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Notes and Comments

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Admiralty—Limitations Period Where Jones Act and Unseaworthiness Counts Joined

In a recent assertion[1] of the supremacy of federal maritime law the Supreme Court of the United States took a new look at a thoroughly settled doctrine[2] and had relatively little difficulty deciding that insofar as that doctrine allowed a state procedural limitation to impinge upon a federally created right it could not be applied.

Briefly, the question before the Court was whether or not a state court can apply a two-year state personal injury statute of limitations as a bar to an action based on unseaworthiness that is joined with an action for negligence under the Jones Act.[3]

Petitioner was a crew member on respondent's vessel. He was injured in a shipboard fall allegedly caused by the unseaworthy condition of the vessel. Almost three years after the accident occurred he brought suit in a Texas court, claiming damages under the Jones Act for negligence and under the general maritime law for unseaworthiness and for maintenance and cure. The trial court found for the petitioner only on the maintenance and cure count. The intermediate appellate court affirmed,[4] refusing to review any assignments of error regarding the unseaworthiness count, since in its opinion that count was barred by the two year state statute of limitations.[5] The Jones Act claim was not appealed. The Texas Supreme Court denied petitioner's application for a writ of error. The U.S. Supreme Court in "view of the importance of this ruling for maritime personal injury litigation in the state courts" granted certiorari.[6]

[1] McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958).

[2] Lex fori.

[3] Merchant Marine Act, 1920 (Jones Act), 41 STAT. 1007, 46 U.S.C. § 688 (1958). In keeping with its traditional flexibility in granting relief, admiralty courts have applied the doctrine of laches—absent any limiting statute—in determining the timeliness of the bringing of claims. The early decisions were made with reference to the "particular equitable circumstances of the case," see The Key City, 81 U.S. (14 Wall.) 653 (1871), and indeed, still are today, see Gardner v. Panama R. Co., 342 U.S. 29, 30 (1951). However, even though generally no definite time is adopted, the usual practice today is to follow by analogy the applicable state statute of limitations and to bar the claim if the statute has run, unless the libellant can show that his delay is excusable and there has been no prejudice to the defendant. See Redman v. United States, 176 F.2d 713 (2d Cir. 1949).

[4] McAllister v. Magnolia Petroleum Co., 290 S.W.2d 313 (Tex. Civ. App. 1956).

[5] TEX. CIV. STAT. art. 5526 § 6 (Vernon Supp. 1958). The maintenance and cure count was not barred. This, probably because that action is considered contractual in nature and therefore subject (by analogy) to the state statute of limitations applicable to contract actions. Claussen v. Mene Grande Oil Co., 163 F. Supp. 779 (D. Del. 1958).

[6] McAllister v. Magnolia Petroleum Co., 352 U.S. 1000 (1956).

Upon review the judgment was vacated and the cause remanded (three justices dissenting).

The Chief Justice, speaking for the majority, assumed this position: the question of whether the state statute should be applied in this action "must be determined with an eye to the practicalities of admiralty personal injury litigation."[7] Under the holding of *Baltimore S.S. Co. v. Phillips*,[8] *viz.*, that unseaworthiness and Jones Act negligence are but two aspects of a single cause of action so that a judgment on one is res judicata as to the other, it became necessary for the injured seaman to bring these two actions jointly.[9] Congress gave the seaman a full three years in which to prosecute his Jones Act claim,[10] but has remained silent as to the unseaworthiness action. But if a state applies a shorter period than three years to the unseaworthiness action it means that a seaman can join the two actions only during the shorter period. This, according to the Chief Justice, effects a limitation on the Jones Act right; a seaman is not getting "full benefit" of the maritime law if he is compelled of practical necessity to prosecute a claim within a shorter period than Congress has allotted him.[11] Since the Texas statute produced this effect it was held not to apply.

Justice Whittaker, dissenting, argued: (1) that the Jones Act and unseaworthiness rights of action are separate and distinct; (2) the state court is "bound to" apply the statute of limitations of its own state; (3) that since the majority holding is confined to those cases where the two actions are joined, the state statute will continue to apply where an unseaworthiness action is brought alone, thereby producing inconsistencies in the application of limitations periods.

Justice Brennan, in a concurring opinion, denied that the majority intended to apply the three year limitation only where the Jones Act and unseaworthiness actions were brought concurrently. He concluded that, in order to avoid a course that would be "disruptive of the desired uniformity of enforcement of maritime rights," the "three-year limitation on the Jones Act remedy . . . is the ready and logical source to draw

[7] 357 U.S. at 224.

[8] 274 U.S. 316 (1927).

[9] Not within the scope of this note, but worth mentioning, is that the long bothersome rule—gleaned from the "at his election" clause of the Jones Act—requiring election between the two "inconsistent" remedies of unseaworthiness and the Jones Act, Pacific S. S. Co. v. Peterson, 278 U.S. 130 (1938), is laid quietly at rest in the principal case by a footnote, 357 U.S. at 222, n. 2. Actually, the Court's action is little more than a post mortem "rest in peace" to a doctrine hamstrung by the circuit courts almost a decade ago. See McCarthy v. American Eastern Corp., 175 F.2d 724 (3d Cir. 1949).

[10] See 357 U.S. at 225, n. 6.

[11] Evidently, the "full benefit" doctrine, as used here by the Chief Justice, must mean that a seaman is not getting everything he should out of his Jones Act claim if (1) he is not allowed to join an unseaworthiness count with it (2) at any time during a full three years. See discussion of humanitarian doctrine in text following note 36 *infra*.

upon [by analogy] for determining the period within which this federal right may be enforced."[12]

So went the court. The holding, standing by itself, is clear enough; but whether the broad intendment of Justice Brennan can be read into it is a question of great importance to prospective litigants, who will no doubt be more than curious to know what limitations—by analogy or otherwise—will likely be applied to their claim. An analysis of the objections urged by the dissent may yield some clue, something better than a guess, as to whether the majority opinion should be sweepingly or narrowly construed.

I

One of the principal objections to the majority holding is that it is violative of the choice-of-law doctrine which here would require that whenever an unseaworthiness action is being prosecuted, the local statute of limitations governing personal injury actions be applied whether the forum be state or federal. But this doctrine merely allows the interests of the state to be interpolated into the litigation of federally created rights wherever the Congress and the judiciary have remained silent.[13] Local interests become secondary however, when such supplementation places a burden on the free exercise of such rights. Unfortunately, there exists no hard and fast rule which indicates when that burden becomes oppressive, but the broad precepts of supremacy and uniformity of the federal maritime law have provided a potent one-two combination used invariably, if not with consistent results, by the Court in resolving federal-state conflicts.[14]

A brief survey of the conflicts decisions reveals that little encroachment by the states on the maritime law has been allowed. The supremacy doctrine was used initially to declare that a state could not extend its workmen's compensation act to cover seamen.[15] Subsequently it has been employed to hold: (1) that a seaman cannot have recourse against his employer through a common law negligence action;[16] (2) that a state Statute of Frauds cannot prevent the enforcement of an oral

[12] 357 U.S. 229, 230.

[13] Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946).

[14] See Garrett v. Moore-McCormack Co., 317 U.S. 245 (1942). But see Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955).

[15] Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917). Justice McReynolds set forth in broad terms the supremacy rule: "[No state] legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations." *Id.* at 216.

[16] Chelentis v. Luchenback S. S. Co., 247 U.S. 372 (1918). The court, following the *Jensen* case, *supra* note 15, held that such an action was not a "right" known to the maritime law, nor a "remedy" within the "saving to suitors" clause of the Judiciary Act of 1789.

maritime contract;[17] (3) that a state burden-of-proof rule regarding releases must yield to a contrary maritime rule;[18] (4) that a strict state rule regarding the relation back of pleadings amendments must yield to a more flexible admiralty rule (even though an admiralty court is enforcing a state-created right);[19] and (5) that a state court cannot apply the common law contributory negligence doctrine to bar a seaman's claim, but must apply instead the maritime comparative negligence rule.[20]

On the other hand the court has held that actions brought in admiralty under state wrongful death acts are subject to defences available under the laws of the state whose statute gives the right of action.[21] Likewise, a state statute providing for the survival of a cause of action against a deceased maritime tortfeasor was found to be permissible.[22] And recently the court, finding no "established admiralty rule" with regard to marine insurance, decided that regulation of it would remain "where it has been—with the states."[23]

Without attempting to reconcile the various approaches of the court to the supremacy doctrine, it is sufficient to say that it is clear that substantive and procedural infringements, even if merely tending to restrict the flexibility of the admiralty, must yield to the maritime law. The "practical" infringement of the present case seems no less susceptible to the supremacy doctrine. The local law is no longer compatible, even in a supplemental sense,[24] when it becomes restrictive of a federal right.

II

The second objection raised by the dissent is that unseaworthiness and Jones Act actions are separate and distinct causes of action.

Admittedly the Jones Act was passed in order to give a seaman redress for injury occasioned by the negligence of officers or crew members, the older unseaworthiness action arising only from injuries caused by defects in the ship or its appliances.[25] But, however great the gap filled in by the Jones Act may once have been, for most practical purposes it ceased to exist upon the handing down of *Mahnich v. Southern S.S. Co.*, [26] which held that injury to a seaman caused by unseaworthiness brought about by the negligence of an officer of the ship, was grounds for an unseaworthiness action. This extension of the doctrine to cover operating negligence resulting in unseaworthiness, coupled with the

[17] Union Fish Co. v. Erickson, 248 U.S. 308 (1919).
[18] Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942).
[19] Levinson v. Deupree, 345 U.S. 648 (1953).
[20] Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953).
[21] Western Fuel Co. v. Garcia, 257 U.S. 233 (1921).
[22] Just v. Chambers, 312 U.S. 383 (1941).
[23] Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 at 321 (1955).
[24] Just v. Chambers, 312 U.S. 383 (1941). See text at note 22 *supra*.
[25] See 357 U.S. at 321 (discussion and citations therein).
[26] 321 U.S. 96 (1944).

assertion by Justice Stone that the shipowner had an absolute duty to furnish a seaworthy ship,[27] and with the subsequent broad interpretations of what constitutes unseaworthiness, has all but swallowed up the functions of the Jones Act.[28]

There being little left to distinguish the two actions, it is difficult to sustain the proposition voiced by the dissent that "each creates a separate and independent cause of action not covered or made redressable by the other."[29] Of greater significance however is the fact that the unseaworthiness action has virtually supplanted the Jones Act as a recovery device.[30] This being so, uniformity in its application becomes an increasingly fit object for judicial contemplation.

III

The third objection raised by the dissent is the one with the most far reaching implications; it is that the holding of the court invites inconsistency in the application of a federal maritime law.[31]

It is convenient to discuss the inconsistency objections in the light of the two doctrines invoked by the Court—supremacy and uniformity—and a third, which is impliedly observed, the humanitarian doctrine.

Inconsistent results will follow as a matter of course if a narrow view of the holding prevails, because literally interpreted it says no more than that a state limitation cannot restrict a seaman's "right" to join an unseaworthiness count with a Jones Act count as long as the latter is available. It follows that if an unseaworthiness action is brought separately no conflict could exist and hence no objection to the limitation. Thus the present case would seem to be one merely of conflicts, calling upon the supremacy of the general maritime law is its ratio decidendi.

[27] *Id.* at 103-04.

[28] "The only case which is today clearly outside the scope of the unseaworthiness doctrine is the almost theoretical construct of an injury whose only cause is an order improvidently given by a concededly competent officer on a ship admitted in all respects to be seaworthy." GILMORE AND BLACK, ADMIRALTY § 6-39, at 320 (1957).

[29] 357 U.S. at 230. Cf. Pate v. Standard Dredging Corp., 193 F.2d 498 (5th Cir. 1952), wherein it was held (with reference to section 1441(c) of the Judicial Code which provides for the removability of Jones Act actions to federal courts when coupled with a removable action) that an unseaworthiness count was not a sufficiently "separate and independent claim or cause of action" to communicate its removability to the Jones Act count.

[30] "It is safe to predict, unless the Supreme Court reverses its field a second time, that in another ten years the Jones Act will have become a faint and ghostly echo and the law of recovery for maritime injuries will be stated in terms of unseaworthiness alone." GILMORE AND BLACK, ADMIRALTY § 6-38, at 316 (1957).

[31] Suppose, for example, that in the instant case a stevedore had been injured in the same fall with McAllister, it being determined subsequently that the injuries were proximately caused by the unseaworthy condition of the ship. McAllister, by tacking on a Jones Act count had, by virtue of this decision, a full three years in which to prosecute his unseaworthiness claim; but the stevedore, since he would have had no claim under the Jones Act, would have had to bring his unseaworthiness claim separately, subject therefore to the Texas limitations period of two years.

But Justice Brennan would insert a uniformity requirement[32] to avoid the bugaboo of inconsistency, even though the case does not turn on that point and such a result is heedless of the lex fori doctrine. Yet, it would seem that the result asked for is clearly sound and amply justified. Although the majority opinion apparently addresses the problem strictly from the supremacy side, the supremacy doctrine has as its principal basis the desirability of uniformity, so that if the Jones Act limitation period is to be drawn upon, either directly or by analogy, it would be desirable for the result to be as uniform as possible.[33] Furthermore, the pre-eminent position to which the unseaworthiness action has vaulted would seem to justify clothing it with the dignity of uniformity. Finally, it may be said that local standards as to the staleness of injury claims based on federally created maritime rights are no longer competent to be applied and that the unseaworthiness action should be freed altogether from the vagaries of fifty-odd legislative opinions.

If, then, the uniformity requirements laid down in the concurring opinion are followed, the limitation period applied to unseaworthiness actions would be the same in all cases and inconsistency objections would be obviated.

One other factor remains to be considered along with the supremacy and uniformity doctrine. It stems from the long clung-to principle that seamen are wards of the admiralty.[34] This paternal attitude is invoked as the "humanitarian" doctrine, the effect of which has been largely to insure that these "poor and friendless" wards recover for all their maritime injuries. The net result is that humanitarian considerations have played a major part in shaping the present law governing recovery for maritime injury,[35] and it may well be that such considerations prevail over all others.[36] Indeed, it would seem that the ultimate basis for the decision in the instant case is the humanitarian doctrine, the supremacy doctrine being merely adjunctive to the result. It has been noted that this case resolves a conflicts problem; but in order for a conflict to be established with a state law there must be, of course, some federal maritime rule with which it competes. Allowance of the joinder of unseaworthiness and Jones Act counts *so long as* the latter is available has never been held a federal right. But apparently, the Court, thinking it desirable to give the seaman this benefit, fashioned a new

[32] Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) and Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942). See discussion 357 U.S. at 230.

[33] See Garrett v. Moore-McCormack Co., 317 U.S. 239, at 244, 245 (1942).

[34] See 321 U.S. at 103-104.

[35] *Id.*

[36] "Since the court has repeatedly emphasized the humanitarian grounds for its decisions in this field since the early 1940's, it seems arguable that the Hawn rule is not so much a rule of federal supremacy as a rule that seamen are to have the advantage in any court of whatever rules of law, substantive, or procedural, may be most favorable to them." GILMORE AND BLACK, ADMIRALTY § 6-60, at 384 (1957).

rule to that effect, determined that the state rule conflicted therewith, and by virtue of the supremacy doctrine held that the state rule could not be applied.

CONCLUSION

It would seem that an injured seaman's attorney has a choice of courses to pursue, and may stress any one or a combination of the three doctrines, depending upon the position of his client. If, for instance, he is seeking to prosecute an unseaworthiness claim (not joined with a Jones Act count) after the local statute of limitations has run but before three years had passed from the date of his injury, he could stress the uniformity argument advanced by Justice Brennan, contending that the three year limitation period of the Jones Act was intended to be applied to all unseaworthiness actions, conjoined with a Jones Act count or not. If, on the other hand, he is attempting to prosecute a claim before the state statute has run, but after three years time, he could point out that the holding of *McAllister* is confined to situations in which unseaworthiness counts are joined with Jones Act counts and is therefore inapplicable to his case. In either case he could probably successfully invoke the "humanitarian" doctrine, contending in the first instance, that the *McAllister* decision was intended to give all maritime workers the benefit of at least three years time in which to begin the prosecution of their claims, and in the second instance that if he isn't allowed to prosecute his claim beyond three years, as the state statute allows, he is being deprived of "full benefit" of his federal right.

However, if supremacy and uniformity are to mean anything at all, it is submitted that a court called upon to construe this decision should use Justice Brennan's opinion as a guide, and strictly apply the three year Jones Act limitation by analogy. The security to litigants, if not deference to Congress, afforded by this approach would more than justify giving such a "legislative" interpretation to the holding. Certainly, in the light of the recent judicially-wrought metamorphosis of the maritime law, it would cause few blushes.

ROBERT B. EVANS

Civil Procedure—Additur—Power of Court to Increase Jury Award

Generally, courts have long accepted remittitur[1] as a procedural device by which they can, with the plaintiff's consent,[2] reduce the

[1] Neese v. Southern Ry., 350 U.S. 77 (1955); Gila Valley, G. & N. Ry. v. Hall, 232 U.S. 94 (1914); Blunt v. Little, 3 Fed. Cas. 760, No. 1578 (C.C.D. Mass., 1822); New Hampshire Fire Ins. Co. v. Curtis, 264 Ala. 137, 85 So. 2d 441 (1955); Stallcup v. Rathbun, 76 Ariz. 63, 258 P.2d 821 (1953); Hyatt v. McCoy, 194 N.C. 760, 140 S.E. 807 (1927); Tice v. Mandel, 76 N.W.2d 124 (N.D. 1956).

[2] Defendant's consent is not needed. If both plaintiff and defendant consent to the judgment, the need for remittitur is eliminated and the court may enter

amount of an excessive jury award as a condition to denying defendant's motion for a new trial on the ground of excessive damages. They have, however, been reluctant[3] to accept additur.[4] Additur is a procedural device by which courts, with the defendant's consent, increase the amount of an inadequate jury award as a condition to denying plaintiff's motion for a new trial on the ground of inadequate damages.[5]

When the validity of additur is questioned in a jurisdiction which permits the use of remittitur, three courses are open to the court: it may (1) permit the use of additur in light of its accepted use of remittitur,[6] (2) deny the use of additur, yet allow the use of remittitur[7] or (3) deny the use of additur with an indication that the use of remittitur will be denied in the future.

In the recent case of *Caudle v. Swanson*,[8] additur received its first examination by the North Carolina court. Plaintiff-builder brought suit to recover the unpaid building costs of a house. The jury returned a verdict of $6,192 for the plaintiff. The trial court found that the award was inadequate,[9] and, with the defendant's consent, increased it by $500. The plaintiff excepted to the use of this procedure, contending that it deprived him of his right to trial by a jury as guaranteed by the Constitution of North Carolina.[10] Rejecting the plaintiff's contention, the court approved the use of additur on the basis of its established recognition of remittitur.[11]

The same constitutional objection as raised by the plaintiff in the principal case is voiced by defendants in remittitur cases.[12] In those

a consent judgment. King v. King, 225 N.C. 639, 35 S.E.2d 893 (1945); Jones v. Griggs, 223 N.C. 279, 25 S.E.2d 862 (1943).

[3] Some states have provided for the use of additur by statute. See, *e.g.*, R.I. GEN. LAWS ANN. Ch. 23 § 9-23-1 (1956); WASH. REV. CODE § 4.76.030 (1952).

[4] This Note is limited to the use of additur in cases involving unliquidated damages. An increase in damages by the court, in cases involving liquidated damages, is not subject to the same criticism since in those cases the amount of damages is fixed and the only issue for the jury is the fact of liability. Fornara v. Wolpe, 26 Ariz. 383, 226 Pac. 203 (1924); Harris v. McLaughlin, 39 Colo. 459, 90 Pac. 93 (1907).

[5] Dimick v. Schiedt, 293 U.S. 474 (1935); Dorsey v. Barba, 38 Cal. 2d 350, 240 P.2d 604 (1952); Genzel v. Halvorson, 248 Minn. 527, 80 N.W.2d 854 (1957); Bodon v. Suhrmann, 8 Utah 2d 42, 327 P.2d 826 (1958).

[6] Genzel v. Halvorson, *supra* note 5; Bodon v. Suhrmann, *supra* note 5.

[7] Dimick v. Schiedt, 293 U.S. 474 (1935); Dorsey v. Barba, 38 Cal. 2d 350, 250 P.2d 604 (1952).

[8] 248 N.C. 249, 103 S.E.2d 357 (1958).

[9] Generally, the plaintiff makes a motion for a new trial because of inadequacy of damages and the court, as a condition to denial of this motion, accepts the defendant's consent to the increased verdict. However, there is no indication in the record that plaintiff made such a motion here.

[10] N.C. CONST. art. 1, § 19.

[11] Cohoon v. Cooper, 186 N.C. 26, 118 S.E. 834 (1923); Isley v. Bridge Co., 143 N.C. 51, 55 S.E. 416 (1906).

[12] Arkansas Valley Land and Cattle Co. v. Mann, 130 U.S. 69 (1889); Hughes v. Hearst Publications, Inc., 79 Cal. App. 2d 703, 180 P.2d 419 (1940); Sewell v. Sewell, 91 Fla. 982, 109 So. 98 (1926); Henderson v. Dreyfus, 26 N.M. 541, 191 Pac. 442 (1919); Weatherspoon v. Stackland, 127 Ore. 450, 271 Pac. 741 (1928).

cases, the court's answer is that the defendant has no right to complain because the reduction benefits him by requiring him to pay less than the amount awarded by the jury. By the same token, our court reasoned that the plaintiff had no right to complain about the use of additur since he was in fact benefited by its use.

It is argued that a trial by jury necessarily implies a trial by a properly functioning jury.[13] Thus, if the trial court must increase the jury award so that the damages will not be inadequate, it is obvious that the jury has not functioned properly. And, though the plaintiff has benefited by the use of the additur procedure, it is conceivable that a properly functioning jury at a new trial might award greater damages than those awarded with the use of the additur procedure.[14] It is also contended that a trial by jury includes a determination by the jury of both the existence of liability and the amount of damages to be awarded. When a court resorts to the use of additur, it cannot be said that the jury determined the final amount of damages awarded.[15] Has the plaintiff had his right to a jury trial when the final amount of damages awarded was found by the trial court and not by the jury?

