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Fourth Circuit Review: Foreword

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FOREWORD

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As my colleague Judge H. Emory Widener, Jr. observed in his Fourth Circuit Review Foreword of 1980, and as Judge James Dickson Phillips, Jr. reemphasized in his Foreword of 1982, the annual increase in filings has become an identifying symbol for the calendar of the United States Court of Appeals for the Fourth Circuit. When considered in the abstract, the statistics would inspire little optimism on the part of one concerned about prompt resolution of appeals. Indeed, confronted with numbers reflecting a constant increase in the already full circuit docket, even the heartiest among us would pause to query precisely how that increase could be absorbed.

As of the circuit year ending June 30, 1983, there had been an overall increase in filings of 6.4 percent above the 1982 level. With district courts experiencing a 13.3 percent increase in civil filings alone for the twelve-month period ended September 30, 1983,[1] our derivative increase was to be expected. The number of cases pending on appeal as of June 30, 1983, including miscellaneous cases, stood at 1,850. Private civil cases constituted over 29 percent of that number, with criminal matters and prisoner petitions representing about 21 percent each. Other United States civil, bankruptcy, original proceedings, and administrative appeals represented the balance of the caseload. While the total number is admittedly substantial, it does not represent any dramatic change from backlogs of previous years. Thus, we proceed at a deliberate, though not indifferent, pace through the calendar, approaching the task with a blind eye to the difficulty presented by statistics alone. Like the bumblebee that could not levitate were it apprised of the laws of aerodynamics thought to make its flight impossible, so too do we approach our task. We appear to cope.

The loss of Judge Albert V. Bryan marks a dark spot in the circuit's year, and we will miss his personal warmth and assistance. On a more positive note, it seems appropriate to observe that the efficient completion of our task over the past year has been due in no small measure to the continued and active presence of Judge John D. Butzner, Jr. on the bench. Though he took qualified retirement effective November 1, 1982, in choosing to sit, Judge Butzner continues in the tradition of Judges Haynsworth and Field (to mention only those still with us), providing much needed and appreciated assistance in disposition of the caseload. In an era that has seen the splitting of the Fifth Circuit,

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1. *Federal Judicial Workload Statistics*, Administrative Office of the United States Courts, as reported in the *Fourth Circuit Newsletter* (January, 1984).

and has admitted of rumblings of a splitting of the Ninth Circuit, the continued and collegial unity of this circuit emerges as a substantial aid to the fulfillment of the business of the court.

Of particular importance over the past year regarding management of the circuit's calendar has been the matter of transcript delay. Such delay not only contributes to the backlog facing the circuit, but also, and more importantly, causes increased aggravation and anxiety for parties eager to press their claims to appellate resolution. Although the problem is particularly pronounced in the District of Maryland, it is a recurring one throughout the circuit. The case of *United States v. Johnson*,[2] argued in January 1984, presents a typical instance of the "excessive delay" scenario. Convicted on April 9, 1981, appellant Johnson was forced to wait until August 29, 1983 for the filing of his trial transcript. The Government gave no objective reason for the delay, and Johnson and his attorney had made reasonable efforts to expedite the process.

Among the circuits a basic agreement exists that release from custody generally is an inappropriately extreme remedy in a case of excessive delay. On appeal, one is not faced with prejudice through loss of testimony or other evidence, as may be the case when trial is delayed. Nevertheless, fashioning a proper remedy is no simple task. Indeed, a comprehensive fine tuning, if not an outright overhaul, of the entire transcript process stands as a possible response in a circuit in which delay threatens to undercut the efficient functioning of the appellate process. At this juncture, it appears that aggressive measures will likely be necessary, lest the issue of transcript delay become an even more prevalent and compelling one in this circuit's caseload.

Turning to the past year's developments in substantive areas of the law, the area of civil rights emerges as an especially active one, as does the area of charges of judicial misconduct.[3] At least five separate appeals since October 1982, cutting across both civil and criminal lines, have dealt to a substantial extent with the issue of asserted judicial misconduct at the trial level. Writing for a unanimous panel in *United States v. Parodi*,[4] Judge Donald Russell outlined the proper parameters of the trial judge's role vis-a-vis the parties and the jury. Emphasizing that it is necessary to consider the entire trial record when attempting to determine precisely when those bounds may have been overstepped, the court observed that a district judge need not act as a mere "umpire or . . . a moderator at a town meeting. . . . [I]t is his duty to see that a case on trial is presented in such a way as to be understood by the jury, as well as by himself."[5] In fulfillment of that duty, judicial intervention in the form of appropriate questioning may be entirely permissible, so long as

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2. 732 F.2d 379 (4th Cir. 1984).

