property as lump-sum alimony has never been permitted. Prior to equitable distribution, a court could order the property rented out or award possession to the wife, but could not order the sale of the property. *See supra* note 36.

86. Stanley v. Stanley, 226 N.C. 129, 133, 37 S.E.2d 118, 120 (1946).

87. Sharp, *Equitable Distribution of Property in North Carolina: A Preliminary Analysis*, 61 N.C.L. REV. 247, 247 (1983).

88. *Id.* at 249; *see* N.C. GEN. STAT. § 50-20 (1984 & Supp. 1985).

89. N.C. GEN. STAT. § 50-20(c) (1984) (emphasis added).

to declare the interest of one spouse terminated so that the other spouse may take the property unencumbered.

In analyzing the *Wright* issue, the creditors' interests are important and deserve attention.[90] Indeed, many have argued that the entireties estate should be eliminated altogether because it is unfair to creditors.[91] Most creditors, however, are able to protect themselves by insisting on the signatures of both spouses when securing a lien on entireties property.[92] Clearly, tort plaintiffs have no such opportunity. The best solution to this dilemma would be to create for tort plaintiffs, a class of creditors in need of special protection whether or not a divorce is involved, an exception to the broader rule that shields entireties property from creditors of either spouse alone. Because creditors have been unable to reach the interest of one spouse in entireties property in North Carolina since 1891,[93] there is no risk that a creditor will be unfairly surprised by the untimely discovery that a note issued by one spouse is of little value. Creditors who choose to accept such a guarantee are gambling and should suffer the consequences if fortune does not fall their way.[94]

Because so many homes are owned by tenants by the entirety in North Carolina, public policy is an important consideration in resolving the issue in *Wright*. Promoting family life and preserving the family home are important state interests and continue after divorce when minor children are involved. Nonetheless, North Carolina allows only a 7,500 dollar homestead exemption.[95] Because the homestead exemption in North Carolina is so meager,[96] the tenancy by the entirety is an important protection for married as well as divorced individuals. The broad equitable powers given by section 50-20 permit a court to protect the family homestead; for example, the court can require the debtor-spouse to hold the other spouse harmless for his or her property as part of the equitable distribution decree. Preserving the family homestead, however, should not be left to the discretion of a court of equity. Moreover, an equitable distribution decree is no protection if the debtor-spouse simply refuses to pay his or her debt and absconds, as was the case in *Wright*.

Although North Carolina General Statutes section 39-13.6 put an end to a husband's right to execute a valid encumbrance on entireties property without the joinder of his wife, the issue addressed in *Wright* will be an important and recurring one because the statute has no effect on encumbrances executed before

90. In fact, commentators have suggested that the entireties estate be abolished because it is unfair to creditors. *See, e.g.*, Comment, *supra* note 2, at 997-98 (tenancy by the entirety is a stumbling block to creditors and should be abolished or altered).

91. *See supra* note 5 and accompanying text.

92. *See supra* note 37 and accompanying text.

93. The rule was established in Bruce v. Nicholson, 109 N.C. 202, 13 S.E. 790 (1891).

94. It is also significant that a divorce and award of the property to the nondebtor spouse is not the only risk that could defeat the creditor's interest; the death of the debtor spouse during the nondebtor spouse's lifetime would have the same effect. *See supra* note 27 and accompanying text.

95. N.C. GEN. STAT. § 1C-1601(a)(1) (1984).

96. *See* Reppy, *supra* note 18, at 6 ("The exemptions given by statute in North Carolina have always been puny compared to other states."). Reppy points out that some states exempt the entire homestead. *Id.* at 6 n.17.

1983.[97] In *Wright* the North Carolina Court of Appeals allowed a deed of trust executed by a husband alone to interfere with a court's express statutory authority to award title to the family home to the wife. The *Wright* court failed to look behind the transactions that occurred during the divorce and equitable distribution proceedings and to inquire into the nature of the property interests transferred thereby. That the award of the property could be viewed as a termination, rather than a transfer, of the husband's interest in the estate was not even discussed by the court.[98] Thus, the reasoning underlying the court's rejection of the termination theory is left to conjecture. The North Carolina courts should reconsider the issue and offer more than a conclusory restatement of the common law. The "termination" approach should be acknowledged as controlling in North Carolina.

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97. N.C. GEN. STAT. § 39-13.6 (1984).
98. *See* Appellee's Brief at 1-4, *Wright*.

Oates v. JAG: Let the Builder Beware—A Remedy for Subsequent Purchasers of Homes in North Carolina

The purchase of a home is the largest and most important investment most families will ever make. In addition, owning a home represents the fulfillment of a long time dream for many home buyers. The dream can quickly turn into a nightmare, however, upon the discovery of hidden defects in the recently purchased house. The immediate concern of the new owners in this situation is whether they must spend additional money on the house or whether they can force the "builder"[1] of the house to pay for the repairs. In most jurisdictions, the answer depends largely on whether the home buyers are the initial purchasers or "subsequent purchasers"[2] of the house.

In *Oates v. JAG, Inc.*[3] the North Carolina Supreme Court considered whether a subsequent purchaser of a defective house could maintain an action for negligence against the builder to recover the cost of repairing the defects. A unanimous court answered affirmatively, holding that the lack of privity between the subsequent purchaser and the builder did not bar the purchaser's negligence claim.[4] The court's decision creates a remedy for subsequent purchasers and places North Carolina law in line with a growing trend in this area of the law.[5] This Note analyzes the reasoning behind the court's decision in *Oates* and considers the implications of that decision. It finds that although the decision expands the class of purchasers to whom builders owe a duty of care, the decision does not render builders absolute insurers of their work. The Note concludes that the *Oates* court reached a proper decision, as subsequent purchasers are generally in a position similar to that of initial purchasers. Subsequent purchasers thus deserve protection equal to that given to initial purchasers. The *Oates* court, however, failed to address the question whether subsequent purchasers can maintain negligence actions against builders when the initial purchaser knew of and accepted the risk of such a defect. The Note proposes that the court not simply apply the *Oates* rule in such a situation. Rather, the court should consider the equities involved and determine whether the subsequent purchaser should be allowed to maintain an action for negligence.

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1. The term "builder" is used in this Note to refer to a person who builds *and* sells houses. This Note considers only remedies available to a subsequent purchaser who purchased a house originally purchased from the builder itself. Persons who buy a house originally purchased from someone other than the builder have more limited remedies available and, absent fraud or misrepresentation, may be subject to the doctrine of *caveat emptor*. *E.g.*, Rutledge v. Dodenhoff, 254 S.C. 407, 413-14, 175 S.E.2d 792, 795 (1970). For a definition of *caveat emptor*, see *infra* note 15.

2. For the purpose of this Note, the term "subsequent purchaser" is used to refer to anyone who purchases a house from someone other than the builder of the house. Similarly, a subsequent purchaser can be thought of as the purchaser of a used home.

3. 314 N.C. 276, 333 S.E.2d 222 (1985).

4. *Id.* at 281, 333 S.E.2d at 226.

5. *See, e.g.*, Cosmopolitan Homes, Inc. v. Weller, 663 P.2d 1041 (Colo. 1983); Coburn v. Lennox Homes, Inc., 173 Conn. 567, 378 A.2d 599 (1977); Keyes v. Guy Bailey Homes, Inc., 439 So. 2d 670 (Miss. 1983) (en banc); McMillan v. Brune-Harpeneau-Torbeck Builders, Inc., 8 Ohio St. 3d 3, 455 N.E.2d 1276 (1983); Terlinde v. Neely, 275 S.C. 395, 271 S.E.2d 768 (1980).

Plaintiffs in *Oates* were the third purchasers of a dwelling and lot located in Wake County. The property originally was owned by defendant, who in 1978 had constructed a house and made other improvements on the land. Defendant sold the house in 1978 to a purchaser who subsequently resold the property. Plaintiffs purchased the house from the second purchasers in 1981.[6]

According to their complaint, plaintiffs discovered a number of defects shortly after moving into the house.[7] These defects included installing a cut drain pipe in the bathroom; failing to use grade-marked lumber, which had caused the second floor to sag; building the house so that part of the flooring had rotted; using too few nails in places; and other violations of the North Carolina Uniform Residential Building Code.[8] Plaintiffs alleged that the defects were the result of defendant's negligent construction, and they sought to recover over 25,000 dollars from defendant for the cost of repairing the defects.[9]

In its answer, defendant moved to dismiss the complaint for failure to state a claim for relief.[10] In essence, defendant asserted that the lack of privity between it and plaintiffs barred any cause of action.[11] The trial court granted defendant's motion.[12] The North Carolina Court of Appeals affirmed, noting that "[n]o duty has been alleged for which the breach thereof would give rise to an action in tort for negligence."[13] Furthermore, the court noted that an implied warranty of fitness is available only to the initial purchaser in North Carolina and that North Carolina has not yet extended strict liability concepts to the construction and sale of homes.[14] The court held that plaintiffs had "acted at

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6. *Oates*, 314 N.C. at 277, 333 S.E.2d at 224.

7. *Id.*

8. *Id.* Specifically, plaintiffs alleged that the defendant was negligent in the construction of the home by:

(a) installing a cut toilet drain pipe in the upstairs bathroom,

(b) using nongrade marked lumber which caused the floor joists on the second floor to sag, settle, and become unlevel,

(c) using an undersized stud underneath a second floor beam in a weight bearing position,

(d) improperly installing a steel flinch plate under the second floor,

(e) creating an excessive span of the floor joists,

(f) using insufficient nails on the ledgers or beams,

(g) improperly nailing the bridging between joists and beams,

(h) using shims between floor joists and second floor flooring in an attempt to raise and level the second floor and to disguise other negligence,

(i) using insufficient vents in the foundation walls,

(j) building the dwelling so that "[a] portion of the hardwood flooring was rotted," and

(k) failing in general "to conform to the customary and acceptable standards and practices" in the trade.

Oates v. JAG, Inc., 66 N.C. App. 244, 245, 311 S.E.2d 369, 370 (1984), *rev'd*, 314 N.C. 276, 333 S.E.2d 222 (1985).

9. *Oates*, 66 N.C. App. at 245, 311 S.E.2d at 370.

10. *Id.* at 246, 311 S.E.2d at 370. Defendant's motion was filed pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, N.C. GEN. STAT. § 1A-1 (1983).