In the principal case it was stated that the defendant waived his constitutional right to trial by jury by consenting to the use of the additur procedure. The consenting defendant pays a reasonable amount determined by the trial court; however, the non-consenting defendant is faced with a new trial, additional expenses, and the gamble as to what the new jury will award. Might it not be said that this is a legalized coercive type consent? Of course, if there were no coercion it is highly unlikely that defendants would consent.

The court in *Caudle* stated that if they held the trial court lacked the power to increase the verdict by $500, they "would be required to remand the case for a judgment upon the verdict in the sum of $6,192."[16] The implication of this language is that the court was of the opinion that the original jury verdict was adequate or, at least, not so inadequate as to warrant a new trial[17] for abuse of discretion. Since the trial court, by its use of additur, indicated that the verdict was inadequate, would it not have been more accurate for the Supreme Court to have

[13] Note, 21 VA. L. REV. 666 (1935).

[14] In Wisconsin, the defendant may prevent a new trial by consenting to an increased verdict which equals the maximum amount of damages which could be awarded as a matter of law. Campbell v. Sutliff, 193 Wis. 370, 214 N.W. 374 (1927); Note, 27 MARQ. L. REV. 86 (1943).

[15] Carlin, *Remittiturs and Additurs*, 49 W. VA. L. Q. 1 (1942).

[16] 248 N.C. at 261, 103 S.E.2d at 366.

[17] "While the judgment recites the trial court was of opinion that the amount of damages awarded was inadequate, he did not exercise the power of discretion vested in him to set the verdict aside on that ground, and, in our opinion, it cannot be said that his refusal was an abuse of his discretion." 248 N.C. at 256, 103 S.E.2d at 362.

said, instead, that if additur was improper they would remand the case to the trial court for exercise of its discretion, and not for "judgment on the verdict"?

As indicated above it appears that the additur procedure denies the plaintiff his right to trial by jury; however, in light of the remittitur precedent in North Carolina, our court's decision rests on logical ground.

NICK J. MILLER

Constitutional Law—Discretionary Power of the Secretary of State to Deny Passports

The power of the Secretary of State to deny passports for reasons other than those established by congressional legislation was rejected by the Supreme Court in the recent case of *Kent v. Dulles*.[1] To understand adequately the problem involved in that case it is necessary to review briefly the historical and legal background of the present passport laws.[2]

Originally, passports were issued by a multiplicity of federal, state, and local officers.[3] A statute[4] enacted in 1856 and, with minor amendments, codified in 1926 changed this practice. This statute remains the basis of the present passport laws. Its pertinent provision reads:

> "The Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports."

The Secretary assumed that under this statute and the executive order issued pursuant to it[5] he had the discretionary power to deny a passport. Until recently that power had never been questioned.[6]

[1] 357 U.S. 116 (1958).

[2] This Note will deal with the Secretary's power to deny passports and with the substantive grounds for such denial. It will consider only incidentally the related problem of procedural due process in the denial of passports.

[3] See 357 U.S. at 123.

[4] 11 STAT. 60 (1856) (later amended by 44 STAT. 887 (1926), 22 U.S.C. § 211a (1952)).

[5] Exec. Order No. 7856 (1938), 22 C.F.R. §§ 51.1-.77 (1958). This order outlined certain procedural rules and in § 51.77 authorized the Secretary to promulgate additional regulations not inconsistent therewith.

[6] The first case mentioning passports in the Supreme Court was Urtetiqui v. D'Arcy, 34 U.S. (9 Pet.) 692 (1835), where the Court, in a frequently quoted dictum, described the passport as a political document whose issuance was in the sole discretion of the Secretary. Briefly stated, the basis of the viewpoint thus expressed was that the inherent power of the Chief Executive to exercise sole discretion in conducting foreign affairs encompassed the issuance of passports, because the traveler's activities abroad might conflict with our foreign policy and because the government was in some measure obligated to protect citizens abroad. For a good exposition of this point of view, see Briehl v. Dulles, 248 F.2d 561,

A passport has never been a prerequisite to travel in peacetime.[7] A 1918 statute,[8] making it unlawful for a person to leave or enter the United States without a passport while a presidential proclamation of war was in force, was so amended[9] early in 1941 that the President might invoke its provisions in the then-existing emergency. The statute, altered so that it could be invoked in *any* national emergency, was re-enacted in 1952.[10] The necessary proclamations were made so that continuously since 1941 a passport has been a legal prerequisite to exit from the United States.[11] In the light of this requirement, the power of the Secretary of State to deny passports has assumed a new importance and has been subjected to a critical re-examination.[12]

Beginning in the late 1940's the State Department began rejecting passport applications on the ground that issuance to the applicant in question would be "against the best interests" of the United States.[13] This practice was first challenged in *Bauer v. Acheson*[14] where the Federal District Court for the District of Columbia recognized the constitutional right of a citizen to travel[15] and held that the right could

566-68 (D.C. Cir. 1957). This, combined with the supposed statutory authority under the cited legislation, was generally thought to give the Secretary a two-fold basis for his actions.

[7] It is merely a convenience in international travel, its chief use being to establish the citizenship of the bearer. 357 U.S. at 121. Persons denied a passport have generally traveled without one.

[8] 40 STAT. 559 (1918). [9] 55 STAT. 252 (1941).

[10] 66 STAT. 190 (1952), 8 U.S.C. § 1185(b) (1952).

[11] The statute was invoked in 1941 before the United States entered World War II. Proclamation No. 2523, 55 STAT. 1696 (1941). This period ended in 1952 by Proclamation No. 2974, 66 STAT. C31 (1952). But the provisions of the statute were extended several times, eventually to April 1, 1953. 66 STAT. 54, 57, 96, 137, 330, 333 (1952). The Korean crisis was declared by Proclamation No. 2914, 64 STAT. A454 (1950). This, however, did not invoke the statute, which at that time was restricted in its terms to the World War II emergency. The 1952 act, applying to *any* emergency, was invoked in January, 1953, prior to the expiration of the statutory extension of the World War II proclamation. Proclamation No. 3004, 67 STAT. C31 (1953). Thus the prohibition was continuously in effect from 1941.

[12] Dayton v. Dulles, 357 U.S. 144 (1958); Kent v. Dulles, 357 U.S. 116 (1958); Kraus v. Dulles, 235 F.2d 840 (D.C. Cir. 1956); Robeson v. Dulles, 235 F.2d 810 (D.C. Cir.), *cert. denied*, 352 U.S. 895 (1956); Boudin v. Dulles, 235 F.2d 532 (D.C. Cir. 1956); Shachtman v. Dulles, 225 F.2d 938 (D.C. Cir. 1955); Dulles v. Nathan, 225 F.2d 29 (D.C. Cir. 1955); Bauer v. Acheson, 106 F. Supp. 445 (D.D.C. 1952).

[13] From the nature of the transaction involved there is no public record of a number of such "best interests" denials. In most cases it appeared that the refusal was based on the applicant's membership in the Communist party or his affiliation with the Communist cause. See Comment, 61 YALE L.J. 171 (1952), for a documented collection of individual instances of such refusals prior to the first court test.

[14] 106 F. Supp. 445 (D.D.C. 1952) where plaintiff had her passport revoked without notice or hearing. The Secretary was ordered to restore it or accord the plaintiff a hearing.

[15] The existence of this right has not been disputed in any of the cases in this field, yet the courts have some difficulty in finding an authoritative basis for it. There is no clear historical evidence to rely on for its existence, and the framers of the Bill of Rights make no mention of it. The cases in general draw heavily

not be denied without according the citizen the procedural due process requirements of notice and hearing. Presumably, as a result of this decision the Secretary promulgated regulations listing membership in the Communist party or affiliation with the Communist movement as substantive grounds for denial and establishing administrative procedures for appeal of passport denials.[16]

The first court test of a substantive ground for denial of a passport was in *Shachtman v. Dulles*.[17] Here the applicant had been given a "best interests" denial because he was the president of an organization on the Attorney General's list of subversive organizations. The court found that the grounds for denial employed by the Secretary were not related to foreign affairs on that level which was beyond the power of the courts to review, generally termed the political level. Thus the Secretary could not rely solely on his discretion for such denial. Strengthened by the admission of the Secretary that the passport might have been granted but for the Attorney General's listing, the court held the denial arbitrary and thus invalid. It is to be noted that in this case the Secretary did not rely on any of his written regulations in denying the passport, so that they were not called into question. The importance of the case lies in the court's assertion of the right to review the substantive grounds of a denial and its invalidation of those grounds upon finding them to be arbitrary and to lie in an area where the Secretary could not exercise his discretion arbitrarily. This, by implication, acknowledged that in the area reasonably related to foreign affairs on the political level the Secretary has absolute discretion which is not reviewable.[18]

Other cases appealing passport denials were disposed of on procedural or other grounds that are not relevant here.[19]

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on an analogy to the right of interstate travel cited in Williams v. Fears, 179 U.S. 270 (1900). Until recently there was argument as to whether such a right should be based on the first or the fifth amendment. The Supreme Court in the instant case resolved the arguments by stating that such a right exists and that it is an element of "liberty" protected by the fifth amendment. 357 U.S. at 125-27.

[16] 22 C.F.R. §§ 51.135-.142 (1958). Sections 51.135-.136 establish the substantive grounds for denial. The following sections provide for administrative procedure, including the establishment of the Board of Passport Appeals. Section 51.142 provides that at any stage of the process of application or appeal the applicant may be required to execute under oath as part of the application a statement as to past and present membership in the Communist party. This requirement has figured prominently in several cases herein discussed.

[17] 225 F.2d 938 (D.C. Cir. 1955).

[18] In the similar case of Kraus v. Dulles, 235 F.2d 840 (D.C. Cir. 1956), the court held that denial of a passport to the applicant because he still owed the State Department for paying his way home previously and because he refused to show that he was in such financial condition that this would not happen again was held to be arbitrary, since it did not appear to be a test applied to all applicants. Note that here, as in *Shachtman*, the grounds relied on were not in the Secretary's written regulations.

[19] Robeson v. Dulles, 235 F.2d 810 (D.C. Cir.), *cert. denied*, 352 U.S. 895

Kent v. Dulles, presenting squarely for the first time the question of the Secretary's discretionary authority to deny passports, is the first passport case to reach the Supreme Court since World War II.[20] The cases of Rockwell Kent, the artist, and Walter Briehl, a psychiatrist, were combined for this appeal from the United States Court of Appeals for the District of Columbia.[21] The facts are identical in their important details. Petitioners applied for passports and were tentatively refused because of their Communist affiliations. Each refused to execute an affidavit concerning past or present membership in the Communist party. Each was accorded an informal hearing and was later informed that in view of his refusal to execute the affidavit the Board of Passport Appeals could not give further consideration to his appeal. Each brought suit, and in each suit summary judgment was awarded the Secretary of State. On appeal the court of appeals divided, the majority finding that the Secretary had the statutory authority to deny passports on the grounds stated and that denial on these grounds was constitutional.

The Supreme Court reversed this decision by a vote of five to four. It stated without too much discussion that the right to travel is an element of "liberty" protected by the fifth amendment, so that a citizen could not be deprived of it without due process of law. The Court found that the political function of the passport had become subordinate to that of control over exit so that issuance could no longer be argued to be within the sole discretion of the Chief Executive. Summarily dismissing the possibility that the regulation could be made under the war power at the present time, it concluded that Congress alone had the power to establish substantive grounds for denial of passports.

Finding no *specific* delegation of authority by Congress, the Court considered whether Congress, in legislating on passport regulations, had by implication made the administrative practice of denying passports to Communists part of the law. It found that at the time of the 1926 act grounds for denial had "jelled" into two categories, allegiance to the United States and participation in illegal conduct.[22] The Court found that the grounds in question fell into neither of these categories, and it

(1956); Boudin v. Dulles, 235 F.2d 532 (D.C. Cir. 1956); Dulles v. Nathan, 225 F.2d 29 (D.C. Cir. 1955).

[20] Dayton v. Dulles, 357 U.S. 144 (1958), decided on the same day as *Kent,* presented the question of the constitutionality of the use of confidential information by the Secretary in denying passports. It was disposed of on the grounds stated in *Kent.*

[21] Kent v. Dulles, 248 F.2d 600 (D.C. Cir. 1957); Briehl v. Dulles, 248 F.2d 561 (D.C. Cir. 1957).

[22] The first of these is based on a statute. 14 STAT. 54 (1866), as amended, 22 U.S.C. § 212 (1952). As authority for the second the Court cites 3 MOORE, DIGEST OF INTERNATIONAL LAW § 512 (1906); 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW § 268 (1942); and 2 HYDE, INTERNATIONAL LAW § 401 (2d rev. ed. 1945).

refused to impute to Congress in passing the 1952 act, making a passport necessary to travel, a purpose not already clearly established in administrative practice.[23] It therefore held that the Secretary did not have the power to deny passports in his sole discretion as he had claimed, either by the inherent power of the Chief Executive or by congressional delegation of the power.

The Court explicitly refused to treat the constitutional merits of the substantive grounds for denial the Secretary had employed, construing the statutes involved strictly so as to avoid the question. But the whole decision is written in a context that leaves little doubt but that it entertains grave misgivings about the constitutionality of these regulations. Its language categorizing the practice of the Secretary of State as a denial of the right to travel because of political beliefs and associations[24] admits of no other inference.

The minority argued[25] that the intent of Congress in passing the legislation making a passport a prerequisite to travel was to sanction just such practices as were challenged by the plaintiffs in this case. It questions the majority's summary dismissal of the applicability of the war power of the Chief Executive to the present situation. Indeed, it says that rather than being irrelevant, the war-time practice may be the only relevant one, since passports are a prerequisite for travel only during proclaimed periods of war or emergency. It would hold that the war power would sanction such regulation as is challenged by the plaintiff in this case. On these grounds the dissenters would affirm the Secretary's power to make such denials.

The logic of the minority seems to the writer sounder than that of the majority. Yet as a matter of law the result reached by the majority seems to be the better view under the circumstances. Delegation by Congress of the power to regulate individual rights should be explicit and unequivocal.[26] It should not be found in implied ratification of an administrative practice. In refusing to do so the majority was pursuing a sound policy.

[23] The Court relied somewhat on the fact that there was a statute on the books dealing with issuance of passports to Communists. Internal Security Act of 1950, 64 STAT. 987, 50 U.S.C. §§ 781-98 (1952). It felt that even though certain conditions precedent to its becoming operative had not yet been fulfilled, this statute, in the absence of any other specific legislation on the subject, pre-empted the field and negated the inference that Congress might have sanctioned any regulation under the statutes on which the Secretary relied. It would seem that in view of the fact that the Internal Security Act is a criminal statute, not yet effective, and not a delegation of restrictive power to the Secretary who issues passports, this argument is of doubtful validity.

[24] 357 U.S. at 130.

[25] *Ibid.*

[26] For three excellent examples of such a policy on the part of the Court, see United States v. Rumely, 345 U.S. 41, 46 (1953) (House of Representatives resolution); Hannegan v. Esquire, Inc., 327 U.S. 146, 156 (1946) (federal statute); *Ex parte* Endo, 323 U.S. 283, 301-02 (1944) (executive order).

The impact of the decision in *Kent* on the practical problem of regulating passports is unfortunate. It leaves the Secretary powerless to deny passports save on the limited grounds approved in that decision. There is a real and pressing necessity for such regulation.[27] The problem admits of no uncertainty in its solution, for it is vital to the interests of the nation as a whole.

The Communist party openly seeks as its ultimate goal world revolution; to attribute to it any lesser aim is to ignore the essence of its existence. We need cite no authority that its machinations are the greatest concern of our government today. Statements to the effect that denial of a passport on the basis of membership in the Communist party or adherence to its cause is denial merely on the basis of "political beliefs and associations" are open to serious question. It is hoped that the use of such language by the majority in *Kent* was inadvertent.

That the exigencies of the moment should be used as grounds for denial of constitutional rights is contrary to the basic principles of free government.[28] But, on the other hand, it must be recognized that there is a problem that touches on the well-being of the nation, and that there are citizens whose purposes in going abroad justify their being forced to forfeit their rights. The problem must be to find some way to determine, using substantive criteria established by congressional authority and standard procedures that protect the individual from arbitrary action, whether the individual in question deserves to forfeit his right to travel.

E. OSBORNE AYSCUE, JR.

Constitutional Law—Little Rock School Litigation—Re-examination of North Carolina Laws

> [T]he Constitutional rights of children not to be discriminated against in school admission on grounds of race or color . . . can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously."[1]

With these words, the Supreme Court in *Cooper v. Aaron*[2] emphati-

[27] This necessity is evidenced by the fact that several days after this decision was handed down the President sent a message to Congress urging legislation delegating the power to regulate to the Secretary. It read in part: "I wish to emphasize the urgency of the legislation I have recommended. Each day and week that passes without it exposes us to great danger." 104 CONG. REC. 11849 (1958). The Eighty-fifth Congress adjourned without having acted on this problem.

[28] *Ex parte* Endo, 393 U.S. 283 (1944).

[1] Cooper v. Aaron, 358 U.S. 1, 17 (1958) quoting from Smith v. Texas, 311 U.S. 128, 132 (1940).

[2] 358 U.S. 1 (1958).

cally rejected the application of the Little Rock School Board for a two and one-half year suspension of its court-approved[3] desegregation program. In order to fully appreciate the import of this decision, a brief review of its background is necessary.

On May 17, 1954, the Supreme Court, in the *Brown* case,[4] held that enforced racial segregation in the public schools of a state denied the equal protection of the laws guaranteed by the fourteenth amendment. The Court expressly overruled the "separate but equal" doctrine of *Plessy v. Ferguson*[5] which had been relied on by the southern states for almost fifty years. However, the Court delayed formulation of a decree to effectuate this decision pending further argument. This decree was rendered May 31, 1955,[6] and called for the district courts concerned to require "a prompt and reasonable start toward full compliance"[7] with the *Brown* ruling and to take such action as was necessary to bring about the end of racial segregation in the public schools "with all deliberate speed."[8]

The Court pointed out that once such a start had been made, the courts might find that additional time was necessary to carry out the ruling in an effective manner, but that the burden was on the defendants to establish that such time was necessary.

Following these decisions, the Little Rock District School Board formulated a plan for desegregation. This plan was approved by the district court[9] and in pursuance thereof, nine Negroes were scheduled to be admitted in September 1957 to Central High School which had over 2,000 students. This plan failed, however, when the Governor of the state dispatched units of the Arkansas National Guard to the school grounds and placed the school "off limits" to colored students.[10] Upon investigation, the district court found that the Governor was obstructing the court-approved plan of desegregation and entered a preliminary injunction against him and officers of the National Guard enjoining prevention of the attendance of Negro children at Central High School, and other obstruction or interference with the orders of the court in connection with the desegregation plan.[11] The National Guard was removed and on Monday, September 23, 1957, the nine Negro children entered the high school under the protection of the

[3] Aaron v. Cooper, 143 F. Supp. 855 (E.D. Ark. 1957), *aff'd*, 243 F.2d 361 (8th Cir. 1957).
[4] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).
[5] 163 U.S. 537 (1896).
[6] Brown v. Board of Education of Topeka, 349 U.S. 294 (1955).
[7] *Id.* at 300. [8] *Id.* at 301.
[9] Aaron v. Cooper, 143 F. Supp. 855 (E.D. Ark. 1957), *aff'd*, 243 F.2d 361 (8th Cir. 1957).
[10] Cooper v. Aaron, 358 U.S. 1 (1958).
[11] Aaron v. Cooper, 156 F. Supp. 220 (E.D. Ark. 1957), *aff'd*, Faubus v. United States, 254 F.2d 797 (8th Cir. 1958).

Little Rock Police Department. They were removed, however, because of difficulties in controlling a large and demonstrating crowd which had gathered.

On September 25, 1957, the President dispatched federal troops to the school and the Negro students were admitted.[12] Later the federal troops were replaced by federalized National Guardsmen who stayed at the school for the remainder of the school year.

In February 1958, the School Board filed a petition in the district court seeking a postponement of its program of desegregation.[13] It was contended that because of the extreme public hostility, attributed by the Supreme Court to the attitudes of the Governor and the legislature, a sound education system could not be maintained with the attendance of the Negro students at Central High School.

The district court granted the relief requested by the board.[14] This was reversed by the court of appeals[15] and the reversal was affirmed by the Supreme Court in the present litigation.[16]

Although the Court was called upon to decide only one narrow point, *viz.*, whether or not open hostility by the people of a state toward a School Board's plan for desegregation is sufficient reason to warrant a delay of such plan, it very painstakingly stated its position regarding the whole school desegregation problem. With its assertion that no evasive scheme to avoid desegregation would be tolerated whether it be attempted "ingeniously or ingenuously"[17] it indicated that no plan would be allowed to circumvent the order of the Court.

Is North Carolina affected by this decision? This state has a three-fold plan for dealing with the problems posed by the *Brown* decision.[18] It consists of (1) a pupil assignment law vesting authority in the local school boards to assign students residing within their administrative

[12] See Pollitt, *Presidential Use of Troops to Execute the Laws: A Brief History*, 36 N.C.L. Rev. 117 (1957).

[13] Aaron v. Cooper, 163 F. Supp. 13 (E.D. Ark. 1958).

[14] Aaron v. Cooper, *supra* note 13. The 1955 *Brown* case language to the effect that additional time might be necessary to carry out the ruling in an effective manner once a start had been made was construed to mean that such time would be allowed when necessary to preserve the public peace. The Supreme Court, however, rejected this view and quoted from Buchanan v. Warley, 245 U.S. 60, 81 (1917), as follows: "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."

[15] Aaron v. Cooper, 257 F.2d 33 (8th Cir. 1958).

[16] The Court rendered the decision September 12, 1958, but the opinion was not given until September 29, 1958.

[17] *Ingenious* means talented, clever, shrewd, or inventive while *ingenuous* implies high-mindedness or candor. Webster's New International Dictionary.

[18] For an excellent discussion of North Carolina's new legislative enactments and constitutional amendments on education, see Wettach, *North Carolina School Legislation*, 35 N.C.L. Rev. 1 (1956).

units to a public school,[19] (2) an amendment to the state constitution which provides for education expense grants to be given to students to enable them to attend private schools under certain conditions, and[20] (3) an amendment to the constitution known as the local option plan whereby the people of a local unit may close their schools when a majority of its electorate so desires.[21]

This plan originated in the report of a committee[22] appointed by Governor William B. Umstead and headed by the Honorable Thomas J. Pearsall, "to study the difficult and far reaching problems"[23] presented by the *Brown* decision. Under the heading of "Recommendations and Conclusions," the committee reported *inter alia,* the following:

> The mixing of the races forthwith in the public schools throughout the State cannot be accomplished and should not be attempted. The schools of our State are so intimately related to the customs and feelings of the people of each community that their effective operation is impossible except in conformity with community attitudes. The Committee feels that the compulsory mixing of the races in our schools, on a State-wide basis and without regard to local conditions and assignment factors other than race, would alienate public support of the schools to such an extent that they could not be operated successfully.[24]

This report, along with the brief that the state had filed in the *Brown* case,[25] was "approved as a declaration of the policy of the state"[26] by the North Carolina General Assembly.