3. *See generally* N. DORSEN & L. FRIEDMAN, DISORDER IN THE COURT, 199-205 (1973) (offering brief description of "forms of judicial misbehavior"); Gautier, *Judicial Discretion to Intervene in the Course of Trial*, 23 CRIM. L.Q. 88 (1980) (surveying situations in which judicial examination of trial participants was recognized as departure from acceptable procedure).

4. 703 F.2d 768 (4th Cir. 1983).

5. *Id.* at 775, *quoting* Simon v. United States, 123 F.2d 80, 83 (4th Cir.), *cert. denied*, 314 U.S. 694 (1941).

the judge remains mindful of his "position of preeminence and special persuasiveness" in the eyes of the jury. Viewing the questions posed by the trial judge in *Parodi* against the background of the entire panorama of courtroom exchanges, this court found the presiding judge to have represented a "model of impartiality" and patience in the face of sometimes considerable provocation.

On the opposite end of the spectrum, *Anderson v. Warden, Maryland Penitentiary*,[6] presented a case in which the state trial judge's "emphatic, one-sided" comments, and his pressuring of two key defense witnesses to change their stories, were found to have denied appellant of his sixth amendment right to present testimony, and likely to have intimidated and stifled defense counsel. Affirming the district court's grant of habeas corpus, the circuit held that the trial judge "so dominated the jury's impressions" by his impermissible comments regarding witness credibility that appellant had likewise been deprived of his fourteenth amendment right to a fair trial. Acknowledging that the rules governing judicial comment "do not by themselves determine the due process parameters of fairness," a six to four majority of the court fixed its own parameters at the line of "blatant interference" with or "clear infringement" upon the jury's function.

Between the extremes of *Parodi* and *Anderson* lie three other cases touching upon the issue of judicial misconduct, each presenting various degrees of impropriety. In *Garrett v. Desa Industries, Inc.*,[7] the sole civil case of the group, the trial judge had participated "to an uncommon degree" in the questioning of witnesses, but that questioning was held not to have deprived plaintiff of a fair and impartial trial. Nonetheless, the case still was remanded for a new trial since the judge had abused his discretion by limiting the scope of expert testimony and by refusing requested jury instructions.

A determination of precisely *when* judicial comment has deprived a party of a fair trial is no easy task, as was made particularly evident in *United States v. Tello*.[8] In *Tello*, a two-member majority determined that since the trial judge's comments contained "no direct expression of his opinion of the evidence or of [defendant's] credibility, and stopped short of expressing any opinion of [defendant's] guilt," the defendant had received a fair trial. Emphasizing the flexibility afforded a federal judge in assisting the jury as the ultimate trier of fact,[9] the majority conceded that, while a judge would act improperly if his comments left the jury no option as to their ultimate decision, the instant case presented no such infraction. By contrast, the dissenting opinion, proceeding from a detailed reading of the record below, did perceive a denial of a fair and impartial trial through the trial judge's use of "perjorative adjectives" evidencing a "marked disbelief" of and "distaste" for

6. 696 F.2d 269 (4th Cir. 1982) (*en banc*).

7. 705 F.2d 721 (4th Cir. 1983).

8. 707 F.2d 85 (4th Cir. 1982).

9. Contrast the restrictions in many state courts that prohibit a trial judge from commenting on the evidence. *See generally* 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 107[01] (1982) (categorizing states from those having "completely restricted" power of trial judge to comment or summarize, to those granting "considerable leeway" for comment and summary).

the defendant's story.[10] The case thus highlights the fact that much room for disagreement exists when demarcating proper from improper judicial comment, a task made all the more difficult by the necessity of reviewing the often rapidly unfolding, pressure-packed exchanges of a jury trial.