11. *Oates*, 66 N.C. App. at 246, 311 S.E.2d at 370.

12. *Id.*

13. *Id.* at 244, 311 S.E.2d at 369.

14. *Id.* at 246-47, 311 S.E.2d at 370.

their own risk and [were] subject to the traditional rule of *caveat emptor*."[15] Plaintiffs appealed from this decision. In a unanimous opinion authored by Justice Frye, the North Carolina Supreme Court reversed and remanded the case on the ground that "plaintiffs' complaint sufficiently states a claim for negligence."[16]

Historically, the doctrine of *caveat emptor* governed the sale of real property in all jurisdictions.[17] During the 1950s, however, the law began to change as courts recognized a change in the home buying market.[18] As a larger segment of the population began to purchase homes, courts realized that persons involved in such transactions did not have equal bargaining positions.[19] Home buyers lacked the expertise necessary to bargain effectively and were forced to rely on the home builders.[20] Similarly, courts realized that the size of the investment in buying a home warranted protection equal to that available in the sale of personal property.[21] As one commentator noted, "[I]t became increasingly apparent that something was unfair in a system which conscientiously protected the purchaser when he bought small items but left him to the mercy of *caveat emptor* when he purchased a home."[22] In response, courts fashioned a number of remedies for homebuyers, including an implied warranty of habitability, strict liability for construction defects,[23] and actions for negligence.[24]

In *Hartley v. Ballou*[25] the North Carolina Supreme Court joined the movement away from a strict application of *caveat emptor* in the sale of real prop-

15. *Id.* at 247, 311 S.E.2d at 371. The term *caveat emptor*, "[l]et the buyer beware, . . . summarizes the rule that a purchaser must examine, judge and test for himself." BLACK'S LAW DICTIONARY 202 (5th ed. 1979).

16. *Oates*, 314 N.C. at 280, 333 S.E.2d at 225.

17. *See* Comment, *Builder's Liability for Latent Defects in Used Homes*, 32 STAN. L. REV. 607, 607 (1980); Note, *Real Property Law—Subsequent Purchasers—Privity of Contract Is Not a Necessary Element of an Action in Negligence Brought by A Buyer-Vendee of Real Property Against a Builder/Vendor*—McMillan v. Brune-Harpenau-Torbeck Builders, Inc., 8 Ohio St. 3d 3, 455 N.E.2d 1276 (1983), 53 U. CIN. L. REV. 801, 801 (1984); *see also* McDonald v. Mianecki, 79 N.J. 275, 283, 398 A.2d 1283, 1287 (1979) (discussing the history of the doctrine of *caveat emptor* as applied to the sale of real property). For a North Carolina decision stating the traditional rule, see Buckman v. Bragaw, 192 N.C. 152, 134 S.E. 422 (1926).

18. McDonald v. Mianecki, 79 N.J. 275, 283-84, 398 A.2d 1283, 1287 (1979).

19. *Id.* at 287-89, 398 A.2d at 1289-90.

20. *Id.*

21. *Id.* at 287-90, 398 A.2d at 1288-90.

22. Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 CORNELL L.Q. 835, 837 (1967); *see also* Haskell, *The Case for Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633, 633 (1965) (noting that the law provided more protection to the purchaser of a 79 cent dog leash than to the purchaser of a house).

23. At least three states have extended strict liability in tort principles to the sale of homes. *See* Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 227, 74 Cal. Rptr. 749, 752 (1969) (doctrine of strict liability in tort can be applied to home builders); Berman v. Watergate West, Inc., 391 A.2d 1351, 1357 (D.C. 1978) (the law of products liability applies not only to sale of goods but also to sale of newly constructed homes); Hermes v. Staiano, 181 N.J. Super. 424, 432-33, 437 A.2d 925, 929-30 (1981) (complaint based on strict liability in tort for material defects not barred by lack of privity between subsequent purchasers and defendant). *See generally* Annot., 10 A.L.R.4th 385 (1981) (discussing the remedies available to subsequent purchasers of residential real property).

24. *See* Comment, *supra* note 17, at 610-18.

25. 286 N.C. 51, 209 S.E.2d 776 (1974).

erty.[26] The court in *Hartley* held that the initial purchaser of a defective house was entitled to recover for breach of an implied warranty of habitability.[27] The court's holding in *Hartley* was recently expanded in *Gaito v. Auman*.[28] In *Gaito* the supreme court held that the initial purchaser's action for breach of implied warranty was not barred because of the tenancies that preceded plaintiff's purchase of the house.[29] Rather, the prior occupancy by tenants was simply one of the factors to be considered in deciding whether the purchasers could recover under the implied warranty.[30] Although in *Hartley* and *Gaito* the court greatly expanded the rights of homebuyers in North Carolina, the court did not go so far as to make home builders strictly liable for construction defects.[31]

The problems faced by subsequent purchasers of real property are more complex than those faced by initial purchasers. The lack of privity between a subsequent purchaser and the builder often bars subsequent purchasers from relying on breach of an implied warranty as a basis for recovery when they purchase defective houses.[32] Subsequent purchasers, however, are not without remedies. Such purchasers have been allowed to maintain negligence actions against builders on the long-accepted theory that privity is not a necessary element in a negligence action.[33] At least eleven jurisdictions have held that subse-

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26. *Id.* at 60-61, 209 S.E.2d at 782.

27. *Id.* at 62, 209 S.E.2d at 783. Plaintiffs in *Hartley* discovered flooding and leakage problems in the basement of their new house shortly after moving in. They subsequently filed suit against the builder of the house to recover losses suffered as a result of water damage to the basement. Among other charges, plaintiffs alleged that defendants had warranted that the house had been waterproofed and that the floor in the basement was of sufficient quality to prevent any leakage. *Id.* at 53-54, 209 S.E.2d at 777-78.

28. 313 N.C. 243, 327 S.E.2d 870 (1985).

29. *Id.* at 251, 327 S.E.2d at 876. In *Gaito* the house in dispute was built by the defendant in November 1973. From 1974 to 1978 the house was rented to three different tenants. *Id.* at 245, 327 S.E.2d at 873. In 1978 plaintiffs purchased the house from the defendant. *Id.* Shortly after moving in, plaintiffs discovered that the house's air conditioning system did not work properly. After defendant refused to repair the system, plaintiffs paid for the repairs themselves. *Id.* Plaintiffs subsequently filed suit against defendant, seeking $3,500 in damages for a breach of warranty. *Id.* at 244, 327 S.E.2d at 872.

In *Gaito* the court noted that the implied warranty of habitability applied only to "recently completed" dwellings. *Id.* at 250, 327 S.E.2d at 876. Further, the court adopted a standard of reasonableness for determining whether a dwelling has been recently completed. *Id.* Among the factors to be considered in applying the reasonableness standard are the age of the house, the use to which it has been put, its maintenance, the nature of the defects, and the parties' expectations. *Id.* The intervening tenancies were thus just an additional factor to be considered in this determination.

30. *Id.* at 251, 327 S.E.2d at 876. In an earlier decision the North Carolina Court of Appeals extended the implied warranty of habitability to a party who had inherited the house from the initial purchaser. Strong v. Johnson, 53 N.C. App. 54, 58-59, 280 S.E.2d 37, 40 (1981). For a discussion of *Gaito* and the implied warranty of habitability in North Carolina, see Note, *Another Look at the Implied Warranty of Habilitability in North Carolina*, 64 N.C.L. REV. 869 (1986).

31. *See Oates*, 66 N.C. App. at 246-47, 311 S.E.2d at 370; *see supra* text accompanying note 14. *But see supra* note 23 and accompanying text (doctrine of strict liability in tort being applied to home builders).

32. *See Gaito*, 313 N.C. at 250, 327 S.E.2d at 876 (noting that the case in which the doctrine was adopted limits the implied warranty of habitability to initial vendees). *But cf. infra* note 36 (noting that *Gaito* can also be read to imply a willingness on the part of the North Carolina Supreme Court to extend the warranty to a subsequent purchaser on the right facts). *See generally* Annot., 10 A.L.R.4th 385 (1981) (discussing remedies available to subsequent purchasers of residential real property).

33. *See, e.g.*, Coburn v. Lenox Homes, Inc., 173 Conn. 567, 574-75, 378 A.2d 599, 602 (1977). MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), is a landmark case in which

quent purchasers can maintain negligence actions against a home builder.[34] In addition, a few jurisdictions have extended the implied warranty of habitability to subsequent purchasers.[35] North Carolina has not yet joined the courts that extend the implied warranty of habitability to subsequent purchasers.[36] In *Oates*, however, the court did allow the subsequent purchasers to maintain a negligence action for defective construction against the home builder.[37]

The *Oates* court began its discussion by recognizing that many jurisdictions deny relief based on an implied warranty theory when the plaintiff is a subsequent purchaser rather than the initial buyer.[38] In *Oates*, however, plaintiffs had alleged only negligence, not implied warranty.[39] In holding that a subsequent purchaser can maintain an action for negligence, the *Oates* court relied primarily on the reasoning of the Florida Court of Appeals in *Simmons v. Owens*[40] to support its holding.[41] Plaintiff in *Simmons* was a subsequent purchaser who sued the builder for negligence after discovering defects in the house shortly after moving in. Like plaintiffs' complaint in *Oates*, the complaint in *Simmons* was dismissed by the trial court for failure to state a cause of action.[42] A divided panel of the district court of appeals reversed, noting that defendant had failed to cite a single case in which the purchaser of a used home was not allowed to sue the builder for negligent construction.[43] The *Simmons* court reasoned:

> We must be realistic. The ordinary purchaser of a home is not qualified to determine when or where a defect exists. Yet, the purchaser makes the biggest and most important investment in his or her life and, more times than not, on a limited budget. The purchaser can ill afford to suddenly find a latent defect in his or her home that completely destroys the family's budget and have no remedy or recourse. This happens too often. The careless work of contractors, who in the past

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the New York Court of Appeals became the first court to hold that an action in negligence was not barred by the lack of privity between plaintiff and defendant.

34. *See Oates*, 314 N.C. at 281, 333 S.E.2d at 226; Annot, 10 A.L.R. 4th 385 (1981) (discussing the remedies available to subsequent purchasers of real property).