In order to implement this policy, the North Carolina General Assembly, on the Pearsall committee's recommendation, enacted the Pupil

[19] N.C. GEN. STAT. §§ 115-176 through -179 (1955).
[20] N.C. CONST. art. IX, § 12.
[21] *Ibid.*
[22] This committee was first entitled the Special Advisory Committee on Education and was later denominated the North Carolina Advisory Committee on Education. It is commonly referred to as the Pearsall Committee.
[23] N.C. Sess. Laws (1955), Resolution 29, at 1692.
[24] *Id.* at 1693.
[25] Although North Carolina was not a party to the litigation in the *Brown* case, it was invited to file a brief amicus curiae. This brief, the purpose of which was to aid the Supreme Court in formulating a plan to effectuate its 1954 desegregation decision, stated: "The people of North Carolina know the value of the public school. They also know the value of a social structure in which two distinct races can live together as separate groups, each proud of its own contribution to that society and recognizing its dependence upon the other group. They are determined, if possible, to educate all of the children of the State. They are also determined to maintain their society as it now exists with separate and distinct racial groups in the North Carolina community.
"The people of North Carolina firmly believe that the record of North Carolina in the field of education demonstrates the practicability of education of separate races in separate schools. They also believe that the achievements of the Negro people of North Carolina demonstrate that such educational system has not instilled in them any sense of inferiority which handicaps them in their efforts to make lasting and substantial contributions to their State." Quoted in N.C. Sess. Laws (1955), Resolution 29, at 1693.
[26] N.C. Sess. Laws (1955), Resolution 29, at 1693.

Assignment Act[27] as the first part of the three-fold plan. Without mentioning race, the act merely directs each local school board[28] to assign the children within the school district "so as to provide for the orderly and efficient administration of the public schools, and provide for the effective instruction, health, safety, and general welfare of the pupils."[29] Pursuant to this plan, the local school boards have to date assigned thirteen Negro children to what were formerly white schools. This is in accord with the declared policy of the state[30] to allow each local unit to decide whether or not it desires to desegregate.

Assuming that it is constitutional on its face,[31] is the plan constitutional in its context and application? Resolution 29 recites that "the mixing of the races in the public schools within the State cannot be accomplished and if attempted would alienate public support of the schools to such an extent that they could not be operated successfully."[32] But this very reason for postponing integration was asserted by the Little Rock School Board and rejected by the Supreme Court in the *Cooper* decision. Reading this state "policy" into the Pupil Assignment Act as it now functions, it is believed that the Supreme Court would find it either an "ingenious" or an "ingenuous" scheme by the state to deprive Negro rights of the equal protection of the laws.[33] It is not to be doubted that the courts will be quick to strike down any action by

[27] N.C. GEN. STAT. §§ 115-176 through -179 (1955).

[28] Prior to these amendments, N.C. GEN. STAT. § 115-352 (1952) provided that school children attend school within the district in which they resided unless assigned elsewhere by the State Board of Education. The only criteria for making an assignment outside the district in which the student resided was when it was more economical for the efficient operation of the schools.

[29] N.C. GEN. STAT. § 115-176 (1955). This new legislation authorizes each local board of education to assign students residing within its administrative unit to a public school whether such school is within its administrative unit or not.

[30] N.C. GEN. STAT. § 115-176 (1955).

[31] In Carson v. Warlick, 238 F.2d 724 (4th Cir. 1956), it was contended that the North Carolina Pupil Enrollment Act (denominated Pupil Assignment Act by 1956 amendment) was unconstitutional on its face because it vested discretion in an administrative body without adequate standards for the exercise of this discretion. The court held that, as to this contention, it was not unconstitutional on its face. Alabama's school placement law, which like North Carolina's makes no mention of race, was declared constitutional on its face in Shuttlesworth v. Birmingham Board of Education, 162 F. Supp. 372 (N.D. Ala. 1958), *aff'd*, 27 U.S.L. WEEK 3159 (U.S. Nov. 25, 1958), in spite of legislative resolutions adopted before passage of the placement law which indicated an intention not to follow the *Brown* case. However, it must be noted that the School Board denied the petitioners' allegations that they were denied the right to attend the white public schools solely on the basis of race and the court found no evidence to indicate that this was the sole reason for such denial. *But see* Adkins v. School Board of Newport News, 148 F. Supp. 430 (E.D. Va. 1957), *aff'd*, 246 F.2d 325 (4th Cir. 1957), where Virginia's school placement plan, when considered in the light of its legislative history, was held to be so patently bad as to be unconstitutional on its face.

[32] N.C. Sess. Laws (1955), Resolution 29, 1692-93.

[33] In the Virginia case, *supra* note 31, the court held that inasmuch as the criteria for assignment was based partly on the race of the applicant, that it was a violation of the constitutional provision guaranteeing equal protection of the laws.

the local school boards pursuant to the plan which appears to be motivated by race.

The second part of the plan recommended by the committee is found in a 1956 amendment to the constitution and in legislative statutes of the same year.[34] These provisions authorize "payment of education expense grants from any State or local public funds for the private education of . . . a child who is assigned against the wishes of his parents . . . to a public school attended by a child of another race."[35] However, no child shall be eligible for such a grant unless he attends a private school "recognized and approved under"[36] and "found to be in compliance with"[37] article 32 of the North Carolina General Statutes on Education.[38] Since this is an integral part of the state's program designed to cope with the *Brown* decision, these grants, like the Pupil Assignment Act, may be viewed in the light of the legislature's declared policy, and if so viewed, their authorization would be constitutionally suspect.[39] Furthermore, in *Rice v. Elmore*,[40] the court held that the

[34] N.C. CONST. art. IX, § 12; N.C. GEN. STAT. §§ 115-274 through -295 (1955).
[35] N.C. CONST. art. IX, § 12.
[36] N.C. GEN. STAT. § 115-282 (1955).
[37] N.C. GEN. STAT. § 115-285 (1955).
[38] N.C. GEN. STAT. §§ 115-255 through -257 (1955). Private schools in North Carolina cannot operate lawfully at any time unless they are regulated and supervised by the State Board of Education and meet the standards required of the public schools with respect to the following: (a) grading of instruction (b) promotion of pupils (c) the courses of study for each grade (d) the manner in which these courses are conducted (e) the qualifications and certification of teachers.

The fourteenth amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." It is state action which is prohibited by the Constitution and not purely private action. As the Court said in *Ex parte* Virginia, 100 U.S. 339, 347 (1879): "The constitutional provision, therefore, must mean that no agency of the State . . . shall deny to any person within its jurisdicton the equal protection of the laws." It is submitted that the amount of private regulation embodied in N.C. GEN. STAT. §§ 115-255 through -257 (1955) might induce a holding that such schools are agencies of the state so that denial of admission to Negroes by them because of race would be unconstitutional. Certainly it has taken far less state regulation to class as state action what is in form private action. See Terry v. Adams, 345 U.S. 461 (1953), where a private Texas organization held pre-primary elections to determine their candidates for the state primaries and restricted its membership to white persons. The Court found this discrimination to be state action although the Court split as to the reasons for its conclusion.

[39] That the purpose for these grants is to avoid the desegregation order of the *Brown* decisions cannot fairly be denied. Section 115-274 of the North Carolina General Statutes states in part that "Our people need to be assured that no child will be forced to attend a school with children of another race in order to get an education. It is the purpose of the State of North Carolina to make available, under the conditions and qualifications set out in this article, education expense grants for the private education of any child of any race residing in this State." The courts have already struck down two evasive schemes which were designed to avoid the desegregation order. See Aaron v. Cooper, 27 U.S.L. WEEK 2236 (8th Cir. Nov. 18, 1958), where private corporations leased state buildings to conduct schools on a segregated basis and Allen v. Charlottesville School Board, 27 U.S.L. WEEK 2173 (D.C. Va. Oct. 14, 1958), where the State of Virginia paid teachers to teach in private, segregated schools.

[40] 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948).

Democratic party must allow Negroes to vote in its primary elections even though the state had repealed all laws which related to the Democratic party and it was functioning as a club. The court reasoned that since primaries had become a part of the machinery for choosing public officials, they should be subject to the same tests of discrimination as those applied to general elections. If North Carolina private schools admitted pupils who had availed themselves of state tuition grants, might not the Court hold that these institutions thus became agencies of the state, fulfilling the functions of the public schools, and require that admission to these private schools be granted to Negroes on a non-discriminatory basis?[41]

The third and final part of the Pearsall plan is found in article IX[42] of the constitution and supplementing legislation of 1956. It permits any board of education to "call for an election on the question of closing the public schools"[43] and directs the board of education to suspend the operation of such public schools "when a majority of the votes cast in such election are in favor"[44] of suspending the schools. This plan has not yet been put into operation and consequently has not been tested. However, suits testing the constitutionality of the Arkansas and Virginia school closing plans are now pending. In Virginia, the litigants contend among other things that closing the schools in Norfolk while leaving Richmond schools open denies Norfolk children equal protection of the laws. Another possible argument is that legislation by the state authorizing the closing of a previously segregated *white* school if a Negro exercises his constitutional right to attend it is the use of a governmental power to enforce segregation, and, hence is unlawful.[45]

In conclusion, it must be noted that the Supreme Court in the *Cooper* decision not only announced a decision, it also expressed a mood. It went out of its way to point out that state officials take an oath of office to support the Constitution of the United States and hence are obligated to comply with the spirit as well as the terms of the desegregation decisions. One suspects that all plans aimed at continued segregation of

[41] The authorization of such grants by the state might be subject to attack from still another angle. Any taxpayer who had not availed himself of such grants could seek to enjoin this expenditure of state funds on the grounds that this would be a non-public use of public funds in violation of the due process clause of the fourteenth amendment. Teer v. Jordan, 232 N.C. 48, 59 S.E.2d 359 (1950), states that a taxpayer has the legal right to bring an action against the state or any agency which is using public funds for an unlawful purpose.

[42] N.C. CONST. art. IX, § 12.

[43] N.C. GEN. STAT. § 115-265 (1955).

[44] *Ibid.*

[45] Professor Douglas B. Maggs of the Duke University Law School included this argument in a prepared statement to a Joint Meeting of the Special Session of the North Carolina General Assembly on the Legislation Proposed by the North Carolina Advisory Committee on Education. (unpublished in University of North Carolina Law School Library, 1956).

school children will be nullified as either "ingenious" or "ingenuous" attempts to evade the Constitution, a document which, as has been said, is "colorblind."[46]

ROBERT G. WEBB

Constitutional Law—Military Jurisdiction Over Civilians

In the last two decades the United States has been confronted with a major world war and a police action in Korea. These have necessitated wholesale conscription of millions of American citizens to supply the armies needed, and the additional use of citizens in civilian capacities to complement these armies. In such situations the military requires prompt and efficient means of dealing with personnel who commit acts threatening the discipline and morale of the armed forces. Resort was made to the age-old military tribunal, the court-martial.[1] Thus during war time courts-martial have long exercised jurisdiction over uniformed military personnel and civilians accompanying the armed forces in the field.[2]

However, upon cessation of hostilities, there arises the question of continued military jurisdiction over persons who committed crimes while on active duty but were separated prior to being charged with such crimes. The general rule was that a discharge or separation divested the military of jurisdiction.[3] In *United States ex rel. Hirshberg v. Cooke*,[4] the Supreme Court held this rule applicable to one who was discharged and immediately re-enlisted, reasoning that courts-martial could not assume jurisdiction without a grant of congressional authority.

This case motivated Congress,[5] in enacting the new Uniform Code of Military Justice[6] (hereafter referred to as UCMJ), to include article 3(a),[7] a provision retaining military jurisdiction over serious offenders

[46] Mr. Justice Harlan dissenting in Plessy v. Ferguson, 163 U.S. 537, 559 (1896).

[1] For a concise historical development of courts-martial, see WINTHROP, MILITARY LAW AND PRECEDENTS 45-51 (2d ed. reprint 1920).

[2] See, *e.g.*, Caldwell v. Parker, 252 U.S. 376 (1920); Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858); Perlstein v. United States, 151 F.2d 167 (3d Cir. 1945); *Ex parte* Campo, 71 F. Supp. 543 (S.D.N.Y.), *aff'd sub. nom.* United States *ex rel.* Campo v. Swenson, 165 F.2d 213 (2d Cir. 1947); *In re* Berue, 54 F. Supp. 252 (S.D. Ohio 1944); McCune v. Kilpatrick, 53 F. Supp. 80 (E.D. Va. 1943).

[3] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 14 (1951); MANUAL FOR COURTS-MARTIAL, U.S. ARMY, 9 (1949).

[4] 336 U.S. 210 (1949).

[5] H.R. REP. No. 491, 81st Cong., 1st Sess. 5, 11 (1949); S. REP. No. 486, 81st Cong., 1st Sess. 8 (1949).

[6] 10 U.S.C. §§ 801-940 (Supp. V, 1958).

[7] "[N]o person charged with having committed, while in a status in which he was subject to this chapter, an offense against this chapter, punishable by confinement for five years or more and for which the person cannot be tried in the courts of the United States . . . may be relieved from amenability to trial by court-martial by reason of the termination of that status." 10 U.S.C. § 803(a) (Supp. V, 1958).

who had been lost to courts-martial by reason of a termination of their code status. Of equal constitutional significance is article 2(11),[8] which grants military jurisdiction over all "persons serving with, employed by, or accompanying the armed forces" without the continental limits of the United States. These two jurisdictional provisions and their application to persons not in uniform are the subject of this Note.

The constitutionality of article 3(a) was squarely presented in *United States ex rel. Toth v. Quarles*,[9] where it was held that petitioner, a discharged ex-serviceman who had severed all connections with the military, could not constitutionally be tried by court-martial for offenses against UCMJ committed while on active duty overseas. The Court emphasized that the necessity for compelling obedience and order in the military authorized Congress, under its power to make rules for the regulation of the land and naval forces,[10] to establish courts-martial. However, the Constitution did not authorize Congress to expand court-martial jurisdiction to include civilians whose relationship with the military had been severed by discharge. The amenability of such civilians to military tribunals had no proper relationship to continued maintenance of order and discipline of the services, hence they could not be deprived of the right to a trial by jury in a civil court.

When the constitutionality of article 2(11) was presented in 1956 the Supreme Court held,[11] relying on the principle that constitutional guarantees do not extend beyond the boundaries of the United States,[12] that Congress could constitutionally subject civilian wives, accompanying their servicemen-husbands overseas, to trial by court-martial for the murder of their husbands. On rehearing the following year the Court in *Reid v. Covert*[13] reversed itself and held that the Constitution necessarily follows the flag since all authority for governmental action abroad is derived from the Constitution. Thus, American citizens accompanying the military overseas were entitled to the safeguards of the Bill of Rights.[14] Four Justices thought that the power to make regulations for the land and naval forces did not encompass persons who could not fairly be said to be *in* the military service, although they recognized that there might be circumstances where a person could be *in* the armed services even though he had not formally been inducted into the military. They concluded that *dependents* of servicemen were not *in* the military for purposes of trial by court-martial, stating that *"a statute cannot be*

[8] 10 U.S.C. § 802(11) (Supp. V, 1958).
[9] 350 U.S. 11 (1955).
[10] U.S. CONST. art. I, § 8, cl. 14.
[11] Kinsella v. Krueger, 351 U.S. 470 (1956); Reid v. Covert, 351 U.S. 487 (1956), 35 N.C.L. REV. 157.
[12] Dorr v. United States, 195 U.S. 138 (1904); *In re* Ross, 140 U.S. 453 (1891).
[13] 354 U.S. 1 (1957).
[14] U.S. CONST. amend. I-IX.

framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace."[15] The two concurring Justices[16] limited their holding to capital cases involving dependents in peace time.

In *United States ex rel. Guagliardo v. McElroy,*[17] the *Covert* holding was held inapplicable to a civilian employee of the Air Force convicted and sentenced by court-martial under the authority of article 2(11) for conspiracy[18] to commit larceny.[19] Noting that federal courts prior to UCMJ had also sustained military jurisdiction in similar cases,[20] the court reasoned that civilian employees may be deemed part of the military since certain civilians are indispensable to its operations. Following this reasoning a later district court decision[21] held a civilian employed by the military in France amenable to court-martial for premeditated murder.[22]

In the recent case of *Wheeler v. Reynolds,*[23] involving article 3(a), a district court held an inactive reservist amenable to court-martial jurisdiction for a murder he allegedly committed while on active duty in Germany. Distinguishing the *Toth* case, the court found an assignment to the inactive reserve did not operate as a discharge so as to deprive the military of jurisdiction. However, prior to UCMJ it was held[24] that an assignment to the inactive reserve was the equivalent of a discharge, and the court refused to allow the reservists to be recalled to active duty for the sole purpose of trial by court-martial. That the discharge should no longer be the determinative factor since the passage of UCMJ is shown by a case,[25] involving a fact situation essentially the same as *Hirshberg,* where the Military Court of Appeals held that a discharge did not divest courts-martial of jurisdiction for offenses committed during a former enlistment when the accused immediately reenlisted. Morale, discipline, and good order required punishment for offenders still serving in the armed forces.

From the foregoing it appears that a discharged ex-serviceman who has severed all relations with the military may not constitutionally be

[15] 354 U.S. at 35, quoting from WINTHROP, *op. cit. supra* note 1, at 107.
[16] 354 U.S. at 41, 65 (concurring opinions).
[17] 158 F. Supp. 171 (D.D.C. 1958).
[18] 10 U.S.C. § 881 (Supp. V, 1958).
[19] 10 U.S.C. § 921 (Supp. V, 1958).
[20] The court cited: Hines v. Mikell, 259 Fed. 28 (4th Cir. 1919); McCune v. Kilpatrick, 53 F. Supp. 80 (E.D. Va. 1943); *Ex parte* Jochen, 257 Fed. 200 (S.D. Tex. 1919); *Ex parte* Falls, 251 Fed. 415 (D.N.J. 1918). It should be noted that these cases held only that the military could try civilians employed by the services *in the field* during time of war.
[21] Grisham v. Taylor, 161 F. Supp. 112 (M.D. Pa. 1958).
[22] 10 U.S.C. § 918 (Supp. V, 1958).
[23] 164 F. Supp. 951 (N.D. Fla. 1958).
[24] United States *ex rel.* Viscardi v. MacDonald, 265 Fed. 695 (E.D.N.Y. 1920); United States *ex rel.* Santantonio v. Warden, 265 Fed. 787 (E.D.N.Y. 1919). The courts stated that inactive reservists were civilians subject to recall into active service only "in time of war or national emergency." It is conceivable that the same reasoning would apply today. See 10 U.S.C. § 672(a) (Supp. V, 1958).
[25] United States v. Gallagher, 7 U.S.C.M.A. 506, 22 C.M.R. 296 (1957).

tried by court-martial for offenses committed while he was in uniform.[26] However, military jurisdiction is not lost when the serviceman immediately re-enlists[27] or retains an inactive reserve status.[28] Civilian dependents accompanying the armed forces abroad may not be subjected to a military trial in peace time when charged with a capital crime.[29] Whether this reasoning will be applied in civilian dependent non-capital cases remains to be seen. However, a civilian employed by the armed services abroad is deemed to have military status and consequently is amenable to military jurisdiction,[30] even in capital cases.[31] It will be interesting to see if the Supreme Court agrees that civilian employees and inactive reservists are in the land and naval forces for purposes of military trial in peace time.

RICHARD VON BIBERSTEIN, JR.

Constitutional Law—Police Power—Changed Economic Condition of Railroads Judicially Applied in Determining Reasonableness of Ordinance

The generally accepted test as to the constitutionality of an exercise of the police power[1] is whether under all the existing conditions and surrounding circumstances it is reasonable;[2] *i.e.*, it must be reasonably adapted to accomplish a legitimate end,[3] be reasonable toward persons whom it affects,[4] must not be for the annoyance of a particular class,[5] nor be unduly oppressive.[6] Reasonableness is a question of law for the

[26] United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).
[27] United States v. Gallagher, 7 U.S.C.M.A. 506, 22 C.M.R. 296 (1957).
[28] Wheeler v. Reynolds, 164 F. Supp. 951 (N.D. Fla. 1958).
[29] Reid v. Covert, 354 U.S. 1 (1957).
[30] United States *ex rel.* Guagliardo v. McElroy, 158 F. Supp. 171 (D.D.C. 1958); *In re* Varney's Petition, 141 F. Supp. 190 (S.D. Cal. 1956).
[31] Grisham v. Taylor, 161 F. Supp. 112 (M.D. Pa. 1958).

[1] Police power, although elusive of definition, has been defined as "the power inherent in every sovereignty to govern men and things, under which power the legislature may, within constitutional limits, not only prohibit all things hurtful to the comfort, safety, and welfare of society, but may prescribe regulations to promote the public health, morals, and safety, and add to the general public convenience, prosperity, and welfare." 11 AM. JUR., *Constitutional Law* § 247 (1937).

[2] Austin v. Shaw, 235 N.C. 722, 71 S.E.2d 25 (1952); Berger v. Smith, 156 N.C. 323, 72 S.E. 376 (1911). It has been suggested, however, that an exercise of the police power may be reasonable and yet unconstitutional. Soref, *The Doctrine of Reasonableness in the Police Power,* 15 MARQ. L. REV. 3 (1930).

[3] "It is necessary . . . that the proposed restriction have a reasonable and substantial relation to the evil it purports to remedy." State v. Harris, 216 N.C. 746, 759, 6 S.E.2d 854, 863 (1940). See also East Side Levee and Sanitary Dist. v. East St. Louis & C. Ry., 279 Ill. 123, 116 N.E. 720 (1917); Victory Cab Co. v. Shaw, 232 N.C. 138, 59 S.E.2d 573 (1950).

[4] East Side Levee & Sanitary Dist. v. East St. Louis & C. Ry., *supra* note 3; State v. Bass, 171 N.C. 780, 87 S.E. 972 (1916).

