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Eleventh Annual Survey of North Carolina Case Law

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ELEVENTH ANNUAL SURVEY OF NORTH CAROLINA CASE LAW*

The *Eleventh Annual Survey of North Carolina Case Law* is designed to review cases decided by the North Carolina Supreme Court during the period covered and to supplement past and future *Surveys* in presenting developments in North Carolina case law over a period of years.

It is not the purpose of the *Survey* to discuss all the cases that were decided during the period of its coverage. It is intended to discuss only those decisions which are of particular importance—cases regarded as being of significance and interest to those concerned with the work of the Court, and decisions which reflect substantial changes and matters of first impression in North Carolina. Where a case embraced within the period covered by the *Survey* has been the subject of a note in the *Review,* the holding is briefly stated and the note is cited.

Most of the research for and writing of this *Survey* was accomplished by selected members of the Student Board of Editors of the *Law Review,* working under the supervision of the Faculty of the School of Law of the University of North Carolina. Some sections, however, represent the individual work of a faculty member.[1]

Student members of the *Law Review,* or candidates for membership and the sections for which they are responsible are: Arch T. Allen (Civil Procedure (Pleading & Parties)); Robert G. Baynes (Credit Transactions and Sales); George M. Beasley III (Torts); Scott N. Brown, Jr. (Criminal Law & Procedure); John S. Johnston (Administrative Law, Municipal Corporations and Public Utilities); DeWitt C. McCotter III (Domestic Relations and Taxation); Mrs. Ann H. Phillips (Real Property); Walter Rand III (Agency & Workmen's Compensation); Arch K. Schoch IV (Evidence); William Edward Shinn, Jr. (Equitable Remedies, Labor Law and Trusts); James M. Talley, Jr. (Damages, Eminent Domain and Wills & Administration); Marvin Edward Taylor, Jr. (Con-

* The period covered embraces the decisions of the North Carolina Supreme Court reported in 258 N.C. 211 through 260 N.C. 451.

[1] The survey of case law in the field of Trial Practice is reviewed by Professor Herbert Baer.

tracts and Insurance); Charles M. Whedbee (Conflict of Laws and Constitutional Law).

Throughout this *Survey* the North Carolina Supreme Court will be referred to as the "Court" unless it appears by its full title. The United States Supreme Court will be designated only by its full name. North Carolina General Statutes will be signified in text and textual footnotes by "G.S."

ADMINISTRATIVE LAW

Administrative Findings of Fact

An established principle relating to the validity of administrative decisions is that there must be basic findings of fact which support the conclusions of law.[1] Several recent cases are indicative of the difficulties which administrative agencies have in applying this principle.

In *Moore v. Adams Elec. Co.*,[2] a workmen's compensation case, the Industrial Commission found that two insurance companies were not liable due to cancellation of the policies. The Supreme Court remanded because there was no finding of fact as to whether in one instance the employer had received any notice of the cancellation and in the other instance there was no finding as to whether the proper notice had been given.

Also, in *Pardue v. Blackburn Bros. Oil & Tire Co.*,[3] the Commission made an award, but the case was remanded because the Commission failed to find any facts relating to whether the plaintiff, at the time of the injury, was about his normal duties and was performing such duties in the usual manner. Nor were there any facts found from which these matters could be inferred.

The same principle was used in *State Highway Comm'n v. Clinchfield R.R.*,[4] where the Commission found that a grade crossing was dangerous to the public safety. The Commission, however, failed to find any facts relating to the actual conditions at the crossing. Furthermore, it did not appear that any evidence had been offered concerning these conditions.

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[1] See generally Davis, Administrative Law § 163 (1951).
[2] 259 N.C. 735, 131 S.E.2d 356 (1963).
[3] 260 N.C. 413, 132 S.E.2d 747 (1963).
[4] 260 N.C. 274, 132 S.E.2d 595 (1963).

Exhaustion of Administrative Remedies

In *Sinodis v. Board of Alcoholic Control*,[5] the Board suspended petitioners' permit to sell malt beverages on the basis of evidence taken by a hearing examiner. Petitioners, seeking judicial review, asserted that they were denied a proper hearing because they had no opportunity to appear before the Board and because a copy of the examiner's report was not made available to them. The Supreme Court, rejecting petitioner's contention, pointed out that the Board had promulgated rules governing hearings. Under these rules, the petitioners could have obtained a hearing before the Board, and it was implicit in these rules that petitioners could have obtained a copy of the examiner's report if they had made such a request. Moreover, since the petitioners failed to request a hearing by the Board, their request for judicial review had to be dismissed under the rule requiring the prior exhaustion of administrative remedies.

Judicial Review

In *Jarrell v. Board of Adjustment*,[6] the Board found as a fact that petitioner's building was not used as a two-family residence when a zoning ordinance went into effect. Accordingly, under this ordinance, the Board had no authority to grant petitioner a nonconforming use of the property as a two-family residence in a one-family residential area. The Board had based its finding of fact solely on an affidavit as to what occupants had told affiant and one letter. On judicial review, the lower court affirmed the Board's decision, but the Supreme Court reversed. The Court relied on the general judicial review statute,[7] which provides the judicial review of administrative decisions "unless adequate procedure for judicial review is provided by some other statute, in which case the review shall be had under such other statute."[8] The Court stated that the particular review provided for the Board's decision would be adequate only if the scope were equal to that under the general judicial review statute. The latter includes in the grounds for reversal of the decision of an administrative agency, that the decision is "unsupported by competent, material, and substantial evidence in view of the entire record

[5] 258 N.C. 282, 128 S.E.2d 587 (1962).
[6] 258 N.C. 476, 128 S.E.2d 879 (1963).
[7] N.C. Gen. Stat. §§ 143-306 to -316 (1958).
[8] N.C. Gen. Stat. § 143-307 (1958).

as submitted . . . ."[9] The Board's critical finding of fact based on the affidavit and letter was unsupported as thus required.

Accordingly it is clear that the Court took the position that the general judicial review statute provides the minimum scope of judicial review which will be afforded.

In *Ballenger Paving Co. v. Highway Comm'n*,[10] plaintiff filed a claim for funds due on a construction contract which provided for liquidated damages of one hundred dollars per day for any delay not occasioned by unforeseeable causes. The Board of Review found that there had been an eleven day delay, but that plaintiff was chargeable with only nine of those days. The other two days were due to an unforeseeable cause. Therefore the Board allowed a deduction of nine hundred dollars from the sum due plaintiff.

Defendant appealed to the superior court, where the presiding judge held that the findings of fact did not support the conclusion that part of the delay was due to an unforeseeable cause. The correctness of this ruling was not questioned on appeal. It would seem that the plaintiff would therefore be chargeable with eleven days of delay; however, the lower court went further. Although the Board had not considered the question of whether the liquidated damage clause had been properly invoked, the judge nevertheless considered this and found that the facts indicated that the defendant Highway Commission showed no concern about the delay and that there was no evidence that the delay inconvenienced it. Therefore the defendant was entitled to deduct only nominal damages, which the judge assessed at nine hundred dollars, and accordingly approved the amount of the Board's award.

The Supreme Court reversed, pointing out that under the applicable statute,[11] the Court reviews only for errors of law. It may not find additional facts. Therefore the lower court had no power to make the additional finding that the Highway Commission had suffered no damages as a result of the delay. Having held that the delay was not due to an unforeseeable cause, the lower court should have allowed the deduction of eleven hundred dollars for the full

[9] N.C. GEN. STAT. 143-315(5) (1958).

[10] 258 N.C. 691, 129 S.E.2d 245 (1963). This case is discussed in DAMAGES, *Nominal Damages, infra.*

[11] N.C. GEN. STAT. § 136-29 (1958).

eleven days. The Court added that nine hundred dollars could not be considered merely nominal damages.

In *Thomas v. Board of Alcoholic Control*,[12] the Board suspended permits to sell beer and wine on the ground that the licensee had sold beer to a person under eighteen years of age. The evidence showed that beer had been sold to Lawrence Reid. The evidence as to his age was a birth certificate showing the birth of one Lawrence Christopher Reid in another county. The superior court vacated the order of suspension, and the Supreme Court affirmed on the ground that under the general judicial review statute,[13] decisions of administrative agencies may be reversed for lack of competent evidence.[14] Here there was no competent evidence that the purchaser of the beer, Lawrence Reid, was under eighteen years of age, since the birth certificate was not shown to be the record of the birth of the Lawrence Reid who bought the beer.

Liability of Witnesses in Administrative Determinations

In *Robinson v. United States Cas. Co.*,[15] plaintiff's driver's license had been suspended by the Commissioner of Motor Vehicles, and the plaintiff brought an action against the defendant for having given false testimony to the Commissioner, which had resulted in the suspension. The Court held that such an action could not be maintained, mainly due to policy reasons against the intimidation of witnesses. The plaintiff's only remedy was to contest the suspension further before the Commissioner as allowed by statute.

Original Jurisdiction

In *Cox v. Pitt County Transp. Co.*,[16] decedent's widow, after having recovered under the workmen's compensation laws, demanded damages for wrongful death from another party. This party paid 50,000 dollars into court for a full release. The insurance company

[12] 258 N.C. 513, 128 S.E.2d 884 (1963).

[13] N.C. Gen. Stat. § 143-315(5) (1958).

[14] See, *e.g.*, Maley v. Thomasville Furniture Co., 214 N.C. 589, 200 S.E. 438 (1939), for a discussion of the role of otherwise inadmissible evidence in administrative determinations. In *Maley*, the Court states that an award will not stand "which is based on hearsay evidence uncorroborated by facts and circumstances or other evidence." *Id.* at 594, 200 S.E. at 441.

[15] 260 N.C. 284, 132 S.E.2d 629 (1963). This case is discussed in Insurance, *Automobile Liability Insurance, infra.*

[16] 259 N.C. 38, 129 S.E.2d 589 (1963).

which was to pay the workmen's compensation award claimed that they were subrogated to this 50,000 dollars to the extent of their liability under the workmen's compensation award. Plaintiff thereupon brought an action for a declaratory judgment, seeking a ruling to the effect that the insurance company had no claim to the 50,000 dollars which the tortfeasor had paid into court. The Court dismissed the action on the ground that the Industrial Commission had exclusive original jurisdiction to decide the question.

STATUTORY INTERPRETATION

The general judicial review statute[17] allows an appeal by any person aggrieved by a final administrative decision. G.S. § 105-241.3,[18] concerning the judicial review of Tax Review Board decisions, states that the taxpayer shall have an appeal to the superior court from this Board under the general judicial review statute; however, there is no express provision allowing such an appeal by the Commissioner.

In the case of *In re Halifax Paper Co.*,[19] the Court considered whether there was jurisdiction to hear an appeal by the Commissioner, since G.S. § 105-241.3 was enacted after the general judicial review statute and G.S. § 105-241.3 does not expressly provide for such an appeal. The Court held that there was jurisdiction, reasoning that the legislature was only collaterally dealing with the question of appeal when the statute was enacted. Moreover, the Court did not favor an amendment or repeal by implication of the general judicial review statute.

The Court also considered the question of whether the Commissioner was an aggrieved person within the meaning of the general judicial review statute. The Court pointed out that although an administrative agency could not be a person aggrieved by its own order, nevertheless it could still be an aggrieved person to secure judicial review of a decision of an administrative reviewing agency. In holding the Commissioner an aggrieved party, the Court stated: "The Commissioner serves in a representative capacity, is charged with an important public trust, and is aggrieved by the opinion adverse to what he considers is a fair and correct interpretation of law

[17] N.C. GEN. STAT. § 143-307 (1958).
[18] N.C. GEN. STAT. § 105-241.3 (1958).
[19] 259 N.C. 589, 131 S.E.2d 441 (1963).

affecting his duties and affecting the public interest with which he is charged."[20]

AGENCY AND WORKMEN'S COMPENSATION

AGENCY

Permissable Inferences from Co-ownership

If husband and wife are co-owners of an automobile and the wife's alleged negligence in operating the vehicle results in injury to an "expense sharing" passenger, can the husband, in whose name the vehicle is registered, be held liable under either the family purpose doctrine or a partnership theory? *Rushing v. Polk*[1] answered that on these facts alone, liability does not result to the husband by either theory.

In reaching this conclusion the Court noted that registration of an automobile in one's name is prima facie evidence of ownership,[2] but actual ownership may be proved by parol evidence.[3] If co-ownership is established no liability is imposed on the absent co-owner without proof of agency;[4] therefore, the family purpose doctrine could not apply to co-owners, nothing else appearing, because each uses the automobile by his *own* right.[5]

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[20] *Id.* at 596, 131 S.E.2d at 446.

[1] 258 N.C. 256, 128 S.E.2d 675 (1962).

[2] N.C. GEN. STAT. § 20-71.1 (Supp. 1963).

[3] Carolina Discount Corp. v. Landis Motor Co., 190 N.C. 157, 129 S.E. 414 (1925).

[4] A sole or joint owner is not liable for damage done by his automobile due to the fact of ownership alone. If such liability exists it is on the principle of *respondeat superior.* See Gibbs v. Russ, 223 N.C. 349, 26 S.E.2d 909 (1943); Parrott v. Kantor, 216 N.C. 584, 6 S.E.2d 40 (1939); Leary v. Virginia-Carolina Joint Land Bank, 215 N.C. 501, 2 S.E.2d 570 (1939).

The fact that the co-owners are husband and wife does not affect the result, since one spouse is not the agent of the other as a matter of law. General Air Conditioning Co. v. Douglass, 241 N.C. 170, 84 S.E.2d 828 (1954); Pitt v. Speight, 222 N.C. 585, 24 S.E.2d 350 (1943); Towles v. Fisher, 77 N.C. 437 (1877).

[5] The family purpose doctrine is inapplicable in the principal case because the person sought to be held (husband) had no control over the vehicle as to its use by the alleged negligent party. Control is a necessary element for fixing liability under the family purpose doctrine. See Tart v. Register, 257 N.C. 161, 125 S.E.2d 754 (1962); Griffin v. Pancoast, 257 N.C. 52, 125 S.E.2d 310 (1962); Matthews v. Cheatham, 210 N.C. 592, 188 S.E. 87 (1936).

The basic function of the family purpose doctrine is to make the owner of the vehicle liable for the negligence of his "agent." This is merely an

The Court reasoned that the mere application of money received from an "expense sharing" passenger to the upkeep of the automobile would not make co-owners liable as partners in the legal sense, because this is not sufficient to show a joint business undertaking between the co-owners.[6]

Proof of Agency—Ratification

In *Reverie Lingerie, Inc. v. McCain*[7] process was served upon the defendant Union's alleged agent. The Union contended that it was not doing business in North Carolina[8] and denied the existence of an authorized agent.

The Court recognized the general rule that declarations and acts of the alleged agent are not sufficient by themselves to establish the agency,[9] thereby implying that evidence tending to show that the alleged agent had engaged in attempts to organize Reverie's employees might not be sufficient by itself to show the principal-agent relationship.[10] However, the Court held that when, prior to this action, the Union filed suit with the National Labor Relations Board charging Reverie with unfair labor practices, the Union ratified the acts of the agent and proof of the relationship was complete.[11]

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extension of *respondeat superior*. See Grindstaff v. Watts, 254 N.C. 568, 119 S.E.2d 784 (1961); Robertson v. Aldridge, 185 N.C. 292, 116 S.E. 742 (1923).

[6] The Court distinguished between transporting passengers for hire and transporting them for "expenses." 258 N.C. at 263, 128 S.E.2d at 681.

[7] 258 N.C. 353, 128 S.E.2d 835 (1963). This case is discussed in LABOR LAW, *Vicarious Liability of Parent for Local's Misconduct, infra;* TRIAL PRACTICE, *Process—Waiver of Immunity, infra.*

[8] Process was also served upon the Secretary of State under N.C. GEN. STAT. § 1-97 (6) (1953), which provides that unincorporated associations doing business in the state are to appoint agents upon whom process may be served, and if no process agent is appointed, the association is bound by service on the Secretary of State.

[9] *E.g.,* Sealy v. Albany Ins. Co., 253 N.C. 774, 117 S.E.2d 744 (1961); D'Armour v. Beeson Hardware Co., 217 N.C. 568, 9 S.E.2d 12 (1940).

[10] The Court did not state that the alleged agent's actions *were* insufficient to prove the relationship in the principal case. On the contrary the Court stated that if the agent's actions and declarations were such that the principal had knowledge and acquiesced in them, then the agent's acts and declarations are admissable as evidence. *Accord,* Smith v. Kappas, 218 N.C. 758, 12 S.E.2d 693 (1941) (dictum).

[11] Ratification by a suit attempting to enforce the benefits of the "unauthorized" agent's action is well accepted in North Carolina. See, *e.g.,* Lawson v. Bank of Bladenboro, 203 N.C. 368, 166 S.E. 177 (1932); Alex. Sprunt & Sons v. May, 156 N.C. 388, 72 S.E. 821 (1911); Beeson v. Smith, 149 N.C. 142, 62 S.E. 888 (1908).

WORKMEN'S COMPENSATION

Accidents Arising Out of Employment

An employee's duties were divided between operating a fork lift truck and serving as a cook, chauffeur, and valet for company executives as additional compensation to them. The employee frequently accompanied a particular executive to a weekend cottage where the employee served as a general utility man, for which he was paid for an eight hour day by the company. During one such weekend excursion the executive consented to his young son's request that the employee be allowed to accompany him and an older son on a short hunting trip. Returning to the cottage the employee was killed in an automobile accident.

Lewis v. W. B. Lea Tobacco Co.[12] denied compensation on the ground that there was no causal relationship between the employment and the automobile accident, so the injury did not arise out of the employment. The Court reasoned that the employee was not performing any of his customary duties while on the trip; the executive did not order the employee to go on the trip;[13] and the trip was of no benefit to the business of the employer.[14] It was further stated

Where the principal brings suit on an unauthorized contract, the suit automatically ratifies the agent's acts, because the principal would have no right except for the agent's actions. *Reverie* appears distinguishable from this type suit because the Union received no additional rights from the alleged agent's acts. The Union could have made the unfair labor practice charge without having an agent in North Carolina. See TWENTY-EIGHTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 63 (1963). Thus it appears that bringing the unfair labor practice charge constituted *conduct* which the Court interpreted as ratifying the alleged agent's actions.

[12] 260 N.C. 410, 132 S.E.2d 877 (1963).

[13] In Kelly v. Hackensack Water Co., 10 N.J. Super. 528 (App. Div.), 77 A.2d 467 (1950), *aff'd*, 23 N.J. Super. 88 (App. Div.), 92 A.2d 506 (1952), the court recognized that the circumstances surrounding the act would determine whether the employee was compelled to do it. A direct order is not necessary. *Accord*, Miller v. Keystone Appliance, Inc., 133 Pa. Super. 354, 2 A.2d 508 (1938).

[14] The requirement that the act resulting in the injury be of benefit to the employer, rather than a third person or the employee himself, is well accepted. Burnett v. Palmer-Lipe Paint Co., 216 N.C. 204, 4 S.E.2d 507 (1939), denied compensation when an employee, who was employed primarily as a painter's helper but who also did yard work at his employer's home, was injured while mowing his employer's lawn. The Court said that the injury did not arise out of and in the course of his employment, because the yard work did not benefit the company. *Accord*, Beavers v. Lily Mill & Power Co., 205 N.C. 34, 169 S.E. 825 (1933), where a company foreman instructed another employee to pose for a group picture, the employee's

that the trip was not a risk inherent in the employee's job.[15]

Such a decision as *Lewis* places an employee whose job entails the performance of personal services for other employees as well as the performance of "regular" business duties in an impossible position. By performing the personal services the employee risks the loss of Workmen's Compensation coverage,[16] and by refusing he risks dismissal from employment. No rules of law need be changed to remedy this result; all that is necessary is a broader interpretation of such terms as "arising out of... the employment," as required by G.S. § 97-2, and "benefit to the employer's business," which has been made an indispensable requirement by North Carolina case law.[17]

Borrowed Servants

G.S. § 97-9[18] is interpreted as preventing an injured employee, who is covered by Workmen's Compensation, from bringing an action for the injury against a co-employee.[19] *Weaver v. Bennett*[20] further clarified the statute by holding that the exemption does not apply to borrowed servants.[21]

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seat collapsed and she was injured. Compensation was not allowed because the employer had no interest in the proceeds derived from the picture. *Lewis* is distinguishable from *Burnett* and *Beavers,* because in *Lewis* the employee's acts were an indirect benefit to the employer by making the company a more attractive one to executives. See 1 LARSON, THE LAW OF WORKMEN'S COMPENSATION § 20.00 (1952). A liberal construction of "benefit to the employer" would seem warranted by Guest v. Brenner Iron & Metal Co., 241 N.C. 448, 85 S.E.2d 596 (1955), where the Court based the decision in part on the fact that "plaintiff's response was reasonable and natural. He had reasonable grounds to believe that what he was doing was incidental to his employment and beneficial to his employer...." *Id.* at 453, 85 S.E.2d at 600.

[15] This requirement would seem only another method of stating that the injury must arise out of the employment. See Goodwin v. Bright, 202 N.C. 481, 163 S.E. 576 (1932).

[16] As the employee loses the right to recover for injury because of its designation as "work-connected," he gains the right to sue his employer or a co-employee on the basis of fault. See 1 LARSON, *op. cit. supra* note 14, § 2.

[17] See note 14 *supra.*

[18] N.C. GEN. STAT. § 97-9 (1958). The statute is to the effect that neither the employer nor "those conducting his business" can be sued by the injured employee.

[19] Warner v. Leder, 234 N.C. 727, 69 S.E.2d 6 (1952); Bass v. Ingold, 232 N.C. 295, 60 S.E.2d 114 (1950); Essick v. City of Lexington, 232 N.C. 200, 60 S.E.2d 106 (1950).

[20] 259 N.C. 16, 129 S.E.2d 610 (1963).

[21] For a criticism of this decision see 42 N.C.L. REV. 251 (1964).

Occupational Disease—Silicosis

In order for a death to be compensable it must result from an accident sustained in the course of and arising out of the deceased's employment.[22] The Court uncovered an exception to this rule in *Davis v. North Carolina Granite Corp.*[23]

In *Davis* the employee contracted silicosis as a result of his employment and began receiving disability payments under Workmen's Compensation. While receiving disability payments the employee died from a heart attack, a cause totally unrelated to silicosis.

In reversing the Commission's denial of compensation for death the Court held that G.S. § 97-61.6, which provides that compensation is due "should death result from . . . silicosis within two years from the date of last exposure, or should death result within 350 weeks from the date of last exposure and while the employee is entitled to compensation for disablement . . . ." does not require a causal relationship to exist between death and employment when the employee is receiving compensation at death. The Court's decision was based upon the "plain meaning" rule[24] of statutory interpretation.

It would seem that G.S. § 97-61.6 might also be interpreted from the viewpoint of legislative intent. It is firmly established that the basic rationale of Workmen's Compensation requires a "causal connection" between the employment and the injury.[25] This would lead to the conclusion that "from silicosis" was inadvertently omitted from the second clause of the statute, and that the words "should death result" in the second clause relate back to "from silicosis" in the first clause.[26] The Court found, however, that the second clause

[22] N.C. GEN. STAT. §§ 97-2(6), (10) (1958).

[23] 259 N.C. 672, 131 S.E.2d 335 (1963).

[24] "[W]hen language is clear and unambiguous it must be held to mean what it plainly expresses." 2 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 4702, at 334 (3d ed. 1943).

[25] A "causal connection" between employment and injury is required in all North Carolina cases. See, *e.g.*, Sandy v. Stackhouse, Inc., 258 N.C. 194, 128 S.E.2d 218 (1962); Vause v. Vause Farm Equip. Co., 233 N.C. 88, 63 S.E.2d 173 (1951). Workmen's Compensation is not to provide general health insurance, but to compensate for industrial injuries. Duncan v. City of Charlotte, 234 N.C. 86, 66 S.E.2d 22 (1951); Conrad v. Cook-Lewis Foundry Co., 198 N.C. 723, 153 S.E. 266 (1930).

[26] "Result" is defined as "to proceed, spring, or arise, as a consequence, effect or conclusion." WEBSTER'S NEW INTERNATIONAL DICTIONARY 2126 (2d ed. 1940). The choice of "result" would seem to indicate that it should relate back to "from silicosis"; if relation back was not intended "ensue," "occur," or "follow" might be more descriptive.

was independent of the first and that it expressed an exception to the scheme of Workmen's Compensation, due to the nature of silicosis. Therefore, the Court felt bound by the "plain meaning" rule; however, the antithesis of that rule, that a "plain meaning" should not be followed when it leads to results clearly not intended by the legislature[27] would seem equally applicable.

Suicide Caused by a Compensable Injury

When an employee who has suffered a compensable injury later commits suicide because of insanity produced by the prior injury, may there be a recovery for the death under Workmen's Compensation? This question was presented in *Painter v. Mead Corp.*[28]

G.S. § 97-12 specifies that compensation is denied if death is caused by "the willful intention of the employee to . . . kill himself." Thus the question of primary concern is to what extent the employee must be deprived of his reasoning to remove the case from the "willful" category under the statute. There is conflicting authority here—the "Massachusetts rule" requires the suicide to be the result of "an uncontrollable and irresistable impulse" and requires that death occur without "conscious volition" to produce it;[29] the English rule merely requires that the suicide be the result of a compensable injury which produces insanity.[30]

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[27] "One who contends that a section of an act must not be read literally must show either that some other section expands or restricts its meaning, that the section itself is repugnant to the general purview of the act, or the act considered *in pari materia* with other acts, or with the legislative history of the subject matter, imports a different meaning." 2 SUTHERLAND, *op. cit. supra* note 24, § 4702, at 335.

[28] 258 N.C. 741, 129 S.E.2d 482 (1963).

[29] This rule originated from Sponatski's Case, 220 Mass. 526, 108 N.E. 466 (1915). However, Massachusetts has since adopted the more liberal rule by statute. MASS. GEN. LAWS ch. 152, § 26A (1937). The *Sponatski* case is still followed by a majority of the courts. See, *e.g.*, Cubit v. City of Philadelphia, 138 Pa. Super. 325, 10 A.2d 853 (1940); McFarland v. Department of Labor & Indus., 188 Wash. 357, 62 P.2d 714 (1936); Barber v. Industrial Comm'n, 241 Wis. 462, 6 N.W.2d 199 (1942).

[30] Marriott v. Maltby Main Colliery Co., 13 B.W.C.C. 353 (C.A. 1920); Graham v. Christie, 10 B.W.C.C. 486 (Scot. 1916). This view has been accepted by California, Florida, Mississippi, New York, and Ohio. See Burnight v. Industrial Accident Comm'n, 181 Cal. App. 2d 816, 5 Cal. Rptr. 786 (1960); Whitehead v. Keene Roofing Co., 43 So. 2d 464 (Fla. 1949); Prentiss Truck & Tractor Co. v. Spencer, 228 Miss. 66, 87 So. 2d 272 (1956); Delinousha v. National Biscuit Co., 248 N.Y. 93, 161 N.E. 431 (1928); Burnett v. Industrial Comm'n, 87 Ohio App. 441, 93 N.E.2d 41 (1949).

In affirming the award of compensation as being justified by the evidence, the Court did not choose between the two rules, even though the Commission had applied the harsher "Massachusetts rule" in making a determination of the issue. Since the Court found that the evidence was sufficient to support compensation under either rule[31] it would seem that *Painter* would have been a good place to declare future policy. This may indirectly result from the Court's specific statement that *Painter* should not be read as approving of the "Massachusetts rule"; this statement seems to leave the way open for adoption of the more liberal English rule.[32]

CIVIL PROCEDURE (PLEADING AND PARTIES)

PLEADING

Alternative Remedies

In *Wirth v. Bracey*,[1] plaintiffs were allowed to maintain actions for negligence against a state employee notwithstanding prior filing of claims with the Industrial Commission under the Tort Claims Act.[2] While the claims were pending before the Industrial Commission, the trial judge overruled defendant's plea in abatement and plea in bar, both of which were based on the claims pending before the Industrial Commission. The Court affirmed. The claims before the Industrial Commission, being *sui generis* rather than civil actions instituted under and subject to the Code of Civil Procedure, were held not to constitute "another action"[3] within the meaning of G.S. § 1-

[31] The Court affirmed the Commission's finding that the deceased became "insane and mentally deranged to such an extent that he became delirious and frenzied without rational knowledge of the physical consequence of his act, without conscious volition to produce death...." 258 N.C. at 746, 129 S.E.2d at 485. Such a finding would also make the death compensable under the English rule which only requires that the compensable injury produce insanity, which in turn, produces death.

[32] See 8 U.C.L.A.L. REV. 673 (1961), which criticizes the "Massachusetts rule" as being based on the "fault" concept of criminal law and tort, and precluding a liberal construction of the statute.

[1] 258 N.C. 505, 128 S.E.2d 810 (1963).

[2] N.C. GEN. STAT. §§ 143-291 to -300.1 (Supp. 1963).

[3] "The defendant may demur to the complaint when it appears upon the face thereof,... that:... 3. There is another action pending between the same parties for the same cause...." N.C. GEN. STAT. § 1-127 (1953).

127. Nor were the claims "between the same parties"[4] as provided therein, because the claims under the Tort Claims Act were against the State. Furthermore, the Court rejected defendant's contention that plaintiffs should be forced to an election of remedies, holding that plaintiffs' claims were not inconsistent.[5] The Court reasoned that the legislature intended the Tort Claims Act as an enlargement of the rights and remedies available persons injured by the actionable negligence of state employees, but added that such persons are not to recover in excess of the damages sustained.[6]

Contribution

In *Pearsall v. Duke Power Co.*,[7] *P* sought recovery from *D* for personal injuries allegedly caused by *D*'s negligence. Under G.S. § 1-240, *D* alleged the right to contribution from *T*. The jury found *D* negligent, but it exonerated *T*. Judgment was entered accordingly. Within time for appeal, *D* paid the judgment and then accepted its assignment and transfer. *D* then appealed the case for contribution from *T*. The Court found error and granted a new trial on the issue of *T*'s negligence. In hearing the appeal, the Court rejected *T*'s contention that by paying and taking an assignment of the judgment *D* forfeited the right to have his claim for contribution reviewed. As stated by the Court: "It would be manifestly unjust to compel . . . [*D*] to withhold compensation from plaintiff until its rights, if any, against . . . [*T*] had been determined."[8]

Demurrer—Dismissal or Amendment

A complaint subject to demurrer for failure to "state facts sufficient to constitute a cause of action"[9] is generally described as either a "defective statement of a good cause of action"[10] or a "statement

[4] *Ibid.*

[5] "The whole doctrine of election is based on the theory that there are inconsistent rights or remedies of which a party may avail himself, and a choice of one is held to be an election not to pursue the other. The principle does not apply to co-existing and consistent remedies." Standard Sewing Mach. Co. v. Owings, 140 N.C. 503, 505, 53 S.E. 345, 346 (1906). *Accord*, Thomas v. Catawba College, 248 N.C. 609, 104 S.E.2d 175 (1958).

[6] Under the Tort Claims Act, "in no event shall the amount of damages awarded exceed the sum of ten thousand dollars . . . ." N.C. GEN. STAT. § 143-291 (1958).

[7] 258 N.C. 639, 129 S.E.2d 217 (1963).

[8] *Id.* at 643, 129 S.E.2d at 220.

[9] N.C. GEN. STAT. § 1-127 (1953).

[10] "When, however, there is an enforceable cause of action stated but

of a defective cause of action."[11] Although the distinction between the two types of insufficiency determines whether amendment or dismissal results,[12] it "is not always clearly defined."[13] Under the leadership of Bobbitt, J., however, the Court has begun using language more suggestive of the nature of the insufficiency. By this language, dismissal results, "only if the allegations of the complaint *affirmatively disclose* . . . that plaintiff has no cause of action against the defendant."[14] Some recent opinions by other justices use similar language.[15] Further use of this language is desirable if only as a matter of semantics, for its apt description of the defect indicates the result more clearly than the traditional phraseology.

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the statement thereof is inartificially expressed, or is in general terms, or the facts are not clearly and definitely stated, or it is lacking in some material allegation, it constitutes a defective statement of a good cause." Davis v. Rhodes, 231 N.C. 71, 73, 56 S.E.2d 43, 45 (1949).

[11] "When the defect goes to the substance of the cause and not to the form of the statement, it is a defective cause of action which cannot be made good by adding other allegations not included in the original complaint. It is in no event, however expertly stated, an enforceable cause of action." *Ibid.*

[12] "In each instance, the demurrer should be sustained. Where there is a defective statement of a good cause of action, the complaint is subject to amendment; and the action should not be dismissed until the time for obtaining leave to amend has expired.... But where there is a statement of a defective cause of action, final judgment dismissing the action should be entered." Mills v. Richardson, 240 N.C. 187, 190, 81 S.E.2d 409, 411 (1954).

[13] 1 McINTOSH, NORTH CAROLINA PRACTICE & PROCEDURE § 1189, at 645 (2d ed. 1956).

[14] Skipper v. Cheatham, 249 N.C. 706, 711, 107 S.E.2d 625, 629 (1959). (Emphasis added.) *Accord,* East Carolina Lumber Co. v. Pamlico County, 250 N.C. 681, 110 S.E.2d 278 (1959); Elliott v. Goss, 250 N.C. 185, 108 S.E.2d 475 (1959).

[15] In Ingram v. Nationwide Mut. Ins. Co., 258 N.C. 632, 129 S.E.2d 222 (1963), the Court affirmed the sustaining of a demurrer to the complaint, but found error in dismissal because it did not find that "the allegations of the complaint affirmatively disclose that plaintiff has no cause of action against the defendant." *Id.* at 639, 129 S.E.2d at 228. The same result was reached in Murray v. Bensen Aircraft Corp., 259 N.C. 638, 131 S.E.2d 367 (1963), where there was no finding that "the facts stated affirmatively showed that plaintiff did not have a cause of action." *Id.* at 642, 131 S.E.2d at 371. Less significant language is found in Johnson v. Johnson, 259 N.C. 430, 130 S.E.2d 876 (1963), where dismissal was affirmed because "a study of plaintiff's... allegations of fact affirmatively shows that it [the complaint] contains a statement of a defective cause of action...." *Id.* at 440, 130 S.E.2d at 883-84. Ingram v. Nationwide Mut. Ins. Co., *supra,* is discussed in *Real Party in Interest, infra;* Murray v. Bensen Aircraft Corp., *supra,* is discussed in SALES, *Warranty, infra;* Johnson v. Johnson, *supra,* is discussed in TRUSTS, *Trustee's Power of Sale—Necessity of Allegations in Action, infra.*

Motion to Make More Definite and Certain

In *Clement v. Koch*,[16] plaintiff appealed a judgment sustaining defendant's demurrer and dismissing the action. Upon concluding that defendant's objections were without merit, the Court reversed. The Court stated, however, that the complaint met no more than minimum requirements. To rectify this situation, the Court advised that the proper procedure was to move that plaintiff be required to make his complaint more definite and certain.[17] The distinction between the proper functions of a demurrer and a motion to make more definite and certain has not always been observed.[18] If a demurrer is sustained, where instead a motion to make more definite and certain should be granted, the allowance of amendment usually saves plaintiffs from harsh results. Problems arise, however, as in *Webb v. Eggleston*,[19] where the demurrer was sustained with express leave to amend, but the statute of limitations ran before plaintiff filed an amendment, thereby defeating the action.