35. *See, e.g.*, Barnes v. Mac Brown & Co., 264 Ind. 227, 342 N.E.2d 619 (1976); Terlinde v. Neely, 275 S.C. 395, 271 S.E.2d 768 (1980); Moxley v. Laramie Builders, Inc., 600 P.2d 733 (Wyo. 1979).

36. In Strong v. Johnson, 53 N.C. App. 54, 59, 280 S.E.2d 37, 40 (1981), the North Carolina Court of Appeals indicated that it did not "intimate any opinion" on whether the implied warranty of habitability should be extended to subsequent purchasers. In *Gaito v. Auman*, however, the court of appeals noted that the logic of its holding would apply in the case of a subsequent purchaser. Gaito v. Auman, 70 N.C. App. 21, 29 n.1, 318 S.E.2d 555, 560 n.1 (1984), *aff'd*, 313 N.C. 243, 329 S.E.2d 870 (1985). The supreme court in *Gaito* disavowed any inference that could be drawn from the dictum of the appellate court that its decision would also apply to subsequent purchasers. *Gaito*, 313 N.C. at 251, 327 S.E.2d at 876. Although the North Carolina Supreme Court has not yet so held, a reading of the supreme court's opinion in *Gaito* suggests that the court might be willing to extend the implied warranty of habitability to subsequent purchasers on the right facts. *See* Note, *supra* note 30, at 876-78.

37. *Oates*, 314 N.C. at 281, 333 S.E.2d at 226.

38. *Id.* at 279, 333 S.E.2d at 225. *See generally* Annot., 10 A.L.R.4th 385 (1981) (discussing the remedies available to subsequent purchasers of real property).

39. *Oates*, 314 N.C. at 279, 333 S.E.2d at 225.

40. 363 So. 2d 142 (Fla. Dist. Ct. App. 1978).

41. *Oates*, 314 N.C. at 280-81, 333 S.E.2d at 225-26.

42. *Simmons*, 363 So. 2d at 143.

43. *Id.*

> have been insulated from liability, must cease or they must accept financial responsibility for their negligence. In our judgment, building contractors should be held to the general standard of reasonable care for the protection of anyone who may foreseeably be endangered by their negligence.[44]

Although recognizing that the Florida Supreme Court had not yet addressed the question, the *Oates* court stated that it was "persuaded by the reasoning contained in the intermediate appellate court's decision."[45] The court further stated that "[t]he reasoning of the Court in *Simmons* convinces us that a subsequent purchaser can recover in negligence against the builder of the property if the subsequent purchaser can prove that he has been damaged as a proximate result of the builder's negligence."[46]

The reasoning of the courts in several of the cases cited in *Oates* also supports the holding in *Oates*. In *Terlinde v. Neely*[47] the South Carolina Supreme Court held that a subsequent purchaser could maintain an action in negligence against a home builder.[48] In rejecting the argument that privity was essential to the cause of action, the *Terlinde* court noted that the key inquiry was foreseeability.[49] Further, it was "clearly foreseeable" that more than one purchaser would occupy the house. Thus, plaintiff purchaser was a "member of the class for which the house was constructed."[50] The *Terlinde* court went on to adopt a "stream of commerce" analysis, holding that "[b]y placing this product into the stream . . . the builder owed a duty of care to those who will use his product, so as to render him accountable for negligent workmanship."[51] Seeking to protect innocent purchasers from latent defects, the court stated that any reasoning that would "arbitrarily interpose a first buyer as an obstruction to someone equally as deserving is incomprehensible."[52]

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44. *Id.* This passage was cited in full in the *Oates* decision. *Oates*, 314 N.C. at 280-81, 333 S.E.2d at 225-26.

45. *Id.* at 281, 333 S.E.2d at 226.

46. *Id.* As part of its holding, the *Oates* court rejected the court of appeals' assertion that the defects in plaintiffs' house were not latent. The supreme court noted that "[n]owhere in the pleadings is there any allegation that the defects were obvious or discoverable." *Id.* Rather, the defects listed in plaintiffs' complaint were such "that a jury could find they would not ordinarily be discovered by a purchaser during a reasonable inspection." *Id.* at 281-82, 333 S.E.2d at 226.

The court of appeals' discussion on whether the defects were latent was prompted by its earlier decision in Sullivan v. Smith, 56 N.C. App. 525, 289 S.E.2d 870, *disc. rev. denied*, 306 N.C. 392, 294 S.E.2d 220 (1982). In *Sullivan* the court of appeals upheld the right of a subsequent purchaser to sue a building contractor for negligent construction of a fireplace. *Id.* at 527-28, 289 S.E.2d at 871-72. In *Oates* the court of appeals distinguished the case before it from *Sullivan* on the ground that the defects in *Oates* were readily discoverable. *Oates*, 66 N.C. App. at 248, 311 S.E.2d at 371. At the same time, the court of appeals did not address the direct conflict between its primary holding in *Oates* that no cause of action in negligence existed for a subsequent purchaser and its holding in *Sullivan*. Thus, although the court of appeals arguably distinguished the two cases, it did not sufficiently reconcile the two holdings. The supreme court in *Oates* did not discuss *Sullivan*.

47. 275 S.C. 395, 271 S.E.2d 768 (1980).

48. *Id.* at 398-99, 271 S.E.2d at 769-70. Plaintiff in *Terlinde* sued on the theory of breach of an implied warranty of habitability and in negligence to recover for cracks in the foundation of the house. *Id.* at 395-96, 271 S.E.2d at 768.

49. *Id.* at 398-99, 271 S.E.2d at 769-70.

50. *Id.* at 399, 271 S.E.2d at 770.

51. *Id.*

52. *Id.*

In *Keyes v. Guy Bailey Homes, Inc.*[53] the Mississippi Supreme Court also held that a subsequent purchaser was entitled to recover damages for negligent construction and that privity was not required in such an action.[54] The *Keyes* court noted that most homebuyers lack the knowledge and expertise to discover all defects in a house.[55] The court also noted that a rule denying negligence actions to subsequent purchasers would "[promote] an injustice against remote purchasers and . . . is not based on sound reasoning."[56] Like the *Terlinde* court, the *Keyes* court was concerned with fashioning "some legal framework . . . to protect innocent purchasers."[57] The reasons that support protecting initial purchasers apply equally to subsequent purchasers, the court noted.[58] Further, allowing subsequent purchasers to maintain an action for negligence against home builders will not expand the duty owed by such persons because builders will be under the same duty to exercise reasonable care.[59]

In *McMillan v. Brune-Harpenau-Torbeck Builders, Inc.*[60] the Ohio Supreme Court overruled an earlier decision that had denied the right of subsequent purchasers to maintain an action for negligence against a builder.[61] The *McMillan* court's decision was based primarily on the fact "[n]o sound policy reasons exist to prevent the extension of [a builder's duty to exercise reasonable care] to all subsequent vendees as well."[62] In support of this proposition, the *McMillan* court noted that adopting such a rule would not render builders insurers of their work.[63] Even under this rule, builders will be liable only for failing to exercise reasonable care. Further, plaintiffs will still have the burden of proving all the traditional elements of negligence.[64] The *McMillan* court also pointed out that continuation of the prior rule would allow builders to avoid liability altogether through the use of a "strawman."[65]

Although the *Oates* decision arguably is in line with the current trend,[66] the *Oates* rule has not been universally accepted. Some courts have held that no purchaser can maintain an action to recover only for negligent construction.[67] These decisions, however, rest on respective state tort law that denies relief for

53. 439 So. 2d 670 (Miss. 1983). Plaintiff in *Keyes* also sued to recover for problems with the foundation under both the breach of an implied warrenty of habitability and negligence theories. *Id.* at 670.

54. *Id.* at 673.

55. *Id.* at 671-72.

56. *Id.* at 671.

57. *Id.* at 672.

58. *Id.*

59. *Id.* at 673.

60. 8 Ohio St. 3d 3, 455 N.E.2d 1276 (1983).

61. *Id.* at 4, 455 N.E.2d at 1277, *overruling* Insurance Co. of N.A. v. Bonnie Built Homes, 64 Ohio St. 2d 269, 416 N.E.2d 623 (1980).

62. *Id.* at 4, 455 N.E.2d at 1278.

63. *Id.*

64. *Id.*

65. *Id.* at 5, 455 N.E.2d at 1278. A "strawman" is a "front" or "a person who is put up in name only to take part in a deal." BLACK'S LAW DICTIONARY 1274 (5th ed. 1979).

66. *See supra* text accompanying note 34.

67. *See, e.g.*, Redarowicz v. Ohlendorf, 92 Ill. 2d 171, 176-78, 441 N.E.2d 324, 326-27 (1982); Crowder v. Vandendeale, 564 S.W.2d 879, 882-84 (Mo. 1978).

simple property damages.[68] As one court noted, the "buyer's desire to enjoy the benefit of his bargain is not an interest that tort law generally protects."[69]

More significantly, the Alabama Supreme Court in *Wooldridge v. Rowe*[70] recently held that the lack of privity between a subsequent purchaser and a builder barred the purchaser's negligence claim.[71] Absent privity, the doctrine of *caveat emptor* applied to the purchaser.[72] The *Wooldridge* court stated:

> Although we have abrogated the *caveat emptor* rule in sales of new residential real estate by a builder/vendor . . . we are not inclined in this case to depart from a longstanding rule which provides certainty in this area of the law. A purchaser may protect himself by an express agreement in the deed or contract of sale.[73]

Dissenting opinions in other jurisdictions also have argued against the adoption of the rule accepted by the *Oates* court. In a dissent from the *McMillan* opinion, Judge Holmes expressed concern that the majority's decision moved Ohio law "in the direction of [making] the builder/vendor . . . an insurer" of his or her work.[74] Holmes expressed the belief that subsequent purchasers are able to protect themselves through the bargaining process by insisting on an express warranty in the deed or contract of sale, as suggested by the *Wooldridge* court.[75] Holmes also argued that there "must be a point where builders and developers know that they will no longer be subject to allegations of negligent construction."[76] Moreover, Holmes asserted that any extension of liability in this area should have come from the Ohio General Assembly.[77]

In *Cosmopolitan Homes, Inc. v. Weller*[78] Judge Rovira argued in dissent that tort law should not protect "disappointed expectations."[79] Rather, tort law should protect parties only from physical harm.[80] Rovira also asserted that no

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68. *See, e.g.*, Redarowicz v. Ohlendorf, 92 Ill. 2d 171, 176-77, 441 N.E.2d 324, 327 (1982); Crowder v. Vandendeale, 564 S.W.2d 879, 882 (Mo. 1978). Explaining why it refused to allow an action for negligence in the construction of a house, the Missouri Supreme Court stated:

> A duty to use ordinary care and skill is not imposed in the abstract. . . . Traditionally, interests which have been deemed entitled to protection in negligence have been related to *safety* or freedom from physical harm. Thus, where personal injury is threatened, a duty in negligence has been readily found. . . . However, where mere deterioration or loss of bargain is claimed, the concern is with a failure to meet some standard of *quality*. This standard of quality must be defined by reference to that which the parties have agreed upon.