Finally, *United States v. Billups*[11] offered a procedural reminder to counsel that under Federal Rule of Evidence 614(c), all objections to the court's interrogation of witnesses are to be made "at the time [of interrogation] or at the next available opportunity when the jury is not present." Because appellant in *Billups* failed to make such a timely objection, thereby foreclosing a contemporaneous correction of the perceived error, he was deemed to have waived any objection on appeal. Moreover, the judge's curative instructions were determined to have lessened the possibility of any prejudicial effect. Thus, mere "improvidence" on the part of a trial judge in questioning witnesses will not, in and of itself, merit reversal, and counsel is well advised to lodge his objections at an early stage, lest waiver preclude appellate review.

In the area of civil rights, the circuit had cause in several instances to construe the rights of prisoners under both section 1983 of Title 42 of the United States Code and federal habeas corpus, section 2254 of Title 28 of the United States Code. An important procedural enhancement of prisoners' rights was the initial result at the panel level of *Shah v. Hutto*,[12] in which the court reaffirmed its decision in *Craig v. Garrison*,[13] that "when a pro se litigant files a notice of appeal that is untimely but within the period [of extension under Rule of Appellate Procedure 4(a)], the litigant must be informed of the rule and provided an opportunity to establish excusable neglect." The panel determined that the Advisory Committee's admonition that rules 3 and 4 be construed in a liberal manner was still a valid one, even after a 1979 amendment to rule 4, and that flexibility was especially appropriate to avoid unjust and unwarranted exclusion of litigants from judicial relief intended by the rules to be available to them. However, the flexible approach of the panel was held inappropriate in an *en banc* opinion that emphasized the restrictive intent of the 1979 amendment to rule 4(a).[14] By expressly requiring the filing of a motion to obtain an extension of time, the amendment would not permit that a bare notice of appeal be liberally construed as a proper motion for extension, notwithstanding the *pro se* status of the would-be appellant. The circuit thus abandoned the rationale of *Craig*, and joined the more restrictive approach of other courts of appeal.[15]

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10. 707 F.2d at 90 (Murnaghan, J., dissenting).

11. 692 F.2d 320 (4th Cir.), *cert. denied*, 104 S. Ct. 84 (1982).

12. 704 F.2d 717 (4th Cir. 1983).

13. 549 F.2d 306 (4th Cir. 1977).

14. 722 F.2d 1167 (4th Cir. 1983) (*en banc*).

15. *See* Ryals v. Estelle, 661 F.2d 904 (5th Cir. 1981) (since 1979 amendment to rule 4(a), Fifth Circuit has held "tight rein" on timely-filed requirement); Pettibone v. Cupp, 666 F.2d 333 (9th Cir. 1981) (despite awareness that appellant was proceeding *in propria persona*, Ninth Circuit still holds that 30-day limit of rule 4(a) is "mandatory and jurisdictional"); Mayfield v. United States Parole Commission, 647 F.2d 1053 (10th Cir. 1981) (district court should advise

The potential scope of recovery under section 1983 of Title 42 of the United States Code was likewise abridged to a degree in *Ward v. Johnson*.[16] In *Ward* the circuit held that the chairman of a Virginia prison adjustment committee enjoyed absolute immunity from damages for his action in excluding three witnesses from a disciplinary hearing.[17] Originally charged with a "Major Violation" under Virginia Department of Corrections Guidelines, inmate Ward objected to defendant Johnson's exclusion of live witness testimony as irrelevant and cumulative. Characterizing the role of an Adjustment Committee Chairman as "functionally comparable" to that of a judge,[18] the majority found that because the Virginia disciplinary proceedings possessed the sufficient safeguards of a formal administrative adjudication, Johnson's claim of immunity fell squarely within the criteria for absolute immunity. That finding rested to a large extent on a critical policy consideration: "if absolute immunity [were] denied in this case, the members of the Adjustment Committee involved in prisoner disciplinary hearings. . . will be subjected to a real threat of burdensome and expensive litigation, much of it in 'retaliatory response' to the decisions of the Committee."[19]

Nonetheless, the majority still recognized that determining the proper scope of immunity required a detailed consideration of the facts of each case, with reference to the particular procedure under which the disciplinary hearing is held. Thus, a nonadversarial, informal procedure would be unlikely to trigger absolute immunity for institutional participants. While *Ward* is not controlling beyond the scope of the Virginia regulations themselves, the case does reflect a willingness on the part of a majority of the circuit to expand the coverage of absolute immunity by employing a broadly flexible interpretation of Supreme Court guidance in *Butz*.