[5] Plessy v. Ferguson, 163 U.S. 537 (1896); Town of Clinton v. Standard Oil Co., 193 N.C. 432, 137 S.E. 183 (1927).

[6] Plessy v. Ferguson, *supra* note 5.

court,[7] and is said to be based on human judgment, natural justice, and common sense in view of all the facts and circumstances.[8] The application of the police power may vary as social, economic, and political needs change;[9] therefore, what was once a proper exercise of such power may later become arbitrary and unreasonable as a result of changed conditions and circumstances.[10]

Winston-Salem v. Southern Ry.[11] is a recent North Carolina decision wherein the foregoing principles were applied. In this case it appeared that the plaintiff had been given power by its city charter[12] to require any railroad company "at its own expense, to construct, maintain and repair . . . crossings at grade, over or under its streets . . . ."[13] Pursuant to this power, the Board of Aldermen of Winston-Salem enacted an ordinance[14] requiring the defendant to rebuild, at its entire expense, an existing trestle over a municipal street so as to accommodate a proposed intracity thoroughfare which was to cross the street under the trestle. Writ of mandamus[15] was requested to enforce the ordinance.

Defendant challenged the provisions of both the charter and the ordinance on the ground that they were arbitrary, unreasonable, and unconstitutional, and contended, *inter alia,* that the instant case was factually distinguishable from the numerous cases cited by the plaintiff

[7] Durham v. Southern Ry., 185 N.C. 240, 117 S.E. 17 (1923).

[8] Bonnett v. Vallier, 136 Wis. 193, 116 N.W. 885 (1908).

[9] Elizabeth City v. Aydlett, 201 N.C. 602, 161 S.E. 78 (1931) (police power expands); State v. Lockey, 198 N.C. 551, 152 S.E. 693 (1930) ("The police power is elastic, stretching out to meet the progress of the age.")

"It is more accurate to say, however, that the power itself remains the same, and that its apparent extension is only the application of the principle on which it is based to new conditions as they arise." State *ex rel.* Short v. Reidall, 109 Okla. 35, 39, 233 Pac. 684, 687 (1924); *accord,* Schmidt v. Board of Adjustment, 9 N.J. 405, 88 A.2d 607 (Sup. Ct. 1952).

[10] Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935) ("A statute valid as to one set of facts may be invalid as to another."); Abie State Bank v. Bryan, 282 U.S. 765 (1931) (assessments under bank guaranty law); Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924) (post war rent controls); Atlantic Coast Line R.R. v. Ivey, 148 Fla. 680, 5 So. 2d 244 (1941) (statute making railroads absolutely liable for injury to livestock on unfenced track, and no such liability put on motor vehicles); Realty Revenue Corp. v. Wilson, 181 Misc. 802, 44 N.Y.S.2d 234 (Sup. Ct. 1943) (order requiring sprinkler systems in multiple dwellings held invalid where material not obtainable due to war). See also Note, 40 CORNELL L.Q. 780 (1955).

Likewise, a once improper regulation may later become proper. Miller v. Board of Pub. Works, 195 Cal. 477, 234 Pac. 381 (1925) (zoning laws); Elizabeth City v. Aydlett, 201 N.C. 602, 161 S.E. 78 (1931) (zoning laws). For this reason a few jurisdictions state that stare decisis has no application to the exercise of police power. Schmitt v. F. W. Cook Brewing Co., 187 Ind. 623, 120 N.E. 19 (1918); State *ex rel.* George v. Aiken, 42 S.C. 222, 20 S.E. 221 (1894).

[11] 248 N.C. 637, 105 S.E.2d 37 (1958).

[12] The General Assembly may delegate to a municipality a quantum of the state's sovereign police power. Brewer v. Valk, 204 N.C. 186, 167 S.E. 638 (1933).

[13] N.C. Private Laws 1927, c. 232, § 54. [14] Adopted April 15, 1957.

[15] As to mandamus being the proper remedy, see 2 ELLIOTT, RAILROADS § 1013 (4th ed. 1926), and cases there cited.

in which similar statutes and ordinances were upheld.[16] In support of its position, defendant introduced into evidence special facts[17] tending to show changed economic conditions unfavorable to the railroads. The trial court, without reference to these special facts, granted mandamus.[18] On appeal the supreme court reversed, holding that the ordinance (also the provision of the charter) was unconstitutional, as applied to the facts of the case, in that it was an unreasonable exercise of the police power, depriving the defendant of its property without due process of law in violation of the Constitution of North Carolina.[19]

[16] Where an ordinance, in the interest of public safety, convenience, or welfare, requires the railroad to construct or reconstruct passageways over or above streets and highways, whether existing at the time such passageway is constructed or not, the majority view is that such an ordinance is valid as a reasonable exercise of the police power. Atchison, Topeka & Santa Fe Ry. v. Public Util. Comm'n, 346 U.S. 346 (1953); Erie R.R. v. Board of Pub. Util. Comm'rs, 254 U.S. 394 (1921); Chicago, Milwaukee & St. Paul Ry. v. Minneapolis, 232 U.S. 430 (1914); Cincinnati, I. & W. Ry. v. City of Connersville, 218 U.S. 336 (1910). The theory of these cases is that the public has a superior right to the safe and unimpeded use of the streets and highways, that the railroad is obstructing such use, and that the cost to the railroad is *damnum absque injuria,* or deemed to be compensated by the public benefit which the company is supposed to share. Erie R.R. v. Board of Pub. Util. Comm'rs, *supra;* Missouri Pac. Ry. v. Omaha, 235 U.S. 121 (1914).

The great weight of authority refuses to recognize any distinction, as pertains to railroad liability, between streets laid out previous to or subsequent to the existence of the railroad track. 44 AM. JUR., *Railroads* § 297 (1942), and cases there cited.

It is interesting to note that in State v. Wilmington & Weldon R.R., 74 N.C. 143 (1876), the railroad was not required to repair a bridge where such repairs were made necessary by roads laid out subsequent to the existence of the railroad. An opposite result was reached in Atlantic Coast Line R.R. v. Goldsboro, 155 N.C. 356, 71 S.E. 514 (1911), *aff'd,* 232 U.S. 548 (1914). Though it might be argued that these variant decisions rest on differences in the respective charters, the *Goldsboro* case, *supra,* quotes with approval the majority theory as found in State *ex rel.* Minneapolis v. St. Paul, M. & M. Ry., 98 Minn. 380, 108 N.W. 261, (1906), *aff'd mem.* 214 U.S. 497 (1909), *viz.,* "A railroad . . . accepts . . . its franchise subject to the implied right of the state to lay out and open new streets and highways over its tracks, and must be deemed, as a matter of law, to have had in contemplation at the time its charter was granted, and is bound to assume, all burdens incident to new, as well as existing, crossings."

The principal case seems passively to accept the majority view.

[17] The special facts are, in essence, the following:

(1) Large-scale competition from trucks and public carriers has resulted in economic hardship for railroads, and costs of trestle improvements cannot be passed to the public by higher freight rates.

(2) The City of Winston-Salem has at its disposal, for street improvements, over $500,000 yearly, obtained from *ad valorum* taxes on motor vehicles and from gasoline taxes.

(3) Benefit of trestle construction no longer goes to railroads through creation of "feeders" which bring business to the railroads, but rather, the benefit goes to the railroads' competitors.

(4) There is a growing legislative trend toward relieving the railroads of some or all of such costs.

[18] Mandamus was issued July 24, 1957, by Resident Judge Walter E. Johnston, Jr., who found as fact that "the trestle of the defendant as now located constitutes an unreasonable and dangerous interference with and will endanger and impede and obstruct traffic on [the proposed street] . . . and constitutes a danger to the traveling public for the City of Winston-Salem." Transcript of Record, p. 179, Winston-Salem v. Southern Ry., 248 N.C. 637, 105 S.E.2d 37 (1958).

[19] N.C. CONST. art. I, § 17.

In the principal case, the court noted a lack of evidence that the present underpass was dangerous to existing traffic at the underpass, and in that respect distinguished it from cases based primarily on the safety factor.[20] It is admitted by the court that when the proposed street is built it will have to narrow considerably in order to pass through the existing trestle, and that in fact a hazardous situation will result at this bottleneck. The court disposes of this rather summarily, however, with the statement that "this situation of possible danger would be entirely of the *City's* making in its attempt to eliminate traffic congestion, originating principally in other areas of the City . . . ." (Emphasis added.)[21] The implication from such language is that the railroad would not be held liable for the cost, even in the event that a hazardous bottleneck subsequently occurs, so long as the situation is caused by factors unconnected with the location and operation of the railroad. The soundness of this implication should be considered in connection with the three cases which follow.

In *State ex rel. Minneapolis v. St. Paul, M. & M. Ry.*,[22] a somewhat novel situation arose when the city constructed, at its own expense, a new street and trestle through the railroad's embankment. The street was designed as a thoroughfare (as in the principal case) manifestly to aid the flow of traffic in other parts of the city. The trestle subsequently burned and the city directed the railway, at its entire expense, to build a new trestle. The court, in an elaborate decision, upheld the city's power.[23]

In *Atlantic Coast Line R.R. v. Goldsboro*,[24] streets were laid out subsequent to the existence of railroad tracks. The town graded the streets parallel to the tracks, leaving the tracks six to eighteen inches higher than the streets. The court upheld an ordinance requiring the

[20] See, *e.g.*, Durham v. Southern Ry., 185 N.C. 240, 117 S.E. 17 (1923), in which mandamus was granted to enforce an ordinance requiring the railway to separate a grade crossing and construct a street underpass at its entire expense of $250,000, where the tracks were crossed by thousands of pedestrians and motorists every day, several accidents had occured, and where traffic was obstructed by trains and switching engines. Likewise, in Shreveport v. Kansas City, S. & G. Ry., 167 La. 771, 120 So. 290 (1929), where the street underpass originally served street traffic and one street car track; twenty years later there were two street car tracks and barely room for two lanes of motorist traffic; the city's population had doubled; and the underpass was a hazard, the railway was forced to rebuild the underpass at its entire expense of $43,000.

[21] 248 N.C. at 650, 105 S.E.2d at 46.

[22] 98 Minn. 380, 108 N.W. 261 (1906), *aff'd mem.*, 214 U.S. 497 (1909).

[23] The underpass was said to be analogous to a grade crossing safety device, the only difference being one of relative cost, and not of principle.

Quaere: Assuming that the city under its charter has power to require railroads to construct safety devices at crossings of new roads, could not the court in the principal case have decided in favor of the city on the basis of this analogy? Would the hesitance to accept such an analogy indicate that the objection was one of principle, or of extra cost?

[24] 155 N.C. 356, 71 S.E. 514 (1911), *aff'd*, 232 U.S. 548 (1914).

railroad, at its entire expense, to lower the tracks in the interest of public safety and convenience.

In *Atchison, Topeka & Santa Fe Ry. v. Public Util. Comm'n*,[25] the railroad, in 1914, constructed two adjoining street underpasses, the principal uses of which were to give access to a garbage disposal plant. The City of Los Angeles, in order to alleviate traffic conditions in other parts of the city, subsequently (in the late 1940's) built a main thoroughfare boulevard sixty feet wide which narrowed to twenty feet at the underpasses, thereby causing a bottleneck. The Utilities Commission, empowered by statute to allocate costs, required the railroad to pay fifty per cent of the cost of reconstructing the underpasses. In affirming the allocation, the United States Supreme Court said: "[T]he improvements were instituted . . . to meet local transportation needs and further safety and convenience, made necessary by the rapid growth of the communities. In such circumstances, this Court has consistently held that in the exercise of the police power, the cost . . . *may be* allocated all to the railroads. . . . There is the proper limitation that such allocation of costs must be fair and reasonable."[26]

In each of the latter three cases the railroad was held liable for at least a proportionate part of the expense, notwithstanding that the hazards and inconveniences were "entirely of the City's making."

Having ruled that public danger, either existing or prospective (as a result of a probable bottleneck), has no bearing on this case, the court states that this case is one of public convenience, designed to relieve traffic congestion in other parts of the city; that where the location of the railroad is not a reasonably related causative factor in producing the inconvenience sought to be remedied, the railroad cannot be held liable for the entire expense. The court would seem to restrict the railroad's liability for public inconvenience to cases of traffic congestion caused by the location of a particular grade crossing.[27]

It is important to note that there are cases of public convenience in which no traffic congestion—indeed, no traffic—existed prior to the construction of an underpass or overpass. These cases should be compared to the principal case in that respect.

In *Cincinnati, I. & W. Ry. v. City of Connersville*,[28] the city extended

[25] 346 U.S. 346 (1953). [26] *Id.* at 352.

[27] For example, in one of the consolidated cases of *Atchison, Topeka, & Santa Fe Ry. v. Public Util. Comm'n*, a grade crossing, often blocked by trains, caused a considerable backlash of traffic; no danger was involved. The Court upheld the commission order requiring the railroad to pay almost $750,000 (half of the total cost) to construct an underpass so as to alleviate the inconvenience. Likewise, in State *ex rel.* Wabash Ry. v. Public Serv. Comm'n, 340 Mo. 225, 100 S.W.2d 522 (1936), the railroad was required to build an underpass, since the existing grade crossing was causing delay, congestion, and general inconvenience to motorists and pedestrians in a public park.

[28] 218 U.S. 336 (1910).

its city limits to include the railroad tracks, then constructed a new street up to the railroad embankment and required the railroad to provide, at its own expense, an underpass for the new street. The United States Supreme Court upheld the action of the city.

In a later United States Supreme Court decision, *Chicago, Milwaukee & St. Paul Ry. v. Minneapolis*,[29] the railroad tracks were situated between two lakes used for recreation. The City of Minneapolis proposed to connect the two lakes by means of a canal in order that pleasure boats could pass from one lake to the other. The Court held that no constitutional rights of the railroad had been violated by virtue of its being required to build a bridge over the canal, at its entire expense, for the convenience of passing boats.[30]

It is submitted that the principal case cannot be distinguished from cases cited in support of the plaintiff on the ground that the location of the existing trestle does not cause public inconvenience; nor does the court *purport* to distinguish the present case on such ground. Rather, the court states: "The uncontroverted special facts shown in evidence or of which the courts may take judicial notice, as herein pointed out,[31] disclose changed economic conditions bearing favorably on the financial condition of the City but unfavorably on that of the railway company, and factually distinguish the instant case from the decisions cited by the City and take the case out of the principles relied upon by it as authority to sustain the validity of its ordinance."[32]

Fifty years ago, trestle costs were not unfairly imposed on the railroads, since in most cases they benefited directly by a reduction in tort claims through the elimination of dangerous grade crossings,[33] or indirectly in that new roads acted as "feeders," transporting business to and from the railroad.[34] Even in cases where no benefit can be found,[35] there was no burden on the railroad, since the costs were easily passed on to the ultimate consumers of rail-carried goods.

[29] 232 U.S. 430 (1914).

[30] The Court reiterated the rule set out in the *Connersville* case, stating: "It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings but also to build and maintain suitable bridges or viaducts to carry highways, *newly laid out*, over their tracks . . . ." (Emphasis added.) *Id.* at 438.

For the theory behind the holdings of the *Connersville* and *Minneapolis* cases, see note 16, *supra*.

Note that the street underpass now in dispute in the principal case was constructed by the railway in 1923, at its entire expense, pursuant to a resolution by the city in order to make way for the *new* city street constructed up to the railway's embankment; the railway apparently never questioned the fact that such was its duty.

[31] See note 17 *supra*.

[32] 248 N.C. at 655, 105 S.E.2d at 50.

[33] See, *e.g.*, Erie R.R. v. Board of Pub. Util. Comm'rs, 254 U.S. 394 (1921).

[34] See, *e.g.*, Cincinnati, I. & W. Ry. v. City of Connersville, 218 U.S. 336 (1910).

[35] See, *e.g.*, Chicago, Milwaukee & St. Paul Ry. v. Minneapolis, 232 U.S. 430 (1914).

Today the imposition of such costs is not always so fair and justifiable. New streets which were once "feeders" for the benefit of the railroads are now avenues of convenience for the benefit of the railroads' competitors—the trucks and public carriers. Costs which once could be passed to the public in the form of higher shipping rates must now be absorbed by the railroads, since to raise rates would mean loss of business to competitors.

It would seem that the North Carolina court is the first to apply the dictum of Justice Brandeis, in *Nashville, C. & St. L. Ry. v. Walters*,[36] which judicially recognizes the significance of the changing economic position of the railroads brought about by increased competition.

Municipalities should take notice of the implications of the principal case—that fairness of allocation of trestle construction costs on the railroad will in large part be determined by the present economic and competitive positions of the railroads, including the relative economic status of the railroad and municipality. Economic position, benefit[37] or detriment, local necessity for the construction, and purpose of the construction—all must be considered as factors in determining the reasonableness and fairness of the cost imposition. Apparently, then, municipalities will find little solace in precedent decisions which ignore such considerations.[38]

LOUIS J. FISHER III

[36] 294 U.S. 405 (1935). The Tennessee Supreme Court was held in error for ruling that a police regulation requiring the railroad to pay 50% of the costs of a new underpass was valid on its face, and that evidence of changed conditions could not be admitted. The United States Supreme Court did not say that the excluded evidence showed that the regulation *was* arbitrary or unreasonable, but only that the evidence of changed conditions should be examined as *possibly* affecting the reasonableness of the regulation. The excluded evidence showed that the underpass proposed was not necessary nor requested by the rural community of 1,823 inhabitants using the crossing; that the proposed highway was a link in the federal interstate system which would manifestly further the convenience of motor carriers in competition with the railroad. Justices Stone and Cardozo dissented on the ground that even in view of all these facts the regulation could not be held to be arbitrary or unreasonable.

For discussions of the *Nashville* case, see Notes, 13 N.C.L. REV. 491 (1935) (predicting changes in railroad law), 23 CALIF. L. REV. 631 (1935), 13 CHI.-KENT L. REV. 262 (1935), 44 YALE L.J. 1259 (1935).

Recognition of the change in economics and competition as discussed in the *Nashville* case is found in dictum of Austin v. Shaw, 235 N.C. 722, 71 S.E.2d 25 (1952).

[37] The principal case does not go so far as to hold that fairness depends solely on benefit derived, though defendant sought this result. This theory was expressly negated in the recent United States Supreme Court case of Atchison, Topeka & Santa Fe Ry. v. Public Util. Comm'n, 346 U.S. 346 (1953).

[38] Although the decision of the principal case was particularly favorable to the railroads, it must not be assumed that the court protected the interest of railroads at the expense of the public interest; it is more probable that the court recognized that the best interest of the public lies in preventing the too-rapid decline of the railroad industry.

As to the railroads' decline and effect on national economy and defense, see 25 ICC PRAC. J. 836 (1958).

Constitutional Law—President's Power to Remove Non-Executive Officeholder

The War Claims Commission was established[1] to adjudicate claims for compensating internees, prisoners of war, and religious organizations who suffered personal injury or property damage at the hands of hostile governments during World War II. The creating statute[2] contained no provision for removal of members of the Commission by the President. Myron Wiener was appointed to the Commission by President Truman and removed by President Eisenhower who wanted it staffed with personnel of his own selection. Wiener brought an action in the Court of Claims to recover the salary he would have received from the date of his removal until the dissolution of the Commission alleging that the President had no authority to remove him. The Court of Claims dismissed the action stating that absent *express congressional limitation* the President has power to remove an official who exercises quasi-judicial or quasi-legislative functions.[3] The Supreme Court reversed[4] on the ground that no removal power exists unless it could fairly be said that *Congress had conferred* such power on the President.

The controversy surrounding the scope of the President's power of removal has a history dating back to the first Congress.[5] The Supreme Court was first called on to decide whether or not Congress could *limit* this power in the case of *Myers v. United States*.[6] Myers had been appointed a first class postmaster for a term of four years pursuant to an act of Congress which provided for his removal "by and with the advice and consent of the Senate."[7] Even though the President had not consulted the Senate, the Supreme Court sanctioned his action in removing Myers on the ground that the removal was an executive act which Congress could not appropriate by requiring its advice and consent. The Court went on to state by way of dictum that the President's illimitable power of removal extended to administrative officers performing quasi-judicial as well as executive functions.[8]

In 1935, in the case of *Humphrey's Executor v. United States*,[9] the Supreme Court once again was called on to decide if Congress could *limit* the President's power to remove officers appointed with the advice

[1] War Claims Act, 1948, 62 STAT. 1240, 50 U.S.C.A. §§ 2001-16 (Supp. 1958).
[2] *Ibid.*
[3] Wiener v. United States, 135 Ct. Cl. 827, 142 F. Supp. 910 (1956).
[4] Wiener v. United States, 357 U.S. 349 (1958).
[5] *Id.* at 351. See Myers v. United States, 272 U.S. 52 (1926), for a review of this history.
[6] 272 U.S. 52 (1926).
[7] 19 STAT. 80 (1876), 39 U.S.C. § 31 (1952).
[8] Myers v. United States, 272 U.S. 52, 135 (1926).
[9] 295 U.S. 602 (1935).

and consent of the Senate. Humphrey had been appointed to the Federal Trade Commission pursuant to a statute which provided in part that "any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office."[10] President Roosevelt removed him on the ground "that the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection."[11] After Humphrey's death his executor brought an action in the Court of Claims to recover his salary as a Federal Trade Commissioner from the time of his removal until his death. The Court of Claims certified two questions[12] to the Supreme Court: 1) whether the Federal Trade Commission Act in providing for removal of commissioners for specified causes limited the President's removal power to the causes enumerated, and, 2) if so, whether such limitation was constitutional. The Court answered both questions affirmatively.