Crowder, 564 S.W.2d at 882.

69. Redarowicz v. Ohlendorf, 92 Ill. 2d 171, 177, 441 N.E.2d 324, 327 (1982).

70. 477 So. 2d 296 (Ala. 1985).

71. *Id.* at 298. Plaintiffs in *Wooldridge* sued to recover for damages resulting from problems with a fireplace. *Id.* at 297.

72. *Id.* at 298.

73. *Id.*

74. *McMillan*, 8 Ohio St. 3d at 8, 455 N.E.2d at 1280 (Holmes, J., dissenting).

75. *Id.* at 9, 455 N.E.2d at 1281 (Holmes, J., dissenting).

76. *Id* (Holmes, J., dissenting).

77. *Id.* at 9, 445 N.E.2d at 1281-82 (Holmes, J., dissenting).

78. 663 P.2d 1041 (Colo. 1983).

79. *Id.* at 1048 (Rovira, J., dissenting).

80. *Id.* Judge Rovira criticized the majority for failing to distinguish between a duty imposed in tort law and a duty imposed by contract law. He noted, "The effect of the majority opinion is to blur the distinction between tort and contract. The duties imposed by the two doctrines are different

authority in tort law supported limiting liability to latent defects as most of the decisions in this area have done.[81] But perhaps the most compelling aspect of Rovira's dissent was his presentation of a slightly different fact situation. In most situations the initial purchaser simply buys the house and later sells it to the subsequent purchaser. In such a situation the defect is discovered for the first time by the second purchaser. What if, Rovira asked, the initial purchaser is aware of and accepts the defect at the time of purchase?[82] This scenario could occur if the negligent construction is done at the request of the initial purchaser or if the initial purchaser simply accepts the defect with a corresponding reduction in price. In such a transaction the builder arguably is insulated from liability by the initial purchaser's contributory negligence or assumption of risk.[83] But these defenses may not be available to the builder in an action by a subsequent purchaser.[84] Rovira argued that "the specter of a claim by a subsequent purchaser" may limit the rights of the initial parties to allocate the risk of the transaction. No sound policy exists, Rovira argued, for placing such limits on these rights.[85]

Like Justice Holmes in *McMillan*, Rovira argued that such a change in the law was better left to the legislature.[86] Further, Rovira noted that the inability of the builder to disclaim or otherwise allocate the economic risk in a subsequent purchase argued against extending the builder's duty to subsequent buyers.[87]

Although these arguments have merit, they are outweighed by the policies supporting the *Oates* decision. The decision does not make home builders in North Carolina insurers of their work. A plaintiff still must prove all the traditional elements of negligence to win his or her case:[88] that the builder failed to exercise reasonable care and that this failure proximately caused the problems in the plaintiff's house. Moreover, the holding in *Oates* does not alter the standard by which reasonable care will be measured. Just as before *Oates*, builders will not be liable for minor defects[89] or for obvious or readily discoverable defects.[90]

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and arise out of different policy considerations. They should be kept conceptually distinct." *Id.* at 1050 (Rovira, J., dissenting).

81. *Id.*

82. *Id.* at 1049-50 (Rovira, J., dissenting).

83. *Id.*

84. *Id.* Rovira again cited the blurred distinction between tort and contract law to explain this problem. He stated:

> If the builder has actually breached a legal, as opposed to contractual, duty to all foreseeable purchasers—that is, both first and subsequent purchasers—the fact that he built to the specifications of the first purchaser may not be relevant to the question of liability to subsequent purchasers, because the contributory negligence of the first purchaser may not be imputed to subsequent purchasers.

Id. at 1050 (Rovira, J., dissenting).

85. *Id.* at 1048 (Rovira, J., dissenting).

86. *Id.* at 1051 (Rovira, J., dissenting).

87. *Id.* at 1048 (Rovira, J., dissenting).

88. *See* Comment, *supra* note 17, at 611, 623; Note, *supra* note 17, at 809.

89. *See* Comment, *supra* note 17, at 623.

90. *See Cosmopolitan Homes*, 663 P.2d at 1045. The *Oates* court did not specifically hold that a cause of action for negligent construction could be maintained only for latent defects. Its refutation of the court of appeals' finding with respect to the obviousness of the defects, however, implies that this is the law in North Carolina. *See supra* note 46.

Finally, actions for negligent construction will be limited by the relevant statutes of limitation or repose.[91]

The decision in *Oates* does expand the scope of the duty owed by home builders to include subsequent purchasers in addition to initial purchasers. But the reasons for this expansion are compelling. Subsequent purchasers of personal property are not excluded for that reason alone from the class of persons to whom a manufacturer owes a duty of care.[92] Further, a subsequent purchaser of real estate is in a very similar position to that of the initial purchaser. Both are innocent purchasers who lack the expertise and knowledge necessary to uncover every latent defect. Both are making large investments and must rely on the good workmanship of the builder. Thus, both classes of purchasers deserve equal protection.

Although it is conceivable that subsequent purchasers could protect themselves through express warranties from the seller, this may not be a satisfactory solution to the problem. It may be unrealistic to assume that sellers will agree to accept liability for latent defects in the house arising from the builder's negligent construction. Moreover, such a warranty would shift the liability for faulty construction from the builder to the innocent first purchaser. It is unclear whether any policy arguments could support such a result.

Similarly, the argument that such decisions are best left to state legislatures is not very persuasive. Courts have historically taken it upon themselves to act without legislative initiative. A clear example in North Carolina is the supreme court's decision to create a cause of action for breach of implied warranty of habitability in *Hartley*.[93] The argument that legislative action should be required is even less persuasive when one considers the strength of the building industry lobby in most states. As one commentator noted, the existence of these strong lobbies makes it almost impossible to pass legislation expanding or ex-

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91. The court in *Oates* held that such actions in North Carolina will be controlled by the six-year limit imposed by N.C. GEN. STAT. § 1-50(5)(a) (1983), which reads:

> No action to recover damages based upon or arising out of the defective or unsafe condition or an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.

Oates, 314 N.C. at 282, 333 S.E.2d at 226.

The court rejected defendant's claim that the action was controlled by the three-year limitation on actions "[f]or criminal conversation, or for any other injury to the person or rights of another not arising on contract and not hereafter enumerated" in N.C. GEN. STAT. § 1-52(5) (1983). *Oates*, 314 N.C. at 284, 333 S.E.2d at 227.

In Evans v. Mitchell, 74 N.C. App. 732, 733, 329 S.E.2d 681, 681-82 (1985), the court of appeals relied on its holding in *Oates* to deny a subsequent purchaser's right to sue for negligent construction. The supreme court, however, remanded the cause of action for reconsideration in light of its holding in *Oates*. Evans v. Mitchell, 314 N.C. 531, 335 S.E.2d 315 (1985). On remand, the court of appeals recognized that plaintiffs had a cause of action even though they were not the initial purchasers of the house. Evans v. Mitchell, 77 N.C. App. 598, 599, 335 S.E.2d 758, 759 (1985). The court noted, however, that plaintiffs' complaint was filed ten years after the house was built by defendant. Thus, the action was barred by N.C. GEN. STAT. § 1-52(5)(a) (1983). *Evans*, 77 N.C. App. at 599, 335 S.E.2d at 759.

92. *See* MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), a landmark case in which the New York Court of Appeals held that an action in negligence was not barred by the lack of privity between plaintiff and defendant manufacturer.

93. *See supra* text accompanying notes 25-27.

tending the liability of builders.[94] It is thus appropriate and arguably necessary for courts to act if subsequent purchasers are to be protected.

Despite the merits of the *Oates* decision, it leaves some unanswered questions. As discussed in Judge Rovira's dissent in *Cosmopolitan Homes*,[95] a situation might arise in which the builder and initial purchaser had allocated the risk of defective construction to the initial purchaser. Should the builder be held liable for defects if the initial purchaser knew about the negligent construction and consented to it or should the initial purchaser be accountable because he or she accepted the risks? The arguments supporting the subsequent purchaser's action for negligence against the builder are weaker in this situation. It is more logical to insulate a builder from liability when the initial purchaser accepted the defect. In this situation the North Carolina Supreme Court should not simply apply the *Oates* rule and allow the subsequent purchaser to maintain an action for negligence against the builder. Rather, the court should consider the equities involved and determine which party should bear the loss: the builder, the subsequent purchaser, or the initial purchaser who accepted the defects.

Despite its failure to address this issue, the *Oates* court reached the appropriate result. The policy arguments supporting protection for initial purchasers apply equally to subsequent purchasers. Moreover, no sound policy reasons justify relieving a builder of liability simply because of a subsequent sale. Not only would such a policy be unsound, but, as noted by the Ohio Supreme Court, it would allow builders to insulate themselves from liability to buyers through the use of a strawman.[96]

The decision in *Oates* leaves unchanged the duty of care owed by builders but holds that subsequent purchasers may recover for a breach of that duty. The holding does not impose an undue burden on builders in North Carolina, nor does it make them insurers of their work. It does, however, represent a welcome movement away from the harsh doctrine of *caveat emptor* and a movement toward providing much-needed protection for subsequent purchasers of residential real property.[97]

DWIGHT F. HOPEWELL

94. *See* Note, *supra* note 17, at 809-10.

95. *See supra* text accompanying notes 82-85.

96. *See supra* text accompanying note 65.

97. The *Oates* decision was limited to the subsequent purchase of residential real property. It is unclear whether the *Oates* court would extend its holding to the subsequent purchase of *commercial* real property. A court might find that commercial purchasers are able to protect themselves through the bargaining process and thus decline to extend the *Oates* rule to this class of purchasers.