The plaintiff in *Gaskins v. Hartford Fire Ins. Co.*[20] was faced with a situation analogous to that presented the plaintiff in *Webb v. Eggleston*, but fortunately was spared the same fate. In *Gaskins*, plaintiff sought recovery on a fire insurance policy issued by defendant. A demurrer to the complaint was sustained upon stipulation by counsel for both parties that the complaint failed to state facts sufficient to constitute a cause of action,[21] but plaintiff was allowed

[16] 259 N.C. 122, 130 S.E.2d 65 (1963).

[17] "When the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment...." N.C. GEN. STAT. § 1-153 (Supp. 1963). "When, however, the complaint alleges or attempts to allege a good cause of action but is defective in that it does not definitely and sufficiently set out all the essential, ultimate facts, or is inartificially stated, or is in general terms, demurrer will not lie if, when liberally construed, the allegations are sufficiently intelligible to inform the defendant as to what he is required to answer. The remedy is by motion to make the complaint more definite." Davis v. Rhodes, 231 N.C. 71, 74, 56 S.E.2d 43, 45 (1949).

[18] "When, as is often the case, counsel resort to a demurrer, rather than a motion to make more definite, to challenge the sufficiency of the statement of a good cause of action and the defect may be cured by amendment, the courts will allow the amendment rather than dismiss the action." *Id.* at 74, 56 S.E.2d at 46.

[19] 228 N.C. 574, 46 S.E.2d 700 (1948).

[20] 260 N.C. 122, 131 S.E.2d 872 (1963).

[21] The complaint was deemed insufficient "for that (1) it appeared the contract was without consideration and (2) there was no allegation that

leave to amend. The plaintiff amended within thirty days. While the action had been instituted within twelve months of the loss as required by G.S. § 58-176,[22] the amendment was filed subsequent to the twelve month period. The defendant's demurrer on grounds that the limitation period had expired was overruled by the trial court. The Court affirmed, ruling that the policy provision requiring commencement of the action within twelve months after loss was contractual and therefore subject to waiver or estoppel. In dictum, however, the Court took pains to indicate that the original complaint was not subject to demurrer but only to a motion to make more definite and certain, and that plaintiff's counsel could not be allowed to stipulate away plaintiff's case as the *Webb v. Eggleston* precedent might suggest.

Motion to Strike

While no direct appeal ordinarily lies from an order allowing a motion to strike,[23] a direct appeal is allowed when the motion to strike challenges the legal sufficiency of a complaint and is therefore a demurrer in substance.[24] In *Chas. H. Jenkins & Co. v. Lewis,*[25] direct appeal was allowed from an order striking an affirmative defense in its entirety, since the motion to strike was a demurrer in substance.

Releases

In *Simpson v. Plyler,*[26] the Court held that a covenant not to sue one of two joint tort-feasors, entry of a consent judgment pursuant thereto, and subsequent satisfaction of the judgment constituted a

plaintiff had an insurable interest in the property which was destroyed." *Id.* at 123, 131 S.E.2d at 873. Plaintiff's subsequent amendment merely supplied these specific averments.

[22] N.C. GEN. STAT. § 58-176 (1960), provides for the Standard Fire Insurance Policy.

[23] "[T]his Court will not entertain an appeal:... (2) From an order striking or denying a motion to strike allegations contained in pleadings. When a party conceives that such order will be prejudicial to him on the final hearing of said cause, he may petition this Court for a writ of certiorari within thirty days from the date of the entry of the order." N.C. SUP. CT. R. 4(A).

[24] See Williams v. Hunter, 257 N.C. 754, 127 S.E.2d 546 (1962).

[25] 259 N.C. 85, 130 S.E.2d 49 (1963).

[26] 258 N.C. 390, 128 S.E.2d 843 (1963). This case is discussed in TORTS, *Negligence, infra;* TRIAL PRACTICE, *Judgments—Consent Judgment as Waiver of Claim Against Joint Tortfeasor, infra.*

release of the other tort-feasor as well, notwithstanding recitals to the contrary. This case is the subject of a previous note in the *Review*.[27]

Rights of an Insurer after Partial Payment of a Loss

The rights of an insurer paying only a portion of a loss were considered in *Nationwide Mut. Ins. Co. v. Spivey*.[28] The plaintiff insurance company paid all but the deductible amount on an automobile collision policy and took from its insured a release and assignment of the insured's claim to the extent of the amount paid. The tort-feasor responsible for the loss was notified of the assignment. Thereafter, the tort-feasor settled by consent judgment with the insured for that portion of his loss not paid by the insurance company.[29] When the insurance company sued for compensation for the amount paid on the loss, the tort-feasor relied on the settlement and a proposition stated in *Burgess v. Trevathan*[30] to defeat the action. The Court disagreed, holding that the insurer had a cause of action for compensation. As stated by the Court: "[T]he tort-feasor who has knowledge of insurer's rights cannot, by settling with claimant for the rights remaining in him, defeat the insurer's rights."[31]

Subject of the Action

In *Burton v. Dixon*,[32] plaintiff sought to recover for services rendered defendant's intestate. Plaintiff alleged that defendant's intestate lived with plaintiff and her husband, that he had promised to compensate her for services, care, and support rendered him by

[27] 42 N.C.L. REV. 429 (1964).

[28] 259 N.C. 732, 131 S.E.2d 338 (1963).

[29] The consent judgment was entered in an action for personal injury as well as the uncompensated portion of the loss.

[30] 236 N.C. 157, 72 S.E.2d 231 (1952). "4. Where the insurance paid by the insurance company covers only a portion of the loss, the insured is a necessary party plaintiff in any action against the tort-feasor for the loss. The insured may recover judgment against the tort-feasor in such case for the full amount of the loss without the joinder of the insurance company. He holds the proceeds of the judgment, however, as a trustee for the benefit of the insurance company to the extent of the insurance paid by it." *Id.* at 160, 72 S.E.2d at 233. The Court in the principal case upheld the validity of this statement of law, but rejected defendant's contention that it controlled, relying instead on Powell v. Wake Water Co., 171 N.C. 290, 88 S.E. 426 (1916).

[31] 259 N.C. 732, 734, 131 S.E.2d 338, 340. *Accord*, Phillips vs. Alston, 257 N.C. 255, 125 S.E.2d 580 (1962); Powell v. Wake Water Co., 171 N.C. 290, 88 S.E. 426 (1916).

[32] 259 N.C. 473, 131 S.E.2d 27 (1963). Also discussed in *Proper Parties, infra.*

providing for her in his will, and that no such provision was made. Defendant denied plaintiff's material allegations. In a counterclaim, defendant alleged in effect that plaintiff and her husband conspired to gain control of the intestate's assets, that they persuaded the intestate to sign a legal instrument purporting to be a power of attorney over the property of intestate, and that by virtue of the power of attorney they sold timber and collected rents from the intestate's property, converting the proceeds to their own use. The Court allowed the counterclaim, holding that there was no misjoinder of causes and parties.

If he meets the requirements of G.S. § 1-137, a defendant may litigate in the one action a counterclaim "connected with the subject of the action."[33] The Court found defendant's counterclaim connected with the subject of plaintiff's action, namely, the alleged contract between plaintiff and defendant's intestate.[34] The Court reasoned that the services plaintiff was to render the intestate under the alleged contract may have included the sale of timber and the collection of rent. If such were not the case, the Court reasoned that the alleged failure of performance by the intestate could have resulted from his properly considering the conversion of his assets when it came time for him to perform.

The Court's opinion, per Moore, J., indicates commendable willingness to find a connection with the subject of the action. Perhaps the Court will now find satisfaction of that requirement under both G.S. § 1-137 and G.S. § 1-123[35] more easily than in the past.[36]

[33] N.C. GEN. STAT. § 1-137 (1953).

[34] "The 'subject of the action' means, in this connection, the thing in respect to which plaintiff's right of action is asserted, whether it be specific property, a contract, a threatened or violated right, or other thing concerning which an action may be brought and litigation had." Hancammon v. Carr, 229 N.C. 52, 55, 47 S.E.2d 614, 616 (1948).

[35] "The plaintiff may unite in the same complaint several causes of action, of legal or equitable nature, or both, where they all arise out of —— 1. The same transaction, or transaction connected with the same subject of action." N.C. GEN. STAT. § 1-123 (1953).

[36] Compare Pressley v. Great Atlantic & Pacific Tea Co., 226 N.C. 518, 39 S.E.2d 382 (1946), where plaintiff unsuccessfully sought to join against his employer causes of action for (1) injury caused by negligence, and (2) wrongful discharge for refusal to sign a release from liability for the injury. The Court found different subjects of action. "This is certainly a situation in which common sense indicates that joinder ought to be permitted. There is an argument to be made that the basic subject of action is the negligent injury, and that the transaction involving the discharge is a transaction 'con-

Two factors, however, prevent reaching that general conclusion. First, the litigation involved the assets of an estate.[37] And second, as expressed by the Court, "the adjustment of plaintiff's claim and defendant's counterclaim is necessary to a full and final determination of the controversy."[38]

Variance

As previously noted in the *Review*,[39] *Whichard v. Lipe*[40] introduced a strict view of variance by which parties are held substantially to proof of those facts alleged as the basis of their cause of action, and of those facts alone. A "material variance" is now said to be "fatal" even though the evidence at variance has not been objected to, and a "material and fatal" variance requires nonsuit, a result formerly required only when the discrepancy could be characterized as a "total failure of proof" as contemplated in G.S. § 1-169.

In *Noland v. Brown*,[41] proof that plaintiff worked an eight-hour day where the allegation had been that plaintiff worked a twenty-hour day was held to constitute a material variance, thus requiring nonsuit in plaintiff's action to recover for services rendered under an alleged contract. On the other hand, in *Chappell v. Winslow*,[42] where plaintiffs alleged and sought to enjoin defendants' construction of north-south ditches, but their evidence showed they were attempting to prevent connection of east-west ditches with a highway drainage ditch, the Court found no material variance. Properly emphasized was the critical factor that "no element of surprise appears."[43] Thus, in *Chappell v. Winslow*, the Court adhered to the statutory scheme that "no variance between the allegation in a pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action upon the merits."[44]

nected with' that subject." Brandis, *Permissive Joinder of Parties and Causes in North Carolina*, 25 N.C.L. REV. 1, 12 (1946).

[37] "In litigation involving the assets of an estate, even though complicated as to parties and involving multiple demands for relief, objection for misjoinder of causes and parties has an excellent chance of being overruled." Brandis, *supra* note 36, at 22.

[38] 259 N.C. 473, 479, 131 S.E.2d 27, 32.

[39] 41 N.C.L. REV. 647 (1963).

[40] 221 N.C. 53, 19 S.E.2d 14 (1942).

[41] 258 N.C. 778, 129 S.E.2d 477 (1963).

[42] 258 N.C. 617, 129 S.E.2d 101 (1963).

[43] *Id.* at 622, 129 S.E.2d at 105.

[44] N.C. GEN. STAT. § 1-168 (1953).

PARTIES

Joinder of Parties and Causes

In *Conger v. Travelers Ins. Co.*,[45] the Court allowed joinder of alternative causes of action against two defendants. Plaintiff alleged that the first defendant was liable on an insurance policy, or, in the alternative, that the second defendant was liable for failure to pay the premiums on the policy. This case is the subject of a previous note in the *Review*.[46]

While a plaintiff may not ordinarily join in one cause of action claims against the owners of different tracts of land, dictum in *Redevelopment Comm'n v. Hagins*[47] suggests that urban renewal condemnation proceedings should be tried in one action for the whole planned area, leaving the question of just compensation due each landowner for determination in seperate inquiries.

Proper Parties

In *Burton v. Dixon*,[48] the Court allowed defendant to set up a counterclaim against plaintiff and her husband for conspiracy. The husband was a Virginia resident, and not then a party. But because conspirators are jointly and severally liable, the Court reasoned that the counterclaim could be maintained, "with or without the husband as a party."[49] Yet if jurisdiction could be lawfully acquired over him,[50] the Court regarded him as "a proper, and perhaps a necessary, party."[51]

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[45] 260 N.C. 112, 131 S.E.2d 889 (1963).

[46] 42 N.C.L. REV. 242 (1963).

[47] 258 N.C. 220, 225, 128 S.E.2d 391, 394 (1962). This case is discussed in EMINENT DOMAIN, *infra.*, and in MUNICIPAL CORPORATIONS, *Urban Redevelopment, infra.*

[48] 259 N.C. 473, 131 S.E.2d 27 (1963). Also discussed in *Subject of the Action, supra.*

[49] *Id.* at 478, 131 S.E.2d at 31.

[50] The Court observed that a party over whom there is no jurisdiction cannot be ordered before a court as a proper or necessary party to an action. Because the action was in personam, jurisdiction could be acquired only by personal service of process within the State, or by acceptance of service, or or by general appearance, active or constructive. See Worlick v. H.P. Reynolds & Co., 151 N.C. 606, 66 S.E. 657 (1910). See generally 1 MCINTOSH, *op. cit. supra* note 13, §§ 911-17.

[51] 259 N.C. at 480, 131 S.E.2d at 32. An inconsistency is apparent. Because the counterclaim could be maintained "with or without the husband as a party," he cannot be a "necessary party." "A person is a necessary party to an action when he is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely

Plaintiffs in *Simon v. Board of Educ.*[52] sought to recover the alleged balance due on a construction contract entered into with defendant. Denying plaintiffs' allegation of substantial performance of the contract, defendant alleged that breach of the contract necessitated employment of additional parties and supervising architects to complete the construction, and that the architects should be compensated from the balance plaintiffs claimed due. On defendant's motion, the architects were ordered to interplead. Plaintiffs appealed, assigning as error the order making the architects additional parties.

Although the Court dismissed plaintiffs' appeal,[53] it rejected the grounds on which the architects were made parties. The defendant was not entitled to a bill of interpleader[54] because he had an interest in the subject matter and furthermore because the plaintiffs and the architects did not claim a common fund. Nor was defendant entitled to a bill in the nature of an interpleader,[55] as no common source or obligation gave rise to the claims of plaintiffs and the architects. Since a complete adjudication of the controversy between plaintiffs and defendant was possible without directly affecting the architects rights, they were not necessary parties whose presence could be compelled under the first section of G.S. § 1-73.[56]

Nevertheless, the Court allowed the architects to remain in the

and finally determining the controversy without his presence as a party." Garrett v. Rose, 236 N.C. 299, 307, 72 S.E.2d 843, 848 (1952). See generally 1 McINTOSH, *op. cit. supra* note 13, §§ 571-84.

[52] 258 N.C. 381, 128 S.E.2d 785 (1963).

[53] The Court held that the order making the architects additional parties did not adversely affect a "substantial right" of plaintiffs, therefore no appeal existed under N.C. GEN. STAT. § 1-277 (1953).

[54] The Court stated that the second and third sections of N.C. GEN. STAT. § 1-73 (1953), provide for interpleader, but that the statute does not supersede the equitable remedy with its four requisites: "1. The same thing, debt or duty, must be claimed by both or all the parties against whom the relief is demanded. 2. All their adverse titles or claims must be dependent, or be derived from a common source. 3. The person asking the relief—the plaintiff —must not have nor claim any interest in the subject-matter. 4. He must have incurred no independent liability to either of the claimants; that is, he must stand perfectly indifferent between them, in the position merely of a stakeholder." 258 N.C. at 386, 128 S.E.2d at 789.

[55] "[T]he material difference between a strict interpleader and a bill in the nature of an interpleader seems to be that in the latter the plaintiff may show that he has an interest in the subject matter of the controversy between the claimants." 258 N.C. at 387-88, 128 S.E.2d at 790.

[56] "[W]hen a complete determination of the controversy cannot be made without the presence of other parties, the court must cause them to be brought in." N.C. GEN. STAT. § 1-73 (1953).

action as proper parties on the stated basis that, "both convenience and the ends of justice will be promoted by making the architects parties so that both claims can be settled in one suit."[57] The result is that a defendant has been allowed to bring in a third party to litigate a claim not germane to plaintiffs' cause of action. It may presage a more liberal approach to third party practice than has been evident in the past.[58]

Real Party in Interest

In a civil action arising from an automobile collision, *P* recovered judgment against both *O*, owner of one of the vehicles involved, and *D*, driver of *O*'s vehicle. No appeal was taken. *O* and his insurer partially paid *P* on the judgment, which was then assigned to a trustee pursuant to G.S. § 1-240. The trustee brought action against *D*'s insurer to recover complete indemnification of the amount paid by *O* on the judgment. Defendant demurred for failure to state facts sufficient to constitute a cause of action and for defect in parties plaintiff and defendant. In *Ingram v. Nationwide Mut. Ins. Co.*,[59] the Court held that the demurrer was properly sustained because the complaint contained no allegation that a right to indemnification had been judicially established, but the Court remanded with leave to amend to so allege. The Court found no defect in parties plaintiff and defendant. Thus, in such a situation the trustee may recover any indemnification to which his *cestui que trust* has been found entitled by taking direct action against the indemnitor's insurer, without joining the indemnitor or his *cestui que trust.*

[57] 258 N.C. at 389, 128 S.E.2d at 792.

[58] The traditional limitation has been that only those claims might be asserted between defendants, whether original or impleaded, that are germane to the plaintiff's cause of action. This restriction has practically confined impleading as of right to parties against whom contribution and legal indemnification claims could be asserted. For discussion of third party practice, see Brandis and Graham, *Recent Developments in the Field of Permissive Joinder of Parties and Causes in North Carolina,* 34 N.C.L. REV. 405, 425-29 (1956); Brandis, *A Plea for Adoption by North Carolina of the Federal Joinder Rules,* 25 N.C.L. REV. 245, 263-68 (1947).

[59] 258 N.C. 632, 129 S.E.2d 222 (1963).

CONFLICT OF LAWS

CONFLICTING DECISIONS

Under a North Carolina statute[1] the Department of Motor Vehicles may suspend the drivers license of a resident of this state upon receiving notice of his conviction in another state of an offense which, if committed in North Carolina, would be grounds for revocation. Under North Carolina law forfeiture of bail is equivalent to conviction.[2] In *In re Donnelly*,[3] petitioner was arrested in South Carolina for drunken driving. Petitioner posted fifty dollar bond and returned to North Carolina but no warrant was served on him. The North Carolina Department of Motor Vehicles sought to suspend his drivers license but petitioner contended that there had not been a valid forfeiture of bond, citing a previous North Carolina decision[4] holding that there is no valid forfeiture of bail unless a warrant is issued. This case, though, is directly contra to South Carolina law which holds that no warrant is necessary.[5]

The Court held that the South Carolina decision was not binding on the North Carolina Court on the question of whether there had been a valid forfeiture of bond, and that a North Carolina drivers license can be suspended only in accordance with statutes written and construed in this state. Since under the decisions of the North Carolina Court these circumstances (lack of a warrant) do not constitute forfeiture of bail, the petitioner's license was returned. It seems clear from the instant case that the procedure resulting in the foreign state forfeiture of bail must be such as would constitute valid forfeiture in North Carolina.[6]

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[1] N.C. GEN. STAT. § 20-23 (1953).

[2] N.C. GEN. STAT. § 20-24(c) (1953).

[3] 260 N.C. 375, 132 S.E.2d 904 (1963).

[4] In re Wright, 228 N.C. 301, 45 S.E.2d 370 (1947), *rehearing*, 228 N.C. 584, 46 S.E.2d 696 (1948). This case also concerned an arrest and "forfeiture" of bail in South Carolina and is directly in point with the exception of the intervening South Carolina decision.

[5] State v. Langford, 223 S.C. 20, 73 S.E.2d 854 (1952).

[6] A general rule is that matters of procedure are governed by the law of the forum, while in matters of substance the law of the foreign state governs. GOODRICH, CONFLICT OF LAWS § 80 (3d ed. 1949). The Court did not mention this rule but it would seem that forfeiture of bail is a matter of procedure. Also this case raises the problem of whether *any* foreign state conviction (not just forfeiture of bail under G.S. § 20-24(c)) must be such as would constitute a valid conviction in North Carolina. *E.g.*, the right to jury trial in petty offenses may differ. Should the fact that defendant

Interspousal Tort Actions

Shaw v. Lee[7] involved a suit by a wife against her husband's estate for negligent injuries received in a Virginia automobile accident.[8] The Court, in sustaining a demurrer, reaffirmed its rule that in interspousal negligence suits the *lex loci* governs,[9] and refused to follow a trend allowing the *lex domicilii* to control.[10]

CONSTITUTIONAL LAW

Due Process

In two cases the Court dealt with the problem of a request for an extension of time to allow counsel to collect and present evidence in support of a motion to quash a criminal indictment on the grounds of systematic exclusion of Negroes from the grand jury. *State v. Covington*[1] reiterated the rule that the defendant must be given reasonable time to investigate and secure evidence on the question of jury exclusion; he must be allowed process to compel the production of such evidence, and he must be given an opportunity to present his evidence. Here the trial court found[2] that there was no discriminatory exclusion and denied motions to set a hearing on the motion to quash and to cause process to issue. The Supreme Court, following *State v. Perry*,[3] reversed, holding that defendant must be given an opportunity to compile and present his case.[4]

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would have had a right to jury trial in North Carolina, but not in the foreign state, mean there was no valid conviction for the purposes of G.S. § 20-23?

[7] 258 N.C. 609, 129 S.E.2d 288 (1963). Noted in 41 N.C.L. Rev. 843 (1963).

[8] In Virginia one spouse cannot sue the other for negligent injury. Keister's Adm'r v. Keister's Ex'rs, 123 Va. 157, 96 S.E. 315 (1918). North Carolina has abrogated this common law rule by statute. N.C. Gen. Stat. § 52-10.1 (Supp. 1963).

[9] Howard v. Howard, 200 N.C. 574, 158 S.E. 101 (1931).

[10] Thompson v. Thompson, 193 A.2d 439 (N.H. 1963); Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959). *But see* Holder v. Holder, 384 P.2d 663 (Okla. 1963).

[1] 258 N.C. 495, 128 S.E.2d 822 (1963).

[2] 258 N.C. at 497, 128 S.E.2d at 824.

[3] 248 N.C. 334, 103 S.E.2d 404 (1958).

[4] A companion case, State v. Covington, 258 N.C. 501, 128 S.E.2d 827 (1963), involves identical parties and identical questions as to the motion to quash. However, here defendant pleaded guilty following the denial of his motion. The Court, in reversing, noted on its own motion that a plea of guilty does not waive a timely objection to the grand jury made on the grounds that Negroes were systematically excluded therefrom. This case is

State v. Inman[5] held, per curiam, that defendant's counsel must be allowed more time to compile information on possible exclusion, even though counsel had been employed for more than four weeks, and had not issued any subpoena to substantiate his motion. The Court made it clear[6] that a liberal amount of time is guaranteed counsel to compile his case on this point.

In *State v. Lane*[7] the Court again held that adequate time for counsel to prepare the defense is inherent in the constitutional rights to counsel and confrontation.[8] An indigent defendant's case was called at 9:30 A.M., at which time counsel was appointed. At 2:30 P.M. on the same day the trial was begun, counsel's motion for a continuance in order to prepare the defense having been overruled. The Court, in a per curiam opinion, granted a new trial on the grounds that the rights of counsel and confrontation of accuser had been denied the prisoner. This case marks a liberal extension of the right to continuance in order to preserve constitutional rights.[9]

In *State v. Hubert*[10] the defendant assigned as error the action of the trial judge in summarizing the testimony of a state's witness whom the jury complained they could not hear, instead of requiring the solicitor to re-question the witness. The Court granted a new trial on the authority of *State v. Payton*.[11] It is clear from the instant case that due process rightly demands that the jury hear all testimony directly from the lips of the witness.

In *State v. Patton*[12] the defendant complained: (1) That he had been denied the right to a speedy trial; and (2) That loss of defendant's key witnesses by death and incapacity during the delay resulted in a violation of due process. Defendant was arrested in

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discussed in CRIMINAL LAW, *Jurisdictional Defect not Waived by Guilty Plea, infra.*

[5] 260 N.C. 311, 132 S.E.2d 613 (1963) (per curiam).

[6] 260 N.C. at 312, 132 S.E.2d at 614.

[7] 258 N.C. 349, 128 S.E.2d 389 (1962) (per curiam).

[8] U.S. CONST. amend. XIV; N.C. CONST. art. I, § 11.

[9] For a complete discussion of the ramifications of this case see 41 N.C.L. REV. 863 (1963).

[10] 259 N.C. 140, 129 S.E.2d 888 (1963) (per curiam).

[11] 255 N.C. 420, 121 S.E.2d 608 (1961) (per curiam). This case involved the examination of an eight year old rape victim outside the presence of the jury, the court reporter reading her testimony to the jury. The Supreme Court reversed per curiam.

[12] 260 N.C. 359, 132 S.E.2d 891 (1963).

1958 for armed robbery and in 1960[13] was found guilty. In March, 1963, the Fourth Circuit, in habeas corpus proceedings, found that the defendant had been denied a fair trial and ordered that the state be given a reasonable opportunity to retry him.[14] Accordingly, defendant was tried at the May, 1963 term of superior court. Between 1958 and 1963 one of defendant's key witnesses died and another became incapacitated. The Court, citing numerous authority,[15] held there was no denial of a speedy trial, as the delay in the retrial was caused not by arbitrary delay by the prosecution, but by defendant's successful effort to reverse his first conviction. Also the fact that defendant's witnesses are unavailable due to death and incapacity during the period between trials is not a denial of due process,[16] since the state is under no duty to guarantee that all defendant's witnesses will be available.[17] The problem inherent in this situation is obvious, since all too often a long delay will completely destroy the defendant's chances of recompiling his case. However, the state should not be denied a retrial since the filing of the petition for habeas corpus is controlled by the prisoner and he should exercise it within a reasonable time.[18]

STATUTES

The Supreme Court upheld as constitutional three previously untested statutes dealing respectively with parental liability for a child's malicious property damage, commercial bribery, and denial of unemployment compensation to certain persons. In a case of first impression[19] the Court upheld a statute[20] which imposes liability up

[13] During 1960 defendant was in federal prison. He did not claim that his first trial was unduly delayed.

[14] Patton v. State, 315 F.2d 645 (4th Cir. 1963).

[15] *E.g.*, State v. Dehler, 257 Minn. 549, 102 N.W.2d 696 (1960); State v. Hadley, 249 S.W.2d 857 (1952).

[16] There is little authority on this point. State v. Dehler, 257 Minn. 549, 102 N.W.2d 696 (1960), holds that even though a lapse of seventeen years made proof of insanity difficult, the defendant could still be retried.

[17] In the present case the Court took judicial notice of an affidavit filed by the incapacitated witness during a post conviction hearing and held that the loss of the admissiable portion of the testimony was not prejudicial to the defendant.

[18] Gideon v. Wainwright, 372 U.S. 335 (1963), requiring counsel for indigent defendants, should partially answer the argument that the prisoner without counsel often is ignorant of his right to petition for habeas corpus.

[19] General Ins. Co. v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

[20] N.C. GEN. STAT. § 1-538.1 (Supp. 1963).

to five hundred dollars on the parents of a minor child who wilfully or maliciously damages or destroys the property of another. Defendant's eleven year old son allegedly set fire to school property which resulted in over two thousand dollars damage. In a suit by the insurance company to recover five hundred dollars the lower court sustained a demurrer by the parents, who claimed that the statute fixed liability without fault on the parents and thus constituted a taking of property without due process of law.[21] The Supreme Court reversed on the grounds that the statute was a valid exercise of the police power, its purpose being to curb juvenile delinquency by stimulating closer parental attention to and supervision over children. The statute was not intended to provide compensation for the injured party, as evidenced by the five hundred dollar limitation, and therefore does not affix liability without fault.

North Carolina is one of thirty-two states with similar statutes,[22] yet this case marks only the second constitutional challenge, a similar Texas statute having been upheld.[23] It has been suggested that decisions upholding the "family car" statutes provide authority for the validity of the child vandalism statutes,[24] though the North Carolina Court does not rest its holding on this basis.[25]

In the case of *State v. Brewer*[26] the Court upheld the validity of North Carolina's "commercial bribery" statute,[27] which makes it a misdemeanor to give or receive gifts or promises with the intent to influence the action of an agent in relation to his principal's or employer's business. The Court held the statute was not void for vagueness, nor was it an arbitrary exercise of the police power. North Carolina is one of only thirteen states with such a statute,[28] and litigation relating to them is scarce.[29] New York upheld the validity of a

[21] U.S. CONST. amend. XIV, § 1; N.C. CONST. art. I, § 17.

[22] See Ligon, *Parental Responsibility Statute,* 40 N.C.L. REV. 619, 625 (1962), for a discussion of the statute when passed.

[23] Kelly v. Williams, 346 S.W.2d 434 (Tex. Civ. App. 1961).

[24] 55 MICH. L. REV. 1205 (1957); 28 U. KAN. CITY L. REV. 185, 186 (1960).

[25] This case is discussed in DOMESTIC RELATIONS, *Parent and Child, infra,* EQUITABLE REMEDIES, *Subrogation, infra,* and INSURANCE, *Fire Insurance, infra.*

[26] 258 N.C. 533, 129 S.E.2d 262, *appeal dismissed,* 375 U.S. 9 (1963). This case is discussed in CRIMINAL LAW AND PROCEDURE, *Criminal Law, infra.*

[27] N.C. GEN. STAT. § 14-353 (1953).

[28] Note, 108 U. PA. L. REV. 848, 864 (1960).

[29] *E.g.,* People v. Jacobs, 309 N.Y. 315, 130 N.E.2d 636 (1955); People

similar statute in what appears to be the only constitutional test prior to the instant case.[30]

In *In re Abernathy*[31] the Court upheld as constitutional the 1961 amendment to the Workman's Compensation Act which deletes the so-called escape clause by which certain non-striking employees were allowed unemployment compensation. Eight other states have similar clauses in their statutes and none have been struck down. The North Carolina Court held the amendment to be a change of degree, not substance, and well within the police power.

CONTRACTS

Accord and Satisfaction

In *Prentzas v. Prentzas*[1] the plaintiff and defendant's deceased husband formed a partnership for the purchase of real estate. Three tracts were purchased by the partnership and title was taken in defendant's name. On several occasions thereafter plaintiff called for an accounting and in 1950 defendant and her husband conveyed one tract to the plaintiff. After the conveyance defendant's husband informed plaintiff the deed was in full settlement of plaintiff's claim to partnership assets. Plaintiff refused to recognize the deed as a settlement but did not reconvey the property. Plaintiff later brought an action for a partnership accounting. On the issue of accord and satisfaction the trial judge charged the jury that if it should find the plaintiff did not intend to accept the deed in full settlement then accord and satisfaction was no defense.[2] On appeal a new trial was granted. The Court recalled that when a demand for an accounting is met with an offer of property in full discharge an acceptance and retention of the property usually constitutes a complete discharge.[3]

v. Davis, 160 N.Y. Supp. 769 (Ct. Spec. Sess. 1915). Cases also arise under civil law in attempts to set aside contracts. *E.g.*, Sirkin v. Fourteenth St. Store, 108 N.Y. Supp. 830 (App. Div. 1908).

[30] People v. Davis, 160 N.Y. Supp. 769 (Ct. Spec. Sess. 1915), upheld the second section of the New York statute dealing with improper commissions paid to purchasing agents. The North Carolina statute contains a similar section.

[31] 259 N.C. 190, 130 S.E.2d 292 (1963). This case is discussed in Labor Law, *Unemployment Compensation—Disqualification for Benefits, infra.*

[1] 260 N.C. 101, 131 S.E.2d 678 (1963).

[2] 260 N.C. at 105, 131 S.E.2d at 682.

[3] See, *e.g.*, Fidelity & Cas. Co. v. Nello L. Teer Co., 179 F. Supp. 538 (M.D.N.C. 1960); Fidelity & Cas. Co. v. Nello L. Teer Co., 250 N.C. 547,

The Court held, however, that in the case of a partnership the property might be accepted and retained for the benefit of the partnership. Thus, the question for the jury was whether the plaintiff retained title to the property for his own benefit or for the benefit of the partnership rather than whether he intended to accept the deed in full settlement of his claim to partnership assets.

ASSIGNMENT

In *Morton v. Thornton*[4] the Court considered the validity of the assignment of fifteen separate claims for wages to three of the claimants who instituted this suit. In an earlier action[5] the plaintiffs had brought suit on the claims "jointly and as Assignees."[6] The defendants demurred for misjoinder of parties and causes. The Court held that a claim for unpaid wages could be assigned, but the nature of the alleged assignment was not clear so the Court remanded to allow amendment. The amended complaint which came before the Court in the present case included copies of the fifteen identical instruments purporting to assign all wages due the assignors. The instruments assigned the claims to the plaintiffs "individually and collectively"[7] and empowered the plaintiffs "to act individually or together in their individual names as assignees or in the event, for any reason, this assignment is held void, they shall be deemed to act in their own name or names and individual capacity or capacities for me as my agent coupled with an interest."[8]

On appeal the Court applying the rule that an assignment requires an assignor, an assignee and a thing assigned[9] found that the assignors were clearly denoted but the interest created in the purported assignees was ambiguous. Since the interest created in the assignees was unclear, the instrument was ineffective as an assignment. The

109 S.E.2d 171 (1959); Moore v. Greene, 237 N.C. 614, 75 S.E.2d 649 (1953). N.C. GEN. STAT. § 1-540 (1953), provides, "In all claims, or money demands, of whatever kind, and howsoever due, where an agreement is made and accepted for a less amount than that demanded or claimed to be due, in satisfaction thereof, the payment of the less amount according to such agreement in compromise of the whole is a full and complete discharge of the same."

[4] 259 N.C. 697, 131 S.E.2d 378 (1963).