In resolving the first interrogatory the Court could point to no provision in the statute expressly stating that Congress intended to so limit the President's removal power. As a result the Court, apparently conceding that such power exists,[13] was obliged to infer what Congress intended in this matter. In doing so the Court found that "the fixing of a *definite term* subject to *removal for cause,* unless there be some counter vailing provision or circumstance indicating the contrary . . . is enough to establish the legislative intent that the term is not to be curtailed in the absence of such cause."[14] While this finding would have sufficed to dispose of the first question, the Court also concluded that this intent was "made clear by a consideration of the character of the commission and the legislative history which accompanied and preceded the passage of the act."[15]

In answering the second question the Court rejected the dictum in the *Myers* case[16] and distinguished that case on the ground that the office of postmaster is merely a unit of the executive branch and hence inherently subject to the President's power of removal, whereas a

[10] 38 STAT. 717 (1914), 15 U.S.C. § 41 (1952).
[11] 295 U.S. at 618.
[12] *Id.* at 619.
[13] That the power of removal is an incident to the power of appointment is a principle of longstanding recognition. *Ex parte* Hennen, 38 U.S. (13 Pet.) 230 (1839).
[14] 295 U.S. at 623. In finding a congressional intent to restrict the President's power of removal the Court was confronted with a prior decision, Shurtleff v. United States, 189 U.S. 311 (1903), where it was held that a statute should not be construed as limiting this power in the absence of plain and unambiguous language. That case was distinguished, however, on the ground that the statute under which Shurtleff was appointed provided no term of office so that a denial of the President's removal power would have given him the right to tenure for life or until found guilty of some act specified in the statute.
[15] *Id.* at 624.
[16] *Id.* at 631-32.

Federal Trade Commissioner's duties are quasi-judicial and quasi-legislative which must be performed free from executive influence and control.[17] The basis of this distinction rests on the fundamental doctrine of the separation of powers between the three branches of the federal government.[18] Thus, after *Humphrey's,* the law seems to have been that with respect to officials charged with purely executive duties the President's power of removal is illimitable, but where an appointee's work is quasi-judicial or quasi-legislative Congress can limit the President's power of removal.[19]

The principal case lends itself to two possible interpretations: (1) that the President has complete power to remove members of quasi-judicial or quasi-legislative bodies (hereafter referred to as independent agencies) except where limited by Congress; or (2) that the President has no power to remove members of such bodies except where conferred by Congress. The first interpretation arises out of the Court's approach to the problem. Just as in the *Humphrey's* case, the Court seems to have concerned itself with whether or not Congress intended to *limit* the President's power of removal. This approach, from which a tacit admission that such power exists might be inferred,[20] is made manifest by the fact that the Court looked to the history of the act creating the War Claims Commission, failure of congressional explicitness, and tenure —found in the relatively short life expectancy of the Commission—and concluded that "Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President."[21] Because of the striking resemblance between the Court's approaches in the two cases, both might very well be interpreted as standing for the same proposition.

Viewed in this light, however, the *Wiener* decision represents a broadening of the doctrine of the *Humphrey's* case, for in *Wiener* there were fewer factors indicating a congressional intention to restrict the President's power of removal. One of the two factors, causes for removal, which the Court in the latter case indicated would be sufficient to establish the requisite legislative intent, was conspicuously missing from the instant case. The remaining factor, tenure of office, was sup-

[17] *Id.* at 627-28.
[18] *Id.* at 629-30.
[19] The *Humphrey's* case left for future judicial determination cases falling within the field of doubt between it and the *Myers* case. One such case arose in 1940, Morgan v. TVA, 115 F.2d 990 (6th Cir. 1940). The President removed Morgan from the board of directors of TVA but not pursuant to the statute which provided for the removal by the President of any member of the board who made appointments on the basis of anything other than merit and efficiency. Morgan's duties were found to be predominantly executive and his removal was upheld.
[20] However, the Court might obviate this inference by attributing this approach to an attempt on its part to ascertain whether or not Congress had *conferred* removal power on the President.
[21] Wiener v. United States, 357 U.S. 349, 356 (1958).

plied by the Court's finding of tenure in the relatively short period during which the War Claims Commission was to operate.[22] Moreover, the legislative history of the act less convincingly demonstrated Congress' intent. The Court was able to point to but a single act on the part of Congress evincing its intent. The House Bill placed the administration of the Commission in the hands of the Federal Security Administrator, an arm of the Executive. The Senate rewrote the bill to establish a Commission "with jurisdiction to receive and adjudicate [claims] according to law."[23]

While this interpretation of the decision would not be a declaration of total separation of powers in the area involving independent agencies created by Congress, it would seem to represent a stride in that direction. Conceivably, separation may eventually be achieved through erosion, on a case by case basis, of the factors relied upon by the Court in the *Humphrey's* case in arriving at Congress' intent.

Perhaps the more reasonable interpretation to ascribe to the principal case is the second one which arises out of the Court's discussion of *Humphrey's*. It cited *Humphrey's* as having drawn a sharp line of cleavage between officials of the Executive Department and officials of independent agencies, and apparently regarded that case as standing for the proposition that the President's power to remove officials of these agencies "exists only if Congress *may fairly be said to have conferred it.*"[24] [Emphasis added.]

This latter interpretation would enable the courts to dispose of contested removals such as the one presented in the principal case by simply ascertaining two things: (1) that the President had removed a member of an independent agency, and (2) that Congress could not fairly be said to have conferred upon him the power to make such removal. Having found these two things it would follow that the removal was invalid. Viewed in this light the principal case represents a very considerable extension of the *Humphrey's* case and effects a total separation of powers in the area of the President's power to remove members of independent agencies. It has the desirable effects of placing both Congress and the President on notice as to where each stands on the matter of removal and of clarifying the confusion which apparently still exists in this area. In addition, it would greatly curtail employment of the spoils system, withdraw the ominous "Damocles' sword of removal" from over independent agencies, encourage more selective appointments, and conduce to a more efficient and impartial performance of an agency's functions. These things in turn would facilitate the creation of a group

[22] *Id.* at 352.
[23] *Id.* at 354.
[24] *Id.* at 353. Although the principal case did not mention it, the *Shurtleff* case would seem to be nullified by this interpretation. See note 15 *supra.*

of experts ready to exercise their trained judgments on the multitude of complex problems constantly brought before them. Thus, assuming that there should be a separation of powers, the decision in the principal case seems to be desirable regardless of which interpretation is placed on it. Under the first interpretation the decision represents a stride toward separation; under the second, total separation is achieved.

JOHN R. INGLE

Corporations—Non-Profit Corporations Engaging in Commercial Enterprises

The doctrine of ultra vires in general corporation law has undergone considerable statutory revision in recent years.[1] The scope of this Note is to survey briefly the application of this doctrine to the narrower field of non-profit corporations, as such application appears in the comparative paucity of case law.

In the recent Georgia case of *Church of God of the Union Assembly v. Carmical*,[2] the defendant church, incorporated generally to promote the interests of religion, was engaging in the auction business in competition with plaintiff auctioneer. The court denied an injunction against the church's conducting the business, holding that the plaintiff lacked sufficient interest to complain about the alleged ultra vires act. The point was made that the court was conceding, not holding, that the business activity was ultra vires. While this case does not reach the question of whether a non-profit corporation may or may not operate a business for profit, it serves to point up the problem inherent in considering the powers which may be exercised by this class of corporate entities.

Generally speaking, the problem of whether to allow or enjoin business activity by a non-profit corporation has presented itself to the courts in three situations: (1) where such activity is expressly prohibited by the corporation's charter; (2) where it is not contemplated by the charter; and (3) where it is provided for in the charter, but such a provision is beyond statutory authorization.

In *State ex rel. v. Southern Junior College*,[3] there was an express provision in the charter that the corporation should *not* possess the power to engage in any kind of trading operation. In an action brought by the state on relation of citizens engaged in the printing business, it was held that the prohibitory clause prevented the college from operating

[1] BALLANTINE, CORPORATIONS § 108 (Rev. ed. 1946). For a typical statement of the ultra vires rule as it is found in modern statutes, see N.C. GEN. STAT. § 55-18 (Supp. 1957).

[2] 104 S.E.2d 912 (Ga. 1958).

[3] 166 Tenn. 535, 64 S.W.2d 9 (1933).

its printshop commercially, even though the profits derived from the operation were applied to the general educational purposes of the school.

An early Georgia case[4] is illustrative of the second situation. The church there chartered a steamboat for an excursion to raise funds to pay off the indebtedness incurred in erecting a new church building. The defense of ultra vires was upheld against the church's suit to recover for the loss of profits resulting from the failure to make the trip. The court thought this activity was an attempt by the church to conduct a day's carrying business with the public, a venture not contemplated in the objects of association. However, a contrary result was reached by an Ohio court[5] where the permitted business activity was selling particular merchandise to its members for a profit which was properly used to defray the non-profit corporation's expenses.

That a non-profit corporation cannot assure itself of the power to invade the business world by simply including that power in its charter is pointed out by the cases in the third category. On much the same facts presented by the *Southern Junior College* case, the Tennessee court two years later again enjoined a publishing enterprise by a non-profit corporation.[6] But instead of prohibiting this activity, the charter in the latter case expressly authorized it. The court held that the operation did not come within the purview of any of the authorized objectives set out in the controlling statute,[7] pointing to a statutory prohibition[8] against such corporations engaging in trading operations. In *State ex rel. Dade County Kennel Club, Inc. v. State Racing Comm'n,*[9] a kennel club organized for charitable and benevolent purposes was refused a permit to operate a racetrack, even though the power to build and operate greyhound racing tracks was expressly granted by the club's approved charter. The proposed act was declared contrary to the statute[10] authorizing non-profit incorporation.

Apparently there are no North Carolina decisions in point. But there is no reason to believe that our court would hold differently from other courts; *i.e.,* when called upon in a proper proceeding, it would probably enjoin a corporation organized for non-profit purposes from engaging in purely commercial enterprises in competition with business

[4] Harriman v. First Bryan Baptist Church, 63 Ga. 186 (1879).

[5] State *ex rel.* Bartlett v. National Ass'n of Angling and Casting Clubs, 72 Ohio App. 319, 51 N.E.2d 662 (1943). *Accord,* Emrick v. Pennsylvania R.R. YMCA, 69 Ohio App. 353, 43 N.E.2d 733 (1942) (operating restaurant) and Eads v. YWCA, 325 Mo. 577, 29 S.W.2d 701 (1930) (renting building).

[6] State *ex rel.* v. Southern Publishing Ass'n, 169 Tenn. 257, 84 S.W.2d 580 (1935). For a discussion of the power of religious, educational or charitable corporations to engage in business for profit, see Annot., 100 A.L.R. 579 (1936).

[7] TENN. CODE ANN. § 48-1101 (1955).

[8] TENN. CODE ANN. § 48-1109 (1955).

[9] 116 Fla. 144, 156 So. 343 (1934).

[10] FLA. STAT. ANN. § 617.01 (1956).

organizations or individuals. It seems worthy of comment, however, that an express prohibition against engaging in trading operations does not appear in our new Non-Profit Corporation Act.[11]

The North Carolina act provides that non-profit corporations may be formed for any lawful purpose;[12] and in order to carry out the purposes stated in the charter, the power is given to "acquire, own, hold, improve, use and otherwise deal in and with, real or personal property."[13] There is a general grant of all powers necessary or convenient to effect the corporation's purposes,[14] plus freedom of charter amendment so long as the charter as amended contains only provisions lawful under the chapter.[15] The authority to assert lack of power to act is given to the Attorney General in an action to dissolve the corporation or to enjoin it from transacting unauthorized business.[16]

In conclusion, it appears that the trend toward liberalization of the ultra vires doctrine as regards business corporations[17] has been carried over to the non-profit field to a large extent. Perhaps excursions into the commercial world which are flagrant departures from the purposes of the corporation will continue to be enjoined; but, at the same time, it would seem to be growing easier to bring business operations within the protective veil of things incidental to the non-profit objectives stated in the charter. The business corporation and private merchant may well look with disfavor at the type of competition presented by these "non-profit" corporations.

HAROLD L. WATERS

Criminal Law—Forgery—Use of Fictitious Name

In *Hubsch v. United States*,[1] a recent decision from the Fifth Circuit, the defendant was indicted under the National Stolen Property Act[2] on

[11] N.C. GEN. STAT., ch. 55A (Supp. 1957). Although not specifically mentioned in the case, such a prohibition is set out in the Georgia statute under which the church in the principal case was incorporated. GA. CODE ANN. § 22-401 (1935).
[12] N.C. GEN. STAT. § 55A-5 (Supp. 1957).
[13] N.C. GEN. STAT. § 55A-15(b)(1) (Supp. 1957).
[14] N.C. GEN. STAT. § 55A-15(b)(8) (Supp. 1957).
[15] N.C. GEN. STAT. § 55A-34 (Supp. 1957).
[16] N.C. GEN. STAT. § 55A-17(3) (Supp. 1957).
[17] BALLANTINE, *op. cit. supra* note 1.

[1] 256 F.2d 820 (5th Cir. 1958).
[2] 48 STAT. 794 (1934) (later codified as 18 U.S.C. §§ 2311, 2314-15 (1952 and Supp. IV 1957)). The portion of § 2314 under which defendant was indicted provides in pertinent part as follows:

> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited [shall be punished].

two counts of causing[3] falsely made and forged[4] checks to be transported in interstate commerce, knowing the same to have been falsely made and forged.

As to the first count, the following facts were found: the defendant received treatment at a hospital, representing himself to be "Alfred Weinstein"—in fact, a fictitious person; in payment for the treatment, the defendant gave a check signed "A. A. Weinstein" and drawn on a bank in another state; the check was returned by the bank with the notation "unable to locate." The court held that these facts were insufficient to constitute forgery, as required under the act,[5] and therefore that the defendant should be acquitted as to this count.[6]

With regard to the second count, these facts appeared: the defendant selected for purchase a Masonic ring at a jewelry store and asked the jeweler if he could pay for the ring by check; the jeweler replied that he could do so if he had the proper credentials; the defendant then told the jeweler that he was a Mason and a Shriner and produced from a billfold several Masonic cards from Atlanta with the name "Weinstein" thereon; the jeweler then accepted from the defendant a check in payment for the ring, with the name "Weinstein" as drawer; this check was also returned by the out-of-state bank on which it was drawn with the notation "unable to locate." As to this count, the court seemed to think the trier of facts might find that the defendant "created a fictional personality of Weinstein, the Mason who desired to purchase the Masonic ring, and on the faith and credit of a check purporting to be that of Weinstein the Mason the check was accepted."[7] If it were so found, the court concluded, it would show reliance upon the signature rather than on the person of the defendant, and a forgery would have been committed.

That a person may commit forgery by executing an instrument in a fictitious name is well settled.[8] The problem arises in determining under what circumstances the signing of an assumed or fictitious name to an

[3] One who causes the prohibited transportation is punishable as a principal under §2314 by virtue of 18 U.S.C. § 2(b) (1952). Pereira v. United States, 347 U.S. 1 (1953).

[4] Forgery may be defined as "the fraudulent making of a false writing having apparent legal significance." PERKINS, CRIMINAL LAW 291 (1957). The requisites of the offense are (1) a false writing (2) falsely made with intent to defraud and (3) of such a nature that it is a possible subject of forgery, *i.e.*, it must appear on its face to be a valid instrument. *Id.* at 292.

[5] The courts generally interpret the language of § 2314 quoted in note 2 as merely importing the common law of forgery. See, *e.g.*, Wright v. United States, 172 F.2d 310 (9th Cir. 1949); Greathouse v. United States, 170 F.2d 512 (4th Cir. 1948). *But see* Pines v. United States, 123 F.2d 825 (8th Cir. 1941).

[6] Although this conduct would almost certainly be punishable either under state false pretenses or worthless check statutes, federal jurisdiction to prosecute under § 2314 would be defeated.

[7] Hubsch v. United States, 256 F.2d 820, 824 (5th Cir. 1958).

[8] 2 WHARTON, CRIMINAL LAW AND PROCEDURE § 630 (Anderson ed. 1957).

instrument is sufficient to constitute the crime.[9] This Note will be limited to a discussion of the problem as it has arisen in some of the leading cases which have been decided under the National Stolen Property Act.[10]

INSTRUMENT EXECUTED IN FICTITIOUS NAME AND PRESENTED AS ONE'S OWN. If one executes an instrument in his own name and passes it off as his own instrument, he is not guilty of forgery.[11] Likewise if one executes an instrument by signing *his* assumed name and passes it off as *his* own instrument, it is not a forgery.[12] This rule is illustrated by *United States v. Greever*.[13]

In that case the defendant was charged with a violation of the National Stolen Property Act.[14] The facts were stipulated: defendant signed various fictitious names to several checks drawn on a Rhode Island bank[15] in the presence of the several payees, each of whom knew the defendant by the particular name signed on the check; the bank had no account in the name of the defendant or the fictitious drawers; the defendant represented in each case that he was the person whose signature appeared on the check and did not represent that the signatures were of anyone other than himself. The court held that the defendant should be acquitted.

INSTRUMENT EXECUTED IN NAME OF FICTITIOUS COMPANY BY ONE IN HIS TRUE NAME. A person may draw a check in the name of a fictitious company without being guilty of forgery if he signs his own name along with that of the fictitious company, and the person cashing the check knows him by that name.[16] Such were the facts in the leading case of *Greathouse v. United States*.[17] There the defendant signed

[9] Some decisions have held that the forgery is complete where a fictitious name is used, with intent to defraud, and the instrument is capable of being used to the prejudice of another—the so-called "broad rule." State v. Wheeler, 20 Ore. 192, 25 Pac. 394 (1890); State v. Lutes, 38 Wash. 2d 475, 230 P.2d 786 (1951). Others have restricted the rule so that the signature on the instrument must purport to be that of another in order to complete the offense—the so-called "narrow rule." Greathouse v. United States, 170 F.2d 512 (4th Cir. 1948); Green v. State, 76 So. 2d 645 (Fla. 1954). The use of the different rules has resulted in many seemingly inconsistent decisions. See Annot., 49 A.L.R.2d 852 (1956).

[10] Though thus limited in scope, the discussion is applicable to the common law of forgery in general. See note 5 *supra*.

[11] Martyn v. United States, 176 F.2d 609 (8th Cir. 1949); Wright v. United States, 172 F.2d 310 (9th Cir. 1949); Greathouse v. United States, 170 F.2d 512 (4th Cir. 1948); United States v. Greever, 116 F. Supp. 755 (D.D.C. 1953); United States v. Gallagher, 94 F. Supp. 640 (W.D. Pa. 1950); *cf.* United States v. Flores, 66 F. Supp. 880 (D. Virgin Islands 1946); United States v. Woods, 58 F. Supp. 451 (N.D. W.Va. 1945).

[12] United States v. Greever, *supra* note 11; *cf.* La Fever v. United States, 257 F.2d 271 (7th Cir. 1958).

[13] 116 F. Supp. 755 (D.D.C. 1953).

[14] 18 U.S.C. § 2314 (1952 and Supp. IV 1957).

[15] The checks were apparently drawn in the District of Columbia, though the opinion does not specifically state this.

[16] PERKINS, CRIMINAL LAW 297 (1957).

[17] 170 F.2d 512 (4th Cir. 1948).

several checks "Woodruff Motor Sales, Inc., J. W. Greathouse." He represented to the person cashing the checks that Woodruff Motor Sales was the name in which he did business. In fact the motor company was completely fictitious, and neither it nor the defendant had an account at the bank on which the check was drawn. The court held that no forgery had been committed.[18]

The court recognized that forgery can exist when the name used is a fictitious one, as treated in the succeeding section of this Note; here, however, although the defendant signed the name of a fictitious company, the check was accepted on the strength of his apparent authority as agent, and not in reliance on the name of the company. One treatise explains:

> An additional point is to be noted in cases in which one fraudulently purports to act as agent for another. If he has no power or authority to act in this capacity, the other will not be bound; but if the signature contains both names and shows that the signer was purporting to act as agent for the other, the writing is not a forgery. Strictly speaking there is a false writing in such a case because it purports to be the instrument of the principal whereas it is not so in fact; but since any reliance will be upon the implied warrant of authority clearly manifested by the writing, rather than upon any deceptive appearance of the writing itself, it is felt not to come within the type of wrong which forgery is designed to punish. This is the theory back of the holding that signing a note in the name of a fictitious firm, purportedly made up of the writer and another person, is not forgery though done with intent to defraud. The writing binds the man who wrote it and is false merely in the implied warrant of authority to bind the other.[19]

INSTRUMENT EXECUTED IN FICTITIOUS NAME AND NOT PRESENTED AS ONE'S OWN. One may sign a fictitious name to an instrument and pass the instrument off as that of the fictitious person. If it is not signed in the presence of the person defrauded, and it is passed without reference to any particular person, this has been held to constitute forgery.[20] An example is where an individual draws a check in a fictitious name, payable to himself, and negotiates the check to a person who knows him by his true name.[21] Or, the defendant may fill in a fictitious name as payee on a traveler's check and negotiate it purely

[18] "[T]he charge of forgery in this case is not sustained by the fact that the defendant, with intent to defraud, drew the checks in his own name upon a bank in which he had no funds, or that he signed the name of Woodruff Motor Sales, Inc., whether that was the name in which he did business, as he claimed, or was merely the name of a non-existent corporation, as indicated by other testimony." Greathouse v. United States, 170 F.2d 512, 514 (4th Cir. 1948).

[19] PERKINS, CRIMINAL LAW 297 (1957).

[20] Rowley v. United States, 191 F.2d 949 (8th Cir. 1951); Jones v. United States, 234 F.2d 812 (4th Cir. 1956).

[21] Jones v. United States, *supra* note 20.

on the strength of the countersignature and without emphasis on his *own* individuality or identity.[22]

When a fictitious name is signed in the presence of the one defrauded, it would seem that something more is required in order to constitute forgery. The person represented by the fictitious name must take on personality or character separate and apart from the person actually presenting the check, so that credit can be extended to such personality.[23] The principal case seems to be the only case under the act involving this type situation.

In the *Hubsch* case, the court recognizes the existence of a "broad rule" and a "narrow rule" defining forgery,[24] and in ruling on the sufficiency of the indictment, expressly rejects the "narrow rule." However, in ruling on the question of guilt under the facts of the case, the court makes no attempt to fit the facts into either rule. Instead the court apparently used as a test the rationale adopted in the early English case of *Regina v. Martin,*[25] that where the payee in accepting the check has relied on and given credit to the *person* presenting the check, as distinguished from the *name* or *signature,* there has been no forgery.[26]

It would seem that the court correctly applied this theory to the facts as developed under both counts of the indictment. When the hospital representative accepted defendant's check in payment for treatment received, the name "Weinstein," if it meant anything to the hospital, was important only in so far as it represented the man presenting it; that is, the individual who had received the treatment.[27] But the jeweler was not satisfied with accepting the check written by the defendant, a mere stranger. He accepted the check written by the defendant only after the defendant had shown him credentials identifying "Weinstein" as a particular personality—a Mason and Shriner from Atlanta. Relying on the faith and credit of a check purporting to be signed by "Weinstein," the jeweler accepted the defendant's check. Clearly the reliance was not placed on the *person* presenting the check (the defendant), but on the *signature* as creating a valid obligation.