Walls v. Grohman: Adverse Possession in Mistaken Boundary Cases

Ownership of real property has long been an important element of western society due to the numerous rights and benefits it provides. Along with these rights and benefits, however, comes a responsibility to make productive use of or at least to maintain exclusive control of one's land. When a landowner fails to fulfill this responsibility, statutes of limitation provide the means whereby an adverse possessor can acquire title to the property and thereby extinguish the legal interest of the landowner.[1]

Claims of adverse possession can arise in various ways.[2] One way, the mistaken boundary case, arises when landowners occupy land to a certain line beyond their true boundary, based on an honest belief that the line is in fact the true boundary, only to later discover that they were mistaken.[3] In *Walls v. Grohman*[4] the North Carolina Supreme Court addressed the issue whether such landowners can acquire title by adverse possession to the land held under mistake. The court rejected the then existing rule and held that landowners who mistakenly occupy beyond their true boundary can acquire title by adverse possession.[5]

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1. P. HETRICK, WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA, § 286, at 309 (1981); *see* N.C. GEN. STAT. §§ 1-35, -38, -39, -40 (1983). Adverse possession statutes serve two primary purposes. First, by allowing adverse claimants who remain in possession for the requisite period to acquire title, they encourage landowners to use and control their land. Second, by barring recovery after the period has expired, they discourage lawsuits based on ancient title defects and protect persons who have long held possession and ostensibly own the land. P. HETRICK, *supra*, § 286, at 310.

2. Besides mistaken boundary cases, the subject of this Note, other ways that claims of adverse possession can arise include intentional possession of the land of another for the purpose of acquiring title and assertion of adverse possession to remove defects in a record title. *See* J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 300-01 (1975).

3. Mistaken boundary cases frequently arise because of a mistaken belief that a certain fence or other visible line marks the true boundary. 4 H. TIFFANY, THE LAW OF REAL PROPERTY § 1159, at 843 (3d ed. 1975). They also can arise when a strip of land is intended to be included in a conveyance, but is omitted because of an error in surveying or in drafting the deed description. *See infra* note 7 and accompanying text. A related type of case, not specifically discussed in this Note, involves a claim of adverse possession or prescriptive easement based on the encroachment of a building or other structure. *See* Annot., 2 A.L.R.3d 1005 (1965). A second related situation involves a claim based on mistaken improvement of land owned by someone else. *See* N.C. GEN. STAT. §§ 1-340 to -351 (1983); Dickinson, *Mistaken Improvers of Real Estate*, 64 N.C.L. REV. 37 (1985).

4. 315 N.C. 239, 337 S.E.2d 556 (1985).

5. *Id.* at 244, 337 S.E.2d at 559. For general background on how various courts have resolved this issue, see 3 AMERICAN LAW OF PROPERTY § 15.5, at 785-91 (1952 & Supp. 1977); 7 R. POWELL, THE LAW OF REAL PROPERTY ¶ 1013(2)(f)(i), at 91-31 to -34 (P. Rohan rev. ed. 1984); 5 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 2548, at 631-34 (J. Grimes replacement 1979); 4 H. TIFFANY, *supra* note 3, § 1559, at 843-47; H. TIFFANY, TIFFANY ON REAL PROPERTY § 551, at 482-83 (abr. 3d ed. 1970); Bordwell, *Mistake in Adverse Possession*, 7 IOWA L. BULL. 129 (1922); Darling, *Adverse Possession in Boundary Cases*, 19 OR. L. REV. 117 (1940); Day, *The Validation of Erroneously Located Boundaries by Adverse Possession and Related Doctrines*, 10 U. FLA. L. REV. 245 (1957); Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U.L.Q. 331, 339-41 (1983); Note, *Adverse Possession—Intent as a Requisite in Mistaken Boundary Cases*, 33 N.C.L. REV. 632 (1955). For digests of cases on this issue, see Annot., 80 A.L.R.2d 1171 (1961); Annot., 97 A.L.R. 14 (1935).

This Note first summarizes the facts and decision in the *Walls* case and outlines the elements necessary to establish title by adverse possession. It then describes the three basic rules that have been followed by various jurisdictions regarding adverse possession in mistaken boundary situations. The *Walls* opinion is analyzed in light of these rules and the prior development of the law in this area in North Carolina. The Note concludes that the *Walls* decision significantly improves the law of adverse possession in North Carolina.

Plaintiffs in *Walls* sought to quiet title to a fifty-foot strip of land on the northern side of their property.[6] Defendants owned the adjoining property and had mistakenly believed that their land included the strip.[7] When a controversy over title to the land ensued, defendants claimed title to the strip by adverse possession.[8]

The referee[9] hearing the case found that plaintiffs held record title, but concluded that defendants had acquired the disputed strip by adverse possession.[10] The district court reversed the referee, finding that defendants' possession was under a mistaken belief that the boundary described in their deed encompassed the strip and holding that such possession was not adverse under North Carolina law.[11] The court of appeals affirmed the district court's order.[12]

On discretionary review the North Carolina Supreme Court acknowledged that the lower courts correctly applied the then existing law of the state.[13] The court concluded, however, that the existing rule was unreasonable and held:

> [W]hen a landowner, acting under a mistake as to the true boundary between his property and that of another, takes possession of the land believing it to be his own and claims title thereto, his possession and claim of title is adverse. If such adverse possession meets all other requirements and continues for the requisite statutory period, the claimant acquires title by adverse possession even though the claim of

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6. *Walls*, 315 N.C. at 240, 337 S.E.2d at 557.

7. *Id.* The tracts owned by both landowners had originally belonged to the parents of defendant Catherine Grohman. Defendants claimed that their deed was supposed to have included the disputed strip. The strip was apparently omitted from their deed through an error in surveying or in drafting the deed description, because the total road frontage of the tracts Catherine's parents conveyed was approximately 50 feet less than what they owned. *Id.* at 241-42, 337 S.E.2d at 557-58.

8. *Id.*

9. The trial court appointed a referee under N.C. R. Civ. P. 53, upon plaintiffs' motion. Record at 6. Rule 53 provides for the appointment of a referee by the court "[w]here the case involves a complicated question of boundary." N.C. R. Civ. P. 53(a)(2)(c).

10. *Walls*, 315 N.C. at 240, 337 S.E.2d at 557. The conclusions of the referee included the following:

> 3. [Defendant] Mrs. Catherine Grohman has been in exclusive possession of that part of the Walls tract south of the line called for in her deed under a claim of right and title . . . .
>
> 4. Such possession by the Grohmans has been actual, open, hostile, exclusive and continuous for a period of more than thirty years before the Plaintiffs were conveyed their tract. The possession has been characterized as that of an owner exercising exclusive dominion over the lands now in dispute up to a marked and known line in making such use of the land as it is reasonably susceptible of in its condition.

Id. at 242, 337 S.E.2d at 558.

11. *Id.* at 243-44, 337 S.E.2d at 558-59.

12. Walls v. Grohman, 72 N.C. App. 443, 324 S.E.2d 874, *rev'd*, 315 N.C. 239, 337 S.E.2d 556 (1985).

13. *See Walls*, 315 N.C. at 244, 248, 337 S.E.2d at 559, 561.

title is founded on a mistake.[14]

Based on this newly adopted rule, the supreme court concluded that defendants had acquired title to the disputed strip by adverse possession.[15]

To acquire title to real property by adverse possession in North Carolina the claimant must establish the following: that there was actual possession of the property in question,[16] and that the possession was hostile and exclusive,[17] open and notorious,[18] and continuous and uninterrupted[19] for the requisite statutory period.[20] It also has been required "that the possessor . . . occupy the land

14. *Walls*, 315 N.C. at 249, 337 S.E.2d at 562. Although this holding seems reasonably clear, other language in the opinion raises several questions regarding the precise intent now required to establish adverse possession in mistaken boundary cases. *See infra* notes 46-62 and accompanying text.

15. *Walls*, 315 N.C. at 249, 337 S.E.2d at 562. The court expressly overruled, "to the extent they apply a different rule," the following cases: Price v. Whisnant, 236 N.C. 381, 72 S.E.2d 851 (1952); Gibson v. Dudley, 233 N.C. 255, 63 S.E.2d 630 (1951); Sipe v. Blankenship, 37 N.C. App. 499, 246 S.E.2d 527 (1978), *cert. denied*, 296 N.C. 411, 251 S.E.2d 470 (1979); Garris v. Butler, 15 N.C. App. 268, 189 S.E.2d 809 (1972). The court also effectively overruled Williamson v. Vann, 42 N.C. App. 569, 257 S.E.2d 102 (1979), to the extent that it relied on *Garris*.

16. P. HETRICK, *supra* note 1, § 288, at 310-12.

> Any usage of land will be regarded as an actual possession of the land if the claimant makes such use of the land as its quantity, character, nature, location and circumstances will permit, and if the use of such land is the same as is customary in the community by the title owners of similar land. . . .
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> . . . .
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> . . . . In short, actual possession means subjecting the land to the will and dominion of the claimant, to the exclusion of others, and in making the ordinary use and taking the ordinary profits of which it is susceptible, such acts to be so repeated as to show that they are done in the character of owner, and not merely as an occasional trespasser.

Id. at 311-12.

17. *Id.* § 289, at 312-15. "The requirement that possession must be hostile in order to ripen title by adverse possession does not import ill will or animosity but only that the one in possession of the lands claims the exclusive right thereto." State v. Brooks, 275 N.C. 175, 180, 166 S.E.2d 70, 73 (1969). "A 'hostile' use is simply a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under claim of right." Dulin v. Faires, 266 N.C. 257, 261, 145 S.E.2d 873, 875 (1966). In contrast to *Brooks* and *Dulin*, other cases have stated that for the possession to be hostile, there must be a conscious intent to claim against the true owner. P. HETRICK, *supra* note 1, § 289, at 313. The requirement of such a conscious intent was rejected in *Walls*. *See infra* notes 40-45 and accompanying text.

18. P. HETRICK, *supra* note 1, § 290, at 315-16.

> [Open and notorious] means that the record owner of the real property involved must be given actual notice of the hostile possession of the claimant or the possession must be so open, visible or notorious that he is presumed to have constructive notice of the adverse claim. . . . The possession must be decided and as notorious as the nature of the land will permit, affording unequivocal indication to all persons that the claimant is exercising the dominion of owner over the land involved.