[5] Morton v. Thornton, 257 N.C. 259, 125 S.E.2d 464 (1962).

[6] *Id.* at 262, 125 S.E.2d at 466.

[7] 259 N.C. at 699, 131 S.E.2d at 380.

[8] *Ibid.*

[9] Boyd v. Campbell, 192 N.C. 398, 135 S.E. 121 (1926).

Court found that the instruments did operate to appoint the plaintiffs as agents for the other salesmen. Since an agent is not the real party in interest[10] he cannot sue under our statute;[11] hence, plaintiffs were not entitled to maintain this suit.[12]

REFORMATION

In *McCallum v. Old Republic Life Ins. Co.*[13] the complaint alleged that the effective and termination dates on a credit life insurance certificate had been typed in incorrectly and that all parties intended the effective date to be three days later and the term of the policy to be twelve months. It further alleged that the dates were inserted by mutual mistake or were inserted by defendant with the intent to defraud the insured. The Court held the complaint stated a cause of action for reformation of an insurance contract.[14] The Court further held that an allegation in the complaint that the insured, an eighty-three year old woman in feeble health, failed to read the certificate did not, as a matter of law, bar an action to reform the certificate.[15] Although seemingly in conflict with statements in North Carolina that reformation will not be granted where a person fails to read an instrument which he was able to read,[16] the Court stressed

[10] Choate Rental Co. v. Justice, 211 N.C. 54, 188 S.E. 609 (1936).

[11] N.C. GEN. STAT. § 1-57 (1953).

[12] If the Court had found a valid assignment it may well have proven an assignment for collection only. In North Carolina such an assignee is not the real party in interest. First Nat'l Bank v. Rochamora, 193 N.C. 1, 136 S.E. 259 (1927).

[13] 259 N.C. 573, 131 S.E.2d 435 (1963). This case is discussed in EQUITABLE REMEDIES, *Reformation of Insurance Policy—Failure of Insured to Read Policy, infra.*

[14] Other jurisdictions have also dealt with efforts to change the date in an insurance contract. See Kansas City Life Ins. Co. v. Cox, 104 F.2d 321 (6th Cir. 1939); Kentucky Home Mut. Life Ins. Co. v. Marshall, 291 Ky. 120, 163 S.W.2d 45 (1942); Bleam v. Sterling Ins. Co., 360 Mich. 208, 103 N.W.2d 466 (1960); Prudential Fire Ins. Co. v. Stanley, 191 Okla. 506, 131 P.2d 88 (1942). See generally Malone, *The Reformation of Writings Under the Law of North Carolina,* 15 N.C.L. REV. 155 (1937).

[15] It is the majority rule that failure to read an insurance policy in a short time is not a defense to an action to reform the policy. See, *e.g.,* National Reserve Ins. Co. v. Scudder, 71 F.2d 884 (9th Cir. 1934); Broida v. Travelers' Ins. Co., 316 Pa. 444, 175 Atl. 492 (1934); Bankers Fire Ins. Co. v. Henderson, 196 Va. 195, 83 S.E.2d 424 (1954). See generally Annot., 81 A.L.R.2d 7 (1962).

[16] *E.g.,* W. B. Coppersmith & Sons, Inc. v. Aetna Ins. Co., 222 N.C. 14, 21 S.E.2d 838 (1942). See generally Malone, *The Reformation of Writings Under the Law of North Carolina,* 15 N.C.L. REV. 155, 174-76 (1937).

insured's age and condition as preventing a fair opportunity to read the instrument.

TENDER

In *Parks v. Jacobs*[17] the plaintiff who had an option to purchase land informed defendants she wanted to exercise the option and would pay defendants if they would come by her attorney's office. On refusal of defendants to do so plaintiff brought suit on the option contending she had made proper tender within the required time. The Court affirmed a non-suit on the ground the act of the plaintiff did not constitute a tender[18] in that nothing required defendants to come to plaintiff to receive payment.[19] A valid tender requires an offer to perform accompanied by the actual production of the subject matter and not merely a readiness and ability to perform.[20] Here the act of the plaintiff exhibited a readiness and ability to perform but nothing more.

CREDIT TRANSACTIONS

EXECUTION SALES

In *Pittsburgh Plate Glass Co. v. Forbes*,[1] plaintiff furnished labor and materials to construct a motel for the defendant. Plaintiff filed a lien for 6,249.95 dollars against the land upon which the motel was built, which had a fair market value of 126,000 dollars. This lien was subordinate to those of a mortgage for 35,000 dollars and judgments previously rendered against the defendant in excess of 43,000 dollars.

[17] 259 N.C. 129, 129 S.E.2d 884 (1963).

[18] In Bane v. Atlantic Coast Line R.R., 171 N.C. 328, 88 S.E. 477 (1916), the plaintiff sued to recover a statutory penalty for each day the railroad refused to accept a carload of cattle for shipment. The Court held that although plaintiff did not have to drive the cattle to the depot each day he had to offer to do so for each day he wished to collect. The burden was not on defendant to request of the plaintiff if he desired shipment each day to avoid the penalty.

[19] When no place of payment is specified in an offer to sell real property the law implies payment shall be made at the residence of the vendor. See Hall v. Jones, 164 N.C. 199, 80 S.E. 228 (1913). See generally Annot., 3 A.L.R.2d 256 (1949).

[20] Jacobs v. Automotive Repair Center, Inc., 137 So.2d 263 (Fla. Dist. Ct. App. 1962); Mark v. Rizzo, 6 Misc. 2d 2, 162 N.Y.S.2d 633 (1957); Bane v. Atlantic Coast Line R.R., 171 N.C. 328, 88 S.E. 477 (1916); Universal Credit Co. v. Cole, 146 S.W.2d 222 (Tex. Civ. App. 1940).

[1] 258 N.C. 426, 128 S.E.2d 875 (1963). This case is discussed in REAL PROPERTY, *Execution—Judicial Sales, infra.*

Judgment was obtained for the amount owed in an action to enforce the lien. On an execution sale pursuant to the judgment a bid was induced by representations of the owner's attorney that the proceeds of the sale would be used to discharge prior encumbrances on the property. This was untrue, since an execution sale transfers the property subject to prior liens.[2] The Court held that the bidders were properly released from enforcement of the bid.

The Court relied on a California case[3] in which the judgment creditor induced a purchaser to buy by misrepresentations as to the priority of his judgment. There it was held that the doctrine of *caveat emptor* would not be extended to validate a purchase at an execution sale induced by fraud or misrepresentation. The California court pointed out that the maxim "let the buyer beware" presumes knowledge on the part of the purchaser as to what he is purchasing and that he does so at his own risk. But the presumption of knowledge may be overcome by showing lack of knowledge of the condition of the thing purchased and inducement to purchase through misrepresentations by persons who should be thoroughly acquainted with it.[4]

Thus, while the doctrine of *caveat emptor* is applicable to execution sales,[5] it will not bar our Court from preventing an injustice to the purchaser not due to his own fault or neglect.[6]

Foreclosure Sales

In *Gaskins v. Blount Fertilizer Co.*,[7] the plaintiff had executed two deeds of trust conveying the same tract of land. The junior deed

[2] N.C. Gen. Stat. § 1-339.68(b) (1953), provides: "Any real property sold under execution remains subject to all liens which became effective prior to the lien of the judgment pursuant to which the sale is held, in the same manner and to the same extent as if no such sale had been held."

[3] Webster v. Haworth, 8 Cal. 21 (1857).

[4] Earlier North Carolina decisions involving fraud and misrepresentation as voiding a deed executed as a result of a public auction of real property are: Woods v. Hall, 16 N.C. 411 (1830), where the vendor misrepresented the land to be fertile, good for growing tobacco and containing a good water supply; McDowell v. Simms, 41 N.C. 278 (1849), where an agent of defendant misrepresented the land to contain valuable gold deposits; and Davis v. Keen, 142 N.C. 496, 55 S.E. 359 (1906), where the defendant informed persons attending the sale that the title was dubious and then bid the land in at a fraction of its fair market value.

[5] Richardson v. Wicker, 74 N.C. 278 (1876); see generally Annot., 68 A.L.R. 659 (1930).

[6] *Accord,* Clayton v. Glover, 56 N.C. 371 (1857).

[7] 260 N.C. 191, 132 S.E.2d 345 (1963).

of trust was foreclosed and the land sold to one Massey. Plaintiff brought this action to enjoin a subsequent sale under foreclosure of the senior deed of trust upon the ground that the substituted trustee of that conveyance was not appointed in accordance with our statute.

It was held that Massey, the purchaser at foreclosure of the junior deed of trust, acquired plaintiff's equity of redemption under the senior deed of trust,[8] leaving plaintiff divested of all interest in the land. This being so, plaintiff was not a party aggrieved by an order dissolving the injunction against foreclosure of the senior deed of trust, and had no standing to sue.[9]

MATERIALMEN'S LIENS

In *Priddy v. Kernersville Lumber Co.*,[10] defendant furnished materials to one Davis for the erection of a house pursuant to a contract providing for payment when Davis sold the house. Since it was feared that the filing of a lien by defendant would make the house harder to sell, defendant furnished various small items from time to time after it was completed for the purpose of keeping the lien alive under the statute[11] requiring filing within six months after the final furnishing of materials. More than six months after completion of the furnishing of materials actually used in the construction of the house, two deeds of trust on the property to secure loans by plaintiff were made and recorded. Thereafter defendant's lien was filed. The superior court decided that the lien took priority over the deeds of trust, but the Supreme Court reversed and granted a new trial.

According to the Court the time for filing the lien dates from the furnishing of the last item of material required by the contract,[12] and

[8] Staunton Military Academy, Inc. v. Dockery, 244 N.C. 427, 94 S.E.2d 354 (1956); Merchants Bank & Trust Co. v. Watson, 187 N.C. 107, 121 S.E. 181 (1924); Brett v. Davenport, 151 N.C. 56, 65 S.E. 611 (1909); Bobbitt v. Blackwell, 120 N.C. 253, 26 S.E. 817 (1897).

[9] Only the party aggrieved by a judgment may appeal therefrom. N.C. GEN. STAT. § 1-271 (1953); Coburn v. Roanoake Land & Timber Corp., 260 N.C. 173, 132 S.E.2d 340 (1963).

[10] 258 N.C. 653, 129 S.E.2d 256 (1963).

[11] N.C. GEN. STAT. § 44-39 (1950), provides: "Notice of lien shall be filed... except in those cases where a shorter time is prescribed, at any time within six months after the completion of the labor or the final furnishing of the materials, or the gathering of the crops."

[12] But the lien relates back to the date on which the labor or materials were first furnished so as to take priority over the rights of third parties which arose between that date and the date on which the labor or materials

the furnishing must be in good faith for the purpose of fully performing the contract, and not merely for the purpose of extending the time of filing the lien.[13] Otherwise purchasers have nothing to warn them of the existence of the lien when the building has been completed and the time for filing has expired.

USURY

In *Carolina Indus. Bank v. Merrimon*,[14] the defendant purchased an automobile from a used-car dealer, paying five hundred dollars down and executing a note and chattel mortgage to the plaintiff to secure the balance due. A "differential for time payment" of nearly four hundred dollars was added to the total amount due. Plaintiff brought this action to foreclose the mortgage and for judgment on the note. The defendant filed a counterclaim alleging that the transaction was usurious. The Court held that the counterclaim should have been nonsuited.

If in fact a transaction is a bona fide sale and not a loan, there can be no usury.[15] But if the form of the transaction is a subterfuge to make what is in substance a loan appear to be a sale, the courts will look at the substance of the matter and the lender will be held liable if the interest rates are usurious.[16]

If there is a bona fide purchase rather than a loan, as in the principal case, the transaction is not usurious even though the price is exhorbitant and a note is given at legal rates of interest to secure payment, since usury statutes strike only at the exaction of more than the legal rate for the hire of money and a purchaser is not, unlike a borrower, thereby victimized since he can refrain from the purchase if he does not chose to pay the price.[17]

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were finally furnished. Equitable Life Assur. Soc'y v. Basnight, 234 N.C. 347, 67 S.E.2d 390 (1951).

[13] Beaman v. Elizabeth City Hotel Corp., 202 N.C. 418, 163 S.E. 117 (1932). There the Court held that an extension of time for filing a lien would be granted only where three conditions were met: (1) The additional material or labor is embraced within the original contract; (2) The owner assents or requires the additional items; and (3) The items are not of a trivial nature. For an exhaustive study of the North Carolina law with respect to these liens, see Mangum, *Mechanics' Liens in North Carolina*, 41 N.C.L. REV. 173 (1963).

[14] 260 N.C. 335, 132 S.E.2d 692 (1963).

[15] Yarborough v. Hughes, 139 N.C. 199, 51 S.E. 904 (1905).

[16] Ripple v. Mortgage & Acceptance Corp., 193 N.C. 422, 137 S.E. 156 (1927).

[17] General Motors Acceptance Corp. v. Weinrich, 218 Mo. App. 68, 262 S.W. 425 (1924). The Court in the principal case cited as controlling the

WARRANTY-GUARANTY

In *Perfecting Serv. Co. v. Product Dev. and Sales Co.*[18] plaintiff manufactured for the defendant patented mechanical devices which caused radiator fans on automobiles to cease functioning when the automobile reached a certain speed. Defendant was a corporation organized for the purpose of purchasing the devices and selling them to Radiator Speciality Co. for resale to the trade. Radiator Speciality Co. guaranteed payment of all purchases made by Product Development and Sales Co. from the plaintiff. When Product Development and Sales Co. refused to accept further deliveries of the devices from the plaintiff upon the ground that the devices did not comply with the contract specifications, plaintiff brought this action against both Radiator Speciality Co. and Product Development and Sales Co. for breach of contract. Radiator Speciality Co. entered a counterclaim for breach of both express and implied warranties.

It was held that the Radiator Speciality Co. could not assert as a basis for its counterclaim that plaintiff had breached its express warranty of fitness of the goods, because plaintiff was not suing it on the contract, but upon its guaranty of payment of purchases made by Product Development and Sales Co. which is separate and distinct from the primary undertaking of Product Development and Sales Co.[19]

The Court stated that when a principal debtor and a guarantor are sued jointly, a claim of the debtor may be set off by the guarantor,[20] unless the claim constitutes an independent cause of action in favor of the debtor. The Court recognized that there is authority for the position that a warranty does not inure to the benefit of the guarantor,[21] but said that even if it did, it would be available only by way of setoff and not as a basis for an affirmative recovery by the guarantor.[22]

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per curiam opinion in Hendrix v. Harry's Cadillac Co., 220 N.C. 84, 16 S.E.2d 456 (1941).

[18] 259 N.C. 400, 131 S.E.2d 9 (1963). The case is discussed in DAMAGES, *Breach of Manufacturer's Sales Contract, infra.*

[19] Rayfield v. Rayfield, 242 N.C. 691, 89 S.E.2d 399 (1955).

[20] Jarratt v. Martin, 70 N.C. 459 (1874).

[21] Fulton Bank v. Mathers, 183 Iowa 226, 166 N.W. 1050 (1918).

[22] 259 N.C. at 418, 131 S.E.2d at 23. It is difficult to see any significance in the view that a warranty in favor of the debtor cannot inure to the benefit of the guarantor when sued jointly with the debtor. Without question the debtor can assert the breach of warranty and reduce or eliminate any recovery. Then obviously there can be no greater recovery from the guarantor.

It was further held that Radiator Speciality Co. could not counterclaim on the basis of breach of an implied warranty. It purchased the products from Product Development and Sales Co., not from the plaintiff-seller. The benefit of an implied warranty in the sale of personal property does not run with the chattel on its resale and does not benefit a subsequent purchaser so as to give him a cause of action on the warranty against the original vendor.[23] Privity between the parties is required for a recovery for breach of warranty and any party to an action for breach of warranty must, therefore, have been a party to the contract.[24] The subsequent purchaser has rights only against his immediate vendor.

CRIMINAL LAW AND PROCEDURE

CRIMINAL LAW

"Commercial Bribery"

North Carolina's "commercial bribery"[1] statute[2] was applied recently for the first time in *State v. Brewer*.[3] The defendants were indicted on one count charging conspiracy to violate the statute[4] and on eleven counts charging substantive violations. Two of the defend-

[23] Prince v. Smith, 254 N.C. 768, 119 S.E.2d 923 (1961); Wyatt v. North Carolina Equip. Co., 253 N.C. 355, 117 S.E.2d 21 (1960); Rabb v. Covington, 215 N.C. 572, 2 S.E.2d 705 (1939); Daniels v. Swift & Co., 209 N.C. 567, 183 S.E. 748 (1936); Thomason v. Ballard & Ballard Co., 208 N.C. 1, 179 S.E. 30 (1935).

[24] Prince v. Smith, 254 N.C. 768, 119 S.E.2d 923 (1961).

[1] The term "commercial bribery" has been defined as "the advantage which one competitor secures over his fellow competitors by his secret and corrupt dealing with employees or agents of prospective purchasers." American Distilling Co. v. Wisconsin Liquor Co., 104 F.2d 582, 585 (7th Cir. 1939).

[2] "Any person who gives, offers or promises to an agent, employee or servant, any gift or gratuity whatever with intent to influence his action in relation to his principal's, employer's or master's business; any agent, employee or servant who requests or accepts a gift or gratuity or a promise to make a gift or to do an act beneficial to himself, under an agreement or with an understanding that he shall act in any particular manner in relation to his principal's, employer's or master's business... shall be guilty of a misdemeanor and shall be punished in the discretion of the court." N.C. GEN. STAT. § 14-353 (1953).

[3] 258 N.C. 533, 129 S.E.2d 262, *appeal dismissed*, 375 U.S. 9 (1963). This case is discussed in CONSTITUTIONAL LAW, *Statutes, supra*.

[4] The first count of the *Brewer* indictment is treated under *Conspiracy—Statute of Limitations, infra* and *Conspiracy—Non-merger of Conspiracy and Substantive Offenses, infra*.

ants had allegedly offered "money, gifts, gratuities and other things of value"[5] to the third defendant, a State Highway Commission official, who had allegedly accepted these with the understanding that he would attempt to obtain for the offerors certain highway sign contracts. The North Carolina Supreme Court affirmed the convictions of all three defendants as to the actual violations of the statute, holding that their activities fell within the statutory prohibition.[6]

The defendants contended on appeal that G.S. § 14-353 is unconstitutional as violative of the fourteenth amendment "due process" requirement, in that the statute is so vague that they were uncertain as to what acts are prohibited, and that the statute is an unreasonable and capricious exercise of the State's police powers. These arguments were dismissed as untenable.[7]

Though the Court's first exposition of the prohibitions of G.S. § 14-353 was not as full as might have been hoped, it appears that the offense of "commercial bribery" may be committed even where the principal has knowledge of or is uninjured by the bribing of his agent. Even in the absence of a betrayal of the principal-agent relationship the injury to competition as a whole warrants the invocation of the statute.[8]

Conspiracy—Statute of Limitations

The statutory period during which a prosecution for a non-malicious misdemeanor may be initiated in North Carolina is two years from the date of its occurrence.[9] In *State v. Brewer*[10] the Court was presented with the question of whether prosecution for a conspiracy begun in 1957 was barred by the statute of limitations. The first count of the indictment charged that the defendants had entered into

[5] 258 N.C. at 556, 129 S.E.2d at 279.

[6] In deciding what offenses were prohibited by G.S. § 14-353 the Court discussed at length N.Y. PENAL LAW § 439 (1953), which is substantially similar to the North Carolina statute. For an excellent summary of cases arising under the New York law and a tabulation of other state commercial bribery laws see Note, 108 U. PA. L. REV. 848 (1960).

[7] See CONSTITUTIONAL LAW, *Statutes, supra.*

[8] 258 N.C. at 553, 129 S.E.2d at 276-77.

[9] N.C. GEN. STAT. § 15-1 (1953).

[10] 258 N.C. 533, 129 S.E.2d 262 (1963), discussed in *"Commercial Bribery," supra,* and *Conspiracy—Non-merger of Conspiracy and Substantive Offenses, infra.* This case is also discussed in CONSTITUTIONAL LAW, *Statutes, supra.*

a conspiracy in 1957 to violate the North Carolina "commercial bribery" statute[11] and had violated that statute from time to time since 1957 in pursuance to the conspiracy. The violations were alleged to have occurred periodically until February 1, 1962. The indictment was returned in April of 1962.

Two of the defendants were convicted of conspiracy and appealed, asserting that the denial of their motion to quash the first count of the indictment was erroneous. They contended that the conspiracy was completed (and, therefore, terminated) in 1957 when all of the plans had been laid and that any prosecution therefor was barred by the statute of limitations. In overruling these contentions the North Carolina Supreme Court recognized the continuing nature of a conspiracy,[12] and said that the conspiracy may be kept alive by crimes committed periodically in effectuating the purposes of the conspiracy.[13]

Since in North Carolina the crime of conspiracy is complete as soon as the plans are laid[14] and requires no overt act,[15] a conspiracy may exist over a period of time even in the absence of any action taken in carrying out its objectives.[16] The proposition espoused in

[11] N.C. GEN. STAT. § 14-353 (1953), discussed in *"Commercial Bribery," supra.*

[12] "A conspiracy is the unlawful concurrence of two or more persons in a wicked scheme—the combination or agreement to do an unlawful thing or to do a lawful thing in an unlawful way by unlawful means." State v. Anderson, 208 N.C. 771, 786, 182 S.E. 643, 652 (1935); "As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is complete." State v. Knotts, 168 N.C. 173, 188, 83 S.E. 972, 979 (1914); A conspiracy has been termed "a partnership in criminal purposes." United States v. Kissel, 218 U.S. 601, 608 (1910) (quoted at length in the *Brewer* opinion). As such, it exists as a continuing crime which if suspended at any point in time would be complete. See generally Hyde v. United States, 225 U.S. 347 (1912). The conspiracy retains vitality until its purpose is accomplished or until the conspirators abandon their plan. PERKINS, CRIMINAL LAW 548 (1957).

[13] This idea, that a conspiracy may be kept alive by acts done periodically pursuant to it, seems to have crept in from the basic federal conspiracy statute, 18 U.S.C.A. § 371 (1950), which requires *some* overt act in order to complete the crime of conspiracy. Since an overt act is an element of the federal crime, the federal statute of limitations will necessarily run from the most recent act. Hyde v. United States, 225 U.S. 347 (1912). See generally 29 N.Y.U.L. REV. 1470 (1954).

[14] State v. Knotts, 168 N.C. 173, 83 S.E. 972 (1914).

[15] State v. Davenport, 227 N.C. 475, 42 S.E.2d 686 (1947).

[16] Thus, hypothetically, where *A* and *B* conspire in 1957 to violate a law in 1962 and by 1961 have not yet done any overt act pursuant to the conspiratorial plan, the conspiracy is nonetheless alive and may be prosecuted

Brewer is that overt acts are good evidence that the conspiratorial combination is still in being, although it might be possible to show the continuation in other ways.[17]

In ruling that the conspiracy count could be tried the Court adopted the sound view that there had been only one punishable conspiracy in the case[18]—that the overt acts did not punctuate a number of separate and distinct "smaller" conspiracies.[19]

Conspiracy—Non-merger of Conspiracy and Substantive Offenses

One of the defendants in *State v. Brewer*[20] was acquitted of conspiracy but was convicted under several of the counts charging violation of G.S. § 14-353.[21] Since the overt acts alleged in the conspiracy count included the actual violations of the statute of which the appellant had been convicted, he claimed that an acquittal of the

in 1961. See 29 N.Y.U.L. REV. 1470, 1477 (1954), which suggests that this strictly logical approach raises a presumption that the conspiracy continues in existence and requires the defendant to meet an unduly heavy burden of proving its termination.

[17] "We decide here that a conspiracy may have a continuance in time, and count one and the indictment here allege that the conspiracy did so continue with the commission of overt acts by the alleged conspirators in furtherance of conspiracy...." State v. Brewer, 258 N.C. 533, 544, 129 S.E.2d 262, 270 (1963). The implication is that the allegation of overt acts is merely *one* way in which the conspiracy may be alleged to have continued.

[18] *Id.* at 543, 129 S.E.2d at 270. So long as the purpose of the conspiracy has not been fully accomplished or abandoned and the combination has not been dissolved, the original conspiracy continues intact, so that there can be but one conspiratorial offense. See United States v. Kissel, 218 U.S. 601 (1910). "[W]hen the plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such a continuous cooperation, it is a perversion of natural thought and natural language to call such a continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one." *Id.* at 607.

[19] Typical of the older, and generally discredited, thought that there may be several indictable conspiracies is Commonwealth v. Bartilson, 85 Pa. 482 (1877) (conspiracy to defraud the prosecutor of various sums of money over a period of time). *Bartilson* has been interpreted as finding "new" conspiracies only for the purpose of avoiding the statute of limitations, since there was only one conspiracy alleged in that case. Commonwealth v. Kirk, 340 Pa. 346, 17 A.2d 201 (1941). The doctrine of separate conspiracies has been impliedly rejected in Commonwealth v. Fabrizio, 197 Pa. Super. 45, 176 A.2d 147 (1961).

[20] 258 N.C. 533, 129 S.E.2d 262 (1963), discussed in *"Commercial Bribery"* and *Conspiracy—Statute of Limitations, supra.* This case is also discussed in CONSTITUTIONAL LAW, *Statutes, supra.*

[21] These counts of the indictment are discussed in *"Commercial Bribery" supra.*

conspiracy charge was, in effect, an adjudication that he was not guilty of the substantive offenses (the "overt acts"). The Court, in dismissing this contention, reiterated the position it had taken earlier in *State v. McCullough*,[22] to the effect that conspiracy to act is not merged in the act itself, but that the two are separate and distinct offenses and that a defendant may be acquitted of one and convicted of the other.[23]

False Pretenses

It is a felony in North Carolina for one to obtain money, goods, or other valuable property by means of any "false pretense whatsoever" with the intent to defraud.[24] In *State v. Hargett*[25] an undertaker was convicted under an indictment charging him with violating G.S. § 14-100—by showing the prosecutor a casket, manifesting his intention to use it in burying the prosecutor's infant child, and subsequently breaching the argeement to bury the infant in a decent manner. On appeal the conviction was reversed, the Court holding that for the purposes of the statute a state of mind is not such a "fact" or pretense as is capable of being misrepresented. Parker, J., concurred in result on the ground that the indictment was insufficient to charge a misrepresentation of the defendant's intentions, but expressed the view that the state of a man's mind is a fact which may be misrepresented just as any other fact, and that a misrepresentation of that state of mind would be within the false pretenses statute.

Clearly the Court's holding is consistent with previous cases,[26]

[22] 244 N.C. 11, 92 S.E.2d 389 (1956).

[23] "Conspiracy alleged may fail in proof, as well as proven conspiracy may fail in execution. Failure, then, to prove the existence of a conspiracy alleged to have been formed to commit a particular character of crime cannot affect the right of the State, regardless of the conspiracy, to prove that a crime of the same character was actually committed." State v. Brewer, 258 N.C. 533, 560, 129 S.E.2d 262, 281 (1963). See Pinkerton v. United States, 328 U.S. 640 (1946), where the defendants were indicted for conspiracy and for doing the conspired acts. They were convicted of both conspiracy and the substantive violations. The convictions were affirmed, the United States Supreme Court holding that "the commission of a substantive offense and a conspiracy to commit it are separate and distinct offenses." *Id.* at 643.

[24] N.C. GEN. STAT. § 14-100 (1953).

[25] 259 N.C. 496, 130 S.E.2d 865 (1963).

[26] State v. Knott, 124 N.C. 814, 32 S.E. 798 (1899); State v. Phifer, 65 N.C. 321 (1871). "It is settled that a *promise* is not a *pretense*. No matter what the form, or however false the promise, to do something, in the future, it will not come within the statute. There must be a false allegation of some subsisting fact...." *Id.* at 324.

but the wisdom of the distinction drawn between the fact of the defendant's intentions and other concrete facts is questionable.[27] Such a distinction allows the defendant to defraud with impunity so long as he makes no false representations except those pertaining to his state of mind.[28]

Incest

In *State v. Rogers*[29] the defendant was convicted under G.S. § 14-178[30] of incest with a girl whom he had adopted as his daughter. Though there was evidence that the defendant was her natural father, the Court held that this evidence was insufficient to prove a blood relationship,[31] and then interpreted the statute as prohibiting

A promise made without a present intention of performing is a criminal false pretense in California. People v. Otterman, 154 Cal. App. 2d 193, 316 P.2d 85 (1957). In New Jersey a false promise is made a false pretense indictable by statute. N.J. STAT. ANN. 2A:111-1 (1953).

[27] The rationale of the majority rule may be found in Chaplin v. United States, 157 F.2d 697 (D.C. Cir. 1946)—that if false promises or false statements of intention were indictable, "the way would be open for every victim of a bad bargain to resort to criminal proceedings to even the score with a judgment proof adversary [who has, perhaps, been guilty only of a simple commercial default]." *Id.* at 699.

For criticism of the majority rule see 43 CAL. L. REV. 719 (1955); 16 LA. L. REV. 807 (1956); MODEL PENAL CODE § 206.1 (6)(a), comment F (Tent. Draft No. 1, 1953).

[28] In State v. Phillips, 240 N.C. 516, 82 S.E.2d 762 (1954), the prosecuting witness had been induced to pay money to the defendant both by reason of false representations of existing (outside) facts and by the defendant's misrepresentations of his intention to perform certain future services for the prosecutor. The Court held that as long as the prosecutor had relied in part on the misstatements of concrete facts the conviction would not be overturned, although the prosecutor also relied in part on misrepresentations of the defendant's intentions. (The conviction was reversed on other grounds.)

Misrepresentation by the defendant of his intentions to do a particular act in the future may be actionable in a civil suit based on fraud. Pierce v. American Fid. Ins. Co., 240 N.C. 567, 83 S.E.2d 493 (1954); Mitchell v. Mitchell, 206 N.C. 546, 174 S.E. 447 (1934). See generally 24 N.C.L. REV. 49, 50 (1945).

[29] 260 N.C. 406, 133 S.E.2d 1 (1963).

[30] N.C. GEN. STAT. § 14-178 (1953), makes a felony "carnal intercourse between grandparent and grandchild, parent and child, and brother and sister of the half or whole blood...."

[31] The prosecutrix's mother was married to a third party some months before her birth. It was, therefore, incumbent upon the State to rebut the "conclusive" presumption of legitimacy of a child born in wedlock by proving that the husband could not have been the prosecutrix's natural father. State v. Tedder, 258 N.C. 64, 127 S.E.2d 786 (1962); State v. McDowell, 101 N.C. 734, 7 S.E. 785 (1888).

sexual relations only in cases of consanguity and not where the kinship is purely legal.[32]

Perjury

In North Carolina perjury is "a false statement under oath, knowingly, wilfully and designedly made, in a proceeding in a court of competent jurisdiction . . . as to some matter material to the issue . . . ."[33] In *State v. Allen* [34] the defendant had testified in two trials as a State's witness, and his testimony in the second was flatly contradictory to that given in the first.[35] While conceding that one of the defendant's statements was obviously false, the Supreme Court reversed his perjury conviction and held that the State had to show which was the false statement.[36] Though this rule is quite illogical[37] it is widely followed.[38]

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[32] State v. Rogers, 260 N.C. 406, 409, 133 S.E.2d 1, 3 (1963). *Accord, Ex Parte* Bourne, 300 Mich. 398, 2 N.W.2d 439 (1942) (stepdaughter); State v. Lee, 196 Miss. 311, 17 So. 2d 277 (1944) (adopted daughter); State v. Youst, 74 Ohio App. 381, 59 N.E.2d 167 (1943) (adopted daughter).

[33] State v. Smith, 230 N.C. 198, 201, 52 S.E.2d 348, 349 (1949). See N.C. GEN. STAT. § 14-209 (1953).

[34] 260 N.C. 220, 132 S.E.2d 302 (1963).

[35] As a State's witness the defendant had testified in police court that he and a companion, then being tried, had broken into and robbed certain telephone change boxes. In a trial de novo in the superior court he had testified that he had been intoxicated at the time of the robbery and did not know whether his companion had even been present. The defendant claimed that his testimony in police court had been coerced, but the Supreme Court failed to reach this point. *Id.* at 221, 132 S.E.2d at 303.

[36] *Accord,* State v. Sailor, 240 N.C. 113, 81 S.E.2d 191 (1954). The falsity of the testimony alleged to be perjurious must be established by two witnesses, or by one witness and corroborating circumstances. State v. Hill, 223 N.C. 711, 28 S.E.2d 100 (1943). This is the so-called "two-witness rule."

The difficulty of proving perjury has been explained as resulting from: (1) The historical nature of the crime, in that it was first tried in the ecclesiastical courts which required a certain number of witnesses. 7 WIGMORE, EVIDENCE § 2040 (3d ed. 1940). (2) The fact that perjury was regarded as a heinous and enormous crime. State v. Courtright, 66 Ohio St. 35, 63 N.E. 590 (1902). (3) The necessity of protecting witnesses from their innocent mistakes and from the wrath of a defeated litigant. Weiler v. United States, 323 U.S. 606 (1945).

[37] The "two-witness rule," note 36 *supra,* sets up a quantum of proof necessary to establish that the defendant has made a false statement. Where it can be shown that he has wilfully made two conflicting statements under oath the "two-witness rule" is entirely unnecessary to show *falsity* and should not apply. See generally Comment, *Proof of Perjury: The Two Witness Requirement,* 35 So. CAL. L. REV. 86 (1961); Comment, 53 MICH. L. REV. 1165 (1955).

[38] See, *e.g.,* United States v. Goldberg, 290 F.2d 729 (2d Cir. 1961);

CRIMINAL PROCEDURE

Involuntary Confessions

The truth or falsity of evidence tending to show that a confession has been involuntarily made is a matter for the decision of the trial court and is non-reviewable,[39] but whether a certain set of circumstances do or do not render a confession inadmissible is a question of law and may be reviewed on appeal.[40]

In *State v. Woodruff*[41] a purported confession was ruled to be inadmissible by virtue of inducements made to the defendant by the sheriff who held him in custody. The defendant was being held on several forgery charges when he volunteered to assist in the solution of certain murders[42] if the sheriff would use his influence to help him. Over a period of several months the sheriff had the forgery charges consolidated for trial, arranged for the defendant's cousin to serve her term in the county jail rather than in Raleigh, obtained the defendant's release from prison on temporary parole, paid hotel and motel bills for him, gave him spending money, and allowed him to spend a week at home. The sheriff eventually came to suspect that the defendant was involved in the murders and told him that he "certainly would try to help him"[43] if he confessed. Some time thereafter[44] the defendant confessed his part in the crimes.