[22] Rowley v. United States, 191 F.2d 949 (8th Cir. 1951).

[23] The principle was recognized in England at least as early as 1765 in the case of Rex v. Dunn, 1 Leach C.L. 57, 168 Eng. Rep. 131 (1765). For an old, but excellent, discussion of the principle involved, see Brown, *The Forgery of Fictitious Names,* 30 AM. L. REV. 500, 513 (1896).

[24] See note 9 *supra.*

[25] 5 Q.B.D. 34 (1879).

[26] In that case the defendant signed a fictitious name to the check, but the payee, in accepting the check, did not notice that the name was not that of the defendant. The defendant was well known to the payee and it was clear that the payee accepted the check as that of the defendant. It was held that the defendant was not guilty of forgery. Regina v. Martin, *supra* note 25.

[27] As the court pointed out: "It does not appear that the Hospital would have declined to accept the check had it been signed by Hubsch in his own name or in any other name." Hubsch v. United States, 256 F.2d 820, 824 (5th Cir. 1958).

It is submitted that the test applied in the *Hubsch* case is in accord with the technical rules of forgery, and that it is a valid test in determining whether, under the particular fact situation, the crime of forgery has been committed by the use of a fictitious name. However, it may be questioned whether an area already beset with technicalities and dubious distinctions should be further complicated by revitalizing a test which originated in the days when forgery was a capital offense.

HENRY E. FRYE

Sales—Liability of Remote Vendor on Implied Warranty

Plaintiff,[1] a manufacturer of refrigerated biscuits, purchased "Snow Ice" (an integral part of its biscuits sold for human consumption) from a distributor, who had bought the product from the defendant ice manufacturer. Upon finding glass in the ice, plaintiff, at considerable expense, destroyed the biscuits and biscuit dough and recalled the biscuits made the previous day with the glass-contaminated dough. Plaintiff sued the ice manufacturer in federal district court to recover these expenses. The biscuit company, conceding the lack of contractual privity with defendant and foregoing the negligence theory, contended defendant was liable under Texas law by reason of the *Decker*[2] case. In that case it was held that a non-negligent manufacturer who processed and sold contaminated food to a retailer for resale and human consumption was liable to a consumer for injuries sustained by him as a result of eating such food. The court, after noting a trend of the Texas courts away from the *Decker* holding, distinguished that case and held it inapplicable on the ground that it involved a consumer eater whereas the principal case involved a consumer non-eater.[3] The lack

[1] Gladiola Biscuit Co. v. Southern Ice Co., 163 F. Supp. 570 (E.D. Tex. 1958).

[2] Jacob E. Decker & Sons. Inc. v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942). "Liability in such a case is not based on negligence, nor on a breach of the usual implied contractual warranty, but on the broad principle of the public policy to protect human health and life." *Id.* at 612, 164 S.W.2d at 829. Thus privity of contract between plaintiff and defendant is not necessary under the *Decker* rule.

[3] The court may have been influenced by the so-called general rule that there is no implied warranty of fitness for food where the sale is made by one dealer to another dealer for purposes of resale, as distinguished from a sale by a dealer to a buyer for immediate consumption. Howard v. Emerson, 110 Mass. 320 (1872); Emerson v. Brigham, 10 Mass. 197 (1813); Moses v. Mead, 1 Denio 378 (N.Y. 1845); 1 WILLISTON, SALES § 242 (Rev. ed. 1948); Perkins, *Unwholesome Food as a Source of Liability*, 5 IOWA L. BULL. 6, 17-18 (1919); Annot., 15 L.R.A. (n.s.) 886 (1908); Annot., 22 L.R.A. 195 (1893); Annot., 14 L.R.A. 494 (1891). Texas has experienced difficulty with this rule, and there are inconsistent cases dealing with it. Comment, 32 TEXAS L. REV. 557, 564-66 (1954).

Other jurisdictions hold that the sale by one dealer to another dealer for purposes of resale carries with it an implied warranty that the goods are wholesome and fit for food. Annot., 1917F L.R.A. 472. A recent case is Draughon v. Maddox, 237 N.C. 742, 75 S.E.2d 917 (1953), 32 N.C.L. REV. 351 (1954).

No matter which line of cases is accepted, the implied warranty of merchantability would be equally available in the dealer-to-dealer sale for purposes of resale

of contractual privity was deemed to preclude recovery on an implied warranty theory. Accordingly, a verdict was directed for the defendant.

The *Decker* case had concerned the liability of a *manufacturer*. *Griggs Canning Co. v. Josey*,[4] decided the same day, resolved in favor of the consumer the question of whether a *retailer* of foodstuffs was liable on implied warranty. A review of the Texas law of implied warranties since *Griggs* and *Decker* indicates the trend away from the philosophy evinced by the court in those decisions. In *Bowman Biscuit Co. v. Hines*,[5] the Texas Supreme Court refused to apply the *Griggs* rule against a *wholesaler*. In a five to four decision it was held that one who had sustained injury from eating contaminated food purchased in a sealed package from a retailer who had bought the product from the wholesaler could not recover damages in a direct action against the wholesaler. Four majority justices favored overruling *Griggs* and since in their view a retailer would not be liable, a fortiori, defendant wholesaler, who was one step further removed from the consumer and with whom there was no privity, should not be made liable. Four minority justices approved the *Griggs* rule and said that adherence to this rule should require a finding of wholesaler liability. The ninth justice, distinguishing between wholesaler and retailer liability, considered *Griggs* inapplicable and concurred with the "majority" in result only. Thus the *Bowman Biscuit Co.* case preserved the *Griggs* rule but held no wholesaler liability to a consumer not in contractual privity. Paradoxically, this ultimate state of the law was approved by only one of the nine justices who decided the *Bowman Biscuit Co.* case.[6] In two significant situations, where the container[7]

as in a dealer-to-buyer sale for immediate consumption. DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER 30 (1951); Perkins, *supra* at 18-19; Prosser, *The Implied Warranty Of Merchantable Quality*, 27 MINN. L. REV. 117 (1943). North Carolina follows this latter rule in Ashford v. H. C. Shrader Co., 167 N.C. 45, 47, 83 S.E. 29, 31 (1914) and Lexington Grocery Co. v. Vernoy, 167 N.C. 427, 428, 83 S.E. 567, 568 (1914).

[4] 139 Tex. 623, 164 S.W.2d 835 (1942). The *Griggs* case, as did *Decker*, imposed a warranty on defendant as a matter of public policy. See 21 TEXAS L. REV. 454 (1942) for a discussion of these two cases.

[5] 151 Tex. 370, 251 S.W.2d 153 (1952), 31 TEXAS L. REV. 594 (1953), 1953 WASH. U.L.Q. 327, 10 WASH. & LEE L. REV. 255 (1953).

[6] 31 TEXAS L. REV. 594, 597 (1953).

[7] In Annheuser-Busch v. Butler, 180 S.W.2d 996 (Tex. Civ. App. 1944) plaintiff bought beer in a tavern, took it home, and opened it. The bottle exploded, injuring plaintiff. Defendant was held not liable on implied warranty of fitness. Distinguishing the *Decker* case in which injury was caused by eating, the court said, [Here] there was no injury sustained as a result of eating or drinking unwholesome food or drink. For aught we know, the beer may have been . . . harmless. . . . The fact that the glass bottle . . . might have been defective or improperly filled, or improperly capped, would not necessarily change the fitness of the beer for human consumption." *Id.* at 997. Accord, Jax Beer Co. v. Schaeffer, 173 S.W.2d 285 (Tex. Civ. App. 1943). In 23 TEXAS L. REV. 87, 88 (1944) it is said that these cases create an over-refined distinction in recognizing liability when injury is caused by a piece of glass inside the bottle but denying

rather than the foodstuff was defective and where the product was not meant for immediate, internal consumption,[8] Texas has refused to extend the *Decker* rule.

How would the principal case be decided in North Carolina? Although a consumer without contractual privity can proceed against the manufacturer on the theory of breach of *express* warranty where the warranty is printed on the product container,[9] there is some doubt as to whether he can recover against the manufacturer on a theory of breach of implied warranty. *Thomason v. Ballard & Ballard Co.*[10] established the rule that in the absence of contractual privity, a consumer could not recover against a manufacturer on implied warranty. However, in *Davis v. Radford*,[11] which involved a consumer against retailer for breach of implied warranty, the court stated that *Simpson v. American Oil Co.*[12] would permit the consumer without contractual privity to maintain an action against the *wholesaler*[13] on the implied warranty theory.[14] Some authorities[15] have interpreted this *Davis* dictum as authority for the proposition that North Carolina no longer requires privity in breach of implied warranty situations. Granting that this dictum indicates an attitude that would not require privity, it is submitted that the *Thomason* decision remains the rule. Accordingly, the plaintiff biscuit company could not recover from the ice manufacturer in North Carolina in a direct action. However, the manufacturer might not escape liability. The plaintiff could maintain an action against the

liability where the defective bottle itself causes injury. See PROSSER, TORTS § 84, at 509 (2d ed. 1955).

[8] In Brown v. Howard, 285 S.W.2d 752 (Tex. Civ. App. 1955) a manufacturer of insecticide spray was sued by the owner of some cattle which had been killed by the spray. Because of no contractual privity between plaintiff and defendant, there was no breach of implied warranty. The court seemed to regard the *Decker* rule as onerous.

[9] Simpson v. American Oil Co., 217 N.C. 542, 8 S.E.2d 813 (1940).

[10] 208 N.C. 1, 179 S.E. 30 (1935). This rule is repeated in dictum in Caudle v. F. M. Bohannon Tobacco Co., 220 N.C. 105, 110, 16 S.E.2d 680, 683 (1941) and Enloe v. Charlotte Coca-Cola Bottling Co., 208 N.C. 305, 307, 180 S.E. 582, 583 (1935).

[11] 233 N.C. 283, 63 S.E.2d 822 (1951).

[12] 217 N.C. 542, 8 S.E.2d 813 (1940).

[13] It would appear that by this language plaintiff could proceed against the manufacturer as well as the wholesaler, because when the privity requirement is removed, the plaintiff can sue either the retailer, wholesaler, or manufacturer. Heimsoth v. Falstaff Brewing Corp., 1 Ill. App. 2d 28, 116 N.E.2d 193 (1953).

[14] "In case of sale of goods for human consumption the requirement of privity of contract is not always controlling. . . .

"Under the decision in *Simpson v. Oil Co.* . . . it would seem that the plaintiff [consumer] here could have maintained an action against . . . the distributor, for the cause set out in his complaint, though he has elected to sue only the retail dealer." 233 N.C. at 286, 63 S.E.2d at 825. It has been suggested that this dictum should be weighed carefully against the *Simpson* case, because that case involved express warranty, whereas in the *Davis* case there was no express warranty. 30 N.C.L. REV. 191, 194 (1952).

[15] PROSSER, TORTS § 84, at 509 n. 28 (2d ed. 1955).

"Snow Ice" wholesaler, who apparently[16] could join the manufacturer as party defendant so that the court could determine the ultimate liability of the two defendants.[17]

What result would have obtained under the Uniform Sales Act?[18] It appears that plaintiff ordered the ice by description,[19] hence there arose the implied warranty of merchantability[20] from the wholesaler to plaintiff. This warranty would also exist between manufacturer and wholesaler.[21] Some courts would extend the warranty to the ultimate consumer.[22] The implied warranty of merchantability is included in the Uniform Commercial Code.[23] However, a majority of the states adopting these uniform acts[24] still requires privity in breach of implied warranty cases.[25] Hence the plaintiff would not be able to recover in these states.[26]

[16] The rule of the *Davis* case was that the retailer, when sued by the consumer for breach of implied waranty, could join his (retailer's) vendor as a party defendant.

[17] N.C. GEN. STAT. § 1-222 (1953). The theory suggested in the text presupposes that the manufacturer is subject to North Carolina's jurisdiction.

[18] The Uniform Sales Act is in effect in 33 states, District of Columbia, Hawaii, and Panama Canal Zone. UNIFORM LAWS ANNOTATED, SALES at 6 (Supp. 1957). North Carolina has not adopted the Uniform Sales Act.

[19] A sale by description is any sale where there is no adequate opportunity to inspect. Kohn v. Ball, 36 Tenn. App. 281, 254 S.W.2d 755 (1952).

[20] UNIFORM SALES ACT § 15(2): "Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality."

A popular meaning of merchantable quality is that goods must be reasonably suited for the ordinary uses which they were manufactured to meet. Giant Manufacturing Co. v. Yates-American Machine Co., 111 F.2d 360 (8th Cir. 1940). For more complete definitions of merchantability see 1 WILLISTON, SALES § 243 (Rev. ed. 1948), and Prosser, *supra* note 3, at 125-32.

[21] See note 3 *supra*.

[22] Helms v. General Baking Co., 164 S.W.2d 150 (Mo. App. 1942); Markovich v. McKesson and Robbins, Inc., 149 N.E.2d 181 (Ohio Ct. App. 1958); Baum v. Murray, 23 Wash. 2d 890, 162 P.2d 801 (1945). *Contra*, Smith v. Salem Coca-Cola Bottling Co., 92 N.H. 97, 25 A.2d 125 (1942), Lombardi v. California Packing Sales Co., 83 R.I. 51, 112 A.2d 701 (1955).

[23] UNIFORM COMMERCIAL CODE 2-314(2): "Goods to be merchantable must be at least such as
(c) are fit for the ordinary purposes for which such goods are used; . . ." The Uniform Commercial Code is in effect at the date of this writing in Pennsylvania and Massachusetts. PA. STAT. ANN. tit. 12A §§ 1-101 through 10-104 (1953); MASS. G.L. (Ter. Ed.) c. 106 (1957).

[24] UNIFORM LAWS ANNOTATED, SALES § 15, n. 10.

[25] However, the trend is toward abandoning the privity requirement. DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER 63-65, 94-99 (1951); SMITH AND PROSSER, CASES AND MATERIALS ON TORTS 906, 912 (2d ed. 1957); 1 WILLISTON, SALES § 244 n. 7 (Rev. ed. 1948) and Supp. (1957). New York seems to have broken away recently from the privity requirement in Welch v. Schiebelhuth, 169 N.Y.S.2d 309 (Sup. Ct. 1957), Comment, 24 BROOKLYN L. REV. 308 (1958), 9 SYRACUSE L. REV. 326 (1958).

[26] Regarding the Uniform Commercial Code, this result is unfortunate. Section 43 of the Uniform Revised Sales Act, which has been replaced by § 2-318 of the Code, provided an almost complete departure from the antiquated privity requirement. See Note, 29 IND. L.J. 173, 184-88 (1954). The Code has made a change in the present privity requirement in that a member of the buyer's family or a guest

The decision in the principal case is harsh in that it necessitates circuity of action. Plaintiff can sue only the middleman, who in turn will sue the ice manufacturer in order to place liability at the point of origin. The biscuit company is placed in the anomalous position of being subject to liability without contractual privity, under the *Decker* rule, to a consumer who sustains injury by eating unwholesome biscuits. Yet the company which has been diligent in preventing injury to ultimate consumers by destroying the glass-contaminated dough cannot recover its loss from the ice manufacturer because of a lack of contractual privity.[27] It is submitted that this privity requirement is law for law's sake.[28]

WILLIAM H. MCCULLOUGH

Torts—Charitable Immunity

The doctrine that charitable institutions[1] are immune from liability for torts committed by their servants evolved from dictum set forth in *Duncan v. Findlater*,[2] an English case decided in 1839. This doctrine was later recognized and followed in England for a brief period; it was completely discarded in 1866.[3]

McDonald v. Massachusetts General Hospital,[4] in 1876, was the first case to adopt the doctrine in this country, the court holding that a charity was immune from liability if it had exercised due care in the selection and retention of its servants. Since that time a majority of the states have followed the Massachusetts rule, but have differed greatly

of the buyer no longer is required to have privity with the buyer's vendor to recover for breach of implied warranty. But a suit by a buyer against a remote vendor is left unchanged, therefore the majority rule requiring privity in such a situation is left intact. *Legislation*, 15 U. PITT. L. REV. 331, 352-55 (1954).

[27] Of course plaintiff could sue defendant on grounds of negligence, but in this case this theory would be quite difficult to prove. PROSSER, TORTS § 84, at 505 (2d ed. 1955).

[28] Spruill, *Privity Of Contract as a Requisite for Recovery On Warranty*, 19 N.C.L. REV. 551, 565-66 (1941).

[1] An institution "is deemed to be eleemosynary or charitable where its property is derived from charitable gifts or bequests and administered, not for purpose of gain but in interest of humanity. . . ." Ettlinger v. Trustees of Randolph-Macon College, 31 F.2d 869, 870 (2d Cir. 1929).

[2] 6 Clark and Fin. 894, 7 Eng. Rep. 934 (H.L. 1839).

[3] The dictum of Duncan v. Findlater, *supra* note 2, was followed in Holliday v. St. Leonard's, 11 C.B.N.S. 192, 142 Eng. Rep. 769 (1861). However, this case was expressly overruled by Mersey Docks Trustees v. Gibbs, L.R. 1 H.L. 93, 11 Eng. Rep. 1500 (1866), thus repudiating the doctrine in England. See also Hillyer v. St. Bartholomew's Hospital [1909] 2 K.B. 820; Foreman v. Canterbury Corp., L.R. 6 Q.B. 214 (1871).

[4] 120 Mass. 432 (1876). This case was decided ten years after Mersey Docks Trustees v. Gibbs, *supra* note 3, had overruled the doctrine in England; but the Massachusetts court relies on Holliday v. St. Leonard's, *supra* note 3.

both as to the reasons for invoking the rule[5] and as to the situations in which the rule should be applied.[6] However, an examination of recent

[5] At least five theories have been used in upholding the immunity doctrine.
(1) *"Trust Fund" theory.* Under this theory the courts refuse recovery on the ground that the donor intended the funds to be used only for charitable purposes, and to allow them to be diverted therefrom would misappropriate the fund. See *e.g.,* Jensen v. Maine Eye and Ear Infirmary, 107 Me. 408, 78 Atl. 898 (1910); Perry v. House of Refuge, 63 Md. 20 (1885); McDonald v. Massachusetts Gen. Hospital, *supra* note 4; Adams v. University Hospital, 122 Mo. App. 675, 99 S.W. 453 (1907); Fire Ins. Patrol v. Boyd, 120 Pa. 624, 15 Atl. 533 (1888).
(2) *Inapplicability of respondeat superior.* This is based on the theory that a charity has performed its entire duty when it tenders to a beneficiary a competent servant, and from that instant he is the servant of the beneficiary rather than that of the charitable institution. See *e.g.,* Fordyce v. Woman's Christian Nat'l Library Ass'n, 79 Ark. 550, 96 S.W. 155 (1906); Hearns v. Waterbury Hospital, 66 Conn. 98, 33 Atl. 595 (1895); Whittaker v. St. Luke's Hospital, 137 Mo. App. 116, 117 S.W. 1189 (1908).
(3) *"Governmental Immunity" theory.* Because of close association with the state, some courts have cloaked charitable institutions with an immunity like that of the state and its agencies. See *e.g.,* Fordyce v. Woman's Christian Nat'l Library Ass'n, *supra;* University of Louisville v. Hammock, 127 Ky. 564, 106 S.W. 219 (1907); Morrison v. Henke, 165 Wis. 166, 160 N.W. 173 (1917).
(4) *"Implied Waiver" theory.* This theory is based on the idea that when one enters a charitable institution and accepts its services he thereby waives all right to claim damages for injuries suffered as a result of the negligence of the institution or its servants. See *e.g.,* Wilcox v. Idaho Falls Latter Day Saints Hospital, 59 Idaho 350, 82 P.2d 849 (1938); Cook v. John N. Norton Memorial Infirmary, 180 Ky. 331, 102 S.W. 847 (1918); Bruce v. Young Men's Christian Ass'n, 51 Nev. 372, 277 Pac. 789 (1929).
(5) *"Public Policy" theory.* Some courts have stated that they are denying liability because it is against public policy. See *e.g.,* Hearns v. Waterbury Hospital, *supra;* Lindler v. Columbia Hospital, 98 S.C. 25, 81 S.E. 512 (1914); Weston v. Hospital of St. Vincent, 131 Va. 587, 107 S.E. 785 (1921).
For a discussion of the theories of immunity see Note, 30 N.C.L. REV. 67 (1951).

[6] Some states allow complete immunity from liability. See *e.g.,* Jensen v. Maine Eye and Ear Infirmary, *supra* note 5(1); Conklin v. John Howard Industrial Home, 224 Mass. 222, 112 N.E. 606 (1916); Steden v. Jewish Memorial Hospital Ass'n, 239 Mo. App. 38, 187 S.W.2d 469 (1945). Others limit execution of judgment to nontrust property. See *e.g.,* Saint Mary's Academy v. Solomon, 77 Colo. 463, 238 Pac. 22 (1925); Moore v. Moyle, 405 Ill. 555, 92 N.E.2d 81 (1950); McLeod v. St. Thomas Hospital, 170 Tenn. 432, 95 S.W.2d 917 (1936).
Some states allow immunity to be invoked as against strangers. See *e.g.,* Jackson v. Atlanta Goodwill Industries, 46 Ga. App. 425, 167 S.W. 702 (1933); Foley v. Wesson Memorial Hospital, 246 Mass. 363, 141 N.E. 113 (1923). Others say the immunity doctrine does not apply as against strangers. See *e.g.,* Winona Technical Institute v. Stolte, 173 Ind. 39, 89 N.E. 393 (1909); Bruce v. Central Methodist Episcopal Church, 147 Mich. 230, 110 N.W. 951 (1907).
Immunity does not extend to torts committed by one servant against another servant, according to some states. See *e.g.,* Cowans v. North Carolina Baptist Hospitals, Inc., 197 N.C. 41, 147 S.E. 672 (1929). However, other states say the immunity doctrine does apply in this situation. See *e.g.,* Emery v. Jewish Hospital Ass'n, 193 Ky. 400, 236 S.W. 577 (1921); Reavy v. Guild of St. Agnes, 284 Mass. 300, 187 N.E. 557 (1933).
Some states make no distinction between paying and non-paying beneficiaries, and say that both are subject to the doctrine of immunity. See *e.g.,* Williams v. Randolph Hospital, Inc., 237 N.C. 387, 75 S.E.2d 303 (1952); Gable v. Sisters of St. Francis, 227 Pa. 254, 75 Atl. 1087 (1910). Others do make such a distinction and say that a charitable institution is liable to a paying beneficiary. See *e.g.,* Sisters of Sorrowful Mother v. Zeidler, 183 Okla. 454, 82 P.2d 996 (1938).
For a complete listing of cases, see Annot., 25 A.L.R.2d 29 (1952).

decisions reveals that an increasing number of jurisdictions have held charities liable for the torts of their servants on the same basis as privately operated institutions,[7] reaching this result either (1) by initially refusing to follow the doctrine of immunity, or, more important, (2) by overruling earlier decisions which did follow the rule.