Ross v. Reed[20] and *Carrier v. Hutto*[21] both construed the "cause and prejudice" exception to the requirement of contemporaneous objection in the federal habeas corpus context.[22] In *Ross*, a writ of habeas Corpus was granted

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pro se appellant that appeal is untimely, thereby giving notice that further action is required to secure appellate jurisdiction). The Tenth Circuit, however, held that the mere untimely filing of a notice of appeal in district court is not tantamount to requesting a 30-day extension and decided that a timely motion seeking determination of excusable neglect is required to obtain a 30-day extension.

16. 690 F.2d 1098 (4th Cir. 1982) (*en banc*).

17. *Id.* at 1108-09. In dissent, Judges Winter and Ervin emphasized that "where immunity is accorded to executive officials, qualified immunity is the rule and absolute immunity the rare exception," and would not grant absolute immunity on the instant facts. *Id.* at 1114. Judges Phillips and Murnaghan also would have based the decision solely on qualified immunity grounds. *Id.* at 1117.

18. *See* Butz v. Economou, 438 U.S. 478 (1978) (broadening coverage of absolute immunity to include members of executive branch involved in performance of judicial or quasi-judicial function).

19. 690 F.2d at 1108.

20. 704 F.2d 705 (4th Cir.), *cert. granted*, 104 S. Ct. 523 (1983).

21. 724 F.2d 396 (4th Cir. 1983), *reh'g granted*, May 22, 1984.

22. *See* Engle v. Isaac, 456 U.S. 107 (1982) (when procedural default bars state litigation

upon a finding that the defendant had been unfairly required in his March 1969 trial to shoulder the burden or proving self-defense, in violation of the later Supreme Court holding in *Mullaney v. Wilbur*.[23] The state conceded that the "prejudice" prong was satisfied by the improper burden shift, and the court went on to determine that there was ample cause for the defendant's having failed to raise his objection below. Distinguishing *Ross* from the later *Engle* decision, Judge Haynsworth wrote for a unanimous panel that, since the conviction in *Ross* predated any clear articulation by the Supreme Court regarding the proper allocation of burden of proof in self-defense cases, "the question was novel and . . . counsel had no reasonable basis for asserting the constitutional claim on appeal. . . ."[24] While acknowledging that the state has a substantial interest in discouraging procedural defaults during appellate proceedings, the court emphasized that defense counsel could not be expected to possess "extraordinary vision," and, indeed, should not be encouraged to dilute meritorious claims with frivolous ones by raising and arguing every conceivable constitutional claim, no matter how far-fetched.

The potential for successful pursuit of habeas relief was likewise bolstered by the panel decision in *Carrier*, in which a two to one majority held that under certain circumstances, attorney error that is insufficient to support a finding of a full-blown violation of the sixth amendment right to counsel may still constitute "cause" under the "cause and prejudice" standard. In *Carrier*, the trial judge had refused the requests of an accused rapist that he be allowed to discover certain written statements made by the victim. Inexplicably, defense counsel failed to raise the issue on appeal. Refusing to penalize a habeas petitioner for a "momentary lapse by counsel," the panel held that "attorney error short of wholesale ineffectiveness of counsel can constitute. . . cause, provided that the act or omission resulting in procedural default emanated from ignorance or inadvertance, rather than deliberate strategy." Authoring a spirited dissent, Judge Kenneth K. Hall characterized counsel's failure in *Carrier* to lodge the contemporaneous objection as evidencing a "great likelihood that this was a tactical decision." Thus, while the panel opinion in *Carrier* opens the door a crack to habeas relief on grounds of attorney error, petitioners should remain aware that scrutiny for true error, as opposed to savvy tactical maneuvering, may well be strict.