Id. at 315.

19. *Id.* § 291, at 316-18.

> Intermittent, occasional, or periodic possessions do not constitute the continuity of possession required to gain title by adverse possession. While the possession need not be *unceasing*, there must be evidence that warrants the inference that the actual use and occupation of the land have extended over the required period, and that during that time the claimant has from time to time, continuously subjected some part of the disputed land to the only use of which it was susceptible.

Id. at 316.

20. The normal statutory period for adverse possession is 20 years. N.C. GEN. STAT. § 1-40 (1983). Under color of title, the statutory period is seven years. *Id.* § 1-38. Against the State of North Carolina, the statutory periods for adverse possession are 30 years normally and 21 years under color of title. *Id.* § 1-35. Under color of title, an adverse possessor can only acquire title to

in question with the intent to claim title to the land occupied to the exclusion of any recognition of the true owner's rights."[21] This last requirement, which overlaps the requirement that the possession be hostile and exclusive,[22] has been the deciding factor in mistaken boundary cases in North Carolina.[23]

Numerous decisions in various jurisdictions have addressed the issue of adverse possession in mistaken boundary situations.[24] Many of these decisions, however, fail to define clearly and apply consistently the legal principles involved.[25] Nevertheless, three basic rules can be identified from these decisions.[26]

The majority rule,[27] as enunciated in the leading case of *French v. Pearce*,[28] states that visible possession "with an intention to possess" constitutes adverse possession.[29] Under this objective rule,[30] "it is only necessary for a person to enter and take possession of land *as his own*."[31] When a person "enters on land believing and claiming it to be his own, . . . [t]he very nature of the act is an

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"the land embraced within the deed." *See* Price v. Tomrich Corp., 275 N.C. 385, 391-92, 167 S.E.2d 766, 771 (1969). Thus, color of title is not a factor in mistaken boundary cases of the sort involved in *Walls*, because these cases involve landowners who occupy land beyond the boundary described in their deeds. There is an analogous type of case, however, in which color of title is a factor. This type of case involves a lappage, whereby two adjoining landowners hold deeds that describe boundaries that "lap upon each other." *Id.* at 392-93, 167 S.E.2d at 771. In such a case one of the deeds is necessarily mistaken because there can only be one true boundary. For a full discussion of color of title and lappage, see Kalo, *The Doctrine of Color of Title in North Carolina*, 13 N.C. CENT. L.J. 123 (1982).

21. P. HETRICK, *supra* note 1, § 293, at 320.

22. Prior to the decision in *Walls*, this required element of intent, and its consequences, had been described as follows:

> Contrary to the weight of American authority, a conscious intention to claim title to the land of the true owner is required to make out adverse possession in North Carolina if there is no color of title. In this state, if the possession is by mistake due to a mistaken boundary, or if the possession is equivocal in character, and without color of title, it is not adverse. The existence of mistake negates the requisite intent to establish adverse possession.

Walls, 315 N.C. at 244, 337 S.E.2d at 559 (quoting P. HETRICK, *supra* note 1, § 293, at 320). The requirement of a conscious intent to possess against the true owner has not been applied in cases involving color of title. P. HETRICK, *supra* note 1, § 293, at 320 n.62. Indeed, most claims of adverse possession under color of title involve possessors who mistakenly believed that their deed or other instrument of conveyance actually conveyed good title to the land in question and thus, necessarily lacked any intent to claim against the true owner. *See id.*; Kalo, *supra* note 20, at 139-40.

23. *See, e.g.*, Price v. Whisnant, 236 N.C. 381, 72 S.E.2d 851 (1952); Gibson v. Dudley, 233 N.C. 255, 63 S.E.2d 630 (1951); Sipe v. Blankenship, 37 N.C. App. 499, 246 S.E.2d 527 (1978), *cert. denied*, 296 N.C. 411, 251 S.E.2d 470 (1979); Garris v. Butler, 15 N.C. App. 268, 189 S.E.2d 809 (1972). *Walls* expressly overruled these cases "to the extent that they apply a different rule." *Walls*, 315 N.C. at 249, 337 S.E.2d at 562.

24. For general background on this issue, see the sources listed in note 5, *supra*.

25. *See* Annot., 80 A.L.R.2d 1171, § 2, at 1174 (1961).

26. *See* Note, *supra* note 5, at 633-34 (discussing the three rules and the status of the law in North Carolina in 1955).

27. Helmholz, *supra* note 5, at 339; Kalo, *supra* note 20, at 135; Note, *supra* note 5, at 633.

28. 8 Conn. 439 (1831).

29. *Id.* at 443; *see* Note, *supra* note 5, at 633. This rule is sometimes called the "Connecticut rule." *See* Helmholz, *supra* note 5, at 339.

30. G. THOMPSON, *supra* note 5, § 2548, at 630 & n.14; Annot., 80 A.L.R.2d 1171, § 2, at 1174 (1961).

31. *French*, 8 Conn. at 443.

assertion of his own title, and the denial of the title of all others."[32] Possession based on an honest mistake, if continued for the requisite period, is as effective to acquire title as possession based on a wrongful motivation to take the land from the true owner.[33]

The minority rule,[34] as stated in *Preble v. Maine Central Railroad Co.*,[35] uses a subjective test[36] and has two aspects. If a mistaken landowner holds possession up to a certain line beyond the true boundary with intent to claim title up to that line in the event a mistake is discovered, the possession is adverse.[37] However, if the mistaken landowner holds possession up to that line, but intends to claim title only to the true boundary, the possession is not adverse.[38] "It is not merely the existence of a mistake, but the presence or absence of the requisite intention to claim title, that fixes the character of the entry and determines the question of disseisin."[39]

A third rule, as set forth in the North Carolina cases of *Gibson v. Dudley*[40] and *Price v. Whisnant*,[41] provides that possession beyond a true boundary cannot be adverse if it is based on a mistaken belief that the disputed area is encompassed by the description in the possessor's deed.[42] A possessor must have a conscious intention to claim against the true owner to establish adverse possession.[43] The North Carolina Supreme Court rejected this rule in *Walls* and over-

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32. *Id.* at 445.

33. *Id.* at 443.

34. *See* Note, *supra* note 5, at 634.

35. 85 Me. 260, 27 A. 149 (1893). This rule is sometimes called the "Maine view." Helmholz, *supra* note 5, at 339.

36. G. THOMPSON, *supra* note 5, § 2548, at 630; Helmholz, *supra* note 5, at 339; Annot. 80 A.L.R.2d 1161, § 2, at 1174 (1961).

37. *Preble*, 85 Me. at 265, 27 A. at 150.

> It must be an intention to claim title to all land within a certain boundary on the face of the earth, whether it shall eventually be found to be the correct one or not. If, for instance, one in ignorance of his actual boundaries takes and holds possession by mistake up to a certain fence beyond his limits, upon the claim and in the belief that it is the true line, with the intention to claim title, and thus, if necessary, to acquire "title by possession" up to that fence, such possession, having the requisite duration and continuity, will ripen into title.

Id.

38. *Id.* at 265-66, 27 A. at 150.

> If, on the other hand, a party through ignorance, inadvertence, or mistake occupies up to a given fence beyond his actual boundary, because he believes it to be the true line, but has no intention to claim title to that extent if it should be ascertained that the fence was on his neighbor's land, an indispensable element of adverse possession is wanting. In such a case the intent to claim title only exists upon the *condition* that the fence is on the true line. The intention is not absolute, but provisional, and the possession is not adverse.

Id.

39. *Id.* at 266, 27 A. at 150.

40. 233 N.C. 255, 63 S.E.2d 630 (1951), *overruled by* Walls v. Grohman, 315 N.C. 239, 337 S.E.2d 556 (1985).

41. 236 N.C. 381, 72 S.E.2d 851 (1952), *overruled by* Walls v. Grohman, 315 N.C. 239, 337 S.E.2d 556 (1985).

42. *See Price*, 236 N.C. 381, 72 S.E.2d 851 (1952); *Gibson*, 233 N.C. 255, 63 S.E.2d 630 (1951); Note, *supra* note 5, at 633-34. "[N]o act of the [possessor], however exclusive, open and notorious it may have been prior to the time he discovered the area now in dispute was not covered by the description in his deed, will be considered adverse." *Price*, 236 N.C. at 385, 72 S.E.2d at 854.

43. Garris v. Butler, 15 N.C. App. 268, 270-71, 189 S.E.2d 809, 810-11 (1972), *overruled by* Walls v. Grohman, 315 N.C. 239, 337 S.E.2d 556 (1985).

ruled prior cases that had applied it.[44] Few, if any, jurisdictions follow this rule today.[45]

> The *Walls* court enunciated the rule to be applied in North Carolina:
>
> [W]e now join the overwhelming majority of states, return to the law as it existed prior to *Price* and *Gibson*, and hold that when a landowner, acting under a mistake as to the true boundary between his property and that of another, *takes possession of the land believing it to be his own and claims title thereto*, his possession and claim of title is adverse.[46]

The literal language of this holding seems to indicate that the court intended to adopt the *French* rule.[47] However, the court's statement that "we now join the overwhelming majority of states"[48] raises a problem with this interpretation. Earlier in the opinion the court quoted a restatement of the *Preble* holding as "[t]he general rule throughout the United States regarding possession under mistake or ignorance."[49] Taken together these statements support an interpretation

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> Where . . . a grantee goes into possession of the tract of land conveyed to him and also a contiguous tract not included in the conveyance under the mistaken belief that the contiguous tract was included within the description in his deed, no act of such grantee, however exclusive, open and notorious will constitute adverse possession of the contiguous tract so long as he thinks his deed covers the contiguous tract, since there is no *intent on his part to claim adverse to the true owner.*

Id. (emphasis added) (citing Price v. Whisnant, 236 N.C. 381, 72 S.E.2d 851 (1952)).

44. *Walls*, 315 N.C. at 249, 337 S.E.2d at 562. For a list of these cases, see *supra* note 15.