Collopy v. Newark Eye and Ear Infirmary[8] is a recent decision exemplifying this modern trend. In this case the plaintiff sought to recover against the defendant hospital, a charitable institution, for injuries allegedly due to the negligence of the hospital's servant. The lower court granted defendant's motion to dismiss, relying on *D'Amato v. Orange Memorial Hospital*,[9] the case establishing the doctrine of charitable immunity in New Jersey. On appeal, the decision was reversed. The supreme court, in reviewing the various theories of immunity,[10] decided that the only one which could be considered valid was the "public policy" theory. As to this theory, the court stated:

> It may perhaps be that when *D'Amato* was rendered in 1925 it accurately represented the then prevailing notions of public policy. But times and circumstances have changed[11] and we do not believe that it faithfully represents current notions of rightness and fairness. Due care is expected of all, and when an organiza-

[7] President and Directors of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942); Brigham Young University v. Lillywhite, 118 F.2d 836 (10th Cir. 1941); Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P.2d 220 (1951); Malloy v. Fong, 37 Cal. 2d 356, 232 P.2d 241 (1951); St. Luke's Hospital Ass'n v. Long, 125 Colo. 25, 240 P.2d 917 (1952); Durney v. St. Francis Hospital, 46 Del. 350, 83 A.2d 753 (Super. Ct. 1951); Wilson v. Lee Memorial Hospital, 65 So. 2d 40 (Fla. 1953); Wheat v. Idaho Falls Latter Day Saints Hospital, 78 Idaho 60, 297 P.2d 1041 (1956); Haynes v. Presbyterian Hospital Ass'n, 241 Iowa 1269, 45 N.W.2d 151 (1950); Noel v. Menninger Foundation, 175 Kan. 751, 267 P.2d 934 (1954); Mulliner v. Evangelischer Diakonniessenverin, 144 Minn. 392, 175 N.W. 699 (1920); Mississippi Baptist Hospital v. Holmes, 214 Miss. 906, 55 So. 2d 142 (1951); Welch v. Frisbie Memorial Hospital, 90 N.H. 337, 9 A.2d 761 (Sup. Ct. 1939); Collopy v. Newark Eye and Ear Infirmary, 27 N.J. 29, 141 A.2d 276 (Sup. Ct. 1958); Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3 (Ct. App. 1957); Richbeil v. Grafton Deaconness Hospital, 74 N.D. 525, 23 N.W.2d 247 (1946); Avellone v. St. John's Hospital, 165 Ohio St. 467, 135 N.E.2d 410 (1956); Gable v. Salvation Army, 186 Okla. 687, 100 P.2d 244 (1940); Glavin v. Rhode Island Hospital, 12 R.I. 141 (1879); Foster v. Roman Catholic Diocese, 116 Vt. 124, 70 A.2d 230 (1950); Pierce v. Yakima Valley Memorial Hospital Ass'n, 43 Wash. 2d 162, 260 P.2d 765 (1953).

[8] 27 N.J. 29, 141 A.2d 273 (Sup. Ct. 1958).

[9] 101 N.J.L. 61, 127 Atl. 340 (Ct. Err. & App. 1925).

[10] See note 5 *supra*.

[11] Charitable institutions themselves have changed since the rule was initiated. "Then they were largely small institutions, many connected with churches, and of limited means. Today they have become, in many instances, big businesses, handling large funds, managing and owning large properties and set up by large trusts or foundations. It is idle to argue that donations for them will dry up if the charity is held to respond for its torts the same as other institutions or that the donors are giving the funds or setting up large foundations for charitable purposes with the expectation that the charities they benefit will not be responsible like other institutions for negligent injury. Such charities enjoy endowments and resources beyond anything thought of when the matter of immunity was first being considered." Foster v. Roman Catholic Diocese, 116 Vt. 124, 134, 70 A.2d 230, 236 (1950).

> tion's negligent conduct injures another there should, in all justice and equity, be a basis for recovery without regard to whether the defendant is a private charity.[12]

Thus, New Jersey, by overruling its prior decisions, effectively abandoned the doctrine of charitable immunity.

This same result was reached a year earlier in a New York decision,[13] where the court, reasoning along the same lines as the New Jersey court, rejected the immunity doctrine, stating that "a distinction unique in the law should rest on stronger foundations than those advanced."[14]

Courts generally have not gone from the extreme of full immunity to no immunity in one decision. Instead, the process usually follows this pattern: (1) the courts initially state the general rule that charitable institutions are immune from liability if they exercise due care in selecting and retaining their servants; (2) the rule, thus established, is "devoured" by many exceptions;[15] and (3) from this point, the rule is then completely discarded. This is borne out by the developments leading up to the principal case.[16]

This "devouring" of the rule by exceptions, evidenced by the great variance of rules and reasons therefor, is a strong indication that something is wrong and that correction, though in process, is incomplete.[17] In such a state of flux, it would seem that the rule should be critically re-examined by all courts as to its fundamental soundness and compatibility with present day needs and modern ideas of justice.[18]

North Carolina first held to the general rule that the only duty imposed on the charitable institution was that of exercising reasonable care in selecting and retaining its servants;[19] then an exception was made whereby an injured servant of a charitable institution did not have to show lack of due care in selection or retention of the negligent servant

[12] 27 N.J. at 39, 141 A.2d at 282.

[13] Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3 (Ct. App. 1957). This recent decision destroyed the last remnants of charitable immunity in New York.

[14] Bing v. Thunig, *supra* note 13 at 663, 143 N.E.2d at 7.

[15] "The 'rule' has not held in the tests of time and decision. Judged by results it has been devoured in 'exceptions.'" President and Directors of Georgetown College v. Hughes, 130 F.2d 810, 817 (D.C. Cir. 1942).

[16] The rule was laid down in D'Amato v. Orange Memorial Hospital, 101 N.J.L. 61, 127 Atl. 230 (Ct. Err. & App. 1925). An exception as to strangers was made in Simmons v. Wiley Methodist Episcopal Church, 112 N.J.L. 129, 170 Atl. 237 (Ct. Err. & App. 1934). Recovery by a servant was allowed. Rose v. Raleigh Fitkin-Paul Morgan Memorial Hosp., 136 N.J.L. 553, 57 A.2d 29 (Ct. Err. & App. 1948). Thus only the "beneficiaries" of charities were barred from recovery at the time of the *Collopy* case, note 8 *supra*.

[17] President and Directors of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942).

[18] "[S]*tare decisis* has no legitimate application to doctrines of the law of torts built upon a mistaken foundation persisting in the books after that foundation has been undermined, which are out of accord with general principles recognized today, so that if they are rejected the general law is clarified rather than unsettled." 13 NACCA L.J. 23 (1954).

[19] Barden v. Atlantic Coast Line Ry., 152 N.C. 318, 67 S.E. 971 (1910).

as a prerequisite to recovery;[20] and it would seem that charitable immunity would not be invoked as against a stranger to the charity,[21] although there is no case in North Carolina holding squarely on this point. Thus when *Williams v. Randolph Hospital, Inc.*[22] came before the court, the immunity rule of North Carolina was very similar to that in New Jersey when the principal case arose. However, the North Carolina court adopted a much different attitude from that taken by the court in the principal case.[23] The New Jersey court carefully reviewed the theories of immunity and then discarded the doctrine entirely. The North Carolina court merely mentioned the "trust fund," "implied waiver," and "public policy" theories and refused to discuss their merits or demerits. It did agree that they may be subject to some meritorious criticism, but said that "the numerical weight of authority is on the side of immunity." Then it stated that a number of jurisdictions have reached the same result as that of qualified immunity by holding the doctrine of respondeat superior inapplicable as between the charity and its employees.[24]

Since the latter theory is discussed separately and approved by the court, the inapplicability of respondeat superior to charitable institutions,[25] as against beneficiaries of such institutions, is apparently the basis for the doctrine of immunity in North Carolina.

One's liability for the negligence of his alleged servant is generally determined by his right and power to direct and control the servant in the performance of his duty at the instant the negligent act or omission occurs.[26] Applying this test to the situation where the negligence of an employee of a charity results in an injury to a beneficiary, it seems clear that the charity, having the right and power to direct and control its employees, would be the true master; it is only through the use of a legal fiction that the *beneficiary* can be said to be the master in such a situation.[27] There is no sound legal principle under which respondeat superior should be held inapplicable to a charitable institution and at the same time applicable to an institution privately owned and operated.[28] Thus, it appears that the inapplicability of respondeat superior to charitable institutions is as indefensible as the other theories of immunity

[20] Cowans v. North Carolina Baptist Hospitals, Inc., 197 N.C. 41, 147 S.E. 672 (1929).
[21] See Williams v. Union County Hospital Ass'n, Inc., 234 N.C. 536, 67 S.E.2d 662 (1951) (by implication).
[22] 237 N.C. 387, 75 S.E.2d 303 (1953).
[23] For a discussion of the North Carolina law on this subject, see Note, 32 N.C.L. Rev. 129 (1953).
[24] 237 N.C. at 390, 75 S.E.2d at 305.
[25] See note 5 *supra*.
[26] P. F. Collier & Son Distributing Corp. v. Drinkwater, 81 F.2d 200, 202 (4th Cir. 1936).
[27] Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P.2d 220 (1951).
[28] Mississippi Baptist Hospital v. Holmes, 214 Miss. 106, 55 So. 2d 142 (1951).

which, as the North Carolina court has agreed, may be "subject to some measure of meritorious criticism."

However, the court indicates that even if respondeat superior were applicable, the principle of stare decisis would require that any departure made from the rule of immunity be made by the legislature—due to the great weight of authority in North Carolina established over many years.[29] But, if the reasons for the rule are at best doubtful, why should stare decisis be applied without at least reviewing the rule? North Carolina has agreed that: "Where vital and important public or private rights are concerned, and the decisions regarding them are to have a direct and permanent influence on all future time, it becomes the duty as well as the right of the court to consider them carefully and to allow no previous error to continue, if it can be corrected."[30]

Though declaration of public policy is primarily a legislative function, the courts also have authority to declare a public policy which already exists—and to base their decisions on that ground.[31] Immunity, basically unsound under all legal theories, could only have been created by the courts in response to what appeared at the time to be proper as a matter of public policy.[32] Therefore, when the need for such a public policy no longer obtains, the court should declare that it no longer exists; and especially is this true where it was initiated by the courts instead of the legislature.[33]

For negligent or tortious conduct, liability is the rule, and immunity the exception.[34] The avowed purpose of the rule of immunity is to protect the charity. Actually, it clothes charitable and non-profit organizations with special privileges not available to other organizations.[35] It seems clear that most authorities would agree today that: (1) the need for the rule no longer exists; (2) the underlying reasons for the rule are not valid; and (3) the charitable institution is no longer the small institution it was when the rule was initially formulated. This being true, why should not the law itself—even assuming it to have been justifiable when initially made[36]—change so as to reflect these facts?

[29] Williams v. Randolph Hospital, Inc., 237 N.C. 387, 75 S.E.2d 303 (1953). Prior to this case, there were three cases in which all of the necessary elements—a charitable institution, a beneficiary, and a servant who, though carefully selected and retained, had been negligent—were present: Williams v. Union County Hospital Ass'n, 234 N.C. 536, 67 S.E.2d 662 (1951); Herndon v. Massey, 217 N.C. 610, 8 S.E.2d 914 (1940); Barden v. Atlantic Coast Line Ry., 152 N.C. 318, 67 S.E. 971 (1910).

[30] Mason v. A. E. Nelson Cotton Co., 148 N.C. 492, 510, 62 S.E. 625, 631 (1908).

[31] Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P.2d 220 (1951).

[32] Mississippi Baptist Hospital v. Holmes, 214 Miss. 906, 55 So. 2d 142 (1951).

[33] *Ibid.*

[34] President and Directors of Georgetown College v. Hughes 130 F.2d 810 (D.C. Cir. 1942).

[35] Noel v. Menninger Foundation, 175 Kan. 751, 267 P.2d 934 (1954).

[36] *But see,* Pierce v. Yakima Valley Memorial Hospital Ass'n, 43 Wash. 2d

This is the attitude taken by the New Jersey court in the principal case. It is submitted that this should be the attitude taken by *any* court in reviewing the subject.

THOMAS L. NORRIS, JR.

Torts—Lookout—Duty to Maintain at Green Light

In the recent case of *Currin v. Williams*,[1] plaintiff entered the intersection with a green light in his favor but without maintaining a lookout for traffic approaching on the intersecting street. Defendant entered the intersection from plaintiff's left while the traffic control signal facing him was red. Though not conclusive, there was some evidence to support a conclusion that had plaintiff looked he would have been put on notice that defendant was not going to stop. *Held:* Plaintiff's failure to look to the right and the left when he entered the intersection on the green light was not contributory negligence as a matter of law, but the issue of contributory negligence was properly submitted to the jury.

Since, in accidents of this nature, failure to maintain a lookout is invariably alleged, it is essential that attorneys know (1) what is meant by *lookout*,[2] (2) what constitutes the motorist's duty to maintain a lookout, and (3) what effect automatic traffic signals have upon that duty.

In its inception, *lookout* was probably a nautical term designating that member of a ship's crew charged with the duty of keeping watch for danger.[3] Stated quite simply, the duty of a motorist to maintain a lookout is analogous to the duty of that crew member; the motorist must keep watch for possible danger.[4] Quite naturally, one indispen-

162, 260 P.2d 765 (1953). There the court says: "Ordinarily, when a court decides to modify or abandon a court made rule of long standing, it starts out by saying that 'the reason for the rule no longer exists.' In this case it is correct to say that the 'reason' originally given for the rule of immunity never did exist." *Id.* at 167, 260 P.2d at 768.

[1] 248 N.C. 32, 102 S.E.2d 455 (1958).

[2] One of a number of descriptive words usually accompanies the word lookout. See, *e.g.*, Wright v. Ponitz, 44 Cal. App. 2d 215, 112 P.2d 25 (1941) (*ordinary careful* lookout); Wilder v. Cadle, 227 Ky. 486, 13 S.W.2d 497 (1929) (*reasonable* lookout); Broussard v. Hotard, 4 So. 2d 563 (La. App. 1941) (*sharp* lookout); Wright v. Pegram, 244 N.C. 45, 92 S.E.2d 416 (1956) (*proper* lookout); Murray v. Atlantic Coast Line R.R., 218 N.C. 392, 11 S.E.2d 326 (1940) (*reasonably careful* lookout).

[3] See Devore v. Schaffer, 245 Iowa 1017, 65 N.W.2d 553 (1954).

[4] There are four classes of hazards which the motorist must guard against: (1) defects or hazards of the road surface, (2) objects or persons standing or moving in the path of the approaching vehicle, (3) objects or hazards which, without negligence, may enter or attempt to enter the path of the vehicle prior to, or at the time of, its passage, (4) objects or persons which negligently enter or attempt to enter the path of the vehicle prior to, or at the time of, its passage. Barrett, *Mechanics of Control and Lookout in Automobile Law*, 14 TUL. L. REV. 493, 507 (1940).

sable element in the maintenance of a lookout is the use of the eyes. To fulfill his obligation, the motorist must not limit the observation to his immediate front;[5] he must look to the sides—right and left—and to the rear as well.[6] Of course, the courts will take cognizance of the fact that he cannot simultaneously look in four different directions.[7] In many situations common sense will dictate in which direction a driver should look first;[8] however, there is no mathematical formula for determining when the obligation is fulfilled,[9] because looking is only a part of the duty. Not only must the driver look, but the purpose of looking must be accomplished;[10] and if there is evidence that he did not see what he ought to have seen, it is considered as evidence of failure to maintain a lookout.[11] Thus, stated broadly and generally, it appears that the duty to maintain a lookout requires that the driver have an awareness of those things surrounding him which are visible and which might have the effect of impeding the safe progress of his motor vehicle.

A question frequently raised is whether the same lookout is required in the face of an automatic traffic signal showing green as is required absent the automatic traffic signal. To arrive at a sensible answer to the question, it is necessary to know that automatic traffic signals are placed at intersections to render crossings less dangerous and to facilitate the flow of traffic.[12] Since traffic lawfully in the intersection when the light changes must be allowed to clear the inter-

[5] Mumford v. United States, 150 F. Supp. 63 (D. Md. 1957); Ehrhard v. Ruan Transp. Corp., 245 Iowa 193, 61 N.W.2d 696 (1953); Brooks v. State Farm Mut. Auto. Ins. Co., 91 So. 2d 403 (La. App. 1956); Evett v. Corbin, 305 S.W.2d 469 (Mo. 1957).

[6] Scott v. Marshall, 90 Ohio App. 347, 105 N.E.2d 281 (1951). See Kosbar v. Johnson, 185 Pa. Super. 510, 138 A.2d 872 (1958), where it was stated that one is not required to stop at every tree and clump of shrubs and look behind the leaves to see if an automobile lurks in ambush. Naturally the degree of care required in making observations to the rear is not as great as the degree of care required in making observations to the front. Dreher v. Divine, 192 N.C. 325, 135 S.E. 29 (1926).

[7] Gross v. Smith, 388 Pa. 92, 130 A.2d 90 (1957); Koehler v. Schwartz, 382 Pa. 352, 115 A.2d 155 (1955).

[8] For example, when a motorist is approaching an intersection, he should first look to his left, because he first enters the lane in which traffic on his left is moving. Grande v. Wooleyhan Transp. Co., 353 Pa. 535, 46 A.2d 241 (1946); Dandridge v. Exhibitors Serv. Co., 167 Pa. Super. 143, 74 A.2d 670 (1950).

[9] Bosell v. Rannestad, 226 Minn. 413, 33 N.W.2d 40 (1948). See also Davidson v. Vast, 233 Iowa 534, 10 N.W.2d 12 (1943); Morrisette v. A. G. Boone Co., 235 N.C. 162, 69 S.E.2d 239 (1952); Bullock v. Luke, 98 Utah 501, 98 P.2d 350 (1940).

[10] Donnelly v. Goforth, 284 S.W.2d 462 (Mo. 1955); Taylor v. Brake, 245 N.C. 553, 96 S.E.2d 686 (1957). See also Peckham v. Knofla, 130 Conn. 646, 36 A.2d 740 (1944); Blakeman v. Lofland, 173 Kan. 725, 252 P.2d 852 (1953); Marshburn v. Patterson, 241 N.C. 441, 85 S.E.2d 683 (1955); Shew v. Bailey, 37 Tenn. App. 40, 260 S.W.2d 362 (1951); Perry v. Thompson, 196 Va. 817, 86 S.E.2d 35 (1955).

[11] To look and fail to see what could have been seen by keeping a proper lookout is as negligent as not to have looked at all. Goodhue v. Ballard, 122 Conn. 542, 191 Atl. 101 (1937); Mitchell v. Terrell, 55 So. 2d 699 (La. App. 1951); Donnelly v. Goforth, *supra* note 10; Nehi Bottling Co. v. Lambert, 196 Va. 949, 86 S.E.2d 156 (1955).

[12] Gross v. Smith, 388 Pa. 92, 130 A.2d 90 (1957).

section before the motorist having the favorable signal proceeds,[13] the *go* signal does not literally mean that the motorist can go under any and all circumstances.[14] The signals are designed to prevent accidents and not to excuse them;[15] therefore, it would be absurd to assume that a green light gives the driver the privilege to wilfully or recklessly run down people or automobiles with impunity. Reasonable care must be exercised for the safety of others.[16] In approaching a blind unguarded intersection, a motorist, in the exercise of reasonable care, must slow down to a "snail's pace" and maneuver his automobile into a position where he can look to the right and left along the intersecting street and determine that the crossing can be made safely.[17] Is the same thing required when an automatic traffic signal is placed at the intersection?

Answering the question in the affirmative, a minority has held that the duty of a motorist to exercise care at an intersection is not relaxed by reason of the presence of a green traffic signal.[18] For purposes of simplicity, the holding of these courts will be referred to as Rule 1. On the other hand, a definite majority has answered the question in the negative, holding that a green traffic light lessens the degree of care required.[19] The holding of the latter courts will be referred to as Rule 2. In view of the fact that a motorist is not required to anticipate

[13] Freeman v. Churchill, 30 Cal. 2d 453, 183 P.2d 4 (1947); Davis v. Dondanville, 107 Ind. App. 665, 26 N.E.2d 568 (1940); Styskal v. Brickey, 158 Neb. 208, 62 N.W.2d 854 (1954); Indianapolis & Southeastern Trailways, Inc. v. Cincinnati Street Ry., 166 Ohio St. 310, 142 N.E.2d 515 (1957); Lanegan v. Crauford, 49 Wash. 2d 562, 304 P.2d 953 (1956).

[14] Scully v. Railway Express Agency, 137 F. Supp. 761 (E.D. Pa. 1956); Roland v. Murray, 239 S.W.2d 967 (Ky. 1951); Valench v. Belle Isle Cab Co., 196 Md. 118, 75 A.2d 97 (1950); Witt v. Peterson, 310 S.W.2d 857 (Mo. 1958); Fuss v. Williamson, 160 Neb. 141, 69 N.W.2d 539 (1955); Jordan v. Kennedy, 180 Pa. Super. 593, 119 A.2d 679 (1956); Arney v. Bogstad, 199 Va. 460, 100 S.E.2d 749 (1957).

[15] Adkins v. Smith, 98 S.E.2d 712 (W.Va. 1957).

[16] Cases cited note 14 *supra*.

[17] See Green v. Higbee, 176 Kan. 596, 272 P.2d 1084 (1954); Reaney v. Mabry, 97 So. 2d 841 (La. App. 1957); MacDonald v. Skornia, 322 Mich. 370, 34 N.W.2d 4 (1948); Papkin v. Helfand & Katz, 346 Pa. 485, 31 A.2d 112 (1943); Bailey v. Zwirowski, 268 Wis. 208, 67 N.W.2d 262 (1954). See also Annot., 59 A.L.R.2d 1202 (1958).