The issue of ineffective assistance of counsel likewise arose in the appeal

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of constitutional claim, state prisoner may not obtain habeas absent showing of cause and actual prejudice; "cause and prejudice" requires greater showing than that required to establish "plain error" on direct appeal); United States v. Frady, 456 U.S. 152 (1982) (habeas petitioner must show "cause" excusing procedural default and "actual prejudice" resulting from errors of which he complains); Cole v. Stevenson, 620 F.2d 1055 (4th Cir. 1980) (*en banc*), *cert. denied*, 449 U.S. 1004 (1980) (habeas corpus relief denied when petitioner failed to observe valid state rule requiring that objection to jury instructions be raised on direct appeal; no "cause" shown since petitioner was not prevented from raising *Mullaney* issue on appeal by factors beyond his control).

23. 421 U.S. 684 (1978) (burden on prosecution to prove beyond reasonable doubt the absence of heat of passion or sudden provocation).

24. 704 F.2d at 709.

of *Hutchins v. Garrison*,[25] a death penalty case heard on an expedited basis during the December 1983 session of the court. A unanimous panel affirmed the District Court's denial of habeas relief, sought in part on grounds of ineffective assistance of counsel. Hutchins had alleged that the trial court abused its discretion by denying a continuance when defense counsel represented that they had had inadequate time to prepare an insanity defense. Discerning not even a "mere possibility of prejudice" as a result of the denial, the court emphasized its reluctance to interfere with a considered state court judgment on grounds of constitutional defectiveness. Of course, the broader import of the holding is that, following the lead of the Supreme Court, the circuit has evidenced a reluctance to interfere, on farfetched grounds amounting to grasping at straws, with state imposition of the death penalty. The way thus was paved to renewed imposition of capital punishment, as has already occurred in the Fifth and Eleventh Circuits. Even though an eleventh-hour appeal successfully delayed for sixty days Hutchins' scheduled execution in January 1984, the theoretical underpinnings permitting imposition of the sanction apparently remain a viable element of this circuit's approach.

Civil rights of employees under the Civil Rights Act of 1964[26] were addressed in *Equal Employment Opportunity Commission v. Federal Reserve Bank of Richmond*[27] and in *Wright v. Olin Corporation*.[28] *Federal Reserve* clarified the appropriate role of statistical evidence in disparate treatment cases. Refusing to clothe statistics in an unassailable cloak of irrebuttable truth, the court advised that the assessment of statistical evidence and its supporting data be tempered with a pinch of judicial common sense. Thus, in disparate treatment cases, the value of statistics is to be determined in light of the actual disparity they reflect, the relevance of the supporting data, and other circumstances in the case tending to support or undercut the hypothesis of discrimination. Distinguishing mere statistical significance from true legal significance, the court emphasized the circumstantial nature of such evidence, and reiterated that it "is always subject to rebuttal. . . ."[29] Thus, while statistics remain a valid means of establishing a *prima facie* case of discrimination, the court perceives no talismanic quality of statistics alone, but rather requires that they be assessed in a common-sense manner.

Wright required the court to address the issue of sex discrimination arising in the novel context of an employer's "fetal'vulnerability program." Ostensibly to protect the unborn fetus from exposure to abortifacient agents in certain plant areas, the employer adopted a three-level job classification system, under which fertile women were completely excluded from certain jobs. Choosing the disparate impact/business necessity analysis as the proper means of resolving the case, the court held that the implementation of the fetal

25. 724 F.2d 1425 (5th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3532 (U.S. Jan. 11, 1984).
26. 42 U.S.C.A. §§ 2000c-2(a) (1981) *et seq.*
27. 698 F.2d 633 (4th Cir. 1983).
28. 697 F.2d 1172 (4th Cir. 1982).
29. 698 F.2d at 646.

vulnerability program established as a matter of law a *prima facie* violation of Title VII. Aware of the inherent tension between the desire to protect the unborn and the congressional intent to eliminate adverse impact upon women in the workplace, the court held that in appropriate cases, business necessity may allow an employer to impose otherwise impermissible restrictions on employment opportunity in order to protect the unborn. The case thus represents an interesting interface of competing and compelling concerns (the economic welfare of women and the health of future generations), with the court assuming the difficult role of policy maker in a complex area of legal, social, and economic import.