The Supreme Court's holding, that the sheriff's actions and assurance that he would try to help rendered the confession void, appears

Williams v. State, 34 Ala. App. 462, 41 So. 2d 605, *cert. denied*, 252 Ala. 445, 41 So. 2d 608 (1949); McGuire v. State, 171 Ark. 238, 283 S.W. 980 (1926); Hall v. State, 136 Fla. 644, 187 So. 392 (1939); Roddenberry v. State, 37 Ga. App. 359, 140 S.E. 386 (1927); People v. Glenn, 294 Ill. 333, 128 N.E. 532 (1920); State v. Burns, 120 S.C. 523, 113 S.E. 351, 25 A.L.R. 414 (1922); Paytes v. State, 137 Tenn. 129, 191 S.W. 975 (1917); State v. Woolley, 109 Vt. 53, 192 Atl. 1 (1937). *Contra*, ARIZ. CODE ANN. §§ 13-562 to -564 (1956); State v. Storey, 148 Minn. 398, 182 N.W. 613 (1921).

[39] State v. Hammond, 229 N.C. 108, 47 S.E.2d 704 (1948); State v. Whitener, 191 N.C. 659, 132 S.E. 603 (1926).

[40] State v. Crowson, 98 N.C. 595, 4 S.E. 143 (1887); State v. Andrew, 61 N.C. 205 (1866).

[41] 259 N.C. 333, 130 S.E.2d 641 (1963).

[42] The defendant's brother had been convicted of these murders and was at the time imprisoned.

[43] 259 N.C. at 336, 130 S.E.2d at 643.

[44] The length of the interval between inducement and confession was not set out in the case; but, unless shown by the State clearly to the contrary, it is presumed that the inducement continues to influence the defendant until the time he confesses. State v. Drake, 113 N.C. 625, 18 S.E. 166 (1893).

to be consistent with the view announced repeatedly in North Carolina that any material inducement deprives the confessor of his free will and makes his confession inadmissible against him.[45]

Jurisdictional Defect not Waived by Guilty Plea

A valid warrant or indictment is necessary to establish criminal jurisdiction,[46] and an indictment returned by a grand jury from which Negroes have been systematically excluded does not confer jurisdiction on the court if the defendant is a Negro.[47] In *State v. Covington*[48] the defendant, a Negro, had moved to quash three indictments which he alleged had been returned by such a grand jury. He was not given a sufficient hearing on the question[49] and subsequently pleaded guilty. The North Carolina Supreme Court overturned his convictions and ruled, apparently for the first time, that a constitutional objection to the validity of an indictment raised by a timely motion to quash[50] is not waived by a later plea of guilty.[51]

Sentencing

Breaking and entering is punishable in North Carolina by imprisonment for not less than four months nor more than ten years.[52] Possession of housebreaking equipment is a felony punishable by fine or imprisonment, or both, in the discretion of the trial judge.[53]

[45] "The true rule is that a confession cannot be received in evidence where the defendant has been influenced by any threat or promise... a confession obtained by the slightest emotions of hope or fear ought to be rejected." State v. Roberts, 12 N.C. 259, 260 (1827). *Accord,* State v. Gibson, 216 N.C. 535, 5 S.E.2d 717 (1939) (first confession); State v. Livingston, 202 N.C. 809, 164 S.E. 337 (1932). See generally Coates, *Limitations on Investigating Officers,* 15 N.C.L. REV. 229, 233 (1937).

[46] State v. Morgan, 226 N.C. 414, 38 S.E.2d 166 (1946); State v. Beasley, 208 N.C. 318, 180 S.E. 598 (1935).

[47] State v. Covington, 258 N.C. 495, 128 S.E.2d 822 (1963). This case is discussed in CONSTITUTIONAL LAW, *Due Process, supra.*

[48] 258 N.C. 501, 128 S.E.2d 827 (1963). This case is discussed in CONSTITUTIONAL LAW, *Due Process* n.4, *supra.*

[49] The defendant had moved that the court issue process to require the county officials to appear in court with their records pertinent to the selection of grand juries. The court refused to issue this order. State v. Covington, 258 N.C. 495, 128 S.E.2d 822 (1963), the companion case to State v. Covington, 258 N.C. 501, 128 S.E.2d 827 (1963).

[50] Under N.C. GEN. STAT. § 9-26 (1953), the motion to quash is timely if it is made prior to pleading to the indictment.

[51] 258 N.C. at 504-05, 128 S.E.2d at 830.

[52] N.C. GEN. STAT. § 14-54 (1953).

[53] N.C. GEN. STAT. § 14-55 (1953).

In *State v. Blackmon*[54] the defendant had pleaded guilty both to breaking and entering and to possession of burglary tools. He had been sentenced to imprisonment for from eight to ten years on the first charge and from ten to twenty years on the second. He appealed his sentence for possession, contending that he was subjected to "cruel and unusual punishment" by virtue of his receiving a longer sentence for possession than for breaking and entering. In vacating the possession sentence the North Carolina Supreme Court did not reach the constitutional issue. Instead the Court held that G.S. § 14-2[55] limits the length of sentence the trial judge may pronounce in a felony case when the length of sentence is not otherwise specified in the particular statute under which the defendant is convicted.

The question answered by the Court in *Blackmon* is whether a "fine or imprisonment... in the discretion of the court"[56] is a "specific punishment" within the meaning of G.S. § 14-2. This question was answered in the negative and it was adjudged that the trial court could impose a sentence of no longer than ten years.[57]

In holding that it was necessary that *quantum* as well as *type* of punishment[58] be set out by statute in order to render the punishment "specific" under G.S. § 14-2, the Court was forced to overturn the position previously taken in North Carolina. *State v. Cain*,[59] which held that the trial judge was empowered by G.S. § 14-55 to sentence a defendant to twenty-five to thirty years for possession of burglary tools and that the sentence was not "cruel and unusual," and *State v.*

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[54] 260 N.C. 352, 132 S.E.2d 880 (1963).

[55] N.C. GEN. STAT. § 14-2 (1953), insofar as pertinent provides: "Every person who shall be convicted of any felony for which no specific punishment is prescribed by statute shall be imprisoned... not less than four months nor more than ten years, or be fined."

[56] N.C. GEN. STAT. § 14-55 (1953).

[57] "Therefore, if the punishment to be imposed in the discretion of the court, as provided in G.S. § 14-55, for the possession of the implements of housebreaking, is not limited by the provisions of G.S. § 14-2, then we have the anomolous situation of upholding the imposition of a sentence in the State's Prison three times as long as could be legally imposed for the actual commission of the crime of housebreaking under G.S. § 14-54. We have come to the conclusion that the Legislature never intended to authorize any such disparity." State v. Blackmon, 260 N.C. 352, 357, 132 S.E.2d 880, 884 (1963).

[58] Earlier cases had held that the ten year maximum of G.S. § 14-2 did not apply where the statute under which a defendant was convicted prescribed a type of punishment, *i.e.*, a fine or imprisonment in the discretion of the court, even though the maximum amount of the fine or duration of the imprisonment was not specifically provided.

[59] 209 N.C. 275, 183 S.E. 300 (1936).

Swindell,[60] which held that the trial judge could impose a thirty year sentence, the overall ten year maximum notwithstanding, were specifically overruled.[61]

It seems unjust that a man could receive heavier punishment for equipping himself to commit an offense than for doing the act itself. The result in *Blackmon* corrects this injustice and is desirable, but it is debatable whether such a long-standing statutory interpretation should be within the power of the courts to reverse.[62] The effect of *Blackmon* is to limit the trial court's discretion in sentencing for a significant number of other felonies where there is no maximum term specifically set out.[63]

DAMAGES

Breach of Manufacturer's Sales Contract

In *Perfecting Serv. Co. v. Product Dev. & Sales Co.*,[1] defendant entered into a contract with the plaintiff for the manufacture by the plaintiff of ten thousand units of a fuel saving device to be attached to automobile engines. After the plaintiff had purchased the necessary materials to fill the order and had manufactured and delivered over three thousand of the units, the defendant declared the contract rescinded and refused to make any further payments. Judg-

[60] 189 N.C. 151, 126 S.E. 417 (1925) (carnal knowledge of a child).

[61] The Court also overruled what it called *"dictum"* in State v. Rippy, 127 N.C. 516, 37 S.E. 148 (1900) (carnal knowledge of a child), and part of the opinion in State v. Richardson, 221 N.C. 209, 19 S.E.2d 863 (1942) (involuntary manslaughter).

[62] Parker, J., took the position in his dissent that the rule of the earlier cases should be changed only by legislative action. 260 N.C. at 357, 132 S.E.2d at 884.

[63] See, *e.g.*, N.C. Gen. Stat. § 14-12.1 (Supp. 1963) (subversive activities); N.C. Gen. Stat. § 14-18 (1953) (involuntary manslaughter); N.C. Gen. Stat. § 14-26 (1953) (carnal knowledge of a child twelve to sixteen years of age); N.C. Gen. Stat. § 14-33 (1953) (various aggravated assaults); N.C. Gen. Stat. § 14-60 (1953) (burning a school building); N.C. Gen. Stat. § 14-62.1 (Supp. 1963) (burning a building or structure in the process of construction); N.C. Gen. Stat. § 14-65 (1953) (fraudulently setting fire to a dwelling); N.C. Gen. Stat. § 14-67 (1953) (attempting to burn dwellings and other buildings); N.C. Gen. Stat. § 14-92 (1953) (embezzlement of funds by public officers and trustees); N.C. Gen. Stat. § 14-98 (1953) (embezzlement of partnership property by the surviving partner); N.C. Gen. Stat. § 14-150 (1953) (disturbing graves); N.C. Gen. Stat. § 14-328 (1953) (selling recipes for adulterating liquors).

[1] 259 N.C. 400, 131 S.E.2d 9 (1963). This case is discussed in Credit Transactions, *Warranty—Guaranty, infra.*

ment in the lower court was for the plaintiff and damages of fifty-one thousand dollars were assessed. The Supreme Court reversed on the issue of the amount of damages because the charge of the lower court gave the jury "no legal guidance to assess damages."[2] The Court then set forth the following rules as to items of damage recoverable in an action for breach in mid-performance of a sales contract:

(1) Where one violates his contract he is liable for gains prevented and losses sustained which may fairly be supposed to have entered into the contemplation of the parties when they made the contract.[3]

(2) Gains prevented means loss of profits, and where the goods have already been manufactured and there is available market at the time fixed for delivery, the measure of damages is the difference between the contract price and the market price at the time fixed for delivery. Where there is no general market value, the measure of damages is the difference between the contract price and the cost of manufacture. If when the breach occurs a part of the goods has been manufactured and delivered, seller may recover as damages the full contract price for the goods delivered and, as to the portion not delivered, may recover the difference in the contract price of the undelivered goods and what it would have cost the seller to manufacture and deliver the undelivered portion.[4]

(3) There may be recovery for reasonable expenditures incurred for labor and materials in part performance of the contract, to the extent they are wasted when performance is abandoned and if such expenses might reasonably have been contemplated by the buyer.[5]

[2] The charge to the jury was: "The damages ... are such as arise naturally from the breach thereof, or such as may be reasonably supposed to have been within the contemplation of the parties at the time of the making of the contract as a probable result of the breach ...." 259 N.C. at 415, 131 S.E.2d at 21.

[3] 259 N.C. at 415, 131 S.E.2d at 21. *Accord,* Tillis v. Calvine Cotton Mills, Inc., 251 N.C. 359, 111 S.E.2d 606 (1959).

[4] 259 N.C. at 415-16, 131 S.E.2d at 21-22. *Accord,* Cleveland-Canton Springs Co. v. Goldsboro Buggy Co., 148 N.C. 533, 62 S.E. 637 (1908). See generally, 3 WILLISTON, SALES § 583.a (rev. ed. 1948); Annot., 44 A.L.R. 215 (1926), supplemented in 108 A.L.R. 1482 (1937).

[5] 259 N.C. at 416, 131 S.E.2d at 22. *Accord,* Lieberman v. Templar Motor Co., 236 N.Y. 139, 140 N.E. 222 (1923). The Court in the principal case pointed out that recovery is limited to such damages and expenses that accrued prior to the notification by the buyer that he would accept no further

The salvage value of unused materials must be deducted and the seller must use due diligence to minimize damages.[6]

(4) When the seller has a going business and is manufacturing and selling goods to various buyers, overhead and fixed charges constitute elements of cost of manufacturing and are the subject of proper inquiry.[7] Thus overhead and fixed charges are elements of damage for wasted labor and expenses, insofar as they are reasonably applicable.[8]

INTEREST

In *General Metals, Inc. v. Truitt Mfg. Co.*,[9] a case involving a breach of contract, the Court reviewed the North Carolina cases decided since the enactment of G.S. § 24-5[10] and concluded that they establish the following rule: When the amount of damages in a breach of contract action is ascertained from the contract itself, or from relevant evidence, or from both, interest should be allowed from the date of the breach.[11]

LOSS OF PROFITS

In *Smith v. Corsat*[12] there was an action to recover damages resulting from the collision of two automobiles. Plaintiff sought to

deliveries. See Novelty Advertising Co. v. Farmers Mutual Tobacco Warehouse Co., 186 N.C. 197, 119 S.E. 196 (1923).

[6] 259 N.C. at 416, 131 S.E.2d at 22. *Accord,* Atalah v. Wilson Lewith Mach. Corp., 200 F.2d 297 (4th Cir. 1952); Bennet v. S. Blumenthal & Co., 113 Conn. 223, 155 Atl. 68 (1931).

[7] 259 N.C. at 416, 131 S.E.2d at 22. *Accord,* Worrell & Williams v. Kinnear Mfg. Co., 103 Va. 719, 49 S.E. 988 (1905).

[8] 259 N.C. at 417, 131 S.E.2d at 22. *Accord,* Georgia Power & Light Co. v. Fruit Growers Express Co., 55 Ga. App. 520, 190 S.E. 669 (1937). *Cf.* Harris & Harris Constr. Co. v. Crain & Denbo, Inc., 256 N.C. 110, 123 S.E.2d 590 (1962), where due to the peculiarities of the case overhead expenses were not allowed as an item of damage for breach of a construction contract.

[9] 259 N.C. 709, 131 S.E.2d 360 (1963).

[10] This statute provides that "all sums of money due by contract of any kind, excepting money due on penal bonds, shall bear interest, and when a jury shall render a verdict therefor they shall distinguish the principal from the sum allowed as interest; . . . ." N.C. GEN. STAT. § 24-5 (1953).

[11] The cases relied on by the Court as establishing this rule were Harris & Harris Constr. Co. v. Crain & Denbo, Inc., 256 N.C. 110, 123 S.E.2d 590 (1962); Thomas v. Piedmont Realty & Dev. Co., 195 N.C. 591, 143 S.E. 144 (1928); Perry v. Norton, 182 N.C. 585, 109 S.E. 641 (1921); Bond v. Pickett Cotton Mills, Inc., 166 N.C. 20, 81 S.E. 936 (1914). See McCormick, *Interest as Damages,* 9 N.C.L. REV. 237 (1931), for a thorough discussion of this subject.

[12] 260 N.C. 92, 131 S.E.2d 894 (1963).

recover for personal and property damages suffered by him; and the defendant, owner and sole operator of a small wholesale phonograph record business, counterclaimed for like damages.[13] In the trial court defendant was permitted to introduce evidence that his net income, which was derived solely from the net profits of his business, had been "about 10,000 dollars" for the last three years.

On appeal the Court noted that the admissibility of evidence of profits of a business in which the party is interested had never before been considered in North Carolina,[14] but it was concluded that such evidence was admissible as an aid (considered with other evidence) in determining the pecuniary value of the defendant's loss of time or impairment of earning capacity. The Court stated the general rule to the effect that where the profits depend for the most part on employment of capital, labor of others, and similar variable factors, evidence thereof is inadmissable and cannot be considered for the purpose of establishing the pecuniary value of lost time or diminution of earning capacity, since loss of such profits is not the necessary consequence of the injury. In such cases the measure of damages is the loss in value of the injured person's services in the business.[15]

The Court pointed out, however, that where the business is small and the income which it produces is principally due to the personal services and attention of the owner, earnings of business may afford a criterion for determining the owner's earning power. Thus evidence of profits may be used for the purpose of aiding in establishing a standard for the calculation of damages and is useful in determining the pecuniary value of loss of time or impairment of earning capacity.[16]

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[13] The defendant had been a field engineer for the Navy, and through his connections in the Navy he was able to sell records to aircraft carriers and other Naval outlets. He was in full control of his business and served in all capacities—truck driver, janitor, salesman and peddler. After the accident in which he suffered extensive injuries, he was unable to keep the business on a paying basis because of his inability to travel.

[14] Wallace v. Western N.C.R.R., 104 N.C. 442, 10 S.E. 552 (1889), was cited by the Court as a North Carolina case with the "nearest approach" to the principal case.

[15] 260 N.C. at 96, 131 S.E.2d at 897. *Accord,* Hendler v. Coffey, 278 Mass. 339, 179 N.E. 801 (1932); Flintjer v. Kansas City, 204 S.W. 951 (Mo. Ct. App. 1918). See Annot., 12 A.L.R.2d 288 (1950).

[16] 260 N.C. at 97, 131 S.E.2d at 898. *Accord,* Osterode v. Almquist, 89

The defendant also prayed for special damages of ten thousand dollars for "loss of business," that is, loss of profits from business enterprise. The Court pointed out that in actions where such recoveries are allowed there is usually some special contract or engagement from which the injured party would have realized a relatively definite profit but for the injury, or some seasonal or separable transaction from which the claimant would have realized a profit but for the injury.[17] Here recovery for "loss of business" as special damages was not permissible and evidence of lost profits was not admissible on the theory of special damages because (1) special damages were not properly pleaded[18] and (2) the evidence of loss of profits did not reach the degree of certainty required as a foundation for special damages.[19]

Cal. App. 2d 15, 200 P.2d 169 (1948); Amelsburg v. Lunning, 234 Iowa 852, 14 N.W.2d 680 (1944). See generally, Annot., 12 A.L.R.2d 288 (1950).

[17] The Court cited *inter alia* the following cases from other jurisdictions where loss of profits resulting from personal injury were recovered as special damages: Hollander v. Wilson Estate Co., 214 Cal. 582, 7 P.2d 177 (1932), where a dealer in rugs and furniture was unable to conduct his business for eight months after his injury; Hetler v. Holtrop, 285 Mich. 570, 281 N.W. 434 (1938), where the owner and operator of a fruit stand was unable to carry on his occupation for three weeks after being injured; Steitz v. Gifford, 280 N.Y. 15, 19 N.E.2d 661 (1939), where a truck farmer who grew a special variety of corn was unable, due to his injuries, to harvest the corn and deliver it by the due dates specified in his contracts. 260 N.C. at 99, 131 S.E.2d at 899-900.

Although there was no prior North Carolina authority on tort cases which involved lost business profits resulting from personal injury, the Court analogized the recovery to one where property damage was involved in which loss of profits therefrom has been allowed as a foundation for recovery of special damages, and cited a number of North Carolina cases on this point. Thus the door was left open to recovery of business profits as special damages in personal injury cases if the "essential elements" are present. 260 N.C. at 100, 131 S.E.2d at 900. These "essential elements" are discussed *infra* at nn. 18 and 19.

[18] 260 N.C. at 100, 131 S.E.2d at 900. The Court cited Binder v. General Motors Acceptance Corp., 222 N.C. 512, 23 S.E.2d 894 (1943), where the rule was laid down that in order to recover special damages it is necessary that the complaint state specifically and in detail the damages sought to be recovered. See McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE § 1079 (2d ed. 1956).

[19] 260 N.C. at 100, 131 S.E.2d at 900. Johnson v. Atlantic Coast Line R.R., 140 N.C. 574, 53 S.E. 362 (1906), a property damage case, was cited by the Court. In that case it was held that only the profits lost that are reasonably definite and certain are recoverable.

NOMINAL DAMAGES

In *Ballenger Paving Co. v. North Carolina State Highway Comm'n*,[20] a case on appeal to superior court from a State Highway Commission Board of Review decision, the judge assessed "nominal damages" of nine hundred dollars. In remanding the case the Supreme Court pointed out that "an award of $900.00 cannot be denominated *nominal damages* which is 'a small trivial sum awarded in recognition of a technical injury which has caused no substantial damage.' . . . Inflation has not yet reached the stage where $900.00 can be called trivial."[21]

DOMESTIC RELATIONS

ALIMONY WITHOUT DIVORCE

In *Deal v. Deal*,[1] the wife instituted an action for alimony without divorce pursuant to G.S. § 50-16.[2] The lower court denied plaintiff's motion for alimony pendente lite, finding that she was being adequately provided for. Plaintiff appealed, asserting that the lower court failed to pass on the issue of whether defendant had abandoned her, and that a mere finding that plaintiff was adequately provided for would not warrant denial of the motion.

The Court held that the lower court must, on a motion for alimony pendente lite under G.S. § 50-16, find that the husband had

[20] 258 N.C. 691, 129 S.E.2d 245 (1963). The appeal here to the Wake County Superior Court was taken under the provisions of N.C. GEN. STAT. § 136-29 (1958). This case is discussed in ADMINISTRATIVE LAW, *Judicial Review, supra.*

[21] 258 N.C. at 695, 129 S.E.2d at 248. In Hairston v. Atlantic Greyhound Corp., 220 N.C. 642, 644, 18 S.E.2d 166, 168 (1942), cited in the instant case, the Court gave the usual version of the rule for nominal damages: "Nominal damages, consisting of some trifling amount, are those recoverable where some legal right has been invaded but no actual loss or substantial injury has been sustained." See generally, MCCORMICK, DAMAGES §§ 20, 21 (1935).

[1] 259 N.C. 489, 131 S.E.2d 24 (1963).

[2] "If any husband shall separate himself from his wife and fail to provide her and the children with the necessary subsistence according to his means and condition in life, or if he shall be a drunkard or a spendthrift, or be guilty of any misconduct or acts that would be or constitute cause for divorce, either absolute or from bed and board, the wife may institute an action in the superior court of the county in which the cause of action arose to have a reasonable subsistence and counsel fees allotted and paid or secured to her from the estate or earnings of her husband...." N.C. GEN. STAT. § 50-16 (Supp. 1963).

abandoned the wife or was guilty of conduct which would entitle her to a divorce absolute or from bed and board. The Court quoted with approval *Cameron v. Cameron*[3] to the effect that the judge, "[M]ust, by application of his sound judgment, pass upon its truth or falsity and find according to his conviction."[4] Thus, to warrant a holding for the plaintiff, the judge must find the alleged fact of abandonment to be true. Accordingly when the judge makes no formal findings, there being nothing to indicate that he decided truth or falsity, it is presumed that such issue was resolved against the plaintiff. Since there were no formal findings made by the lower court in the principal case, the presumption that such findings were made and were against the plaintiff prevailed,[5] and denial of the motion for alimony pendente lite was affirmed.[6]

On the issue of necessity of support as a requisite to alimony pendente lite, if sufficient grounds should have been found, the Court stated that there is a "conflict of authority as to whether, in a case in which a husband *has abandoned* his wife, allegations and proof that he is providing her adequate support is a defense to her motion for alimony pendente lite."[7] The Court stated that the trend in North Carolina was toward the view that pendente lite awards were not based on the wife's needs for subsistence, but rather on the theory that the wife was entitled to the security of a court order. Both of the cases relied upon as establishing the trend were also decided pursuant to G.S. § 50-16.[8]

[3] 231 N.C. 123, 129, 56 S.E.2d 384, 388 (1949). It is interesting to note here that the action in that case involved G.S. § 50-15, which at the time of the decision required the judge to find that the allegations of the complaint were true. Since then, that statute has been amended, and now only requires that the judge find that the facts were "probably" true. See note 6 *infra.*

[4] 259 N.C. at 492, 131 S.E.2d at 27.

[5] *Quaere* whether the judge here found such facts in view of the lower court finding that "It is the opinion of the court that plaintiff and the three children are being adequately provided for at this time by defendant and therefore her motion for alimony pendente lite is denied." *Id.* at 490, 131 S.E.2d at 25.

[6] It is well to note here that in 1961, G.S. § 50-15 was amended so as to require the judge to find that the facts "probably entitle her to the relief demanded." N.C. GEN. STAT. § 50-15 (Supp. 1963). Thus, on motion for alimony pendente lite under G.S. § 50-15, the judge must find the facts alleged were probably true, while on a similar motion pursuant to G.S. § 50-16, he must find them to be absolutely true.

[7] 259 N.C. at 491, 131 S.E.2d at 26.

[8] Thurston v. Thurston, 256 N.C. 663, 124 S.E.2d 852 (1962); Butler v. Butler, 226 N.C. 594, 39 S.E.2d 745 (1946).

G.S. § 50-15, relating to actions for divorce, expressly provides that in an action for divorce, pendente lite will be awarded if the wife's complaint or affidavit shows that "she has not sufficient means whereon to subsist during the prosecution of the suit...."[9] This statute by its terms seems to require necessity as a basis for relief.[10] Yet the Court in the principal case talked of alimony pendente lite without making any reference to or distinction from actions under G.S. § 50-15. If the decision on this point was intended by implication to apply to pendente lite motions under G.S. § 50-15, then it is clearly contra to the terms of that statute.[11] Yet it would be of questionable value to have different standards for the two statutes. The present indication of willingness to provide alimony pendente lite regardless of necessity for support would seem to be the preferred position.

ANNULMENT

In *Ivery v. Ivery*,[12] the brother of the deceased testator sought to have his marriage declared void ab initio on the grounds that the deceased was mentally incompetent to contract a marriage at the time of the wedding ceremony. The effect of dissolution of the marriage would be revocation of those provisions in the testator's will favorable to his spouse, including her appointment as executrix.[13] The Court stated that whether the marriage could be attacked after the death of one of the parties depended on whether the marriage was void in the true sense or only voidable.[14]

Briefly, a voidable marriage is considered valid until annulled, and the right to have it annulled is personal and hence extinguished on the death of one of the parties.[15] On the other hand, a void mar-

[9] N.C. GEN. STAT. § 50-15 (Supp. 1963).

[10] "[I]f... it appears to the judge... that she has not sufficient means whereon to subsist...." N.C. GEN. STAT. § 50-15 (Supp. 1963).

[11] But, the Court has in earlier cases taken the view that necessity was not a requirement under G.S. § 50-16. Mercer v. Mercer, 253 N.C. 164, 116 S.E.2d 795 (1960); Rowland v. Rowland, 253 N.C. 328, 116 S.E.2d 795 (1960). See also 39 N.C.L. REV. 189 (1961); 39 N.C.L. REV. 365 (1961).

[12] 258 N.C. 721, 129 S.E.2d 457 (1963).

[13] N.C. GEN. STAT. § 31-5.4 (Supp. 1963).

[14] 258 N.C. at 726, 129 S.E.2d at 460.

[15] *E.g.*, Christensen v. Christensen, 144 Neb. 763, 14 N.W.2d 613 (1944); *In Re* Romano's Estate, 40 Wash. 2d 796, 246 P.2d 501 (1952). For a discussion of void and voidable marriages in North Carolina, see Watters v. Watters, 168 N.C. 411, 84 S.E. 703 (1915).

riage is void ab initio and ipso facto, and as such needs no court decree declaring it so, and "its invalidity may be maintained in any proceeding in any court between any proper parties whether in the lifetime or after the death of the supposed husband and wife."[16] Thus the Court was clearly correct in stating the issue as to whether the marriage could be attacked after the death of one of the parties depended on whether the marriage was void or voidable.

At common law, and in North Carolina before statute,[17] the marriage of an incompetent was void. North Carolina now has a statute, G.S. § 51-3, which by its terms seems to say that where one of the parties is incompetent, the marriage is void.[18] However, our Court has held that in North Carolina the only marriages which are absolutely void are those contained in the proviso to G.S. § 51-3—marriages between a white person and a Negro or Indian, and bigamous marriages—all others are voidable.[19] In the principal case, however, the Court stated that: "Our decisions are inconclusive as to whether a marriage contracted when a party thereto is 'incapable of contracting for want of understanding' is void or voidable."[20] Accordingly, the Court held that where there is no cohabita-

[16] Christensen v. Christensen, *supra* note 15, at 766, 14 N.W.2d at 615; "Where a marriage is void, no decree of any court is necessary to terminate it, because in law the marital status never existed." *In Re* De Conza's Estate, 13 N.J. Misc. 41, ——, 176 A. 192, 193 (Orphans Court 1934).

[17] Gathings v. Williams, 27 N.C. 487 (1845).

[18] "All marriages between ... persons either of whom is at the time ... incapable of contracting from want of understanding, shall be void; Provided, double first cousins may not marry; and provided further, that no marriage followed by cohabitation and the birth of issue shall be declared void after the death of either of the parties for any of the causes stated in this section, except for that one of the parties was a white person and the other a negro or of negro descent ... and for bigamy ...." N. C. GEN. STAT. § 51-3 (Supp. 1963).

[19] "This recognizes that the only absolutely void marriages are those named in the proviso ... and that the other need to be 'declared void.' Though the declaration may be, if granted, that the marriage was void ab initio, such marriage is valid until this declaration by the Court ...." Watters v. Watters, 168 N.C. 411, 413, 84 S.E. 703, 704 (1915). "The code ... it is true, provides that a marriage by a female under fourteen years of age or a male person under sixteen, is void, but the proviso speaks of its being declared void, and the construction of the statute by the courts has always been that the meaning is that such marriages are voidable." State v. Parker, 106 N.C. 711, 712, 11 S.E. 517, 518 (1890).

[20] 258 N.C. at 729, 129 S.E. 2d at 463. The Court in the *Watters* case, *supra* note 19, had before it an action to declare void a marriage in which the defendant was an alleged incompetent. In that case, the Court intimated that such a marriage was voidable only, and held that the plaintiff husband was

tion and birth of issue of the marriage, the action to annul may be brought after the death of the incompetent, thereby apparently construing the proviso to embrace those who are incompetent at the time of the marriage.[21]

CUSTODY

In *Bunn v. Bunn*,[22] the husband instituted an action for divorce from bed and board, requesting the custody of a minor child. The wife filed a cross action for alimony without divorce pursuant to G.S. 50-16, also requesting custody. Both the plaintiff's action and the defendant's cross action were dismissed, but the judge awarded custody of the child to the defendant and the plaintiff appealed. The issue before the Court was whether jurisdiction to award custody remained after dismissal of the action and the cross action. The Court held that jurisdiction to award custody was present, citing G.S. § 50-13, which provides that:

> After the filing of a complaint in any action for divorce, whether from the bonds of matrimony or from bed and board, both before and after final judgment therein, it is lawful for the judge of the court in which such application is or was pending to make such orders respecting the care, custody, tuition, and maintenance of the minor children of the marriage as may be proper ....[23]

The courts are not in accord as to whether a divorce court has the power to award custody of children when neither party to the suit is granted a decree.[24] Though North Carolina has not ruled on

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estopped by living with the wife for eight years and having five children. This seems contra to Sims v. Sims, 212 N.C. 297, 28 S.E. 407 (1897).

[21] This holding is in effect saying that such a marriage is valid until declared void—a characteristic of a voidable marriage, for a voidable marriage is valid until a decree declaring its invalidity is issued. See note 15 *supra* and accompanying text. Yet under this decision, the marriage is subject to attack after the death of one of the parties—a characteristic generally attributed to void marriages, see note 16 *supra* and accompanying text, and explicitly attributed only to those classes enumerated in the proviso to G.S. § 51-3 dealing with attack of marriages after the death of one of the parties.

[22] 258 N.C. 445, 128 S.E.2d 792 (1963).

[23] N.C. GEN. STAT. § 50-13 (1950).

[24] Absent any statute, courts are generally recognized to have power to award custody. *E.g.*, Braden v. Braden, 280 Ky. 563, 133 S.W.2d 902 (1939); Davis v. Davis, 194 Miss. 343, 12 So. 2d 435 (1943). *Contra*, Gatton v. Gatton, 41 Ohio App. 397, 179 N.E. 745 (1931). See generally, Annot., 151 A.L.R. 380 (1944). The result in the principal case seems justified by the language of G.S. § 50-13 giving the judge power "[T]o make such orders respecting the care, custody, tuition and maintenance of the minor children of the marriage as may be proper ...." N.C. GEN. STAT. § 50-13 (1950).

this specific point before, statutory authority is given in an action for habeas corpus to determine the issue of custody.[25] The Court in the principal case reasoned that there was no good reason to turn the parties out of one courthouse door and admit them right back through another.[26] Apart from this reason, this holding seems to be good public policy, as a decree fixing the rights of the parties to custody of the children would save much strife from the standpoint of all parties involved.

DIVORCE

Husband instituted an action for absolute divorce based on two years separation. The attorney for the wife informed the attorney for the husband that a cross action for alimony without divorce would be filed in the cause based on adultery and willful abandonment, but before such cross action was in fact filed, husband's attorney moved for a voluntary nonsuit. The next day, a motion to amend the answer by setting up the cross action was made. The clerk then declined to pass on plaintiff's motion for voluntary nonsuit and plaintiff appealed. Thus, in *Scott v. Scott*,[27] the question was whether, before filing of a claim for affirmative relief by defendant, the plaintiff was entitled to a voluntary nonsuit as a matter of right in a divorce action. The Court held that plaintiff was entitled to his nonsuit as a matter of right, and that after granting it there was no action remaining in which defendant could file a cross action.

It is true generally, and in North Carolina, that the plaintiff is entitled to take a voluntary nonsuit as a matter of right.[28] However,

[25] N.C. GEN. STAT. § 17-39.1 (Supp. 1963) provides in part that "[A]ny superior court judge having authority to determine matters in chambers may, in his discretion, issue a writ of habeas corpus requiring that the body of any minor child whose custody is in dispute be brought before him or any other qualified judge. Upon return of said writ, the judge may award the charge or custody of the child...."

[26] The solution reached by the Court in the principal case seems to be the logical one in view of Cox v. Cox, 246 N.C. 528, 98 S.E.2d 879 (1957), in which the Court held it was error for the lower court to dismiss the action for divorce of the wife on motion for voluntary nonsuit when the husband had filed a custody petition in the cause because the custody request was in the nature of a request for affirmative relief, and the defendant had a right to have it determined in that action.

[27] 259 N.C. 642, 131 S.E.2d 478 (1963).