45. Note, *supra* note 5, at 634-35; Annot., 97 A.L.R. 14, 18 (1935) ("In a few early cases it was distinctly held that a mistake would not give title by adverse possession, or that there could be no disseisin by mistake . . . . But this idea is now abandoned . . . ."). *But see* Ellis v. Jansing, 620 S.W.2d 569, 571-72 (Tex. 1981) (apparently requiring a conscious intention to claim against the true owner in order for possession to be adverse); Note, Ellis v. Jansing: *Intent and the Mistaken or Inadvertent Possession*, 34 BAYLOR L. REV. 733, 743-47 (1982) (containing an analysis of Texas adverse possession cases and the possible impact of *Ellis v. Jansing* on future cases).

46. *Walls*, 315 N.C. at 249, 337 S.E.2d at 562. The court stated further, "If such adverse possession meets all other requirements and continues for the requisite statutory period, the claimant acquires title by adverse possession even though the claim of title is founded on a mistake." *Id.*

47. *See supra* text accompanying notes 27-33.

48. *Walls*, 315 N.C. at 249, 337 S.E.2d at 562.

49. *Id.* at 245-46, 337 S.E.2d at 560. The court quoted the following passages:

> It is a widely accepted rule that where one, in ignorance of his actual boundaries, takes and holds possession by mistake up to a certain line beyond his limits, upon the claim and in the belief that it is the true line, with the intention to claim title, and thus, if necessary, to acquire "title by possession" up to that line, such possession, having the requisite duration and continuity, will ripen into title. . . . But if, on the other hand, a party, through ignorance, inadvertence, or mistake, occupies up to a given line beyond his actual boundary, because he believes it to be the true line, but has no intention to claim title to that extent if it should be ascertained that such line is on his neighbor's land, an indispensable element of adverse possession is wanting . . . .
>
> Where an occupant of land is in doubt as to the location of the true line it is reasonable to inquire as to his state of mind in occupying the land in dispute, and if, having such doubt, he intends to hold the disputed area only if that area is included in the land described in his deed, then it is reasonable to say that the requisite hostility is lacking; but if the occupation of the disputed area is under a mistaken belief that it is included in the description of his deed—a state of mind sometimes described as pure mistake to distinguish it from the cases of conscious doubt—then his possession is adverse.

Id. at 245-46, 377 S.E.2d at 560 (quoting 3 AM. JUR. 2D *Adverse Possession* § 41, at 128-30 (1962) (footnote omitted)). These two paragraphs, when read together, are somewhat confusing. The first paragraph is nearly a word for word quote from the *Preble* case. *See supra* notes 37-38. The second paragraph introduces a somewhat different concept, the existence of conscious doubt regarding the

that the court believed the *Preble* rule to be the general rule and intended to adopt it as the law of North Carolina. Because there remains a split of authority among the states, however, between the *French* rule and the *Preble* rule,[50] arguably, there is no general rule.[51]

Another factor to be considered is the statement by the *Walls* court that it intended to "return to the law [of North Carolina] as it existed prior to *Price* and *Gibson*."[52] According to the court the prior law of the state had been enunciated in the 1922 case of *Dawson v. Abbott*.[53] Specifically, the court in *Walls* quoted the following language from *Dawson* as being the law of North Carolina at that time: "There must be an intention to claim title to all land within a certain boundary, whether it eventually be the correct one or not."[54] This intention is one aspect of the *Preble* rule.[55] The *Dawson* court also stated the other aspect of the *Preble* rule: when a possessor occupies beyond the true boundary, but with an intent to claim only to the true boundary, such possession is not adverse.[56]

After setting forth the *Preble* rule, however, the *Dawson* court stated that there was no mistake involved in the case because the possessor "claimed up to the line which he asserted, all the time, to be the true one."[57] Furthermore, the *Dawson* court stated:

> Even if there had been a mistake originally as to the location of the true line, yet if the plaintiff asserted it to be at a certain place, and

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location of the true boundary. For a discussion of this issue, see *infra* notes 81-86 and accompanying text. The confusion arises because the second paragraph concludes by stating the *French* rule—"if the occupation of the disputed area is under a mistaken belief that it is included in his deed . . . then his possession is adverse," *id.*—without mentioning the previously quoted statement of the *Preble* rule requiring an "intention to claim title." The *Walls* opinion follows a similar analysis, first setting forth the *Preble* rule, but then applying the objective test of the *French* rule. *See infra* text accompanying notes 52-62.

50. *See supra* notes 27-39, and accompanying text.

51. However, because the *French* rule is followed by the majority of jurisdictions, Kalo, *supra* note 20, at 135, it could be considered the general rule.

52. *Walls*, 315 N.C. at 249, 337 S.E.2d at 562. *See supra* text accompanying note 46.

53. *Walls*, 315 N.C. at 244-45, 337 S.E.2d at 559 (citing Dawson v. Abbott, 184 N.C. 192, 114 S.E. 15 (1922)).

54. *Walls*, 315 N.C. at 245, 337 S.E.2d at 560 (quoting *Dawson*, 184 N.C. at 196, 114 S.E. at 16).

> It is not merely the existence of a mistake, but the presence or absence of the requisite intention to claim title, that fixes the character of the entry and determines the question of disseisin. There must be an intention to claim title to all land within a certain boundary, whether it eventually be the correct one or not. Where a person, acting under a mistake as to the true boundary line between his land and that of another, takes possession of land of another, believing it to be his own, up to a mistaken line, claiming title to it and so holding, the holding is adverse, and, if continued for the requisite period, will give title by adverse possession.

Dawson, 184 N.C. at 196, 114 S.E. at 16.

55. *See supra* note 37.

56. *Dawson*, 184 N.C. at 195, 114 S.E. at 16.

> [W]here the occupation of the land is by mere mistake, and with no intention on the part of the occupant to claim as his own land which does not belong to him, but he intends to claim only to the true line, wherever it may be, the holding is not adverse.

Id.

57. *Id.* at 196, 114 S.E. at 17.

> occupied and claimed up to it in his own right, although he may have been mistaken as to where the true line was, his possession would still be adverse.[58]

Thus, while stating the elements of intent required under *Preble*, the court in *Dawson* emphasized that the possessor claimed and occupied the land in question as his own. This is the focus of the *French* rule.[59]

The court in *Walls* followed a similar analysis. Although the court described the elements of the *Preble* rule, it focused on the facts defendants thought their deed included the land in question[60] and claimed and used it as their own.[61] These facts do not support a conclusion that defendants' possession was adverse under the *Preble* rule. Under that rule the possessor must intend to claim the land in question in the event it is discovered that the possession extended beyond the true boundary.[62] There is no indication in *Walls* of any expression by defendants that prior to the controversy they had considered what they would do if it were discovered that they were mistaken as to the location of the true boundary.

Indeed, one problem with the *Preble* rule is that it necessitates an inquiry into the possessor's intent under circumstances that probably were never considered before the mistake was discovered.[63] In the absence of a subjective intent to claim beyond the true boundary in the event a mistake is discovered, possession beyond the true boundary is not adverse.[64] Thus, most mistaken possessors cannot acquire title under the *Preble* rule unless they fabricate the requisite intent or the court presumes it to have existed. Moreover, honest mistaken possessors will automatically lose under the *Preble* rule if they testify at trial that they occupied and claimed the land in question as their own, but they never intended to take anything that was not included in their deed.[65]

The *Walls* court recognized the problem with requiring a prior conscious intent to claim beyond the true boundary when it stated that the existing North Carolina rule of *Price* and *Gibson*[66] had "been criticized as rewarding only the claimant who is a thief."[67] This criticism applies equally to the *Preble*

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58. *Id.*
59. *See supra* text accompanying notes 27-32.
60. *Walls*, 315 N.C. at 240, 243, 337 S.E.2d at 557-58.
61. *Id.* at 242-43, 337 S.E.2d at 558.
62. *See supra* text accompanying note 37.
63. *See* Note, *supra* note 5, at 636.
64. *See* Note, *supra* note 5, at 634-35.
65. *See* Note, *supra* note 5, at 636.
66. *See supra* text accompanying notes 40-43.
67. *Walls*, 315 N.C. at 248, 337 S.E.2d at 561. In a footnote to this statement, the court cited the following criticism:

> This view "not only confers a premium upon conscious wrongdoing, but introduces into the law of adverse possession a requirement never otherwise asserted. Under such a rule there could be no adverse possession unless the possessor had the intention of claiming the land if his title is defective. Ordinarily a person who believes that he owns certain land, or land up to a certain boundary, has no thought as to what he will do if he is mistaken. Even assuming that he has an intention, such intention is necessarily difficult, and frequently impossible, of determination. If his own testimony concerning his motive is accepted a premium is placed on perjury."

rule.[68] Under the rule of *Price* and *Gibson* the possessor must have an unqualified intent to claim against the true owner.[69] Under the *Preble* rule there must be an intent to claim against the true owner in the event the mistake is discovered.[70] If the *Preble* rule is strictly applied there is little difference in the practical effect of the two rules.[71]

The question arises whether there was any reason preventing the *Walls* court from expressly adopting the *French* rule. One possibility is that the *French* rule, by not requiring a subjective intent to claim against a perceived or potential true owner,[72] is inconsistent with the presumption sometimes stated by North Carolina courts that possession by someone other than the true owner is permissive.[73]

The North Carolina courts have employed two different types of presumptions in adverse possession cases. The first type is an evidentiary presumption, created by statute, that the holder of legal title has been in possession within the limitation period;[74] possession by someone other than the record owner is deemed to have been permissive.[75] Proof of adverse possession, however, rebuts this presumption[76] regardless of which rule is used to determine when possession is adverse. Thus, the *French* rule is not inconsistent with the statutory presumption.

The other type of presumption is a conclusive presumption[77] created by the courts. Under such a presumption, unless the possessor had a conscious intent

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Id. at 248 n.1, 337 S.E.2d at 561-62 n.1 (quoting H. TIFFANY, TIFFANY ON REAL PROPERTY § 551, at 482-83 (abr. 3d ed. 1970)).

68. In fact, Professor Tiffany directed the criticism quoted in note 67, *supra*, at the *Preble* rule, as evidenced by a specific reference to *Preble* in the previous edition of the treatise. *See* H. TIFFANY, TIFFANY ON REAL PROPERTY § 751, at 791 n.92 (new abr. ed. 1940).

69. *See supra* note 40-43 and accompanying text.

70. *See supra* note 37 and accompanying text.