Turning to the wonderful world of diversity litigation where federal judges may reassert their natural affinity for the common law, an affinity which often occupied their early days at the bar, we call attention to *Caspary v. Louisiana Land and Exploration Company*.[30] The issue in *Caspary* was whether a 1908 statute, requiring a five-percent stockholding to permit access to the stock ledger or stockholder list, itself triggered a revitalization of a common law rule allowing a stockholder access, even if he held but a single share, so long as he could show a proper purpose. The common law rule lay dormant, if indeed it were not extinguished, for forty years, while an 1868 Maryland law gave the right of inspection to any stockholder unless the corporation could shoulder the burden of demonstrating an improper purpose. In *Caspary*, in a two to one decision, the five-percent requirement prevailed although the shareholder established a proper purpose. Nevertheless, the case bears witness to the fact that, in an appropriate set of circumstances, what was the law, even though out of force for a time, may without statutory enactment or court decision spontaneously reassert itself.

Another diversity case, this one involving the common law of South Carolina, was *Livernois v. Warner-Lambert Company, Inc.*,[31] an example of a rarity in the law: one result seemed clearly indicated, in terms of overall fairness, but neither party advanced arguments in favor of that correct result. Warner-Lambert, the employer, sought to hunch in one direction, while Livernois and his colleagues tried to go too far in the other. A division of the company had been sold as a going concern, subject to the requirement of continuation of employees by Warner-Lambert's successor on terms that were at least as favorable as those theretofore obtaining. Livernois and others demanded severance pay, although they lost not a day's work as a consequence of the corporate spinoff. Warner-Lambert contended that it escaped all liability in the way of future severance pay if, for example, the successor, less well financed and perhaps less adept than Warner-Lambert, should fail. Since the solution advanced by neither party was appropriate, the court itself attempted to reach the middle ground, the golden mean, although that solution had gone entirely unmentioned in the District Court. The result was achieved by interpreting Warner-Lambert's severance pay policy as requiring it to remain liable

30. 707 F.2d 785 (4th Cir. 1983).
31. 723 F.2d 1148 (4th Cir. 1983).

for any future severance pay liabilities, should they not in fact be met by the successor corporation.

As interesting as the foregoing determinations of state rules of law in diversity cases is our failure to take decision in another case, *Martin v. Volkswagen of America, Inc.*[32] The unresolved issue of North Carolina jurisprudence was whether, when an automobile containing a hidden defect was involved in an accident with a negligent driver of another vehicle, recovery could be had against the manufacturer for injuries attributable to the hidden defect, or whether the negligent driver alone was responsible. In an earlier case, *Wilson v. Ford Motor Company*,[33] the court had ruled that, as the originator of the chain of events leading to the injury of the plaintiff's decedent, only the negligent driver could be held liable. Applying strict precedent and declining to rehear *en banc*, the court applied the doctrine of *Wilson* to preclude recovery against the manufacturer. A dissent suggested that the earlier assessment of North Carolina law was in error, and asserted a responsibility on the part of the court to overrule a mistaken prior holding as to state law.

Finally, in the bankruptcy realm, *Maryland National Bank v. Mayor and City Council of Baltimore*[34] required the court to determine the proper status of state and local tax liens on real property owned by a debtor in a Chapter XI reorganization that was subsequently converted to a Chapter VII liquidation. Emphasizing that section 546(b) of the Bankruptcy Code[34] preserves an interest holder's opportunity to perfect under any generally applicable law against an entity that acquired its rights before perfection, the court ruled that the City of Baltimore and State of Maryland retained, under Maryland statutory authority, the right to require first application of any sale proceeds to real taxes due and payable. This result would obtain if distribution of the proceeds should occur only after the lien for taxes has been perfected. The right to application of sale proceeds already exists at the moment a competing interest in the real property arises. All parties agreed that, absent bankruptcy, upon foreclosure taxes for which a lien had arisen before distribution of proceeds would have to be paid prior to satisfaction of the mortgagee's lien, even though placing of the mortgage and foreclosure as well had taken place before the tax lien ripened.

32. 707 F.2d 823 (4th Cir. 1983).
33. 656 F.2d 960 (4th Cir. 1981).
34. 723 F.2d 1138 (4th Cir. 1983).
35. 11 U.S.C. § 546(b) (1982).