[28] McKesson v. Mendenhall, 64 N.C. 502 (1870). However, plaintiff may not take a voluntary nonsuit as a matter of right when the defendant has asserted a counterclaim arising out of the same contract or transaction.

there is a split of authority on the question of whether the plaintiff is entitled to a nonsuit in a divorce action when the defendant has filed no claim for affirmative relief.[29] North Carolina, in *Caldwell v. Caldwell*,[30] when confronted with the problem said:

> The better rule seems to be that a motion by the plaintiff for judgment dismissing his action for divorce upon a voluntary nonsuit will not be allowed by the court as a matter of right, but is addressed to the sound discretion of the court, which will be exercised in the interest not only of plaintiff, but defendant and the State. The State and defendant, each, have an interest in the status of plaintiff and defendant, and the purpose of an action for divorce is to change or alter this status.[31]

This language led some writers to the conclusion that North Carolina was in accord with those jurisdictions holding that the plaintiff did not have the right to a nonsuit.[32] In the principal case, however, the Court discounts this language by saying that in *Caldwell* the holding was not that the granting of a nonsuit was within the discretion of the lower court. The case was reversed, but not remanded, which prohibited the exercise of discretion at the trial level, and the Supreme Court could not exercise judicial discretion. Thus the Court held that in reality the rule applied in that case was that the plaintiff was entitled to a nonsuit as a matter of right.[33]

Whether overruling *Caldwell* or merely indicating its true holding, the Court made it clear in the instant case that it did not consider the interests of public policy strong enough to warrant distinguishing between motions for voluntary nonsuit in divorce cases from other cases.

Bynum v. Powe, 97 N.C. 374, 2 S.E. 170 (1887). But, the plaintiff is entitled to a voluntary nonsuit when the defendant files a counterclaim arising out of other than the same transaction or contract. Samuel H. Shearer & Son v. Herring, 189 N.C. 460, 127 S.E. 519 (1925).

[29] For a case holding it within the discretion of the judge see Mayott v. Mayott, 167 Misc. 860, 4 N.Y.S.2d 57 (Sup. Ct. 1938). Other courts do not distinguish between actions for divorce and other actions. See Johnson v. Gerald, 216 Ala. 581, 113 So. 447 (1927). See generally, Annot., 138 A.L.R. 1100 (1942).

[30] 189 N.C. 805, 128 S.E. 329 (1925).

[31] *Id.* at 812, 128 S.E. at 333.

[32] "In a divorce proceeding, a motion by plaintiff for a judgment of voluntary nonsuit is not allowed as a matter of right, but is addressed to the sound discretion of the judge, to be exercised in the interest, not only of the plaintiff, but also of the defendant and the State." II McIntosh, North Carolina Practice & Procedure § 1645 at 125 (2d ed. 1956).

[33] 259 N.C. at 648, 131 S.E.2d at 482.

PARENT AND CHILD

The North Carolina statute[34] imposing liability of five hundred dollars on a parent for the willful or malicious damage to property by a child under eighteen years old was before the Court for the first time in *General Insurance Co. of America v. Faulkner.*[35] The Court held that the statute was constitutional, and said the underlying policy was not to provide a compensatory remedy to one injured by a minor, but rather was a measure to curb juvenile delinquency.[36] This policy is evidenced by the five hundred dollar limit and the restriction of the application of the statute to willful and malicious torts.[37]

EMINENT DOMAIN

In *Guilford Reality & Ins. Co. v. Blythe Bros. Co.*[1] action was brought against a contractor for blast damage to the plaintiff's houses caused by concussion and vibration. The defendant in its answer alleged that it was engaged in the construction of a sewer for a city, in accordance with the specifications prescribed by the city. The defendant claimed that since the construction of a sewerage system was a governmental function when performed by a city, defendant as contractor for the city was entitled to the protection from suit afforded to the city by the doctrine of governmental immunity.

In sustaining the plaintiff's motion to strike that portion of the defendant's answer relating to governmental immunity, the Court expressly noted that it was not deciding that the defendant had no defense of the nature it attempted to allege. Rather the decision was simply that the *facts* alleged by the defendant were insufficient to constitute a defense to the cause of action alleged by the plaintiff.[2] In the course of the opinion the Court had the following to say concerning issues raised by the allegations of the answer:

(1) The facts here did not present a case for the application of

[34] N.C. GEN. STAT. § 1-538.1 (Supp. 1963).

[35] 259 N.C. 317, 130 S.E.2d 645 (1963). This case is discussed in CONSTITUTIONAL LAW, *Statutes, supra,* EQUITABLE REMEDIES, *Subrogation, infra,* and INSURANCE, *Fire Insurance, infra.*

[36] For a comment on this statute, see Ligon, *Parental Responsibility Statute,* 40 N.C.L. REV. 619 (1962).

[1] 260 N.C. 69, 131 S.E.2d 900 (1963). This case is discussed in MUNICIPAL CORPORATIONS, *Municipal Immunity, infra;* TORTS, *Absolute Liability, infra.*

[2] *Id.* at 80, 131 S.E.2d at 908.

the doctrine of governmental immunity.[3] Even where performing a governmental function a municipality cannot maintain a nuisance which causes appreciable damage to the property of a private landowner without incurring liability for such damage.[4] The test for liability is whether, notwithstanding the governmental acts, the municipality's acts amount to a partial taking of property. Here the acts did amount to such a taking, thus rendering the city liable and destroying the basis of the alleged defense. The Court left open, however, the question of whether the plaintiff's remedy against the city was by special proceeding under the general eminent domain statutes,[5] or by civil action.[6]

(2) While not deciding whether, if the city were immune, such immunity would extend to the defendant here, the Court did note that there was authority in the United States that a contractor or agent acting for his principal who holds the power of eminent domain, cannot be held liable for damages if he is in the process of making a public improvement and it is made without negligence on his part.[7]

The Court held in *Redevelopment Comm'n v. Hagins*[8] that the

[3] *Id.* at 78, 131 S.E.2d at 907.

[4] Spaugh v. City of Winston-Salem, 249 N.C. 133, 105 S.E.2d 280 (1958); Young v. City of Asheville, 241 N.C. 618, 86 S.E.2d 408 (1955); McKinney v. City of High Point, 237 N.C. 66, 74 S.E.2d 440 (1953); City of Raleigh v. Edwards, 235 N.C. 671, 71 S.E.2d 396 (1952).

[5] N.C. GEN. STAT. § 40-12 to -29 (1950) as amended N.C. GEN. STAT. § 40-11 to -20 (Supp. 1963).

[6] No cases were cited by the Court in support of either of the remedies mentioned, but in Mason v. Durham County, 175 N.C. 638, 96 S.E. 110 (1918), it was held that the statutory remedy is not exclusive and where the entity vested with the power of eminent domain appropriates property, the owner of the land has the right, at his election, to sue for permanent damages and on the payment of same an easement passes to the defendant. See also Eller v. Board of Educ., 242 N.C. 584, 89 S.E.2d 144 (1955).

[7] Tidewater Constr. Corp. v. Manly, 194 Va. 836, 75 S.E.2d 500 (1953). See also Valley Forge Gardens, Inc. v. James D. Morrissey, Inc., 385 Pa. 477, 123 A.2d 888 (1956). *Contra,* Berg v. Reaction Motors Div., Thiokol Chem. Corp., 37 N.J. 396, 181 A.2d 487 (1962); Scranton v. L. G. DeFelice & Son, 137 Conn. 580, 79 A.2d 600 (1951).

While not necessary to the decision in Moore v. Clark, 235 N.C. 364, 70 S.E.2d 182 (1952), a case involving the State Highway and Public Works Commission, statements were made in the opinion that are generally in line with the *Tidewater* case. However, in *Moore* there seems to be some narrowing of the *Tidewater* generalizations, because the allegation in *Moore* that the principal case quoted with approval was to the effect that the work was in strict conformity with the plans of the highway commission and *under the direction of its highway engineers.*

[8] 258 N.C. 220, 128 S.E.2d 391 (1962). This case is discussed in CIVIL

petitions for condemnation were fatally defective due to insufficient allegations under the requirements of G.S. § 160-463.

The condemnor-petitioner had elected to institute separate proceedings for each parcel of land taken for a redevelopment project. Although the Court did not expressly rule out this method of condemnation, it strongly suggested that a better course to follow would be to institute proceedings covering the whole planned area, serve all interested parties with process and hear all defenses, leaving only the question of just compensation due each respondent to be determined in separate inquiries.[9]

In *Virginia Elec. & Power Co. v. King*[10] a condemnation proceeding was instituted by a utility company, alleging that the respondents were owners of the property in question *in fee simple.* Attached to the petition was a map of the property which indicated that the utility company owned an existing easement over the property. Evidence of this easement was excluded at the hearing, but instead of challenging the award, the company paid the full amount into court and then filed a "conflicting claim" petition under G.S. § 40-23 asking that it be refunded from the compensation paid the value of its easement.[11] This petition was denied and on appeal the Court affirmed the denial, holding that when a condemnation award is made, the condemnor has a right to object and except to a confirmation of the award on the ground that it was based on an erroneous assumption as to the property taken, and from an adverse ruling it can appeal.[12] But if the condemnor elects not to follow the procedure outlined above, it is bound by the award and cannot thereafter by the procedure utilized challenge the condemnee's right to the compensation which has been awarded.[13] It is not a "conflicting claimant" within the meaning of the statute.

PROCEDURE, (PLEADING AND PARTIES), *Joinder of Parties and Causes, supra* and MUNICIPAL CORPORATIONS, Urban Redevelopment, *infra.*

[9] Meyers v. Wilmington-Wrightsville Beach Causeway Co., 199 N.C. 169, 154 S.E. 74 (1930), was cited as authority for a single condemnation proceeding against property belonging to different individuals.

[10] 259 N.C. 219, 130 S.E.2d 318 (1963).

[11] N.C. GEN. STAT. § 40-23 (1950), sets up procedure to determine who is entitled to money paid pursuant to a condemnation award where there are conflicting claimants. The Court cited with approval language from Grand River Dam Authority v. Simpson, 192 Okla. 338, 136 P.2d 879 (1943), in support of its decision here.

[12] N.C. GEN. STAT. 40-19 (Supp. 1963).

[13] 259 N.C. at 222, 130 S.E.2d at 321.

In *Midget v. North Carolina State Highway Comm'n*[14] the Court extended to ocean water the rule relating to the drainage of surface waters overflowing from inland streams. The following rule is, therefore, applicable to both ocean water and inland streams: the law confers upon the owner of each upper estate an easement in lower estates for drainage of surface water flowing in its natural course without obstruction by the owner of the lower estate to the detriment of the upper estate.[15]

This rule of property was then called upon for application in the instant case where the highway commission constructed an elevated road behind the plaintiff's beach lots. The plaintiff's property was inundated by overflow waters from the ocean caused by a storm because the highway formed a dam which prevented the overflow from being dissipated toward the sound that lay on the west side of the property.

The plaintiff brought a civil action to recover damages for a "taking" of his property for public use under the principle of eminent domain, alleging that the obstruction of the road constituted a continuing nuisance which substantially impaired the value of his property. In discussing applicable principles the Court noted that the right to have water flow in the direction provided by nature is a property right, and if it is materially interfered with by the construction of a highway, it is a taking of property for public use for which compensation must be paid.[16] To create enforceable liability the overflow must be a direct result of the structure established by the government and must constitute a permanent invasion of the land amounting to an appropriation and not merely an injury. Here the highway was permanent in nature and the Court held that, tested by the above principles, the complaint stated a cognizable cause of action for the appropriation of land for a public use.[17]

The rule is that ordinarily a statutory remedy for recovery of damages to private property taken for public use is exclusive;[18] however, the Court held that the plaintiff was not restricted to his statutory remedy because a constitutional prohibition against taking

[14] 260 N.C. 241, 132 S.E.2d 599 (1963). This case is also discussed in REAL PROPERTY, *Surface Water, infra.*

[15] *Id.* at 246, 132 S.E.2d at 605.

[16] *Id.* at 248, 132 S.E.2d at 606.

[17] *Id.* at 249, 132 S.E.2d at 607.

[18] *Id.* at 249-50, 132 S.E.2d at 607-08.

private property for public use is self executing and requires no law for its enforcement. Where statute affords no adequate remedy under a particular fact situation, the common law will furnish an appropriate action.[19]

In *Bane v. Norfolk-Southern R.R.*[20] defendant, owner of a right of way over the plaintiff's property, entered upon the right of way and replaced a burned wooden trestle with one of dirt and concrete. The Court held that an action for conspiracy and trespass could not thereupon be maintained by the plaintiff even though the actions of the defendant prevented the plaintiff from passing under the railway. The plaintiff's remedy would be by a condemnation proceeding under G.S. § 40-12, the general condemnation statute, if the construction of the new trestle and preclusion of access thereunder placed a heavier burden on the plaintiff's property than that permitted by the terms of the original easement.

EQUITABLE REMEDIES

Dissolution of Temporary Restraining Order—Amicable and Voluntary Agreement of Parties

G.S. § 1-496 and G.S. § 1-497 construed together permit a party enjoined to sue and recover damages on the injunction bond when it is finally determined that the person procuring the injunction was not entitled thereto. In *Blatt Co. v. Southwell*,[1] a temporary restraining order was dissolved pursuant to agreement between the parties that the defendant would voluntarily refrain from committing the

[19] The Court found the instant case indistinguishable from Eller v. Board of Educ., 242 N.C. 584, 89 S.E.2d 144 (1955), and held *Eller* to be controlling, quoting from the opinion as follows: "It [defendant] does not claim plaintiffs' land. Presumably, it had no intention to 'take' or pay for plaintiffs' land or any other rights therein. G.S. 40-12 *et seq.*... are applicable only to instances where the condemnor acquires title and right to possession of specified land. They have no application here." *Id.* at 587, 89 S.E.2d at 146.

Another reason for giving the plaintiff a common law remedy was that, if he were required to follow the statutory procedure exclusively, his remedy would have been barred because the maximum statutory period for filing for an award after a highway has been completed is twelve months. N.C. Gen. Stat. § 136-103 (Supp. 1963). The statute of limitations in an action for damages resulting from the maintenance of a nuisance, however, runs only from the date that the damage occurs, which here was upon the inundation of the property.

[20] 259 N.C. 285, 130 S.E.2d 406 (1963).

[1] 259 N.C. 468, 130 S.E.2d 859 (1963).

acts prohibited by the order. Defendant subsequently moved the court to award it damages on the injunction bond on the ground that it had finally been determined that plaintiff was not entitled to the temporary restraining order. The lower court awarded the defendant three hundred dollars. This was held to be error on appeal and the case was remanded to the lower court for further proceedings, the Court stating:

> The burden of proof was on defendant to show, as a prerequisite to his right to recover damages from plaintiff and its surety, either that the court had finally decided plaintiff was not entitled to the temporary restraining order or that something occurred equivalent to such a decision.[2]

The Court reviewed the law in this area and stated that the "voluntary and unconditional dismissal of the proceedings by the plaintiff is equivalent to a judicial determination that the proceeding for an injunction was wrongful, since thereby the plaintiff is held to have confessed that he was not entitled to the equitable relief sought."[3] On the other hand, a dismissal resulting from "an amicable and voluntary" agreement of the parties does not operate as a confession by the plaintiff that he had no right to the injunction granted. Thus, in this latter situation, there must be a judicial determination as to whether the plaintiff was entitled to the injunction.[4]

The purport of the case is that dismissal of the proceedings resulting from a compromise settlement of the dispute will not operate as an automatic determination that the plaintiff was not originally

[2] *Id.* at 473, 130 S.E.2d at 862. At the hearing to show cause why the temporary restraining order should not be continued, defendant had tendered a proposed order for dissolution containing the phrase "it appearing to the Court upon such hearing that the plaintiff was not entitled to the said Restraining Order." 259 N.C. at 469, 130 S.E.2d at 860. This phrase was deleted by the judge whose final order simply stated that "the Restraining Order should not be continued." 259 N.C. at 469, 130 S.E.2d at 860. There was no indication in the order of a determination as to whether or not the plaintiff was initially entitled to the restraining order. The court pointed out that no recovery could be had on the bond until such a determination was made.

[3] *Id.* at 472, 130 S.E.2d at 862. *Accord,* Nansemond Timber Co. v. Rountree, 122 N.C. 45, 29 S.E. 61 (1898); Raleigh & Western Ry. v. Glendon & Gulf Mining & Mfg. Co., 117 N.C. 191, 23 S.E. 181 (1895).

[4] The decision appears to accord with the majority view throughout the country. See, *e.g.,* St. Joseph & Elkhart Power Co. v. Graham, 165 Ind. 16, 74 N.E. 498 (1905); Large v. Steer, 121 Pa. 30, 15 Atl. 490 (1888). See generally 28 AM. JUR. *Injunctions* § 340 (1959); 43 C.J.S. *Injunctions* § 292b(2) (1945); Annot., 91 A.L.R.2d 1312 (1963).

entitled to the injunction. It is not clear, however, whether the decision also operates to effectively foreclose the possibility of defendant's ever recovering on the injunction bond, since it is conceivable that the defendant might otherwise prove that the plaintiff was not initially entitled to the restraining order. In the light of this uncertainty, it would seem advisable for plaintiffs' attorneys, simultaneously with the dissolution of the restraining order, to secure releases for their client and the client's surety so as to preserve the apparent finality of the settlement.

INJUNCTIONS

Injunctions were properly granted to enjoin a former employee from violating an agreement not to compete,[5] to restrain upper landowners from collecting and discharging surface waters in volume upon the plaintiff's lands,[6] to enjoin the enforcement of a City Code provision alleged to be unconstitutional,[7] and to restrain a lessor from violating the covenants of the lease.[8]

In *Pleaters, Inc. v. Kostakes*,[9] plaintiff was a shopping center lessee under a lease providing that, "the lessors will grant exclusive Dry Cleaning and finished laundry rights to the lessees and no other dry-cleaning or finished laundry *or other building will be added to Westover Shopping Center.*"[10] Plaintiff sought to permanently enjoin defendant from constructing another building in violation of the terms of the lease. The Court affirmed the lower court's continuance of a temporary restraining order until trial.

The defendant contended on appeal that the terms of the lease were ambiguous and that the provision quoted above was only intended to prevent the addition of another dry-cleaning or finished laundry building to the shopping center.[11] The Court failed to deal

[5] Local Fin. Co. v. Jordan, 259 N.C. 127, 129 S.E.2d 882 (1963) (temporary restraining order properly continued to trial when principal relief sought is permanent injunction).

[6] Chappell v. Winslow, 258 N.C. 617, 129 S.E.2d 101 (1963) (permanent injunction).

[7] Schloss v. Jamison, 258 N.C. 271, 128 S.E.2d 590 (1962) (temporary restraining order properly continued to trial).

[8] Pleaters, Inc. v. Kostakes, 259 N.C. 131, 129 S.E.2d 881 (1963) (temporary restraining order properly continued to trial).

[9] 259 N.C. 131, 129 S.E.2d 881 (1963).

[10] *Id.* at 132, 129 S.E.2d at 881.

[11] Defendant proposed to lease this building to a drug store. 259 N.C. at 132, 129 S.E.2d at 881.

with this contention in its disposition of the case.[12] It would seem that when the plaintiff bases his right to relief on a patently ambiguous contract provision, the extraordinary remedy of injunction should not always be preliminarily available, since the ambiguity at least casts doubt on the probability of plaintiff's being able to maintain his primary equity at the trial. The result in the *Pleaters* case, however, seems perfectly justified, since the apprehension of irreparable injury that might befall either party if the injunction were not continued was so great as to outweigh whatever equities the defendant might have urged in his favor.

QUANTUM MERUIT—EVIDENCE AS TO VALUE AFFECTING RECOVERY

Two cases involved the sufficiency of the evidence as related to the amount of damages recoverable in *quantum meruit* actions. In *Cline v. Cline*,[13] plaintiff sought to recover the reasonable value of services rendered her mother-in-law[14] during the last three years of her life. Plaintiff presented evidence as to the type and extent of the services which she performed,[15] but failed to present evidence as to the value of these services. On appeal, she contended that such evidence was unnecessary since her services were of a value readily

[12] The Court disposed of the case on the general proposition that ordinarily a temporary restraining order will be continued to trial if there is probable cause to believe that plaintiff will be able to maintain his primary equity at the trial and a reasonable apprehension of irreparable loss if the restraining order is not continued. 259 N.C. at 133, 129 S.E.2d at 882. *Accord,* Cobb v. Clegg, 137 N.C. 153, 49 S.E. 80 (1904).

"It is generally proper, when the parties are at issue concerning the legal or equitable right, to grant an interlocutory injunction to preserve the right *in statu quo* until the determination of the controversy, and especially is this the rule when the principal relief sought is in itself an injunction, because a dissolution of a pending interlocutory injunction, or the refusal of one, upon application therefor in the first instance, will virtually decide the case upon its merits and deprive the plaintiff of all remedy or relief, even though he should be afterwards able to show ever so good a case." Local Fin. Co. v. Jordan, 259 N.C. 127, 128-29, 129 S.E.2d 883, 883-84 (1963).

[13] 258 N.C. 295, 128 S.E.2d 401 (1963).

[14] "The relationship of mother-in-law and daughter-in-law was not sufficient to raise a presumption that the services were gratuitously rendered and received." 258 N.C. at 298, 128 S.E.2d at 403. *Accord,* Lindley v. Frazier, 231 N.C. 44, 55 S.E.2d 815 (1949).

[15] "Plaintiff described in some detail the services she performed. She injected insulin as needed. She washed decedent's clothes and bed linen, helped bathe her, cooked for her, and did such other things as needed to make decedent comfortable and happy." 258 N.C. at 299, 128 S.E.2d at 404.

ascertainable by the jury even in the absence of evidence as to their value. In awarding the defendant a new trial, the court stated: "When a plaintiff seeks to recover compensation for . . . services rendered, he must allege and prove [their] . . . value."[16]

In *Johnson v. Sanders*,[17] the plaintiff once again failed to prove reasonable value and the lower court entered a judgment of involuntary nonsuit. On appeal, the Supreme Court held that notwithstanding the failure of proof of actual damages, plaintiff was nevertheless entitled to nominal damages.

Though the implication of the *Cline* case is that the plaintiff would not be entitled to even nominal damages, the cases are not in conflict. The *Cline* case, in effect, holds that it is error to instruct the jury that the plaintiff may recover more than nominal damages when no evidence of the reasonable value of the services is presented,[18] whereas *Johnson* holds that failure to prove reasonable value is not grounds for nonsuit since the plaintiff may always recover nominal damages.

Reformation of Insurance Policy—Failure of Insured to Read Policy

In *McCallum v. Old Republic Life Ins. Co.*,[19] a feeble, eighty-three year old woman applied to a credit association for a one year loan. The association required the applicant to buy a group insurance policy on her life as security for the loan. The policy as drafted by the defendant and as executed by the applicant bore effective and expiration dates of 31 December 1958 and 31 December 1959 respectively. The loan was extended on 3 January 1959 and repaid during the year. The insured died on 2 January 1960. Her administrator sought to reform the policy by deleting the effective and expiration dates mentioned above and inserting in lieu thereof the dates 3 January 1959 and 3 January 1960 so as to bring the death of the

[16] *Id.* at 299, 128 S.E.2d at 404. "Damages are never presumed. The burden is always upon the complaining party to establish by evidence such facts as will furnish a basis for their assessment, according to some definite and legal rule." Lieb v. Mayer, 244 N.C. 613, 616, 94 S.E.2d 658, 660 (1956).

[17] 260 N.C. 291, 132 S.E.2d 582 (1963).

[18] In fact, the court apparently assumed, though not deciding, in this case that nominal damages would be recoverable. See 258 N.C. at 299, 128 S.E.2d at 404.

[19] 259 N.C. 573, 131 S.E.2d 435 (1963). This case is also discussed in Contracts, *Reformation, supra.*

insured within the coverage of the policy. The complaint alleged that the insured had failed to read the policy before signing. The Supreme Court, reversing the trial court's order sustaining a demurrer for failure to state a cause of action, held that the insured's failure to read the policy would not preclude a subsequent suit for reformation.

The Court stated the rule in this manner:

> The North Carolina Court has frequently said that where no trick or device had prevented a person from reading the paper which he has signed or has accepted as the contract prepared by the other party, his failure to read *when he had the opportunity to do so* will bar his right to reformation.[20]

Indeed, this principle has often been applied in cases involving reformation of insurance policies.[21] In the principal case, the Court placed great emphasis on the fact that the policy was issued by the defendant pursuant to a group plan participated in by the creditor whose loan the policy was issued to secure. It was reasoned that in such a situation the insured would be under no duty to anticipate that the policy would bear an effective date several days before the loan was actually made to her. Moreover, the insured's feeble condition and extreme age were sufficient factors to justify the conclusion that the insured had no *opportunity* to read the policy. Thus, the case does not change existing law, but merely represents an extreme application of well settled principles.[22]

Subrogation of Insurer to Claim Against Parents of Minor Maliciously Damaging Property

At common law, absent special circumstances, parents are not liable for torts committed by their children.[23] G.S. § 1-538.1 was enacted in 1961 to provide a limited[24] remedy against the parent of a

[20] *Id.* at 581, 131 S.E.2d at 440, quoting from Setzer v. Old Republic Life Ins. Co., 257 N.C. 396, 401, 126 S.E.2d 135, 139 (1962). (Emphasis added).

[21] Setzer v. Old Republic Life Ins. Co., 257 N.C. 396, 126 S.E.2d 135 (1962); Coppersmith v. Aetna Ins. Co., 222 N.C. 14, 21 S.E.2d 838 (1942); Welch v. Sun Underwriters Ins. Co., 196 N.C. 546, 146 S.E. 216 (1929); Graham v. Mut. Life Ins. Co. of N.Y., 176 N.C. 313, 97 S.E. 6 (1918); Clements v. Life Ins. Co. of Va., 155 N.C. 57, 70 S.E. 1076 (1911).

[22] See generally Malone, *The Reformation of Writings Under the Law of North Carolina*, 15 N.C.L. Rev. 155 (1936); Annot., 81 A.L.R.2d 7 (1962).

[23] Lane v. Chatham, 251 N.C. 400, 111 S.E.2d 598 (1959).

[24] The statute limits recovery to five hundred dollars. N.C. Gen. Stat. § 1-538.1 (Supp. 1963).

minor who maliciously or willfully damages the property of another. In a recent case,[25] the Court held that an insurer who compensated a School Board for damage caused by a fire maliciously set by a minor was subrogated to the School Board's claim against the parents of the minor.

Though such statutes exist in thirty-two states,[26] the Court found the question of subrogation to be one of first impression. The objection usually voiced[27] against the right of subrogation to claims based on statutory liability is predicated on the notion that statutes in derogation of the common law are to be strictly construed.[28] Thus, it is argued that the absence of an express statutory provision for subrogation should preclude its existence. Though the question of subrogation was apparently novel in the principal case, it has arisen in an analogous situation under the various tort claims acts—both state and federal. State courts are not in agreement as to whether a paying insurer is subrogated to the insured's claim against the state.[29] It is clear that such a right does exist under the North Carolina Tort Claims Act,[30] and the same rule prevails with respect to claims arising under the comparable federal legislation.[31]

Whether subrogation should be allowed under this statute would seem to depend on the purpose of the statute. Subrogation is the equitable remedy which affords relief to those who have paid a legal obligation which another ought to have discharged. If G.S. § 1-538.1 is designed merely to provide a means of compensation for those holding worthless claims against minors, it is arguable that subrogation should not be allowed. The parents themselves are not im-

[25] General Ins. Co. v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963). This case is discussed in CONSTITUTIONAL LAW, *Statutes, supra;* DOMESTIC RELATIONS, *Parent and Child, supra;* INSURANCE, *Fire Insurance, infra.*

[26] See Ligon, *Parental Responsibility Statute,* 40 N.C.L. REV. 619, 625 (1962).

[27] See, *e.g.,* United States v. Aetna Cas. & Sur. Co., 338 U.S. 366 (1949). See also Squires v. Sorahan, 252 N.C. 589, 114 S.E.2d 277 (1960), involving the right of the insurer of one joint tortfeasor to enforce statutory contribution against the other joint tortfeasor upon payment of the claim.

[28] Ellington v. Bradford, 242 N.C. 159, 86 S.E.2d 925 (1955).

[29] Turner v. Lumbermen's Mut. Ins. Co., 235 Ala. 632, 180 So. 300 (1938) (no subrogation); American Mut. Liab. Ins. Co. v. State Hwy. Comm., 146 Kan. 239, 69 P.2d 1091 (1937) (no subrogation); Jeff Hunt Mach. Co. v. South Carolina State Hwy. Dept., 217 S.C. 423, 60 S.E.2d 859 (1950) (subrogation).

[30] Lyon & Sons v. State Bd. of Educ., 238 N.C. 24, 76 S.E.2d 553 (1953).

[31] United States v. Aetna Cas. & Sur. Co., 338 U.S. 366 (1949).

mediately blameworthy or responsible for the damage caused by their child, and, if the injured party has been compensated by insurance, then the purpose of the statute has been accomplished. On the other hand, if the purpose of the statute is not only to provide compensation in these cases but also to stem the tide of juvenile deliquency, the effectuation of its purpose would be thwarted absent the ultimate liability of the parents in every situation which it covers. The Court dealt with these considerations and very properly concluded that the statute is primarily designed to curb the anti-social behavior of children through bringing financial pressure to bear on the parents who in many cases are at least indirectly responsible for such behavior. In view of this the Court reasoned that it would be inequitable to allow the parents in the principal case to reap the ultimate benefit from the School Board's foresight in procuring fire insurance on its premises.

EVIDENCE

Character Evidence—Specific Acts of Violence of Deceased Shown in Support of Self-Defense Plea

In *State v. Davis*,[1] the defendant, indicted for murder of one Lester Green, was convicted of manslaughter. While admitting that he shot the deceased, the defendant asserted that he knew deceased to have a reputation of being dangerous and violent, and therefore he claimed self-defense, justifying the killing of deceased. It seems that shortly after the defendant entered a store, Green, the deceased, entered, approached the defendant, and while informing defendant that he knew defendant was carrying a gun, he grabbed the defendant's arm. Defendant tried to free himself; but being unable to do so, he made a move for his right hip, supposedly to get his pistol. The deceased thereupon wrapped his arms around the defendant, and the two struggled until defendant finally managed to reach his gun, shooting the deceased three times.

In defense of the killing, defendant claimed that he had shot in self-defense, justifiable because the deceased had a reputation for violence of which the defendant knew at the time of the shooting. The defense offered evidence of this reputation. However, it also

[1] 259 N.C. 138, 129 S.E.2d 894 (1963).

attempted to show on cross-examination of the State's witnesses that the deceased had committed specific violent assaults on other persons at various times. On objection by the State, this evidence was excluded, to which the defendant excepted.

In upholding the ruling of the trial court, the Supreme Court said that the defendant was not entitled to prove *specific acts* of violence to prove deceased's reputation for violence, and that such holding was consistent with prior decisions of the Court.[2]

The Court cited as authority for the ruling *State v. Morgan*,[3] which case had in turn relied upon *State v. LeFevers*.[4] These cases established the general rule that in support of a self-defense plea, the defendant could not show specific acts of violence of the deceased, although he could show the general reputation for violence. However, an exception to the general rule enunciated in both *Morgan* and *LeFevers* had been established by several previous decisions.[5] This exception is employed to permit specific acts of violence to be

[2] *Id.* at 139, 129 S.E.2d at 894.

[3] 245 N.C. 215, 95 S.E.2d 507 (1956).

[4] 221 N.C. 184, 19 S.E.2d 489 (1942). *LeFevers* said "Where there is evidence tending to show that the defendant acted in self-defense, evidence of the general reputation of the deceased for violence may be admitted, but this rule does not render admissible evidence of specific acts of violence which have no connection with the homicide." *Id.* at 185, 19 S.E.2d at 490. The Court cited as authority State v. Hodgin, 210 N.C. 371, 186 S.E. 495 (1936), and State v. Melton, 166 N.C. 442, 81 S.E. 602 (1914). However, *Melton* was a murder case in which the defendant tried to elicit from its own witness the fact that deceased was a homosexual.

[5] Nance v. Fike, 244 N.C. 368, 93 S.E.2d 443 (1956); State v. McIver, 125 N.C. 645, 34 S.E. 439 (1899); STANSBURY, NORTH CAROLINA EVIDENCE § 106 (2d ed. 1963) [hereinafter cited as STANSBURY]. See also, State v. Blackwell, 162 N.C. 672, 78 S.E. 316 (1913), where the language seems to be most appropriate: "Where one is drawn into a combat of this nature by the very instinct and constitution of his being, he is obliged to estimate the danger in which he has been placed, and the kind and degree of resistance necessary to his defense. To do this he must consider, not only the size and strength of his foe, ... but also his character as a violent and dangerous man. It is sound sense, and we think sound law, that before a jury shall be required to say whether the defendant did anything more than a reasonable man should have done under the circumstances, it should, as far as can be, be placed in the defendant's situation, surrounded with the same appearances of danger, *with the same degree of knowledge of the deceased's probable purpose which the defendant possessed.*" *Id.* at 681, 78 S.E. at 319 (Emphasis added.) See also, Annot., 121 A.L.R. 380, 390 (1939): "Although ... the courts in most jurisdictions formerly excluded evidence of specific acts, the trend of the comparatively recent decisions, even in certain jurisdictions which formerly denied the admissibility of testimony as to specific acts, is towards the admissibility of such evidence."

proved where the defendant was present or had knowledge of such acts prior to the act of repelling a deceased in self-defense.[6]

It would seem that in *Davis* either the North Carolina Court or the attorney for the defense had forgotten this vital exception, because there was no mention of whether or not the defendant had knowledge of the unrelated specific acts of violence upon others, which evidence was excluded.

Dead Man's Statute

Under the North Carolina Dead Man's Statute, G.S. § 8-51, a plaintiff may not testify in his action against the estate of a decedent that he rendered services to or expected pay for services rendered deceased, for such is considered a personal transaction between deceased and the plaintiff in which the plaintiff is directly interested.[7] However, it has generally been held in North Carolina that one spouse may testify for the other concerning such rendition of personal services when the latter institutes suit to recover for the same against the estate of a deceased.[8] The reason for this is that the statutory prohibition extends only to those having direct legal or pecuniary interests, and not merely to "the sentimental interest the husband or wife would naturally have in the law suit of the other."[9] The pecuniary interest must be present and not speculative, as would be the husband's or wife's in such a case.[10]

In *Smith v. Perdue*,[11] the Court has followed these rules to their logical extremes. In *Perdue*, two cases against the same two decedents' estates were consolidated for trial. The two plaintiffs were husband and wife, as were the two decedents, and they were suing the estates for personal services rendered during decedents' lives. Citing *Burton v. Styers*,[12] the Court held not violative of the Dead Man's Statute each spouse's testifying in behalf of the other as to the personal services rendered decedents.[13]

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[6] See cases cited note 5 *supra*.