[18] Spence v. Waters, 39 Del. (9 W.W. Harr.) 582, 4 A.2d 142 (Super. Ct. 1938); Grimes v. Yellow Cab Co., 344 Pa. 298, 25 A.2d 294 (1942); Byrne v. O. G. Schultz, Inc., 306 Pa. 427, 160 Atl. 125 (1932); Vol Cannon v. Philadelphia Transp. Co., 148 Pa. Super. 330, 25 A.2d 584 (1942). "He must be vigilant, must exercise a *high* degree of care. . . . This duty has *not* been relaxed by the introduction of traffic officers and signals. . . . He is still bound to the *same* degree of care as *before* the introduction of these modern aids to travel." Byrne v. O. G. Schultz, Inc., *supra* at 433, 160 Atl. at 127. (Emphasis added.) It may be arguable that the court intended to require due care, but the language used certainly indicates that more than due care was required.

[19] Taylor v. Sims, 72 Cal. App. 2d 60, 164 P.2d 17 (1945); Sullivan v. Locke, 73 So. 2d 616 (La. App. 1954); Buehler v. Beadia, 343 Mich. 692, 73 N.W.2d 304 (1955); Hyder v. Asheville Storage Battery Co., 242 N.C. 553, 89 S.E.2d 124 (1955); Jordan v. Kennedy, 180 Pa. Super, 593, 119 A.2d 679 (1956); Wilson v. Koch, 241 Wis. 594, 6 N.W.2d 659 (1942).

negligence on the part of others,[20] Rule 2 seems eminently more sensible. Take, for example, the case of a motorist approaching an intersection which is surrounded by buildings that obstruct his view to the left and to the right. If this motorist has a green light when he approaches the intersection, what must he do? Not even Rule 1 would require him to stop his automobile, get out and peer around the obstruction to see if motorists approaching on the intersecting street are going to stop in obedience to the red traffic signal. But it seems that Rule 1 would require him to bring his vehicle virtually to a halt, inch forward into the intersection, and determine that vehicles approaching from his left and right are going to stop. Having made that determination, he could then proceed. Under Rule 2, the motorist having the green light could proceed uninterruptedly into the intersection and make his observation to the left and right while in progress.

Consider a second example. Six streets converge at one point. Each street carries six lanes of traffic. A reasonable and prudent motorist has a green light in his favor as he approaches that maze. What must he do? Must he stop in order that he may survey what is occurring in the other lanes of traffic? Allowing the motorist the benefit of Rule 2 enables him to continue his forward progress in reliance upon the favorable signal. Of course, as previously stated, he may not arbitrarily exercise his right.[21] He must still exercise a degree of care commensurate with the danger which continues to exist.[22] Even so, he is merrily on his way while the motorist operating under Rule 1 is still sitting at the intersection in a state of bewilderment.

Considering that traffic lights have two purposes, it seems that Rule 1 should be discarded. While it *may* have the effect of rendering crossings less dangerous,[23] it does not facilitate the flow of traffic. Having determined that the automatic traffic signal is green, the motorist must take the same precautions he would have to take at an unguarded blind intersection; therefore, under Rule 1, the green light is nothing more

[20] Messier v. Zanglis, 144 Conn. 449, 133 A.2d 619 (1957); Smith v. Sizemore, 300 S.W.2d 225 (Ky. 1957); Coyle v. Stopak, 165 Neb. 594, 86 N.W.2d 758 (1957); Morgan v. Saunders, 236 N.C. 162, 72 S.E.2d 411 (1952); Henke v. Peyerl, 89 N.W.2d 1 (N.D. 1958).

[21] Cases cited note 14 *supra*.

[22] Cappo v. Baker, 91 So. 2d 611 (La. App. 1957); Sullivan v. Locke, 73 So. 2d 616 (La. App. 1954); Stephens v. Koprowski, 295 Mich. 213, 294 N.W. 158 (1940); Witt v. Peterson, 310 S.W.2d 857 (Mo. 1958); Rynar v. Lincoln Transit Co., 129 N.J.L. 525, 30 A.2d 406 (Ct. Err. & App. 1943); Dembicer v. Pawtucket Cabinet & Builders Finish Co., 58 R.I. 451, 193 Atl. 622 (1937). See also Nelson v. Ziegler, 89 So. 2d 780 (Fla. 1956); Politte v. Miller, 301 S.W.2d 839 (Mo. App. 1957); Groome v. Davis, 215 N.C. 510, 2 S.E.2d 771 (1939); Reid v. Abbiati, 113 Vt. 233, 32 A.2d 133 (1943).

[23] *But see* Perpetua v. Philadelphia Transp. Co., 380 Pa. 561, 565, 112 A.2d 337, 339 (1955) (dissenting opinion), where it was said: "A hesitating, demurring and irresolute driver is by no means the safest of drivers. Vacillation can cause as much chaos as impetuosity."

than an additional factor to be noted. On the other hand, Rule 2, which allows the motorist to proceed uninterruptedly into the intersection and make his observation while in progress, operates effectively as to both purposes. Crossings are rendered less dangerous and the flow of traffic is facilitated.

WILLIAM H. HOLDFORD

Workmen's Compensation—Analysis of "Jurisdictional Fact" Review by Superior Courts

The North Carolina Workmen's Compensation Act empowers the Industrial Commission to make findings of fact which are binding on the parties and on courts on appeal. Appeals from rulings of the Commission may be taken only "for errors of law, under the same terms and conditions as govern appeals in ordinary civil actions."[1]

Cases in North Carolina reveal two lines of authority concerning the extent to which findings by the Industrial Commission may be reviewed on appeal to the superior court. One group[2] of cases shows literal adherence to the language of the act in holding that the courts may review only questions of law. The other group[3] departs from the literal language of the act and asserts that the superior court judge may not only review questions of law, but that he may also make his own findings of "jurisdictional fact"[4] upon motion of the appellant.

[1] N.C. GEN. STAT. § 97-86 (1958) provides that the award of the Commission "shall be conclusive and binding as to *all questions of fact;* but either party to the dispute may . . . appeal from the decision of said Commission to the superior court . . . for errors of law, under the same terms and conditions as govern appeals in ordinary civil actions. . . ." (Emphasis added.)

[2] Hawes v. Mutual Benefit Health & Acc. Ass'n, 243 N.C. 62, 89 S.E.2d 739 (1955); Thomason v. Red Bird Cab Co., 235 N.C. 602, 70 S.E.2d 706 (1952); Smith v. Southern Waste Paper Co., 226 N.C. 47, 36 S.E.2d 730 (1946); Hayes v. Elon College, 224 N.C. 11, 29 S.E.2d 137 (1944); Bivens v. Teer, 220 N.C. 135, 16 S.E.2d 659 (1941); Beach v. McLean, 219 N.C. 521, 14 S.E.2d 515 (1941); Birchfield v. Department of Conservation and Development, 204 N.C. 217, 167 S.E. 855 (1933).

[3] Hart v. Thomasville Motors, Inc., 244 N.C. 84, 92 S.E.2d 673 (1956); Aylor v. Barnes, 242 N.C. 223, 87 S.E.2d 269 (1955); Francis v. Carolina Wood Turning Co., 204 N.C. 701, 169 S.E. 654 (1933); Aycock v. Cooper, 202 N.C. 500, 505, 163 S.E. 569, 571 (1932) (dictum).

[4] "[I]n every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity. . . ." Nobel v. Union River Logging R.R., 147 U.S. 165, 173 (1893).

Professor Larson has said that practically every fact decided in compensation cases has some bearing on the tribunal's jurisdiction and that reduced to the absurd, the rule could be used to render the tribunal powerless to decide any question with finality. 2 LARSON, WORKMEN'S COMPENSATION § 80.41 (1952).

The North Carolina Supreme Court, however, has termed only three issues questions of "jurisdictional fact": (1) Was the injured worker an employee? N.C. GEN. STAT. § 97-2(2) (1958); Francis v. Carolina Wood Turning Co., *supra* note 3; (2) Does the defendant regularly work five or more employees? N.C. GEN. STAT. § 97-13(b) (1958); Aycock v. Cooper, *supra* note 3; (3) If

The existence of these two lines of authority raises several questions. First, in what circumstances have the two approaches been used? Second, is the "jurisdictional fact" doctrine necessary? Third, why has the "jurisdictional fact" approach been used? It is the purpose of this note to explore the questions presented by these two divergent views.

Aycock v. Cooper[5] is the earliest reported case in which the Industrial Commission's jurisdiction was challenged in a workmen's compensation case. The superior court was upheld in reversing an award of the full Commission because there was no competent evidence to support the "jurisdictional fact" that there were five employees. In dictum[6] the court said that had there been competent evidence on this point, a proper construction of G.S. § 97-86 would have justified a redetermination of this "jurisdictional fact" by the superior court. It was conceded that all other facts are binding on appeal.

The *Aycock* dictum was followed in *Francis v. Carolina Wood Turning Co.*[7] where the superior court was upheld in making an independent finding, from conflicting evidence, of the "jurisdictional fact" of employment and in setting aside the Commission's finding that plaintiff was an independent contractor.[8]

Until 1955 the *Aycock* and *Francis* decisions, although cited in several dicta,[9] were not reaffirmed. For a time the court seemed to deal with jurisdictional matters as questions of law only. An example of this approach is found in *Beach v. McLean*.[10] In that case the jurisdictional question was whether claimant was the employee of the appellant or of an independent contractor who was not subject to the act. The Commission's finding, from undisputed facts, that the appellant was claimant's employer was reversed by the superior court. In affirming the lower court's decision the court described the question of employment as a mixed one of law and fact. The contractual elements found to exist by the Commission were conclusive fact findings, but the relationship evidenced by those facts was treated as a reviewable question of law.

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the injury occurred out of the state, are the place the employment contract was made, the place of business of the employer, and the residence of the employee all in North Carolina? N.C. GEN. STAT. § 97-36 (1958); Aylor v. Barnes, *supra* note 3.

The court has held that whether there was an injury resulting from an accident arising out of and in the course of the employment is conclusive as found by the Commission, if supported by competent evidence, and is not a reviewable "jurisdictional fact." Francis v. Carolina Wood Turning Co., *supra*.

[5] 202 N.C. 500, 163 S.E. 569 (1932).

[6] *Id.* at 505, 163 S.E. at 571.

[7] 204 N.C. 701, 169 S.E. 654 (1933).

[8] See note 17 *infra*.

[9] Mallard v. F. M. Bohannon, Inc., 220 N.C. 536, 542, 18 S.E.2d 189, 192 (1941); Buchanan v. State Highway & Pub. Works Comm'n, 217 N.C. 173, 175, 7 S.E.2d 382, 383 (1940); Thompson v. Johnson Funeral Home, 208 N.C. 178, 180, 179 S.E. 801, 803 (1935).

[10] 219 N.C. 521, 14 S.E.2d 515 (1941).

In *Smith v. Southern Waste Paper Co.*,[11] as in the *Beach* case, there was no dispute as to the facts. The superior court reversed the Commission's finding that claimant's deceased was an employee. The supreme court reversed, calling such a jurisdictional issue a reviewable question of law, but holding that where, as here, there is competent evidence to support the findings and *conclusion* of the Commission the award should be affirmed. This opinion seems to go further than any other in the direction of a liberal attitude toward the finality of Commission decisions. Although this case apparently stands for the proposition that the Commission's conclusions of law will be upheld if supported by competent evidence, the court in subsequent cases has not so interpreted it. On the contrary, it has been accepted along with *Beach,* a question of law case, as authoritative on the question of the scope of the courts' review powers in cases where the jurisdiction of the Commission was in issue. In *Aylor v. Barnes*,[12] however, the court reaffirmed the "jurisdictional fact" rule of the *Aycock* and *Francis* cases. The lower court affirmed the Commission's assumption of jurisdiction and award to the claimant and rejected appellant's argument for non-coverage based on allegations that claimant was a non-resident and that the injury occurred outside the state. On appeal, the superior court was reversed for failure to make an independent finding of the disputed "jurisdictional fact" of residence.

In *Hart v. Thomasville Motors, Inc.,* [13] plaintiff, in a hearing before the Industrial Commission, attacked that body's jurisdiction to enforce a settlement agreement into which he had entered with defendant-employer on the ground that he was not an employee. The superior court, upon its independent finding of the disputed question of employment, affirmed the Commission's finding of no jurisdiction. The supreme court approved, invoking the "jurisdictional fact" rule, even though at times it labeled the employment question one of law. The case, however, was reversed on other grounds.

Shortly after the decision in the *Hart* case the fact that two lines of authority exist with regard to jurisdictional review was recognized for the first time by the Supreme Court of North Carolina in the case of *Pearson v. Peerless Flooring Co.*[14] Defendant had appealed from an award to a worker's widow alleging that deceased was an independent contractor and not an employee as found by the Commission. Defendant assigned as error the failure of the judge below to make an independent finding of this "jurisdictional fact." The supreme court found, however, that such a finding had in fact been made. Since the superior court's

[11] 226 N.C. 47, 36 S.E.2d 730 (1946).
[12] 242 N.C. 223, 87 S.E.2d 269 (1955).
[13] 244 N.C. 84, 92 S.E.2d 673 (1956).
[14] 247 N.C. 434, 101 S.E.2d 301 (1958).

finding was the same as that of the Commission, as was the case in the *Hart* decision, the court did not have to adopt or reject either of the two lines of authority. The court did call attention to the conflict and noted that a considerable period followed the *Aycock* and *Francis* decisions during which the "jurisdictional fact" doctrine of those cases was not invoked. It was also pointed out by the court that when the doctrine was again used in the *Hart* and *Aylor* decisions it was not re-examined for its soundness.

An attempt to classify the situations in which the two approaches have been used yields the following generalities. First, the "jurisdictional fact" approach is taken where there is conflicting evidence as to basic facts upon which the ultimate conclusion as to jurisdiction turns. Second, the doctrine generally has gone unmentioned when there is no dispute as to the evidentiary facts.

What difference, if any, exists between a finding of "jurisdictional fact" and a legal conclusion regarding a circumstance on which a tribunal's jurisdiction depends? Where there is an agreed statement of facts the only possible issues for judicial determination are questions of law.[15] Likewise it seems that when a tribunal has the power to find basic or evidentiary facts conclusively,[16] that the ultimate or "jurisdictional fact" of employment, number employed, or place of residence of the worker, would be but a legal conclusion to be drawn from those facts.

Had the superior courts' power of review been expressly limited by the supreme court to questions of law, all of the cases discussed could have been decided as they were with the exception of the *Francis* case.[17] The court has, on occasion, substantiated this assertion by citing, without distinction, cases which adopt both views.[18]

Why has appellate court redetermination of "jurisdictional facts" been permitted? Professor Larson has offered the following explanation: "The statute gives the administrative agency power to make decisions with reference only to certain situations; an agency with delegated powers may not enlarge those powers beyond the statutory

[15] Thomas v. Raleigh Gas Co., 218 N.C. 429, 11 S.E.2d 297 (1940).

[16] See note 1 *supra*.

[17] The *Francis* case stands out as a decision that seems to be irreconcilable with a "question of law" approach to review. The superior court judge was allowed to redetermine, from the conflicting evidence in the record, evidentiary facts bearing on the question of employment. The Commission called plaintiff, who worked at a table in defendant's shop, an independent contractor. The court sustained the lower court's independent finding that he was an employee. Perhaps the court in the *Francis* case stretched the "jurisdictional fact" rule to reach the result they felt justice demanded.

[18] The *Aylor* and *Hart* decisions ("jurisdictional fact" cases) cite *Smith v. Southern Waste Paper Co.* (a "question of law" case) as authority for the review of "jurisdictional facts." The *Smith* case states that jurisdiction is reviewable as a question of law and cites *Aycock v. Cooper* (the original "jurisdictional fact" case) as authority for this proposition.

grant by its own act; it therefore cannot be allowed to make conclusive findings of the very facts on which the scope of its power and jurisdiction depends. Therefore the reviewing court must decide for itself whether the facts on which jurisdiction rests actually existed."[19]

In the dictum of *Aycock v. Cooper* it was stated that both a "proper construction" of the statute[20] and "well-settled principles of law" require a redetermination of the "jurisdictional facts" by the superior court on appeal. The court did not explain the construction or the principles upon which it relied in asserting the requirement of such review.[21]

It might be argued that the statutory wording, "under the same terms and conditions as govern appeals in ordinary civil actions," justifies a holding that "jurisdictional facts" are reviewable. The quoted words have been held to make appeals from the Commission analogous to those from justices of the peace.[22] The superior court has appellate jurisdiction of all issues of law or *fact* determined by a justice of the peace.[23] The court later limited the justice of the peace analogy to the mechanics of appeal, *i.e.,* procedures for docketing and notice of appeal.[24] This holding seems to preclude justification of "jurisdictional fact" review—of the type seen in the *Francis* case—on the basis of this analogy.

In ordinary civil actions beginning in the superior court where the judge has found a "jurisdictional fact," such as domicile, his determination will be held conclusive on appeal if there is any competent evidence to support the finding.[25] This is true regardless of the conclusion that the supreme court might have reached upon the same evidence.[26] It seems that the court has attached less significance to the findings of "jurisdictional fact" by the Industrial Commission.

Perhaps the "jurisdictional fact" doctrine sprang from a desire on the part of the court to vest in the judiciary a greater amount of control over the scope and coverage of the Workmen's Compensation Act. This control would naturally be exercised by reversals of the Commission's finding or non-finding of "jurisdictional facts." Yet in only one case[27] has the supreme court upheld a superior court reversal of the Commission by invoking the "jurisdictional fact" doctrine.

[19] 2 LARSON, *op. cit. supra* note 4.
[20] See note 1 *supra.*
[21] Connor, J., speaking for the court, expressed the opinion that a failure to recognize the review power over "jurisdictional facts" might raise a serious constitutional question as to the validity of the statute that is now G.S. § 97-86. 202 N.C. at 505, 163 S.E. at 571.
[22] Higdon v. Nantahala Power and Light Co., 207 N.C. 39, 175 S.E. 710 (1934).
[23] N.C. GEN. STAT. § 7-66 (1953).
[24] Fox v. Cramerton Mills, Inc., 225 N.C. 580, 35 S.E.2d 869 (1945).
[25] Bangle v. Webb, 220 N.C. 423, 17 S.E.2d 613 (1941).
[26] *Ibid.*
[27] See note 17 *supra.*

Although the "jurisdictional fact" rule if greatly extended would tend to deprive the Commission of its ability to perform its duty effectively and reduce its proceedings to "meaningless preliminary skirmishes,"[28] the rule has not, as yet, reduced the effectiveness of the Commission in settling compensation claims in North Carolina. The rule has, however, given rise to confusion in federal compensation cases and has been the topic of several well-reasoned dissenting opinions.[29] In addition, a recent treatise on workmen's compensation states that the rule has been "largely discredited."[30]

Another objectionable feature of the rule that "jurisdictional facts" are excepted from the binding facts found by the Commission is that the superior court, without seeing any witnesses or hearing any testimony, may go into the record and determine for itself not just the "jurisdictional fact" but also the basic facts which, considered together, afford a basis for determination of the "jurisdictional fact."[31] This practice seems not to be justified by G.S. § 97-86.

The return of the "jurisdictional fact" rule in the *Aylor* and *Hart* cases could indicate a desire on the part of the court to revest in the judiciary a measure of control seemingly disclaimed in the *Beach* and *Smith* cases. A more likely reason for the return of the rule is that mentioned in the *Pearson* case, namely, that the court apparently ap-

[28] 2 LARSON, *op. cit. supra* note 4.

[29] In Crowell v. Benson, 285 U.S. 22 (1932), the United States Supreme Court held that administrative findings of fact as to the employment relationship and the location of the accident were "jurisdictional facts" which could be determined anew upon appeal to the district court under the Longshoremen's and Harbor Workers' Compensation Act. Speaking for a three-justice minority, Mr. Justice Brandeis criticized the majority opinion by saying: "Whatever may be the propriety of a rule permitting special re-examination in a trial court of so-called 'jurisdictional facts' passed upon by administrative bodies having otherwise final jurisdiction over matters properly committed to them, I find no warrant for extending the doctrine to other and different administrative tribunals whose very function is to hear evidence and make initial determinations concerning those matters which it is sought to re-examine. . . . Logically applied it would seriously impair the entire administrative process." *Id.* at 92, 93. In this case the review provisions of the compensation act in question were similar to those of G.S. § 97-86. See note 1 *supra*.

In Estep v. United States, 327 U.S. 114 (1946), where appellant sought to have a judicial redetermination of "jurisdictional facts" found by a draft board, in his concurring opinion Mr. Justice Frankfurter said: "This argument revives, if indeed it does not multiply, all the casuistic difficulties spawned by the doctrine of 'jurisdictional fact.' In view of the criticism which that doctrine, as sponsored by *Crowell v. Benson*, . . . brought forth and of the attritions of that case through later decisions, one had supposed that the doctrine had earned a deserved repose." *Id.* at 142.

Although the "jurisdictional fact" doctrine has been widely criticized both by members of the United States Supreme Court and legal writers, and later decisions have failed to extend the rule of the *Crowell* case even to similar situations, it has never been specifically overruled. LANDIS, THE ADMINISTRATIVE PROCESS, 133 (1938). See Voehl v. Indemnity Ins. Co., 288 U.S. 162 (1933); Mr. Justice Frankfurter's dissenting opinion, Yonkers v. United States, 320 U.S. 685, 695 (1944); Pittsburgh S.S. Co. v. Brown, 81 F. Supp. 285 (N.D. Ill. 1947).

[30] 2 LARSON, *op. cit. supra* note 4.

[31] See note 17 *supra*.

plied the rule of the *Aycock* and *Francis* cases without a reappraisal of its soundness.

When a proper case comes before the court, the suggested reappraisal should be made and the "jurisdictional fact" rule should be abandoned in North Carolina. This abandonment is suggested not because the rule has led to abuse by the courts, but in the interest of lending consistency to legal terminology. There appears to be little need for perpetuating two phrases to express the same idea and to accomplish the same legal purpose. If the motivation for adopting the rule was the desire to exercise greater control over the policy of the act, past experience does not show that it has been necessary. If no such motive was present, then there is no apparent need for using the two phrases interchangeably. It is felt that abandonment of the term "jurisdictional fact" would not require the court to relinquish any control over compensation policy which it may have exercised in the past; and certainly, such a course would lend greater clarity to this area of the law.

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