71. The only time there might be a different result under the *Preble* rule is if there had been a previous controversy regarding the location of the true boundary. In such a case the adverse possessor may have had an intent to claim title to the disputed area in the event he or she was mistaken regarding the location of the true boundary, but because of the mistake, did not have a conscious intent throughout possession to claim against the true owner.

72. *See supra* text accompanying note 31.

73. P. HETRICK, *supra* note 1, § 289, at 313; Kalo, *supra* note 20, at 135.

74. N.C. GEN. STAT. § 1-42 (1983).

> In every action for the recovery or possession of real property, or damages for a trespass on such possession, the person establishing a legal title to the premises is presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person is deemed to have been under, and in subordination to, the legal title, unless it appears that the premises have been held and possessed adversely to the legal title for the time prescribed by law . . . .

Id. See, e.g., Williams v. N.C. State Bd. of Educ., 266 N.C. 761, 147 S.E.2d 381 (1966); Barbee v. Edwards, 238 N.C. 215, 77 S.E.2d 646 (1953); Conkey v. John L. Roper Lumber Co., 126 N.C. 499, 36 S.E. 42 (1900); Campbell v. Mayberry, 12 N.C. App. 469, 183 S.E.2d 867, *cert. denied*, 279 N.C. 726, 184 S.E.2d 883 (1971).

75. N.C. GEN. STAT. § 1-42 (1983).

76. *See id.* For a discussion of the law relevant to rebuttable presumptions, see 2 H. BRANDIS, BRANDIS ON NORTH CAROLINA EVIDENCE § 215, at 170-74 & n.87 (2d rev. ed. 1982).

77. A conclusive presumption is not an evidentiary device but rather a substantive rule of law. 2 H. BRANDIS, *supra* note 76, § 215, at 170-71.

to claim against the true owner, the possession cannot have been adverse.[78] This principle was the foundation of the rule of *Price* and *Gibson* in mistaken boundary cases.[79] Because the *Walls* court rejected the rule of *Price* and *Gibson*,[80] it follows that the presumption was rejected also. Thus, there was no remaining presumption to preclude adoption of the *French* rule.

The *Walls* court, however, may have refused to adopt the *French* rule expressly because it was disinclined to reject the requirements of the *Preble* rule regarding the subjective intent of the possessor.[81] The court may have believed that these requirements were necessary to resolve two situations that arguably necessitate special consideration. The general framework of the *French* rule, however, can provide for both of these situations.

In the first situation the possessor has both a conscious doubt regarding the location of the true boundary and an intent to claim only to the true boundary.[82] Arguably there should be no distinction between this situation and the typical mistaken boundary case in which the possessor honestly believes a certain line to be the true boundary and actually intends to occupy and claim up to that line.[83] Nevertheless, possession in such a case can be held not to be adverse under the *French* rule because the possessor would not have the requisite intent to possess and claim "as his own" any portion of the property that extended beyond the true boundary.[84] Although it confuses the analysis somewhat, it can be argued that because of the existence of a conscious doubt there is no mistake involved in such a case.[85] A more logical analysis simply uses an objective test of whether

78. Gibson v. Dudley, 233 N.C. 255, 258, 63 S.E.2d 630, 632 (1951) (" '[E]very possession of land is presumed to be under the true title. . . . And if the possession is by mistake or is equivocal in character, and not with the intent to claim against the true owner, it is not adverse.' ") (quoting Vanderbilt v. Chapman, 175 N.C. 11, 13-14, 94 S.E. 703, 704-05 (1917)), *overruled by* Walls v. Grohman, 315 N.C. 239, 337 S.E.2d 556 (1985).

79. *See supra* text accompanying notes 40-43.

80. *Walls*, 315 N.C. at 249, 337 S.E.2d at 562.

81. *See supra* text accompanying notes 37-39.

82. This situation is distinguished from a typical mistaken boundary case, such as *Walls*, in which the possessor honestly and firmly believes a certain line to be the true boundary and actually intends to occupy up to that line. *See Walls*, 315 N.C. at 240-42, 337 S.E.2d at 557-58.

83. If the essential elements of adverse possession are present, *see supra* notes 16-20 and accompanying text, the interest of the true owner is still impaired, regardless of any subjective doubt or intent on the part of the possessor.

84. *See supra* text accompanying notes 31-32. The problem with this analysis, however, is that the objectivity of the *French* rule is diminished by the necessity to weigh evidence regarding the subjective doubt of the possessor.

85. In fact, the court in *Walls* alluded to such a distinction when it stated:

> Where an occupant of land is in doubt as to the location of the true line it is reasonable to inquire as to his state of mind in occupying the land in dispute, and if, having such doubt, he intends to hold the disputed area only if that area is included in his deed, then it is reasonable to say that the requisite hostility is lacking; but if the occupation of the disputed area is under a mistaken belief that it is included in the description in his deed—a state of mind sometimes described as pure mistake to distinguish it from the cases of conscious doubt—then his possession is adverse.

Walls, 315 N.C. at 246, 337 S.E.2d at 560 (quoting 3 AM. JUR. 2D § 41, at 130 (1962)); *see* Norgard v. Busher, 220 Or. 297, 301, 349 P.2d 490, 492-93 (1960). The quoted passage obviously draws from the *French* rule, but it confuses the *French* analysis by requiring a determination of whether an element of subjective doubt is present.

the essential elements of adverse possession are present.[86]

The second situation is one involving a slight encroachment by mistake beyond the true boundary, such as a mistake in the placement of a fence. In North Carolina, however, a "slight encroachment" is not adverse.[87] This result can be reached under two distinct theories. Some cases have held that possession in a case of slight encroachment is not adverse because there is no intent to claim against the true owner.[88] The better view focuses on the requirement that possession be open and notorious to be adverse.[89] Under this view, which is consistent with the objective test of the *French* rule,[90] the facts of each case will determine whether the encroachment was sufficient to put the true owner on notice of its existence.[91]

Thus, there were no apparent reasons to preclude the *Walls* court from adopting the *French* rule. Furthermore, the facts of *Walls* do not support a finding under the *Preble* rule that the possession was adverse. Thus, it seems apparent that the court in *Walls* actually intended to adopt the *French* rule as the law of North Carolina. Under the express holding of the court that a landowner who occupies beyond the true boundary by mistake must "[take] possession of the land believing it to be his own and claim title thereto"[92] for the possession to be adverse, this conclusion is both reasonable and defensible.

To acquire title under the *French* rule claimants must prove only that they have been in actual possession and that the possession has been hostile and exclusive, open and notorious, and continuous and uninterrupted for the requisite statutory period.[93] This objective test is more logical, easier to apply, and more likely to yield consistent results than the subjective test of the *Preble* rule.[94] There is no need under the *French* rule to inquire whether claimants had an intent to claim the disputed area in the event a mistake was discovered, a possi-

86. *See supra* notes 16-20 and accompanying text for a description of these elements.

87. Kalo, *supra* note 20, at 138-39; Note, *supra* note 5, at 635-36. The courts have not precisely defined the term "slight encroachment," but rather have simply used it when it seemed to apply to the facts of a particular situation. Indeed, because of the factual nature of the determination in each case, the term is not particularly useful. The better method of analysis focuses on whether the particular encroachment was sufficiently open and notorious to put the true owner on notice of its existence. See *infra* note 89 and accompanying text.

88. *See* Kalo, *supra* note 20, at 138-39; *see, e.g.*, Vanderbilt v. Chapman, 175 N.C. 11, 94 S.E. 703 (1917); Waldo v. Wilson, 173 N.C. 689, 92 S.E. 692 (1917); Blue Ridge Land Co. v. Floyd, 171 N.C. 543, 88 S.E. 862 (1916); Currie v. Gilchrist, 147 N.C. 648, 61 S.E. 581 (1908); King v. Wells, 94 N.C. 344 (1886). This lack of intent to claim against the true owner was the theory of *Price* and *Gibson*. *See supra* notes 40-43 and accompanying text. That theory was rejected in *Walls*. *See supra* note 44 and accompanying text.

89. *See* Kalo, *supra* note 20, at 139. For a definition of open and notorious, see *supra* note 18.

90. *See supra* text accompanying notes 27-32.

91. *See* McLean v. Smith, 106 N.C. 172, 179, 11 S.E. 184, 186 (1890) ("The quantity of land taken into the enclosure is not so insignificant that a vigilant man would have overlooked the trespass . . . ."); Green v. Harman, 15 N.C. (4 Dev.) 158, 164 (1833) ("[W]hen the portion into which the actual entry is made, and possession taken, is very minute, . . . an owner of reasonable diligence and ordinary vigilance, might remain ignorant that it included his land . . . ."). Both of these cases were lappage cases.

92. *Walls*, 315 N.C. at 249, 337 S.E.2d at 562.

93. *See supra* text accompanying notes 27-32. These essential elements of adverse possession are discussed *supra* at notes 16-20.

94. *See* Note, *supra* note 5, at 637.

bility that most landowners never consider. Nor will claims be defeated simply because honest landowners admit that they never intended to take more than was included in their deed. Moreover, the *French* rule best serves the policy considerations behind the doctrine of adverse possession[95] by encouraging landowners to make productive use of their land and by protecting honest mistaken possessors who have remained in possession for the period prescribed by statute.[96]

By expressly rejecting the rule of *Price* and *Gibson*, a rule that has been "criticized as rewarding only the claimant who is a thief,"[97] the North Carolina Supreme Court in *Walls* also impliedly rejected the *Preble* rule because both rules require a subjective intent to claim against the true owner for possession to be adverse. The courts have not required such an intent in cases of adverse possession under color of title.[98] *Walls* therefore eliminated a significant inconsistency between the rules governing the two types of cases,[99] and substantially improved the law of adverse possession in North Carolina. The North Carolina courts should henceforth apply the objective test of the *French* rule in all adverse possession cases.

JOHN AYCOCK MCLENDON, JR.

95. *See supra* note 1.

96. Note, *supra* note 5, at 636-37.

97. *Walls*, 315 N.C. at 248, 337 S.E.2d at 561.

98. P. HETRICK, *supra* note 1, § 293, at 320 & n.62. *See supra* note 22.

99. One difference that remains between the elements necessary to establish adverse possession in cases involving color of title and those not involving color of title is the difference in the limitation periods prescribed by statute. *See supra* note 20.