[7] Peek v. Shook, 233 N.C. 259, 63 S.E.2d 542 (1951).

[8] Burton v. Styers, 210 N.C. 230, 186 S.E. 248 (1936); Vannoy v. Stafford, 209 N.C. 748, 184 S.E. 482 (1936); McCurry v. Purgason, 170 N.C. 463, 87 S.E. 244 (1915); Helsabeck v. Doub, 167 N.C. 205, 83 S.E. 241 (1914).

[9] Burton v. Styers, 210 N.C. 230, 231, 186 S.E. 248, 249 (1936).

[10] McCurry v. Purgason, 170 N.C. 463, 87 S.E. 244 (1915).

[11] 258 N.C. 686, 129 S.E.2d 293 (1963).

[12] 210 N.C. 230, 186 S.E. 248 (1936).

[13] See also Stansbury § 69.

Declarations Against Interest and Admissions Distinguished

Perhaps a more interesting aspect of the *Perdue* case[14] is the fact that plaintiffs' son was permitted to testify against *both* estates that on the afternoon after the deceased wife's death, her husband told plaintiffs' son that "Willis and Troy [plaintiffs] have continued to care for us as they said they would and I am sure they will continue to care for me and I plan to well pay them for this service."[15] The statement was held admissible against the deceased husband's estate as an *admission.*[16] However, against the wife's estate, the statement was held admissible as a *declaration against interest,* one of the well-known exceptions to the hearsay rule;[17] this holding was based upon the theory that the wife having died, her estate descended to her husband. Since at the time of the litigation he was dead, the facts being within his personal knowledge, there being no motive to misrepresent, and the statement being against his pecuniary interest when made, the declaration met the requirements for admissibility as a declaration against interest.

The distinctions between admissions and declarations against interest are often difficult to see; however *Perdue* presents a perfect example of the application of both with both emanating from the same statement.[18]

Decedent's Bad Character in Wrongful Death Action

In *Sanders v. George,*[19] two wrongful death actions arising out of an automobile accident were consolidated for trial. The defendant was permitted to go into great detail in exposing character faults of the intestates. Among other things, a police officer testified for the defendant that he had observed Susie Green, one of the intestates, wandering the streets between Beaufort and Morehead City in a drunken state during a snowstorm. Other events detailing bad con-

[14] Smith v. Perdue, 258 N.C. 686, 129 S.E.2d 293 (1963). This case is discussed in *Dead Man's Statute, supra.*

[15] 258 N.C. at 689, 129 S.E.2d at 296.

[16] See Stansbury § 174, for the essentials of "admissions."

[17] Stansbury § 147.

[18] Roe v. Journegan, 175 N.C. 261, 95 S.E. 495 (1918). This case is generally regarded as the landmark American case showing the distinction between admissions and declarations against interest. The court in *Perdue* cited *Roe* as authority for its holding. See also, Stansbury §§ 147, 174.

[19] 258 N.C. 776, 129 S.E.2d 480 (1963).

duct and behavior both in court proceedings and private activities were placed before the jury. While granting the plaintiff a new trial mainly on other grounds,[20] the Supreme Court sounded a warning to the trial court that it should not permit the defendant to go to such lengths in the exposé of the intestates' shortcomings: "The result seems to have carried the jury too far from the critical question involved; that is, the fair and just compensation for the pecuniary injuries resulting from death."[21]

The result of the *Sanders* case leaves the North Carolina position on the admissibility of improvident attitude of intestates in wrongful death actions in more confusion than it had been in previously. It would seem that the great majority of the cases decided prior to *Sanders* held that the character of the deceased might be considered in determining the earning capacity of the deceased.[22] However, the cases in North Carolina are not in agreement as to *who* sustains the pecuniary loss: the deceased's family or his estate. The majority of these cases hold that the damage resulting from the death is the net pecuniary loss to the *estate*.[23] In *Hanks v. Norfolk & W. Ry.*,[24] however, in a four to three decision, the Court held that the defendant could show the bad character of the deceased because it tended to show improvident attitude on behalf of the deceased *toward his family*. It would seem that the dissenting opinion of the *Hanks* case took the correct view: viz, that such evidence should be admissible only when it is relevant to the earning capacity of the decedent.

In the light of the majority of the North Carolina decisions, the "warning" given the trial court in *Sanders* was not entirely warranted. Such evidence as the defendant submitted concerning the bad character of the intestates should be admissible if it has any relevancy to the earning capacity of the decedent. Surely the facts that one of the intestates wandered the streets at night in drunken

[20] *Id.* at 778, 129 S.E.2d at 482. The defendant had been permitted by the trial court to testify as to his own injuries in the accident which the Supreme Court held erroneous.

[21] 258 N.C. at 778, 129 S.E.2d at 482.

[22] *E.g.*, Burns v. Asheboro & M. R.R., 125 N.C. 304, 34 S.E. 495 (1899); Burton v. Wilmington & W. R.R., 82 N.C. 505 (1880); STANSBURY § 105.

[23] *E.g.*, Rea v. Simowitz, 226 N.C. 379, 38 S.E.2d 194 (1946); 28 N.C.L. REV. 106 (1949).

[24] 230 N.C. 179, 52 S.E.2d 717 (1949).

stupors and that she was regularly in and out of court should have some relevancy to her earning capacity.

Evidence of Liability Insurance

In *Modern Elec. Co. v. Dennis*,[25] the plaintiff, an electrical contractor, brought suit against the defendant, the owner of a motor service company, on the theory that the defendant was an independent contractor and that defendant's agent, one Gooch, through negligent operation of a crane-hoist, damaged a switchboard during installation of same. The defendant contended that he was not an independent contractor, but that Gooch was a servant leased to the plaintiff, in which case, the defendant would not be liable to the plaintiff for Gooch's negligence.

For the purpose of showing that he was not acting in the capacity of an independent contractor, the defendant attempted to testify that he carried no liability insurance on this job, and that his unfailing custom when he assumed responsibility was to procure such insurance. This evidence was excluded by the trial court, and exception thereto on appeal was overruled.[26]

The fact that a defendant carried liability insurance on a particular occasion is almost universally held to be irrelevant on the issue of negligence.[27] In *Dennis*, the Court also recognized a corollary to this general rule which says that a showing by the defendant of an absence of liability insurance is usually immaterial and irrelevant because such a showing would amount to no more than a plea of poverty.[28]

The North Carolina Court has held, however, that the existence of liability insurance may be relevant if there is some probative value; consequently, the fact that the defendant has protected itself against its liability for injury to or damages inflicted by one of its

[25] 259 N.C. 354, 130 S.E.2d 547 (1963).

[26] *Id.* at 357, 130 S.E.2d at 549. The defendant was awarded a new trial, however, on other grounds.

[27] 259 N.C. at 357, 130 S.E.2d at 551. See generally, Stansbury § 88; Greene v. Charlotte Chem. Lab., Inc., 254 N.C. 680, 120 S.E.2d 82 (1961); Hoover v. Gregory, 253 N.C. 452, 117 S.E.2d 395 (1960); Luttrell v. Hardin, 193 N.C. 266, 136 S.E. 726 (1927).

[28] 259 N.C. at 357, 130 S.E.2d at 550. See also Piechuck v. Magusiak, 82 N.H. 429, 135 Atl. 534 (1926); Rojas v. Vuocolo, 142 Tex. 152, 177 S.W.2d 962 (1944); King v. Starr, 43 Wash. 2d 115, 260 P.2d 351 (1953); Graham v. Wriston, 120 S.E.2d 713 (W. Va. 1961).

employees may be shown to prove that the employee was defendant's agent at the time of the event in question.[29] The defendant in *Dennis* asserted that the converse of the exception to the general rule ought to be true also: viz, that the fact that defendant had not protected itself against employees' negligence by liability insurance ought to be relevant to disprove agency. The Court, however, rejected this contention for the reason that such argument is fallacious; there could have been many reasons for *failure* to secure insurance, such as lack of funds, deliberate assumption of risk, mere forgetfulness or neglect, or the job may have been uninsurable.[30]

It would seem that the Court in *Dennis* has reached a very logical result.

Evidence of Plea of Guilty

Until 1963, the North Carolina Supreme Court had experienced only one occasion to decide whether or not a plea of guilty to a criminal charge was admissible in evidence as an admission by the defendant in a subsequent civil action arising out of the same automobile accident.[31] In that case, a per curiam opinion, the Court said that a plea of guilty by the defendant to a criminal charge of following too closely in violation of G.S. § 20-152[32] was an admission sufficient to require jury determination of the question of actionable negligence.[33]

In *State v. Ingram*[34] and *State v. Libby*,[35] the Court had held that a plea of guilty to a criminal charge in a municipal court was admissible in a subsequent trial in the Superior Court for the same offense. The Court had also held that a plea of *nolo contendere* was not admissible in any subsequent action, be it civil or criminal, because such a plea is not an admission of guilt.[36]

Recently, in *Grant v. Shadrick*,[37] the North Carolina Court was

[29] Isley v. Winfrey, 221 N.C. 33, 18 S.E.2d 702 (1942); Davis v. North Carolina Shipbuilding Co., 180 N.C. 74, 104 S.E. 82 (1920).
[30] 259 N.C. at 358, 130 S.E.2d at 550.
[31] McGinnis v. Smith, 253 N.C. 70, 116 S.E.2d 177 (1960).
[32] N.C. Gen. Stat. § 20-152 (1953).
[33] McGinnis v. Smith, 253 N.C. 70, 116 S.E.2d 177 (1960).
[34] 204 N.C. 557, 168 S.E. 837 (1933).
[35] 209 N.C. 363, 183 S.E. 414 (1936).
[36] State v. Stone, 245 N.C. 42, 95 S.E.2d 77 (1956); Winesett v. Scheidt, 239 N.C. 190, 79 S.E.2d 501 (1954).
[37] 260 N.C. 674, 133 S.E.2d 457 (1963).

again faced with the problem. The plaintiffs sought damages for personal injuries and property damage arising out of an automobile accident. Both plaintiffs alleged that the defendant had "swerved out" from behind the car she was following, left her right side of the highway, and collided with the plaintiffs' car on the plaintiffs' right side of the highway. As proof of these facts, the plaintiffs were allowed over the defendant's objection to testify that the investigating officer charged the defendant with "failing to yield the right of way," and that shortly thereafter the defendant pleaded guilty to this charge before the local justice of the peace. On appeal, the Court realized that plaintiffs were not contending that the defendant's plea before the justice of the peace constituted res judicata or any kind of estoppel. The testimony was admissible as an admission as to whether or not the defendant did, in fact, drive her automobile on her left side of the road into the path of plaintiff's oncoming car. The Court went on to say that the evidence of the plea of guilty and other occurrences before the justice were not conclusive, but were subject to explanation and contradiction, the weight of which was to be determined by the jury.[38]

It would appear from this decision that North Carolina has definitely placed itself in the liberal majority as to the admissibility in civil action of pleas of guilty in prior criminal actions arising out of the same transaction.[39]

Evidence of Voluntarily Adopted Safety Codes

In two unprecedented decisions, the North Carolina Supreme Court has further liberalized proof of standard of care and breach thereof in medical malpractice and products liability cases by allowing the plaintiff to use, as evidence of the standard, voluntarily adopted safety codes.[40]

In *Stone v. Proctor*,[41] the plaintiff brought a malpractice action

[38] 260 N.C. at 676, 133 S.E.2d at 459.

[39] See, *e.g.* 8 Am. Jur. 2d *Automobiles and Highway Traffic* § 944 (1963); Annot., 18 A.L.R.2d 1287, 1307 (1951); 9C Blashfield, Cyclopedia of Automobile Law and Practice § 6196 (Perm. ed. 1954); 31 C.J.S. *Evidence* § 300(b) (1942).

[40] Stone v. Proctor, 259 N.C. 633, 131 S.E.2d 297 (1963); Wilson v. Lowe's Asheboro Hardware, Inc., 259 N.C. 660, 131 S.E.2d 501 (1963). These two cases are discussed in Torts, *Negligence, infra.*

[41] 259 N.C. 633, 131 S.E.2d 297 (1963). See also, Sanzari v. Rosenfeld, 34 N.J. 128, 167 A.2d 625 (1961) (cited by the Court in *Stone v. Proctor.*)

against the defendant psychiatrist for injuries sustained through the defendant's alleged negligence in the administration of electroshock therapy. In all, there were five treatments. Immediately after the first, the plaintiff related the fact to defendant that he was experiencing great pain in his back; however, the defendant continued the treatments with increased intensity and duration, and without taking any X-rays to determine whether there had been any fractures to the plaintiff's vertebrae.

The plaintiff put into evidence no medical testimony from psychiatric specialists. However, on cross-examination of the defendant, it was determined that the defendant was a Fellow in the American Psychiatric Association; that he was familiar with its publication, the *Journal of the American Psychiatric Association;* and that he was familiar with the standards for electroshock therapy which had been prepared by the Association's Committee on Therapy and approved by the Association's Council in 1953. The defendant's objections to putting the standards into evidence and asking the defendant if he were familiar with same were sustained. The plaintiff appealed.

Contained in the excluded standards was a rule that if, after a shock treatment, a patient should complain of pain or impairment of function, he should receive a physical examination which should include X-rays to ascertain whether he has suffered accidental damage.

In holding the exclusion erroneous, the Court has apparently held that the standard of care for a psychiatrist using electroshock therapy may be proved in part through the use of standards with which the doctor is familiar, and that other expert medical testimony is unnecessary in such a case.

In this case, the New Jersey court said that a manufacturer's brochure accompanying an anesthetic prescribing the correct procedure for administration of the drug which did not say anything of obtaining a case history of the patient could not be used as a standard of care when the standard allegedly breached was failure to take a case history. The court, however, held the brochure admissible for another purpose: viz, to show that the defendant was put on notice as to the dangers in the use of the anesthetic. See also, Julien v. Barker, 75 Idaho 413, 272 P.2d 718 (1954) and Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees, 154 Cal. App. 2d 560, 317 P.2d 170 (1957). In these two cases, manufacturers' brochures were held admissible as prima facie proof of the standard of care in the administration and use of the drug which the plaintiffs alleged that the defendants had breached. Thus the brochures were not conclusive on the standard of care, but were sufficient to be held to be prima facie evidence of such standard.

In *Wilson v. Lowe's Asheboro Hdwe.*,[42] the Court, citing *Stone v. Proctor,* held that "the voluntary adoption of a safety code as a guide to be followed for protection of the public"[43] was evidence to be considered by the jury in determining the standard of care in the manufacture of wooden ladders. The plaintiff had been injured when a ladder manufactured by the defendant broke. Alleging negligence in the manufacture of the ladder, the plaintiff elicited from the defendant that it had adopted the "American Standard Safety Code for Portable Wooden Ladders." The plaintiff's evidence tended to show that the manufacturer had not followed the mandatory provisions of the Code. The Court held this to be proper, and that the question to be determined by the jury was whether or not the defendant had conformed to these standards.[44]

Impeachment and Corroboration by Prior Inconsistent Statements

In *McGinnis v. Robinson,*[45] the plaintiff sought damages for injuries sustained in a collision between his automobile and one owned by defendant McGhee, and allegedly being driven by defendant Robinson. Robinson's answer alleged that McGhee had been driving. In the presentation of his case, the plaintiff questioned the investigating officer as to facts concerning the scene of the accident. However, he did not testify concerning the issue of who was driving McGhee's car. On cross-examination of the officer, the defense elicited testimony from the officer to the effect that Robinson had told him that she did not know who was driving, that she had not been driving, and that she did not have a driver's license. Defense counsel then presented a paper to the officer for identification, and the officer identified it as a warrant he had sworn out subsequent and in regard to the accident. Over the plaintiff's objec-

[42] 259 N.C. 660, 131 S.E.2d 501 (1963).

[43] *Id.* at 666, 131 S.E.2d at 505.

[44] *Ibid.* In another recent case, Swaney v. Peden Steel Co., 259 N.C. 531, 131 S.E.2d 601 (1963), the Court held that advisory administrative codes which have not been given compulsory force by the Legislature are not admissible as evidence of negligence in civil actions where the defendant violated these codes. The case would seem to be distinguishable from *Stone* and *Wilson* on the ground that the defendant in *Swaney* had not voluntarily adopted the Code as a standard of care. This case is discussed in Torts, *Negligence, infra.*

[45] 258 N.C. 264, 128 S.E.2d 608 (1962).

tion, the defense was allowed to read the warrant to the jury; it charged McGhee with reckless driving and felonious assault with a deadly weapon—viz, an automobile—on the plaintiff and others. On re-direct, the plaintiff elicited from the officer that after investigation subsequent to the issuance of the warrant, he had discovered that McGhee had not been driving. The issue before the Supreme Court was whether or not the warrant could be used either for the purpose of impeachment of the officer, or for corroboration of the later evidence that McGhee had been driving.

In holding the evidence inadmissible on either ground, the Court first found that, from the evidence, the officer had no first-hand knowledge of who was driving the car, and that any statement he had made in the warrant must have been a mere guess or opinion, which would have undoubtedly been inadmissible as substantive evidence. However, the defendant tried to treat the sworn statement as a prior inconsistent statement. The Court recognized the general rule that prior inconsistent statements of a witness are admissible solely for the purpose of attacking the witness' credibility;[46] but because the officer had not testified previously as to who had been driving the car, the statement was not inconsistent with any previous testimony. Further, the Court reasoned, the fact that the plaintiff on re-direct solicited from the officer the testimony that subsequent investigation brought to light the fact that McGhee had not been driving did not cure the error and make the warrant admissible. Usually where the incompetent evidence is admitted over objection, but the same evidence had been previously admitted or is subsequently admitted without objection, the benefit of the objection is lost.[47] "The rule does not mean [however] that the adverse party may not, on cross-examination, explain the evidence or destroy its probative value, or even contradict it with other evidence, upon peril of losing the benefit of his exception."[48]

[46] *Id.* at 268, 128 S.E.2d 611. See also, State v. Cope, 240 N.C. 244, 81 S.E.2d 773 (1954); State v. Herndon, 223 N.C. 208, 25 S.E.2d 611 (1943); Warren v. Pilot Life. Ins. Co., 217 N.C. 705, 9 S.E.2d 479 (1940); STANSBURY § 46; 98 C.J.S., *Witnesses* § 573 (1957).

[47] 258 N.C. at 269, 128 S.E.2d at 612. See also, State v. Aldredge, 254 N.C. 297, 118 S.E.2d 766 (1961); Jones v. Bailey, 246 N.C. 599, 99 S.E.2d 768 (1957); State v. Tew, 234 N.C. 612, 68 S.E.2d 291 (1951); State v. Godwin, 224 N.C. 846, 32 S.E.2d 609 (1945); STANSBURY § 30.

[48] 258 N.C. at 269, 128 S.E.2d at 612. See also, Shelton v. Southern Ry. 193 N.C. 670, 139 S.E. 232 (1927).

Concerning whether or not the evidence was admissible to corroborate subsequent evidence, the Court held the warrant inadmissible. In general, corroborating evidence is merely supplementary to evidence already given, which tends to strengthen and confirm it.[49] It must, however, be competent evidence; and if incompetent, it cannot be rendered competent merely because it tends to corroborate another witness.[50] Therefore, the opinion of the officer in the warrant, being incompetent, could not be rendered competent as corroborative testimony because later testimony to the same effect by Robinson was competent. "In no aspect of the law of evidence can contradictory evidence be used as corroborating, strengthening, or confirming evidence."[51]

PHOTOGRAPHS

In *State v. Foust*,[52] the defendant, a sixteen-year-old, was convicted of a shotgun murder of a girl his own age. The facts tended to show that the defendant had been hunting on the morning in question and had later gone to the deceased's home. The deceased was in bed when the defendant entered, and the State contended that thereupon the defendant and deceased began pranking with the shotgun, which subsequently discharged killing deceased. The defendant claimed the entire tragedy was a misadventure caused solely by the act of deceased, and not through any act of recklessness of the defendant.

At the trial, the defendant stipulated that deceased had died from a blast from his shotgun. However, the trial court permitted the coroner to testify from ten gory, color photographs of the corpse of deceased to explain his testimony, in detail as to each photograph, as to how death occurred from the wound in the side of the face. The Supreme Court, as one of the grounds for reversing the conviction, held that although the "fact that an authenticated photograph is gory, or gruesome, and may tend to arouse prejudice will not alone render

[49] State v. Lassiter, 191 N.C. 210, 131 S.E. 577 (1926); State v. Mungeon, 20 S.D. 612, 108 N.W. 552 (1901).

[50] State v. Lassiter, 191 N.C. 210, 131 S.E. 577 (1926); State v. Springs, 184 N.C. 768, 114 S.E. 851 (1922); Holt v. Johnson, 129 N.C. 138, 39 S.E. 796 (1901).

[51] State v. Lassiter, 191 N.C. 210, 213, 131 S.E. 577, 579 (1926).

[52] 258 N.C. 453, 128 S.E.2d 889 (1963).

it incompetent to be so used,"[53] under the present circumstances, it would seem that there was an excessive use of the photographs by the prosecution.[54] This decision is apparently in accord with prior decisions of the Court, although the same result has never before been reached. In *State v. Gardner*,[55] the Court said that the fact that such gory or gruesome photographs may tend to arouse prejudice in the jury will not render them incompetent, "*if* the testimony sought to be illustrated or explained be relevant and material to any issue in the case . . . ."[56]

Although the Court in *Foust* did not specifically say that the coroner's testimony would not be relevant and material to any issue, the implication was present. The prejudice raised coupled with the irrelevancy of the gruesome photographs, which irrelevancy arose mainly from the fact that the defendant admitted the shooting, made admission of the evidence erroneous. Such admission could accomplish nothing other than prejudice to the defendant.[57]

INSURANCE

Automobile Liability Insurance

In *Underwood v. National Grange Mut. Liab. Co.*[1] the defendant issued an automobile liability policy to *C* under the Assigned Risk Plan.[2] The car covered by the policy was in *C*'s name but was to be operated by her son, *J*. Later when *C* moved to Florida she transferred title to the car to plaintiff, her sister-in-law, but *J* was to continue driving it. She also attempted to assign the insurance policy to plaintiff. Insurer informed plaintiff that the Assigned Risk Policy could not be assigned, then cancelled the policy effective June 27, 1958. On August 4, 1958 plaintiff's son was killed while riding in the car driven by *J*. Following a judgment against *J*'s estate plaintiff brought suit against the insurer to recover under the insurance

[53] *Id.* at 460, 128 S.E.2d at 894. See also State v. Rogers, 233 N.C. 390, 64 S.E.2d 572 (1951); State v. Gardner, 228 N.C. 567, 46 S.E.2d 824 (1948); Stansbury § 34.

[54] 258 N.C. at 460, 128 S.E.2d at 894.

[55] 228 N.C. 567, 46 S.E.2d 824 (1948).

[56] *Id.* at 573, 46 S.E.2d at 828.

[57] Compare: Annot., 73 A.L.R.2d 769, 787-810 (1960).

[1] 258 N.C. 211, 128 S.E.2d 577 (1962).

[2] N.C. Gen. Stat. § 20-279.34 (Supp. 1963).

policy. Defendant denied coverage on the ground the policy provided there could be no assignment without its consent. The trial court found for the plaintiff and entered judgment thereon, apparently basing its decision on the failure of defendant to give the proper notice of termination of insurance as required by statute.[3] On appeal the Court reversed. In the eyes of the Court the question was not one of proper statutory notice but whether the "non-assignment" clause of the policy was valid under the Vehicle Financial Responsibility Act of 1957.[4] The Court held that the Act did not require the insurance to follow the car as it changed hands. To do so would place the burden of maintaining insurance on a vehicle on the insurer, and the Act clearly places this burden on the owner.[5]

Another question raised on appeal was whether the automobile was operated with the insured's permission as contemplated by the omnibus clause of the policy despite the fact that the policy could not be assigned. The standard omnibus clause[6] provides coverage on the insured vehicle when operated by persons other than the insured if operated with the insured's permission. The crucial question was whether the insured had such an interest in the vehicle at the time of the accident as would enable her to grant permission to another person to operate it. The Court found that in order to grant permission as contemplated by the policy insured must have "such ownership or control ... as to confer the *legal* right to give or withhold assent."[7] Since *C* had transferred her interest prior to the accident, she did not retain ownership and control as required by the omnibus clause. Coverage under the clause is thus prevented even though the operator of the vehicle had actual permission (but not *legal* permis-

[3] N.C. GEN. STAT. § 20-310 (Supp. 1963).

[4] N.C. GEN. STAT. §§ 20-309 to -319 (Supp. 1963).

[5] The Court adopted the reasoning of a recent Virginia case, Nationwide Mut. Ins. Co. v. Cole, 203 Va. 337, 124 S.E.2d 203 (1962). The accident out of which the suit arose occurred in Virginia. The negligent driver was a North Carolina resident and the North Carolina Vehicle Financial Responsibility Act was applicable. There was no insurance covering the car in the present owner's name but title had been recently transferred and the prior owner, a relative of the present one, had an Assigned Risk Policy which covered the vehicle when it was in his name. The question was whether the Act required transfer of the insurance with the vehicle. The Court answered in the negative relying primarily on the language of G.S. § 20-309 and G.S. § 20-313 for its conclusion that the burden of maintaining insurance was on the owner.

[6] N.C. GEN. STAT. § 20-279.21(b)(2) (Supp. 1963).

[7] 258 N.C. at 219, 128 S.E.2d at 583.

sion) of the real owner of the car as well as permission of the fictional owner, the plaintiff.

In *Home Indem. Co. v. West Trade Motors, Inc.*[8] defendant *W* sold an automobile that was insured by the plaintiff under a standard garage liability policy to the defendant *B*. *W* executed and delivered the necessary documents to *B*'s lienholder rather than to *B* as provided in G.S. § 20-72(b) and failed to notify the Department of Motor Vehicles of the transfer as required by G.S. § 20-75. The lienholder failed to apply for a new certificate as required by statute.[9] Subsequently, *B* was involved in an accident with *C*. It was claimed by *C* that under the decision in *Community Credit Co. v. Norwood*[10] *W* was still owner of the car. *C* contended that the *Norwood* case held that title remained in the vendor until all provisions of G.S. § 20-72(b) and G.S. § 20-75 were met; hence, *W* was still owner of the car. *C* further contended that *B* was driving the car with *W*'s permission and therefore his insurer was liable under the garage liability policy. Faced with this possibility the insurer sought to determine its liability by declaratory judgment. The Court held *W* and its insurer were not liable since *W* had put the certificate beyond its control, and there was no reason why the vendor should be penalized for the failure of the vendee to perform his statutory duty, that is, to apply for a new certificate.[11] The *Norwood* case did not apply

[8] 258 N.C. 647, 129 S.E.2d 248 (1963). This case is discussed in SALES, *Automobiles—Certificates of Title, infra.*

[9] N.C. GEN. STAT. §§ 20-73 to -74 (Supp. 1963).

[10] 257 N.C. 87, 125 S.E.2d 369 (1962). Discussed in *Tenth Annual Survey of North Carolina Case Law,* 41 N.C.L. REV. 439 (1963). This case involved the application of G.S. § 20-72(b) and G.S. § 20-75. The statutes were amended in 1961 by adding this sentence to each: "Transfer of ownership in a vehicle by an owner (a dealer) is not effective until the provisions of this subsection have been complied with." N.C. Sess. Laws 1961, ch. 835, §§ 8, 9. The sentence was deleted from both statutes in 1963. N.C. GEN. STAT. §§ 20-72(b), -75 (Supp. 1963). Norwood, the vendee under a conditional sales contract, had submitted his application for a new certificate of title in compliance with the provisions of the statutes. After application but before issue of the new certificate the car was levied on by a second creditor of the vendee. The assignee under the conditional sales contract had not registered its lien until the new title was received. It contended the levy was void because under the amendments to G.S. § 20-72(b) and G.S. § 20-75 the vendee did not acquire title until the new certificate was issued. The Court held that since issuance of a new certificate by the Department was not a provision listed by the statute the vendee acquired title when his application was properly submitted and not when the new certificate was issued.

[11] See statutes cited note 9 *supra.*

because it involved a determination of the priorities between two creditors rather than the liabilities of a vendor and his insurer.

In *Levinson v. Travelers Indem. Co.*,[12] *R* purchased an automobile liability policy covering a Buick from the defendant. Later *R* requested that defendant substitute an Oldsmobile for the Buick. Defendant complied with the request and issued a Certificate of Insurance (FS-1)[13] to insured as provided under the rules promulgated by the Commissioner of Motor Vehicles[14] rather than a Notice of Termination (FS-4). Subsequently, the plaintiffs were injured by *R* in an accident involving the replaced vehicle (Buick). The Buick was still registered in *R*'s name but no other insurance had been purchased for it. Apparently *R* had failed to forward the FS-1 to the Department of Motor Vehicles and had also failed to register the Oldsmobile. Compliance with either of these requirements would have informed the Department that *R* had an uninsured vehicle in his possession. Failure to comply permitted *R* to operate the Buick without insurance and without the knowledge of the Department. Faced with the fact that the Buick was uninsured, plaintiffs brought action against the insurer contending its failure to file an FS-4 was in violation of the statutory requirement of notice to the insured of termination of insurance;[15] therefore, the policy still covered the Buick.[16]

The Court held that where coverage on a vehicle is terminated by the request of insured in order to substitute another vehicle for the one presently covered the insurance policy is not terminated; therefore, the requirement of notice does not apply. Since the requirement of notice to insured was designed to protect the insured from acts of the insurer the holding of the Court is sound as to its effect on an insured party. But the additional requirement of notice to the

[12] 258 N.C. 672, 129 S.E.2d 297 (1963).

[13] Issuance of the FS-1 form signifies that the insurer has issued and there is in effect an owner's motor vehicle liability policy which complies with G.S. § 20-279.21. Swain v. Nationwide Mut. Ins. Co., 253 N.C. 120, 116 S.E.2d 482 (1960).

[14] N.C. GEN. STAT. § 20-315 (Supp. 1963).

[15] N.C. Sess. Laws 1957, ch. 1393, § 2, as amended, N.C. GEN. STAT. § 20-310(a) (Supp. 1963).

[16] Where an insurer fails to give notice of termination as provided by G.S. § 20-310 the contract remains in force. Crisp v. State Farm Mut. Auto. Ins. Co., 256 N.C. 408, 124 S.E.2d 149 (1962). Discussed in *Tenth Annual Survey of North Carolina Case Law*, 41 N.C.L. REV. 484 (1963).

Commissioner is ignored.[17] If the insurer had been required to inform the Commissioner of the substitution to relieve itself of reliability the Commissioner would have had the information necessary to prevent the operation of the Buick without insurance. The applicable statute at the time of this case required notice "upon the termination of insurance by cancellation or failure to renew . . . ."[18] In 1963 the statute was amended to read "no insurance policy . . . may be terminated by cancellation or otherwise by the insurer without having given . . . notice of such cancellation . . . ."[19] It is questionable whether this amendment closes the loophole shown in the *Levinson* case because the amended statute refers to the termination of an insurance policy rather than the substitution of vehicles.

In *Robinson v. United States Cas. Co.*[20] the plaintiff brought suit against defendant-insurer for allegedly misrepresenting to the Department of Motor Vehicles that he was not insured by defendant at the time of an accident as required by statute.[21] The Commissioner, relying on such representation, revoked plaintiff's license which resulted in extra expenditures for transportation. Recalling a prior decision[22] which held that such action by the Commissioner was quasi-judicial and not subject to collateral attack, the Court held that the present suit was in effect a collateral attack on the act of the Commissioner in suspending plaintiff's license. Plaintiff had ten days before actual suspension to show he had insurance[23]

[17] This is not the first time it was ignored. In Nixon v. Liberty Mut. Ins. Co., 258 N.C. 41, 127 S.E.2d 892 (1962) the Court held that where notice to the *insured* conformed to the statute, failure to *notify the Commissioner* did not prevent termination of the contract. Obviously, the Court did not consider the duty to inform the Commissioner as important as the duty to inform the insurer. See note 16 *supra*. The applicable statute required notice to the insured fifteen days prior to termination and notice to the Commissioner within fifteen days after termination. N.C. Sess. Laws 1957, ch. 1393, § 2. The present statutes require similar notice to both parties. N.C. GEN. STAT. §§ 20-309(e), -310 (Supp. 1963).

[18] N.C. Sess. Laws 1957, ch. 1393, § 2, as amended, N.C. GEN. STAT. § 20-310(a) (Supp. 1963).

[19] N.C. GEN. STAT. § 20-309(e) (Supp. 1963).

[20] 260 N.C. 284, 132 S.E.2d 629 (1963). This case is discussed in ADMINISTRATIVE LAW, *Liability of Witnesses in Administrative Determinations, supra.*

[21] N.C. GEN. STAT. § 20-279.5(c)1 (Supp. 1963).

[22] Beaver v. Scheidt, 251 N.C. 671, 111 S.E.2d 881 (1960).

[23] N.C. GEN. STAT. § 20-279.5(b) (Supp. 1963).

and upon an adverse ruling by the Commissioner could have appealed to the superior court.[24]

Fire Insurance

In *General Ins. Co. of America v. Faulkner*[25] a school auditorium insured by plaintiff suffered damage in a fire willfully and maliciously set by defendants' eleven-year-old son. Plaintiff, insurance company, paid the claim and then sued the parents to recover five hundred dollars of the loss under the Parental Responsibility Statute.[26] The defendants demurred on the ground that plaintiff was not one of the persons authorized to recover under the statute. The Court found the purpose of the statute was to curb juvenile delinquency by imposing liability on those most responsible for the "anti-social behavior of children."[27] To refuse to allow the injured owner's insurer to sue under the statute would give the parents the benefit of the property owner's prudence and defeat the purpose of the statute. Therefore, the Court held the plaintiff was subrogated to the statutory rights of the injured owner.

LABOR LAW

Unemployment Compensation—Disqualification for Benefits

On June 23, 1962, Eastern Air Lines' five hundred and seventy-five flight engineers went on strike, requiring Eastern to suspend its operations, and more particularly, to close its terminals in North Carolina. In *In re Abernathy*,[1] petitioners, employees at terminals in North Carolina and in no way connected with the flight engineers

[24] N.C. Gen. Stat. § 20-279.2(b) (Supp. 1963).

[25] 259 N.C. 317, 130 S.E.2d 645 (1963). This case is discussed in Constitutional Law, *Statutes, supra;* Domestic Relations, *Parent and Child, supra;* and Equitable Remedies, *Subrogation, supra.*

[26] N.C. Gen. Stat. § 1-538.1 (Supp. 1963), makes the parents of any minor child under eighteen, living with them, liable, in an amount not to exceed five hundred dollars, to the owner of property for loss caused by its willful or malicious destruction by the minor. Thirty one other states have passed similar statutes. See generally Ligon, *Parental Responsibility Statute,* 40 N.C.L. Rev. 619 (1962).

[27] 259 N.C. at 323, 130 S.E.2d at 650.

[1] 259 N.C. 190, 130 S.E.2d 292 (1963), *cert. denied,* 32 U.S.L. Week 3204 (U.S. Dec. 3, 1963). This case is discussed in Constitutional Law, *Statutes, supra.*

or their strike, sought to secure unemployment compensation for that period during which they were unemployed as a result of the strike. The Employment Security Commission denied them compensation under authority of G.S. § 96-14(4).[2] The Superior Court reversed, holding G.S. § 96-14(4) to be unconstitutional.[3] The Court reinstated the decision of the Employment Security Commission, holding the statute to be a reasonable exercise of the police power.

The North Carolina Unemployment Compensation Law was enacted in 1936 to take advantage of a federal grant provided by the Federal Social Security Act of 1935.[4] The basic purpose of the state law was to provide a means to ease the economic burden of those persons placed out of work through no fault of their own. The statute provided that the fund should not be available to employees whose unemployment was due to some misconduct on their part[5] or a refusal to take other employment.[6] Prior to 1961, an individual was also disqualified for benefits when his unemployment was due to a stoppage of work caused by a labor dispute at the factory, establishment, or other premises at which he was last employed. However, consonant with the original philosophy of the law, if the individual could show that he was not participating in, financing, or interested in the labor dispute, and was not a member of a class of workers who were so involved, he could escape disqualification.[7] Such escape provisions existed and now exist in the majority of statutes throughout the country.[8] Had this law been on

[2] This statute provides for disqualification when the unemployment "is caused by a labor dispute in active progress on or after July 1, 1961, at the factory, establishment, or other premises at which he is or was last employed or caused after such date by a labor dispute at another place, either within or without this State, which is owned or operated by the same employing unit which owns or operates the factory, establishment, or other premises at which he is or was last employed and which supplies materials or services necessary to the continued and usual operation of the premises at which he is or was last employed...." N.C. GEN. STAT. § 96-14(4) (Supp. 1963).

[3] The superior court held alternatively that petitioners were not disqualified under G.S. § 96-14(4), or, if they were disqualified under its provisions, G.S. § 96-14(4) was unconstitutional as being an unlawful discrimination against petitioners.

[4] See Haggart, *Unemployment Compensation During Labor Disputes,* 37 NEB. L. REV. 668 (1958).

[5] N.C. GEN. STAT. § 96-14(2) (1958).

[6] N.C. GEN. STAT. § 96-14(3) (1958).

[7] N.C. GEN. STAT. § 96-14(4) (1958).

[8] For a compilation of the statutes, see Lewis, *The Law of Unemployment Compensation in Labor Disputes,* 13 LAB. L.J. 174 (1962).

the books at the time of the Eastern strike, it is conceivable that petitioners in the principal case would have been entitled to compensation.[9]

The North Carolina law was radically amended in 1961.[10] The effect of the amendment was to delete the provision under which an employee out of work due to a labor dispute might escape disqualification. Indeed, the disqualification was extended to individuals whose unemployment was due to a labor dispute in progress *at another place* if such other place was owned or operated by the same employing unit by whom the individual was last employed and supplied materials or services necessary to the continued operation of the premises at which the individual was last employed. The Court held that the petitioners were disqualified under this provision.

The Court reviewed the history of Unemployment Compensation Acts, pointing out that they were enacted at a time when the country was recovering from the throes of a severe economic depression and were apparently designed to ameliorate the economic hardship brought about by cyclical unemployment. The very existence of the labor dispute disqualification in the original state acts was evidence that the legislators did not intend the fund to be used as a means of indirectly financing such disputes.[11]

At least eight other states[12] have statutes containing, in one form or another, no escape provision from the labor dispute disqualification.[13] These statutes represent a departure in disqualification theory, since they deprive an employee of benefits when his unemployment results through no fault of his own. They are obviously designed to protect management against labor's use of the unemployment fund as an indirect lever by which to achieve its demands. It is argued that in light of such a statute, labor will think twice before resorting to conduct that might cause economic distress to their nonunionized fellow employees.[14] It is arguable that such a statute may afford labor

[9] See In re Ferrara's Claim, 10 N.Y.2d 1, 176 N.E.2d 43, 217 N.Y.S.2d 11 (1961).

[10] N.C. GEN. STAT. § 96-14(4) (Supp. 1963), quoted in part note 2 *supra*.

[11] 259 N.C. at 195, 130 S.E.2d at 297. See generally Haggart, *supra* note 4; Comment, 56 NW. U.L. REV. 662 (1961); 26 ALBANY L. REV. 116 (1962).

[12] Alabama, California, Delaware, Kentucky, Minnesota, New York, Ohio, and Wisconsin.

[13] For a compilation of the statutes, see Lewis, *supra* note 8.

[14] Brief for the Harriet Cotton Mills and Henderson Cotton Mills as Amicus Curiae, p. 23.

a greater weapon than it had before, since non-unionized employees, deprived of the employment security which they enjoyed under the former law, will now have to look elsewhere for security—presumably to the union, thereby increasing rather than curbing union strength.

VICARIOUS LIABILITY OF PARENT FOR LOCAL'S MISCONDUCT

Two cases involved the application of agency principles to: (1) Validate service of process on a non-resident union; and (2) Impose vicarious liability on the parent union for secondary boycott activities engaged in by the local. *Reverie Lingerie, Inc. v. McCain*[15] involved a suit for damages against the International Ladies' Garment Workers, a non-resident labor union, for tortious destruction of plaintiff's manufacturing plant in Hillsboro, North Carolina. Service of process was made upon the Secretary of State pursuant to G.S. § 1-97 (6)[16] on the premise that the nonresident union was "doing business in North Carolina." There was evidence that one Shapiro and others had been actively engaged in soliciting membership and otherwise attempting to organize plaintiff's employees into a local of defendant union. These activities culminated in a strike by plaintiff's employees who had joined the union.[17] During the course of the strike, the union filed unfair labor practice charges against the plaintiff with the National Labor Relations Board. The Court held that the filing of unfair labor practice charges by the union amounted to a ratification of Shapiro's acts and conduct in North Carolina; that Shapiro was at all times acting as the representative of the union; and therefore, the union was "doing business in North Carolina" for purposes of valid service of process upon the Secretary of State.

Jocie Motor Lines v. International Brotherhood of Teamsters[18]

[15] 258 N.C. 353, 128 S.E.2d 835 (1963). This case is discussed in AGENCY, *Proof of Agency—Ratification, supra;* TRIAL PRACTICE, *Process—Waiver of Immunity, infra.*

[16] This statute provides that service of process may be made on a non-resident unincorporated association or organization doing business in this state by serving such process on the Secretary of State. N.C. GEN. STAT. § 1-97(6) (1953).

[17] There was further evidence that the union had financed the strike by renting a house across the street from plaintiff's plant which was used as headquarters for the strikers, and by paying strike benefits in the form of twenty dollars per week plus one meal per day.

[18] 260 N.C. 315, 132 S.E.2d 697 (1963).

involved a suit under section 303 of the Taft-Hartley Act[19] for damages arising out of alleged secondary boycott activities engaged in by locals of the parent union. Various factors such as the control which the International by charter possesses over the locals and the International's financing of the particular boycott activities were held sufficient to justify the conclusion that such activities were authorized by the International union.

In comparing these two cases, it is noteworthy that different requirements exist for proving agency under section 303 than may exist in proving agency for some other purpose. For example, *Reverie Lingerie* was decided by application of common law agency principles, the union's subsequent ratification of Shapiro's acts being the basis for the determination that Shapiro was at all times the agent of the union. On the other hand, section 303(b) subjects actions brought under its provisions to the "limitations and provisions" of section 301. Section 301(e) provides:

> For purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.[20]

Section 301(e) is operative in damage suits arising out of secondary boycott activities[21] and is apparently designed to obviate the strictures of the common law with respect to proving agency.[22] Thus, it should be somewhat easier to impose vicarious liability on the parent for the local's activities.

MUNICIPAL CORPORATIONS

Interpretation of Municipal Powers

In *State v. Byrd*,[1] the Court struck down another Raleigh ordinance prohibiting the sale of ice cream along the city streets by

[19] Labor Management Relations Act, 1947 (Taft-Hartley Act) § 303, 61 Stat. 158 (1947), 29 U.S.C. § 187 (1958), as amended, 73 Stat. 545 (1959), 29 U.S.C. § 187 (Supp. I, 1963).

[20] Labor Management Relations Act, 1947 (Taft-Hartley Act) § 301(e), 61 Stat. 156 (1947), 29 U.S.C. § 185(e) (1958).

[21] See Schatte v. International Alliance of Theatrical Stage Employees, 84 F. Supp. 669 (D.C. Cal. 1949), *aff'd*, 182 F.2d 158 (9th Cir. 1950), *cert denied*, 340 U.S. 827 (1950).

[22] See 1947 U.S. Code Cong. & Ad. News 1172.

[1] 259 N.C. 141, 130 S.E.2d 55 (1963).

mobile bell-ringing vendors.[2] The city council had passed the ordinance in the interest of the public safety and general welfare, after considering a number of factors.[3] The defendant was charged with wilfully violating this ordinance; however, the superior court quashed the warrant and the Court affirmed.

The only powers which municipal corporations possess are those expressly conferred by the legislature and those powers necessarily implied from those expressly granted. The question for the Court, therefore, was whether or not the General Assembly had authorized the municipality to pass such an ordinance. Though no such express authority had been given, the city of Raleigh did have express authority to require a license and to levy a tax on vendors;[4] to regulate the use of streets for the public welfare;[5] to regulate vehicular traffic in congested areas;[6] and to abate nuisances.[7] On the other hand, peddling is a lawful business under general state law, and such law contemplates the use of motor vehicles in the pursuit of such an occupation.[8]

From a consideration of these factors, the Court concluded that the municipality had the express power to regulate peddling by licensing and that it had implied power to pass *reasonable regulations* concerning peddling.[9] But there was no power either express or implied to prohibit peddling, since this activity was expressly sanctioned by the General Assembly.

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[2] The Court previously struck down a Raleigh ordinance in Tastee-Freeze, Inc. v. City of Raleigh, 256 N.C. 208, 123 S.E.2d 632 (1962).

[3] These factors included: the danger to the public, especially to children; the obstruction of traffic; and the nuisance to the peace and quiet of the community caused by the constant ringing of the vendors' chimes and bells. 259 N.C. at 43, 130 S.E.2d at 57.

[4] N.C. GEN. STAT. § 105-53(g) (1958).

[5] N.C. GEN. STAT. § 160-200 (1952), as amended, N.C. GEN. STAT. § 160-200 (Supp. 1963).

[6] *Ibid.*

[7] *Ibid.*

[8] N.C. GEN. STAT. § 105-53 (1958).

[9] "We express no opinion as to whether a regulatory ordinance, otherwise reasonable in all respects would be invalid if it applied only to the sale or offering for sale of *ice cream products* from mobile units." 259 N.C. at 148, 130 S.E.2d at 60.

MUNICIPAL IMMUNITY

In *Guilford Realty & Ins. Co. v. Blythe Bros. Co.*,[10] the defendant undertook to build sewers for a municipality. When the use of explosives in this undertaking allegedly damaged his property, plaintiff brought suit. The contractor argued that the city's immunity extended to it, in that it was exercising a governmental function on behalf of the city. The Court stated that arguments as to governmental immunity were inapposite due to the fact the blasting was a nuisance and there is no immunity where a municipality maintains a nuisance. Since the city had no immunity, the defendant could claim no protection.[11]

URBAN REDEVELOPMENT

In *Redevelopment Comm'n v. Hagins*,[12] the Court struck down a municipality's petition in a condemnation proceeding which was incident to a redevelopment plan. The Court based its decision on the municipality's failure to allege facts showing compliance with the statutory requirements for carrying out such a plan,[13] and reserved opinion on whether expenses incurred in an urban redevelopment plan were for a necessary purpose within the meaning of the North Carolina Constitution.[14]

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[10] 260 N.C. 69, 131 S.E.2d 900 (1963). This case is discussed in EMINENT DOMAIN, *supra* and TORTS, *Absolute Liability, infra.*

[11] The damages resulting from such a nuisance, however, are regarded as a taking of private property for a public use, and just compensation must be paid. The Court indicated that the public taking might render the municipality the *only* party liable, and therefore the contractor might escape liability on this theory. Moore v. Clark, 235 N.C. 364, 70 S.E.2d 182 (1952), had indicated that a contractor was not liable for the non-negligent performance of a governmental contract in strict conformity with the government's plans and under the direction of the government's engineers. Whether the defendant might have this defense did not appear from the record, in that the terms of the contract and its execution were not specified.

[12] 258 N.C. 220, 128 S.E.2d 391 (1962). This case is discussed in CIVIL PROCEDURE (PLEADING AND PARTIES), *Joinder of Parties and Causes of Action, supra* and EMINENT DOMAIN, *supra.*

[13] The Court noted that article 37 of chapter 160 of the General Statutes sets out these requirements: "Among the requisites are: a properly approved redevelopment plan showing the boundaries of the area, existing uses, proposed uses, population density, proposed changes in zoning ordinances, street layouts, a feasible plan for the relocation of displaced families, and '... a statement of the estimated cost and method of financing of acquisition of the redevelopment area, and of all other costs necessary to prepare the area for redevelopment.'" 258 N.C. at 224, 128 S.E.2d at 394.

[14] N.C. CONST. art. 7, § 7. The Court had previously determined that the

The answer to this question, however, followed shortly in *Horton v. Redevelopment Comm'n*,[15] where the subject of litigation was the following provision of the Constitution:[16]

> No... municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless approved by a majority of those who shall vote thereon in any election held for such purposes.[17]

In the *Horton* case, certain taxpayers of the municipality brought an action to restrain the city from contracting any debts, lending any credit, collecting any taxes, or using any funds for the purpose of carrying out a specified urban renewal plan. Plaintiffs claimed that the carrying out of this plan was not a necessary expense within the meaning of the State Constitution and that no action could be taken with respect to such plan until this plan had been approved by a majority vote in an election held by the municipality on the desirability of the plan. A demurrer to the complaint was sustained, but the Court reversed.

There was no question as to whether the municipality had the power to provide for the redevelopment of an area. This power had been specifically granted by statute.[18] The problem involved was the fact that this statute did not require a vote of the people for the approval of such expenditures. The Court reiterated its doctrine that the determination of whether an expense is necessary within the meaning of the Constitution is not a matter for the legislature to decide. Only the Court has the authority to decide on "necessity," and thereby determine whether there must be a vote of the people before any expense can be incurred. Since the Court decided that the expense in question was not a necessary one, any statutory authorization

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expenses of such an undertaking met the "public purpose" test. Redevelopment Comm'n of Greensboro v. Security Nat'l Bank, 252 N.C. 595, 114 S.E.2d 688 (1960).

[15] 259 N.C. 605, 131 S.E.2d 464 (1963).

[16] This provision has been and will be a constant breeding ground for litigation. For a discussion of many of the cases involving the provision, see, *e.g.*, Coates and Mitchell, *"Necessary Expenses,"* 18 N.C.L. REV. 93 (1940). See also Coates, *Green v. Kitchin*, 27 N.C.L. REV. 500, 519-28 (1949); 30 N.C.L. REV. 313 (1952).

[17] N.C. CONST. art. 7, § 7.

[18] N.C. GEN. STAT. §§ 160-454 to -474 (1952), as amended, N.C. GEN. STAT. §§ 160-455.1 to -474.1 (Supp. 1963).

which did not require a vote of the people was necessarily unconstitutional.

The judicial tests which have been contrived to determine what constitutes a "necessary expense" are, at best, unwieldy. Perhaps this is due to the desirability of a flexible standard in an area where the responsibilities of local government are ever changing. The judicial tests and the holding of the Court are well put by Justice Parker:

> [T]he expenses incurred, or to be incurred, by a municipality in putting into effect an urban redevelopment plan, pursuant to the authority vested in it by our Urban Redevelopment Law, are not expenses incurred, or to be incurred, by a municipality in the maintenance of public peace or administration of justice, do not partake of a governmental nature, and do not purport to be an exercise by a municipality of a portion of the State's delegated sovereignty, and consequently are not "necessary expenses" within the purview of the... North Carolina Constitution.[19]

Thus for the first time in North Carolina there is a clear holding that urban redevelopment expenses are not "necessary" within the meaning of the Constitution.

ZONING

Staley v. City of Winston-Salem[20] involved the non-conforming use provisions of a local zoning ordinance. At the time this ordinance was passed, petitioner was: (1) Operating a restaurant; and (2) Selling beer and wine. Under this ordinance, both of these were non-conforming uses, and the ordinance prevented the resumption of any non-conforming use which had been vacated for a two year period. After the petitioner had stopped selling beer and wine for a period of over two years, he resumed such sales. Suit was initiated to determine whether the ordinance caused petitioner to forfeit his right to sell. The Court held that the ordinance could not have this effect. The determination of whether beer or wine may be sold in a restaurant is a matter resting by statute[21] with the State Board of Alcoholic Control. To allow the local ordinance to prohibit such sale would be in direct conflict with this statute, and

[19] 259 N.C. at 611, 131 S.E.2d at 468.
[20] 258 N.C. 244, 128 S.E.2d 604 (1962).
[21] N.C. GEN. STAT. § 18-109 (1953).

the rule is that a local ordinance cannot have this effect.[22] The Court referred to the historical problems which the legislature had faced concerning the sale of alcoholic beverages and pointed out that these problems had been resolved by putting the matter under the control of a statewide agency. An ordinance could not set this policy at naught.

In re Markham[23] involved attempts by a property owner to amend a local zoning ordinance in order to have certain properties reclassified from residential to commercial usage. Petitioner twice appeared before the City Planning and Zoning Commission, but each time the request was denied. She then obtained a public hearing before the city council, but this resulted in the request being denied again. Subsequently, on petitioner's application, the superior court issued a writ of certiorari to review the city council's action. The city moved to dismiss on the ground that certiorari was not a proper means of acquiring jurisdiction to review a city council's actions. The motion was denied, but this denial was held to be error on appeal. The Court pointed out that when a city council acts with respect to the amending of a zoning ordinance, the action which it takes is purely *legislative* in nature. With this factor in mind, it was obvious that a writ of certiorari could not be used to review those actions, because such a writ lies only to review actions which are judicial or quasi-judicial in nature.[24] The Court suggested that petitioner's remedy probably would be to bring an action to declare the zoning ordinance invalid as to his property.[25]

PUBLIC UTILITIES

FRANCHISES

In *State ex rel. Util. Comm'n v. Forbes Transfer Co.*,[1] a carrier purchased additional operating rights, which purchase was approved

[22] A local ordinance cannot override statutes which apply to the entire state. Davis v. City of Charlotte, 242 N.C. 670, 89 S.E.2d 406 (1955).

[23] 259 N.C. 566, 131 S.E.2d 329 (1963).

[24] *Accord,* State *ex rel.* Croy v. City of Raytown, 289 S.W.2d 153 (Mo. App. 1956); Edward H. Snow Constr. Co. v. City of Albuquerque, 65 N.M. 133, 333 P.2d 877 (1958); Lang v. Town Council, 82 R.I. 361, 108 A.2d 166 (1954); Dunbar v. City of Spartanburg, 226 S.C. 360, 85 S.E.2d 281 (1954).

[25] For an illustration of such an action, see, *e.g.*, Penny v. City of Durham, 249 N.C. 596, 107 S.E.2d 72 (1959).

[1] 259 N.C. 688, 131 S.E.2d 452 (1963).

by the Commission. Subsequently, the Commission issued a rule that "no carrier acquiring operating authority... after the effective date of this rule shall tack or join such authority to an authority already held by said carrier without the written consent of the Commission."[2] When the carrier attempted to tack the additional operating authority, the Commission issued a cease and desist order. The superior court upheld the order, but the Supreme Court reversed, reasoning that no restrictions had been imposed by the Commission when it approved the purchase of the additional operating rights, nor was the Commission's rule in effect at that time.

In *State ex rel. Util. Comm'n v Ryder Tank Lines,*[3] the Utilities Commission granted a certificate authorizing the applicant carrier to transport by irregular routes caustic soda and molten sulphur in tank vehicles from Wilmington, N.C. and points within a radius of twenty-five miles from Wilmington to all points in North Carolina. Protestants were other carriers having authority under their certificates to transport such commodities, along with others, but these carriers were based at places distant from Wilmington. The Court, in upholding the Commission's order granting the certificate, pointed to evidence that there was no existing carrier of such commodities based in Wilmington; that there were at that place large storage facilities for these commodities which were needed in the manufacture of textiles, paper and fertilizer; and that having trucks available in Wilmington would make it unnecessary for manufacturers to maintain a large inventory of these chemicals. The Court concluded that there was substantial evidence of convenience and need and stated that what constitutes "convenience and necessity" is primarily an administrative question. Courts will not reverse an administrative agency's exercise of discretionary power except for capricious, unreasonable or arbitrary action, or disregard of law.[4]

Similar reasoning was used in the decision of *State ex rel. Util. Comm'n v. Carolina Coach Co.*[5] This was a three-way contest over bus routes from Raleigh to Charlotte by way of the newly improved

[2] *Id.* at 691, 131 S.E.2d at 455.
[3] 259 N.C. 363, 130 S.E.2d 663 (1963).
[4] See, *e.g.*, State *ex rel.* Util. Comm'n v. Ray, 236 N.C. 692, 73 S.E.2d 870 (1953); State *ex rel.* Util. Comm'n v. Great Southern Trucking Co., 223 N.C. 687, 28 S.E.2d 201 (1943).
[5] 260 N.C. 43, 132 S.E.2d 249 (1963).

segment of Highway 49. The route in question was from Raleigh to Asheboro via Highway 64 and from Asheboro to Charlotte on Highway 49. Prior to the proceedings, Carolina Coach Company (Carolina) had service between the two cities on two different routes, one by way of Greensboro and another by way of Sanford. The Greyhound Corporation (Greyhound) had service by way of Pittsboro, Asheboro, Winston-Salem, and Statesville. The Queen City Coach Company (Queen City) was operating between Charlotte and Asheboro over Highways 49 and 29.

Greyhound's application for service over the desired route was granted, with closed-door service over the portion of Highway 49 served by Queen City. Carolina's application was also granted, with closed-door service as to intermediate points over the entire route.

Carolina and Queen City appealed the granting of the franchise to Greyhound, arguing that the Commission's findings of fact were not supported by competent, material, and substantial evidence in view of the entire record. The Court reviewed the evidence and concluded that it sufficiently met these standards. It was admitted that a public need for the services existed; however, Carolina and Queen City argued that the grant to Greyhound would impair their financial position and ability to serve the public and that, therefore, it would not be in the public interest to give the franchise to Greyhound. Both arguments were rejected. Queen City's position would be damaged little, since Greyhound's operations were closed-door over the Queen City route. The Court recognized that Carolina's position would be affected, but the fact that Carolina would also have operating rights over the same route would tend to minimize the competitive effect. The Commission's order was also supported by the fact that Greyhound already had operating rights over a portion of the new route (Asheboro to Raleigh). The Court stressed that what constitutes "public convenience and necessity" requires consideration of such imponderables as whether there is a substantial need for the service; whether this need can be met by existing carriers; and whether it would jeopardize the operations of existing carriers. Moreover, the Commission's determination of this matter is prima facie just and reasonable.

Greyhound protested the grant of operating rights to Carolina. The Court felt that Greyhound was in a poor position to object since

Carolina historically had the route from Charlotte to Raleigh. To deny Carolina the new route would prejudice it greatly, since the revenue from the Charlotte to Raleigh operations largely supported its other activities.

Another aspect of the case was that before the proceedings were initiated Greyhound had entered into a lease agreement with Carolina whereby Greyhound had agreed not to compete with Carolina for intrastate traffic moving between Raleigh and Charlotte. This agreement had been approved by the Commission. Carolina attempted to use this as a bar to Greyhound's petition; however, this was rejected. Contracts between public utilities, when approved by the Commission, become, in effect, orders of the Commission; and the Commission can alter its orders in the interest of public convenience and necessity.[6] Of course such alteration must be due to some change in the circumstances which would justify it in the interest of the public.[7]

Concerning the lease agreement, Greyhound petitioned for a franchise to replace the operating rights which it had under the lease. The Commission granted the franchise on the ground that the lease did not promote harmony between the carriers. The Supreme Court reversed, stating that a voluntary lease was more conducive to harmony than a Commission's order to the same effect. Moreover, no change of conditions was found which justified a recission of the Commission's prior approval of the lease.

In *State ex rel. Util. Comm'n v. Haywood Elec. Membership Corp.*,[8] Duke Power Company (Duke) and Nantahala Power and Light Company (Nantahala) sought approval of a contract whereby Nantahala would sell its distribution system and some of its hydroelectric generating plants to Duke. Nantahala also sought authorization to abandon service to the public. Customers, including an electric membership corporation, several municipalities and two counties, intervened in opposition to the application. The Commission granted the application but the Supreme Court remanded the case to the Commission because it had failed to find facts essential

[6] N.C. GEN. STAT. § 62-26.5 (1960).

[7] *Accord,* Chicago Housing Authority v. Illinois Commerce Comm'n, 20 Ill. 2d 37, 169 N.E.2d 268 (1960); Central Northwest Business Men's Ass'n v. Illinois Commerce Comm'n, 337 Ill. 149, 168 N.E. 890 (1929).

[8] 260 N.C. 59, 131 S.E.2d 865 (1963).

to a determination of the rights of the parties[9] and because it might have misinterpreted the law.

The Commission had found that the use of electricity by Nantahala's public utility customers[10] had been increasing, that Nantahala estimated that after 1965 it would not have sufficient generating facilities to produce sufficient dependable power to supply the needs of its public utility customers, and that Nantahala's studies showed that the cost of additional hydroelectric generating facilities would be greater than economically feasible. The Commission had also found that Duke could supply the area economically and at reasonable rates.

The Court stated that the finding that the cost of additional necessary facilities "would be greater than economically feasible" was a mere conclusion. The Court pointed to evidence that at one of the sites available to Nantahala for further hydroelectric development it would cost an estimated 13.3 mills per kw. to produce electricity compared to Nantahala's present cost of 7.8 mills and Duke's cost of 12.138 mills. But although the cost of this site would be greater than Duke's, still the cost at Nantahala's present plants and at the new site seemingly would average less than ten mills, which is lower than Duke's cost. The Court added that the Commission neither interpreted nor made findings based on this evidence.

The Court also pointed out that there was nothing in the Commission's findings concerning other sources of power which the evidence indicated might be available to Nantahala.

The Court stated that when a corporation accepts a state's grant of authority to acquire property for use in serving the public and subsequently seeks to be relieved of its obligation to serve, it must establish either that the public no longer needs these services or that there is no reasonable probability of its being able to realize sufficient revenue to meet expenses.[11]

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[9] N.C. GEN. STAT. § 62-26.3 (1960).

[10] Nantahala's principal customer was its parent company, Aluminum Company of America.

[11] N.C. GEN. STAT. § 62-118 (Supp. 1963), which is effective January 1, 1964. Prior to the enactment of the Public Utilities Act of 1963, this section was codified in N.C. GEN. STAT. § 62-96 (1960). See N.C. Sess. Laws 1963, ch. 1165, § 1.

RATE CASES

In *State ex rel. Util. Comm'n v. Tidewater Natural Gas Co.*,[12] the petitioner sought permission to raise its rates, and the request was granted. One customer excepted to this ruling on the ground that the new rates discriminated against it. The Court held that the exception was untimely because it was not the proper subject for a general rate case, rather it should be brought in a complaint case.[13] In a general rate case, the Commission is not required to go into the aspects of how the increase will affect such customer. The Court said that the crucial question is what is a fair rate of return on the company's investment so as to enable it to pay a fair profit to its shareholders and to maintain and expand its facilities and services in accordance with the reasonable needs of its customers.[14]

Another customer objected to the rate increase because of the denial of a request for more detailed evidence of the original cost of the utility's property, its trended cost, the replacement cost, the manner of computing depreciation, a detailed showing concerning the portion of the rate base allocated to the transmission system and the portion allocated to the distribution system, and other information with respect to the utility's income. The Court affirmed the denial of this request, stating that the Commission could have taken more evidence if it wished, but that it was not obligated to do so. Moreover, since the utility had already provided sufficient evidence to justify a rate increase, it would be unreasonable to force the company to incur the additional expenses of more extensive cost studies, which could not have affected the result.

Intrastate rate increases were sought by certain railroads in *State ex rel. Util. Comm'n v. Champion Papers.*[15] After the hearing, the Commission found that the railroads' formula for the

[12] 259 N.C. 558, 131 S.E.2d 303 (1963).

[13] See State *ex rel.* Util. Comm'n v. Carolina Power & Light Co., 250 N.C. 421, 109 S.E.2d 253 (1959), for a discussion of when a proceeding will be determined in a complaint case rather than a general rate case. This case is discussed in *Seventh Annual Survey of Case Law*, 38 N.C.L. REV. 506, 580-81. See also State *ex rel.* Util. Comm'n v. Carolinas Committee for Industrial Power Rates, 257 N.C. 560, 126 S.E.2d 325 (1962), where the Court held that the Commission properly limited its hearing to a complaint proceeding.

[14] A provision for the fixing of rates in a general rate case was made in the Public Utilities Act of 1963. N.C. GEN. STAT. § 62-133 (Supp. 1963).

[15] 259 N.C. 449, 130 S.E.2d 890 (1963).

separation of intrastate and interstate operations was insufficient as a basis for a rate adjustment; however, the Commission allowed a rate increase on other evidence. After the Commission's order was made, the Commission on its own motion held a further hearing, and the railroads' formula for separation of intrastate and interstate operations was accepted. The Commission found it had been used by the Interstate Commerce Commission and in some states. The Commission then struck out its previous findings that the railroads had failed to produce a sufficient formula. On appeal by an intervenor, the Court held, *inter alia,* that the Commission did not exceed its authority by changing the record after it had reopened the proceedings. The specific statutory authority[16] to reopen the proceedings necessarily implied the authority to make changes in the original record.

Faced with conflicting evidence as to the proper formula for separating intrastate from interstate operations, the Court stated that such conflicts are to be resolved by the Commission. Their determination is binding on the Courts if, as here, it is supported by competent, material, and substantial evidence in view of the entire record.

In *State ex rel. Util. Comm'n v. Western Carolina Tel. Co.,*[17] a telephone company petitioned the Utilities Commission for an increase in its rates. The Commission permitted the increase to become effective March 1, 1962, upon the company's agreement to refund to customers any amounts in excess of the rates ultimately determined by the Commission. Thereafter some of the customers filed a protest to the proposed increase and also moved to dismiss the company's application on the ground that the company intended to sell some of its exchanges and had been authorized to do so. The Commission denied the motion to dismiss and heard the company's petition for a rate increase on the merits. Later, however, it did dismiss the petition because at the time it was made the company intended thereafter to convey some of its exchanges to a subsidiary. When the petition was dismissed, the company already had conveyed the exchanges with the approval of the Commission in June, 1962. The Supreme Court held that the dismissal was invalid

[16] N.C. GEN. STAT. § 62-26.4 (1960).
[17] 260 N.C. 369, 132 S.E.2d 873 (1963).

because the company was entitled to have the commission fix lawful rates as of March 1, 1962, since that would determine what, if anything, the company had thereafter collected in excess of the lawful rates. The Commission could not, when determining valid rates as of March 1, consider what had occurred subsequently, that is, the conveyance of some of the exchanges. The change might warrant fixing new rates, but they would relate to the time the change occurred.

REAL PROPERTY

Adverse Possession

In *International Paper Co. v. Jacobs*,[1] an action for trespass to try title, the defendants claimed title to the specific area in dispute by twenty years adverse possession. The Court held that the successive possessions of the spouse of an heir and the ancestor of the heir could be tacked to provide the continuity of physical possession necessary to establish title by adverse possession. This would appear to be an extension of the former holdings that the requirement of privity is satisfied by the successive possession of an ancestor and his heirs.[2]

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[1] 258 N.C. 439, 128 S.E.2d 818 (1963).

[2] The following relationships have been held to meet the requirement of privity: An intestate and his heirs, Barrett v. Brewer, 153 N.C. 547, 69 S.E. 614 (1910); husband and his wife claiming homestead, Atwell v. Shook, 133 N.C. 387, 45 S.E. 777 (1903); husband and wife claiming dower, Jacobs v. Williams, 173 N.C. 276, 91 S.E. 951 (1917); wife and husband claiming curtesy consummate, Stockton v. Maney, 212 N.C. 231, 193 S.E. 137 (1937); landlord and tenant, Alexander v. Gibbon, 118 N.C. 796, 24 S.E. 748 (1896). Prior to the enactment of G.S. § 1-35 in 1868, North Carolina allowed tacking between persons not in privity to establish the requisite period in actions against the state. Price v. Jackson, 91 N.C. 11 (1884). A few states allow tacking between any persons, without any requirement of privity whatsoever. See generally 3 American Law of Property § 15.10 (1952); 6 Powell, Real Property § 1021 (1958).

Privity may exist by deed, devise or purchase, as well as by descent, and the privity requirement is satisfied by a completely oral inter vivos transmutation of possession. However, our Court refuses to allow a grantee to tack to his own the adverse possession of his grantor of a strip of land not within the description of his deed. Jennings v. White, 139 N.C. 23, 51 S.E. 799 (1905). In Newkirk v. Porter, 237 N.C. 115, 74 S.E.2d 235 (1953), it was stated by way of dictum that a grantee who went into the physical possession of a strip not covered in the deed would become an adverse possessor in his own right and not a tenant at will of his grantor but tacking of the preceding adverse possessions of the non-included strip nevertheless would not be allowed. This dictum is in accord with the holding in Blackstock v. Cole, 51

CARTWAYS

A property owner who has no reasonable access to his property may file a petition for a cartway with the clerk[3] if he can show that the use to which he is putting or preparing to put his land complies with G.S. § 136-69. This statute provides in part:

> If any person ... shall be engaged in the cultivation of any land or the cutting and removing of any standing timber ... or taking action preparatory to the operation of any such enterprises, to which there is leading no public road or other adequate means of transportation affording necessary and proper means of ingress thereto and egress therefrom, such person ... may institute a special proceeding as set out in the preceding section, and if it shall be made to appear to the court necessary, reasonable and just that such person shall have a private way to a public road ... over the lands of other persons, the court shall appoint a jury of view ....[4]

The fact that no public road leads to his land is not enough. If he has an easement, a permissive use or a way of necessity over other lands, he is not entitled to a cartway. Once the right has been determined, the mechanics of locating and laying off the cartway is for the jury of view.[5]

There have been two recent cases involving cartways. In *Candler v. Sluder*,[6] the evidence showed that the land of the petitioners was at times leased to hunters, and that there were apple trees, grassland and merchantable timber on the land. Prior to the withdrawal of a permissive use over a road the land had been used for the grazing of cattle. The Court said that the use to which the petitioners were putting or preparing to put the land would have to strictly comply with the statutory provision of G.S. § 136-69,[7] and although hunting was not one of them, the rule of strict construction would not limit the uses to those specified in the statute if there were uses which would meet statutory requirements. Holding that the petitioners were entitled to a cartway, the Court stated that in its broad sense "en-

N.C. 560 (1859), the only North Carolina case in point prior to Jennings v. White, *supra*.

[3] N.C. GEN. STAT. § 136-68 (1958).

[4] N.C. GEN. STAT. § 136-69 (1958).

[5] *Ibid.*

[6] 259 N.C. 62, 130 S.E.2d 1 (1963).

[7] N.C. GEN. STAT. § 136-69 (1958).

gaged in the cultivation of land"[8] would mean the use of the land for raising crops and could include apples or cattle.

In *Weatherington v. Smith*[9] the petitioners' land did not abutt on a road but it was a shorter distance to a neighborhood road than to a public road. The Court said that the actual location of the cartway is for the jury of view, that the Court will determine if it is reasonable and just, but that it is not required that the cartway be laid off to a neighborhood road which is not a public road within the meaning of G.S. § 136-67.[10]

A way of necessity as a matter of right and the finding of a right to a cartway differ materially. When title to an entire tract of land has been in a grantor or testator and a part of it has been conveyed or devised so as to separate it from a public road, there arises by implication in favor of the grantee or devisee, a way of necessity across the other tract to the highway.[11] No compensation is required.[12] The owner of the servient estate may select the location of a way of necessity provided his selection is reasonable with due consideration of the convenience and rights of the owner of the dominent estate.[13] It is a temporary right existing only as long as there is a necessity for it.[14] On the other hand, there is no matter of right to establish a cartway. It is a statutory proceeding[14a] and if such is found to be necessary, reasonable and just, payment of com-

[8] 259 N.C. at 65, 130 S.E.2d at 4.

[9] 259 N.C. 493, 131 S.E.2d 33 (1963).

[10] N.C. GEN. STAT. § 136-67 (1958), provides in part: "All those portions of the public road system of the State which have not been taken over and placed under maintenance or which have been abandoned by the State Highway Commission, but which remain open and in general use as a necessary means of ingress to and egress from the dwelling house of one or more families, ... and all other roads and streets ... outside of the boundaries of any incorporated city or town in the State which serve a public use and as a means of ingress or egress for one or more families ... are hereby declared to be neighborhood public roads ...."

[11] Pritchard v. Scott, 254 N.C. 277, 118 S.E.2d 890 (1961); Smith v. Moore, 254 N.C. 186, 118 S.E.2d 436 (1961); Carver v. Leatherwood, 230 N.C. 96, 52 S.E.2d 1 (1949); 1 MORDECAI'S LAW LECTURES 466 (2d ed. 1916); 3 TIFFANY, REAL PROPERTY § 793 (3d ed. 1939).

[12] Pritchard v. Scott, 254 N.C. 277, 118 S.E.2d 890 (1961).

[13] Pritchard v. Scott, 254 N.C. 277, 282, 283, 118 S.E.2d 890, 895 (1961). Professor Mordecai said, "It is the duty and right of the vendor to select the route; but, if he fails to point it out, the vendee may select; and after selecting it he must stick to it." 1 MORDECAI, *op. cit. supra* note 11, at 466.

[14] Pritchard v. Scott, 254 N.C. 277, 283, 118 S.E.2d 890, 895 (1961).

[14a] N.C. GEN. STAT. §§ 136-67 to -69 (1958).

pensation must be made by the petitioner to the owner of the land across whose land the cartway is laid out by a jury of view appointed by the clerk, as in any condemnation proceeding.

DEEDS—MARRIED WOMEN—HUSBAND'S JOINDER

In *Cruthis v. Steele*,[15] a wife attempted to convey her real property to her children. She was not joined in the deed by her husband.[16] The Court held that since the wife was not joined by her husband, the deed was void, and since there was no consideration for this deed it could not be enforced as a valid contract to convey.[17]

DEEDS—REGISTRATION

A executed a timber deed to *B*. *B* signed and sealed a statement on the back of the timber deed to the effect that he did "hereby transfer this deed in its entirety"[17a] to *C*. *A*'s deed to *B* was recorded with *B*'s endorsement thereon. In *New Home Bldg. Supply Co. v. Nations*,[18] the Court held that the endorsement was sufficient as between the parties to pass title in that it was under seal, containing operative words of conveyance and identified by reference the property conveyed.[19] Since the endorsement had not been acknowledged,

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[15] 259 N.C. 701, 131 S.E.2d 344 (1963).

[16] N.C. CONST. art. X, § 6 has now been amended to eliminate the requirement of the joinder of the husband. N.C. SESS. LAWS 1963, ch. 1209, § 1. This amendment was passed at the last general election held in January, 1964. N.C. SESS. LAWS 1963, ch. 1209, § 4½ provides: "In the event that a majority of the voters in such general election be in favor of the amendments heretofore provided for, North Carolina G.S. 52-4 shall be repealed and said repeal shall be effective on the date the Governor certifies the amendments to the Secretary of State." N.C. GEN. STAT. § 52-4 (1950), was the statutory requirement that the husband's joinder was necessary in his wife's deed of her real property when conveying to persons other than her husband.

[17] Noted in 42 N.C.L. REV. 229 (1963).

[17a] New Home Bldg. Supply Co. v. Nations, 259 N.C. 681, 682, 131 S.E.2d 425, 426 (1963).

[18] 259 N.C. 681, 131 S.E.2d 425 (1963).

[19] A deed must have a grantor, a grantee and a thing conveyed. Powell v. Powell, 168 N.C. 561, 84 S.E. 860 (1915). It must be sealed. Ballard v. Ballard, 230 N.C. 629, 55 S.E.2d 316 (1949). In Tunstall v. Cobb, 109 N.C. 316, 14 S.E. 28 (1891), and in Linker v. Long, 64 N.C. 296 (1870), similar endorsements were used but a seal was not used in either case. It was held in both cases that since a seal was not used, they could not be operative as deeds but if supported by a valuable consideration could be enforced by specific performance. In Thomason v. Bescher, 176 N.C. 622, 626, 97 S.E. 654, 655 (1918), the Court said that in equity causes the Court will usually refuse aid except when there is a valuable consideration. In Cruthis v. Steele, 259 N.C. 701, 131 S.E.2d 344 (1963), the Court held that a void deed

the Court held that there had been no registration which would constitute notice to *B*'s creditors.[20]

It would seem to follow from this case that as the law now stands, a grantor could take the instrument whereby he received title to property, place an adequate endorsement on that deed, sign, seal and acknowledge it, and the "deed" would not only be operative to pass title as between the parties, but when properly registered, constitute notice to third parties.[21]

Dedication of Streets

In *Owens v. Elliott*[22] a tract of land outside the city limits was subdivided into lots and a street was laid off on the ground. A map showing the lots and the street was recorded and lots were sold with reference to the map. Plaintiffs purchased a lot outside the subdivision and built a house facing the opened street. The defendant closed the street. The Court held that the purchasers of a lot located outside the boundaries of the subdivision acquired no right to have the street kept open since the revocable offer to dedicate had not been accepted by the proper public authorities.

The owners of property within a subdivision have a right to have a street kept open as a matter of personal covenant between them and the developer.[23] However, it would seem to follow from this decision that no rights are acquired by members of the public who are outside the subdivision,[24] until such time as there has been an

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could not be enforced as a contract to convey since there was no consideration for the deed.

[20] McClure v. Crow, 196 N.C. 657, 146 S.E. 713 (1929).

[21] N.C. Gen. Stat. § 47-18 (Supp. 1963). The recording of a deed is essential to its validity only as against creditors and purchasers for a valuable consideration. *E.g.*, Ballard v. Ballard, 230 N.C. 629, 55 S.E.2d 316 (1949). No notice is binding upon them except registration of the deed. Dula v. Parsons, 243 N.C. 32, 89 S.E.2d 797 (1955).

[22] 258 N.C. 314, 128 S.E.2d 583 (1962). For a complete discussion of all aspects of this case see 41 N.C.L. Rev. 875 (1963).

[23] Owens v. Elliott, 257 N.C. 250, 125 S.E.2d 589 (1962). In Hughes v. Clark, 134 N.C. 457, 46 S.E. 956 (1904), it was held that where the deeds conveying lots referred to a map, the purchasers rights were not affected by the acceptance or nonacceptance of the dedication.

[24] In Bailliere v. Atlantic Shingle, Cooperage & Veneer Co., 150 N.C. 627, 637, 64 S.E. 754, 758 (1909), the Court said that our decisions were in harmony with the uniform current of the authorities in holding that when lots are sold with reference to a map in which streets are laid out, it constitutes a dedication of the streets to the use of the purchaser *and the public*. In Chesson v. Jordan, 224 N.C. 289, 291, 29 S.E.2d 906, 908 (1944), the modern

acceptance of the street by the proper public authorities. As to those persons who are outside the subdivision, it would be a mere offer to dedicate, and until acceptance by the proper authorities, the owner would have the power of revoking the dedication. According to the decision in this case, this would be true even though such a member of the public has acquired and improved adjoining lands in reliance upon the apparent dedication of the street.[25]

EXECUTION—JUDICIAL SALES

In *Pittsburgh Plate Glass Co. v. Forbes*,[26] *X*, in reliance on statements that the proceeds of an execution sale would be applied in the discharge of prior liens and that he would receive an unencumbered title, bid the market price for the property. On discovering his mistake, he took an assignment of the judgment, withdrew the execution and secured a refund of his deposit by order of the Judge of the Superior Court. All of this was done before confirmation of the sale by the clerk.[27] The Court held that before a sale is confirmed a court of equity has the power to set aside a judicial sale when the price bid is inadequate or excessive, since before confirmation neither the high bidder nor the judgment debtor acquire any rights by virtue of the execution sale.

This does not mean a purchaser would be at liberty to withdraw his bid[28] nor that the doctrine of caveat emptor[29] would not apply,

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view is stated: "According to the current of decisions in this court there can be in this State no public road or highway unless it be one either established by public authorities in a proceeding regularly instituted before the proper tribunal; or one generally used by the public and over which the public authorities have asserted control for the period of twenty years or more; or one dedicated to the public by the owner of the soil with the sanction of the authorities and for the maintenance and operation of which they are responsible."

[25] Many dedications are sustained solely on the ground of estoppel in such a case. 3 AMERICAN, *op cit. supra* note 2, § 12.133.

[26] 258 N.C. 426, 128 S.E.2d 875 (1963). This case is discussed in CREDIT TRANSACTIONS, *Execution Sales, supra.*

[27] N.C. GEN. STAT. § 1-399.67 (1953), provides: "No sale of real property may be consummated until the sale is confirmed by the clerk of the superior court. No order of confirmation may be made until the time for submitting an upset bid, pursuant to G.S. 1-339.65, has expired." The bargain is not complete until the judicial sanction of the Court by confirmation. Miller v. Feezor, 82 N.C. 192 (1880).

[28] In the Matter of Yates, 59 N.C. 213 (1861).

[29] "While the doctrine of caveat emptor applies to purchasers at execution sales, it does not tie the hands of the court to prevent a manifest in-

but only that until the time of the confirmation, the sale would be up for scrutiny by the Court, both in the respect of the adequacy or excessiveness of the bid.[30]

Future Interests—Rule Against Perpetuities

In *Poindexter v. Wachovia Bank & Trust Co.*,[31] *T* left property to the bank as trustee for her son for life, then to his issue, and if he left no issue, then to testatrix's brothers and sisters then living. The Court pointed out that if the word "issue" is used in its strict technical sense it will violate the rule against perpetuities[32] unless something in the context or circumstances show the word "issue" is used in a limited sense as meaning issue living at a date within the rule.[33] In this case the limitation over upon failure of issue was to "my brothers and sisters that is living and have led a sober and good life in every way."[33a] The Court concluded that the testatrix could not have meant an indefinite succession of lineal descendants. Also, a former will indicated that the ultimate disposition of the property should be determined as the time of the death of the son.[34]

The Court made no mention of G.S. § 41-4. This statute pro-

justice not due to the fault or neglect of the purchaser." Pittsburgh Plate Glass Co. v. Forbes, 258 N.C. 426, 429, 128 S.E.2d 875, 878 (1963).

[30] In Harrell v. Blythe, 140 N.C. 415, 416, 53 S.E. 232 (1906), the Court said by way of dictum: "[A] court certainly has the power to set aside a sale made in pursuance of its authority, either for the relief of the owner of the property if the price be inadequate, or for the relief of the purchaser if from mistake or fraud he has been induced to bid too much for the same." In First Carolina's Joint-Stock Land Bank v. Stewart, 208 N.C. 139, 179 S.E. 463 (1935), the Court held that a foreclosure could not be collaterally attacked after confirmation of the sale, and that equitable defenses should have been raised before confirmation by the clerk. In Rorer, Judicial Sales § 1081, at 404 (2d ed. 1878), it is provided: "The court upon whose judgment the execution issues has full power to set aside an execution sale whenever the ends of justice and fair dealing require it, and to order a resale, or award execution anew, at discretion."

[31] 258 N.C. 371, 128 S.E.2d 867 (1963).

[32] Elledge v. Parrish, 224 N.C. 397, 30 S.E.2d 314 (1944); Edmondson v. Leigh, 189 N.C. 196, 126 S.E. 497 (1925); Albright v. Albright, 172 N.C. 351, 90 S.E. 303 (1916).

[33] In Turpin v. Jarrett, 226 N.C. 135, 136, 37 S.E.2d 124, 126 (1946), the Court said that in order "to determine the effectiveness of the limitation over the roll must be called as of the death of the first taker."

[33a] 258 N.C. at 374, 128 S.E.2d at 870.

[34] 258 N.C. at 377, 128 S.E.2d at 872. *Quaere:* Was this proper since they were following the common law rule which says that the contrary intention must appear on the face of the will? This question need not have arisen if G.S. § 41-4 had been applied.

vides that a limitation over on death without issue in a deed or will means without issue living at the death of the first taker, and, therefore, the limitation over is not within the rule against perpetuities unless a contrary intention expressly and plainly appears in the face of the deed or will creating it.[35] The common law rule used by the Court was that the word "issue" meant an indefinite failure of lineal descendants, and, therefore, a limitation over to issue was void for remoteness, unless a contrary intention appeared on the face of the deed or will being construed.[36] Application of G.S. § 41-4 would have made such a finding unnecessary. The statute cured the defect in the common law[37] and established a new rule of construction.[38] If the Court had applied this statute it would have made the limitation over read to the issue of the first taker living at the time of his death, and, therefore, not void for remoteness, as a contrary intention did not expressly and plainly appear on the face of the will. Not only would application of G.S. § 41-4 have eased the Court's task, its application has been held mandatory although overlooked in some cases.[39]

The Court reiterated the change made in our law as to trusts and the rule against perpetuities.[40] It was formerly held by the Court that in order for a trust for private purposes not to fall under the rule against perpetuities, it must terminate within twenty-one years and ten lunar months after a life or lives in being at the time

[35] N.C. GEN. STAT. § 41-4 (1950), provides: "Every contingent limitation in any deed or will, made to depend upon the dying of any person without heir or heirs of the body, or without issue or issues of the body, or without children, or offspring, or descendant, or other relative, shall be held and interpreted a limitation to take effect when such person dies not having such heir, or issue, or child, or offspring, or descendant, or other relative (as the case may be) living at the time of his death, or born to him within ten lunar months thereafter, unless the intention of such limitation be otherwise, and expressly and plainly declared in the face of the deed or will creating it...."

[36] Cabarrus Bank & Trust Co. v. Finlayson, 286 F.2d 251 (4th Cir. 1961).

[37] *Id.* at 253.

[38] *Id.* at 255.

[39] Patterson v. McCormick, 177 N.C. 448, 99 S.E. 401 (1919), held that this rule is obligatory on the courts and must be observed in all cases. The rule has not been applied in some cases, *e.g.*, Elledge v. Parrish, 224 N.C. 397, 30 S.E.2d 314 (1944); Edmondson v. Leigh, 189 N.C. 196, 126 S.E. 497 (1925). The Court said in Cabarrus Bank & Trust Co. v. Finlayson, 286 F.2d 251, 255 (4th Cir. 1961), that the most recent decision applying the rule before the Cabarrus case was House v. House, 231 N.C. 218, 56 S.E.2d 695 (1949).

[40] 258 N.C. at 378, 128 S.E.2d at 873.

of the creation of the trust.[41] The principle now is that as long as the estates will vest in interest within the rule, the length of the trust will be immaterial.[42]

PARTITION

In *Allen v. Allen*,[43] commissioners appointed by the clerk[43a] made an actual partition of a trust of land owned by the parties as tenants in common, in pursuant to G.S. 46-10.[44] Their report was affirmed by the clerk and an appeal was taken to the Superior Court where the trial judge set aside the report and made a new division by altering the boundary lines.

The Court held that the judge could make only such order as could be made by the clerk[45] and since the clerk could not make the

[41] Mercer v. Mercer, 230 N.C. 101, 52 S.E.2d 229 (1949); American Trust Co. v. Williamson, 228 N.C. 458, 46 S.E.2d 104 (1948); Springs v. Hopkins, 171 N.C. 486, 88 S.E. 774 (1916); GRAY, RULE AGAINST PERPETUITIES § 201 (4th ed. 1942).

[42] Finch v. Honeycutt, 246 N.C. 91, 97 S.E.2d 478 (1957); McQueen v. Branch Banking & Trust Co., 234 N.C. 737, 68 S.E.2d 831 (1952).

In the course of its opinion, the Court used the statement: "A vested estate is transmittable, a contingent estate is not." 258 N.C. at 376-77, 128 S.E.2d at 872. It appears that this is rather broad statement which would not be true in all cases. A contingent estate is devisable or transmissable unless survivorship is a condition precedent to the vesting of the estate. In Seawell v. Cheshire, 241 N.C. 629, 86 S.E.2d 256 (1955), the Court said that where the estate is not dependent upon their surviving the first taker, the contingent remaindermen take a transmissible estate, and upon the death of the contingent remaindermen prior to the death of the first taker without children then surviving, the estate goes to the heirs, next of kin and successors of interest of the contingent remaindermen. Pearson, C.J., said in Mastin v. Marlow, 65 N.C. 695, 703 (1871): "[A] contingent remainder ... is transmissible by descent ... and ... it may be devised ...." In SMITH, REAL PROPERTY SURVEY 146 (1956), it is stated that both vested and contingent remainders are descendible and devisable. A possibility of reverter, power of termination, contingent remainder and an executory interest are descendible and devisable. *Id.* at 153. "Of course, no interest is alienable except by one identifiable and qualified to convey." *Id.* at 154. In MOYNIHAN, REAL PROPERTY § 23 at 137 (1962), it is said: "The courts agree that contingent remainders are releasable, and they are devisable and descendible subject to the contingency inhering in the interest."

[43] 258 N.C. 305, 128 S.E.2d 385 (1962).

[43a] N.C. GEN. STAT. § 46-1 (1950), provides that a partition of lands held by tenants in common shall be made by virtue of a special proceeding. N.C. GEN. STAT. § 46-7 (1950), provides: "The superior court shall appoint three disinterested commissioners to divide and apportion such real estate ...."

[44] N.C. GEN. STAT. § 46-10 (1950), provides: "The commissioners ... must meet on the premises and partition the same among the tenants, according to their respective rights and interests therein, by dividing the land into equal shares in point of value as nearly as possible ...."

[45] When a civil action or special proceeding instituted before the clerk is

partition himself,[46] the judge could not do so as it was within the sole province of the commissioners.[47]

SURFACE WATERS

P owned two lots at Nags Head. *D* built an elevated highway between *P*'s property and the sound which acted as a dam obstructing the flow of water which came over the dunes lines in times of storms from going on into the sound. The water thus blocked by the highway inundated *P*'s property. The Court held in *Midgett v. North Carolina State Highway Comm'n*,[48] that although no cases could be found involving overflow waters from an ocean, sea or gulf, despite an exhaustive search, the same principles which apply to surface waters from inland streams should apply.

It is a well established principle of law in North Carolina[49] that where tracts join each other, the lower tracts are burdened with an easement to receive the surface waters flowing naturally from the upper tracts, but the owner of an upper tract cannot divert the water so as to cause it to flow onto lower land in a different manner or in a different place from which it would naturally flow.[50]

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sent to the superior court, the judge has the authority to consider and determine the matter as if *originally before him.* N.C. GEN. STAT. § 1-276 (1953). Woody v. Barnett, 235 N.C. 73, 68 S.E.2d 810 (1952); Plemmons v. Cutshall, 230 N.C. 595, 55 S.E.2d 74 (1949).

[46] In the case of Langley v. Langley, 236 N.C. 184, 185, 72 S.E.2d 235, 236 (1952), the Court said: "While in a partition proceeding... the clerk may (1) recommit the report for correction or further consideration, or (2) vacate the report and direct a reappraisal by the same commissioners, or (3) vacate the report, discharge the commissioners, and appoint new commissioners to view the premises and make partition thereof, he is without authority to alter the report filed either *by changing the division lines* or by enlarging or decreasing the owelty charge assessed by the commissioners." (Emphasis added.)

[47] In Skinner v. Carter, 108 N.C. 106, 12 S.E. 908 (1891), the Court pointed out that the *commissioners* were to make the divisions, but if in the opinion of the clerk or the judge, the report was not fair or equitable, it could be set aside with directions either that the commissioners make a re-allotment or that other commissioners be appointed to do so.

[48] 260 N.C. 241, 132 S.E.2d 599 (1963). This case is discussed in EMINENT DOMAIN, *supra.*

[49] North Carolina follows the civil-law rule and has not recognized and does not apply the common-enemy doctrine with reference to surface waters. The common-enemy doctrine, in its strict application is that surface waters are a common enemy and any landowner has an unqualified right by operations on his own land to fend off surface waters as he sees fit without regard to the consequences to other landowners. Midgett v. North Carolina State Highway Comm'n, 260 N.C. 241, 245, 132 S.E.2d 599, 603-04 (1963).

[50] Chappell v. Winslow, 258 N.C. 617, 129 S.E.2d 101 (1963); Braswell

The Court would seem to be correct in its reasoning that the overflow of ocean waters would become surface waters when they leave the main current in such a way as not to return. It would necessarily follow then, as pointed out by the Court, that the plaintiff, as the owner of an upper estate, would have an easement or servitude in the lower tract for the drainage of this surface water, and would be entitled to have it flow in its natural course and manner without obstruction by the owner of a lower tract.[50a]

TENANCY BY THE ENTIRETY

G.S. §§ 35-14 to -17 provide a method of procedure for the mortgage or sale of estates held by the entireties where one spouse or both are mentally incompetent. If it becomes necessary or desirable for property held by a husband and wife as tenants by the entirety to be mortgaged or sold, the mentally competent spouse and/or the guardian of the mentally incompetent spouse may file a petition with the clerk of the superior court.[51] The clerk is given by statute the power to authorize the execution of a mortgage, deed of trust, deed or other conveyance of such property if he finds the same is necessary or to the best advantage of the parties, and not prejudicial to the interest of the mentally incompetent spouse.[52] Any instrument executed under such authority would be valid to the same extent as if both husband and wife were mentally capable of executing a conveyance.[53] G.S. § 35-17 provides that "it shall be competent for the court, in its discretion, to direct the application of funds arising from a sale or mortgage of such property in such manner as may appear necessary or expedient for the protection of the interest of the mentally incompetent spouse."[54]

In *Perry v. Jolly*[55] petitioner instituted a special proceeding against his incompetent wife's guardian for the purpose of having the Court authorize a private sale of lands held by him and his wife as tenants by the entirety. The petition alleged that the income from the rental of the property was insufficient to provide for the

v. State Highway & Public Works Comm'n, 250 N.C. 508, 108 S.E.2d 912 (1959).

[50a] 260 N.C. at 247, 132 S.E.2d at 605.

[51] N.C. GEN. STAT. § 35-14 (1950).

[52] *Ibid.*

[53] N.C. GEN. STAT. § 35-16 (1950).

[54] N.C. GEN. STAT. § 35-17 (1950).

[55] 259 N.C. 306, 130 S.E.2d 654 (1963).

expense of his wife's constant care and attention, and for the living expenses of the petitioner. The Clerk of the Superior Court found that the sale would be in the best interest of the incompetent and directed that the proceeds of the sale be paid one-half to petitioner and one-half to the guardian of the incompetent wife. The Supreme Court on its own motion raised the question as to the proceeds of the sale and held that the sale would not destroy or separate the interests of the tenants by the entirety when one of the parties was incompetent, but that the right of survivorship would be transferred to the fund and the husband would hold the corpus as trustee for the survivor.

Tenancy by the entirety originated from the common law when the husband and wife were considered but one person, and each is deemed seised of the whole.[56] The proceeds derived from the sale of land held as a tenancy by the entirety are personalty and belong to the husband and wife as tenants in common rather than with the right of survivorship.[57] However, the Court said in *Perry* that this would only apply when it was a voluntary sale by both parties. *Quaere:* Would the test of "voluntariness" have any real relevance to this situation wherein the sale can only be had by regular judicial proceeding[58] based upon a judicial finding that it is necessary or to the best interest of the incompetent, so that the guardian in a trust relationship of the highest character[59] acts for someone who is unable to act for himself? If the land is sold in the best interest of the incompetent, then it would seem to follow the Court could in its discretion direct that the fund be used in the best interest of the incompetent. The Court seems to be interpreting the legislative act[60]

[56] Lanier v. Dawes, 255 N.C. 458, 121 S.E.2d 857 (1961); Carter v. Continental Ins. Co., 242 N.C. 578, 89 S.E.2d 122 (1955); Davis v. Bass, 188 N.C. 200, 124 S.E. 566 (1924).

[57] Wilson v. Ervin, 227 N.C. 396, 42 S.E.2d 468 (1947). Our Court has repeatedly held that a tenancy by the entirety may exist only in land and not in personal property of any kind. *E.g.*, Bowling v. Bowling, 243 N.C. 515, 91 S.E.2d 176 (1956); Wilson v. Ervin, 227 N.C. 396, 42 S.E.2d 468 (1947); Winchester-Simmons Co. v. Cutler, 194 N.C. 698, 140 S.E. 622 (1927). See generally, Lee, *Tenancy by the Entirety in North Carolina,* 41 N.C.L. REV. 67 (1962).

[58] N.C. GEN. STAT. §§ 35-14 to -17 (1950); Smith v. Moore, 178 N.C. 370, 100 S.E. 702 (1919).

[59] Owens v. Hines, 227 N.C. 236, 41 S.E.2d 739 (1947); Adams v. Adams, 212 N.C. 337, 193 S.E. 661 (1937).

[60] N.C. GEN. STAT. §§ 35-14 to -18 (1950), provide a method of procedure to be followed where one spouse or both are mentally incompetent and it becomes necessary or desirable to mortgage or sell land held by them as tenants

as being ineffective to go the full way and separate the fund from the incidents of survivorship after a sale by judicial proceeding.

It appears that the only changes made by statute relative to the incidents of survivorship are when one spouse murders the other,[61] when it cannot be determined which spouse died first,[62] and when one of the tenants is presumed to be dead and so declared by statutory provision.[63] It may be that additional legislation is needed to specifically provide that a court could in its discretion abolish the rights of survivorship in a fund derived from the sale of a tenancy by the entirety if it was found to be in the best interest of the incompetent.

SALES

Automobiles—Certificates of Title

In Home Indem. Co. v. West Trade Motors, Inc.[1] a used car dealer sold and delivered an automobile to one Bradshaw, who paid for it with money borrowed the same day from Smart Finance Co. The dealer executed an assignment on the reverse side of the title certificate, and Bradshaw executed a purchaser's application for a new certificate of title. By agreement with Bradshaw the dealer delivered these two instruments to Smart Finance Co., which had possession of them at all times hereinafter mentioned. More than a month later Bradshaw, while operating the automobile, was in a collision with one Crockett, who asserts that at the time of the collision title to the automobile was still in the dealer and that therefore the dealer's insurance carrier is liable to him. The Court held that there was no such liability.

The Court noted that under G.S. § 20-73 the burden is on the transferee of a motor vehicle to present the title certificate and make application for a new certificate to the Department of Motor Vehicles within twenty days, and that under G.S. § 20-74[2] when, as in

by the entirety. N.C. Gen. Stat. § 35-17 (1950), provides that the court may direct the application of the funds "in such manner as may appear necessary or expedient for the protection of the interest of the mentally incompetent spouse."

[61] N.C. Gen. Stat. § 31A-5 (Supp. 1963).

[62] N.C. Gen. Stat. § 28-161.3 (1950).

[63] N.C. Gen. Stat. § 28-197.1 (Supp. 1963).

[1] 258 N.C. 647, 129 S.E.2d 248 (1962). This case is discussed in Insurance, *Automobile Liability Insurance, supra.*

[2] N.C. Gen. Stat. 20-74 (Supp. 1963), makes it the duty of the purchaser to see that the application for a transfer of title is sent in to the department.

the instant case, the certificate of title is delivered to a lien holder, it is still the duty of the purchaser to see that the certificate is forwarded to the Department. The Court held that these provisions do not prevent title from passing so far as the dealer reselling to a purchaser is concerned. He had complied with the statute by giving the duly endorsed title certificate and Bradshaw's application for a new certificate to Smart Finance Co. There is nothing in the statute, according to the Court, which suggests that the dealer should be penalized and held liable because of the failure of Bradshaw, the buyer, to perform his statutory duty.

WARRANTY

The Court has recently considered a significant case involving warranty in the sale of goods.[4] In *Murray v. Bensen Aircraft Corp.*,[5] plaintiff, a resident of California, purchased an aircraft known as a "gyro-glider" from the defendant-manufacturer, a North Carolina corporation. Plaintiff was injured when the aircraft failed to function properly. This action for damages was instituted alleging negligence in the manufacture and design of the machine, and breach of warranty. The defendant demurred to the complaint. The trial court sustained the demurrer as to the action for breach of warranty, but overruled it as to the action for negligence. The Court affirmed.

Warranty implies a contractual relation between the party making it and the beneficiary of it, and absent privity of contract there can be no recovery for a breach thereof,[6] unless the warrantor addressed the warranty to the ultimate consumer or user.[7] A

[3] The Court in Community Credit Co. v. Norwood, 257 N.C. 87, 90, 125 S.E.2d 369, 371 (1962), stated: "The vesting of title is deferred until the purchaser has the old certificate endorsed to him and makes application for a new certificate." In the instant case, the Court distinguished *Norwood* on the ground that it did not involve rights as between the vendor and vendee of a vehicle.

[4] A second case involving warranty, heard last term, was Perfecting Serv. Co. v. Product Develop. & Sales Co., 259 N.C. 400, 131 S.E.2d 9 (1963), which is discussed under CREDIT TRANSACTIONS, *Warranty—Guaranty, supra.* There are numerous notes in earlier issues of the *North Carolina Law Review* on the subject of warranty. Among the more recent ones are 39 N.C.L. REV. 299 (1961); 39 N.C.L. REV. 86 (1960); and 37 N.C.L. REV. 205 (1959).

[5] 259 N.C. 638, 131 S.E.2d 367 (1963). This case is discussed in CIVIL PROCEDURE (PLEADING AND PARTIES), *Demurrer—Dismissal or Amendment, supra.*

[6] Thomason v. Ballard & Ballard Co., 208 N.C. 1, 179 S.E. 30 (1935).

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

stranger to the contract of warranty may sue the manufacturer only on a theory of negligence.[8]

The plaintiff in the principal case failed to allege where, when and from whom he purchased the gyro-glider. He therefore did not allege contractual privity giving rise to a cause of action in his favor on the warranty. But he may maintain the suit on a theory of negligence.

TAXATION

Apportionment of Tax Burden

In *Cornwell v. Huffman,*[1] the Court was presented with the problem of whether to apportion the estate and inheritance taxes among the properties creating the tax liability. In 1937, Mrs. Cornwell and her mother, Mrs. Huffman, conveyed some stocks and a 5,000 dollar note in trust. The property so transferred was owned one-third by Mrs. Huffman and two-thirds by Mrs. Cornwell. At the time of the conveyance, the properties had a value of 190,000 dollars. The trust agreement provided for a 6,000 dollar annual distribution to Mrs. Huffman from the trust income, and after that distribution, 1,000 dollars of income was to be paid annually to Mrs. Cornwell. If the securities yielded more than 7,000 dollars annually, the next 2,000 dollars was to be divided equally between Mrs. Cornwell and Mrs. Huffman. Any yield in excess of 9,000 dollars was to be invested and added to the principal so as to guarantee Mrs. Huffman an annual income of 6,000 dollars for her life. The principal was not subject to change during the life of Mrs. Huffman, but the income provisions could be modified by unanimous agreement of the grantors and trustees. The trust was to terminate on the death of Mrs. Huffman, and if Mrs. Cornwell was living at that time, she was to become sole owner of the trust property. However, if Mrs. Cornwell died before Mrs. Huffman, the trust property was to be paid to the children of Mrs. Cornwell per capita on the death of Mrs. Huffman.

Mrs. Cornwell died testate before her mother, Mrs. Huffman, and left a probate estate of 790,000 dollars. The date of death value

[8] Caudle v. F. M. Bohannon Tobacco Co., 220 N.C. 105, 16 S.E.2d 680 (1941); Enloe v. Charlotte Coca-Cola Bottling Co., 208 N.C. 305, 180 S.E. 582 (1935). These rules are in accord with the weight of American authority. See Annot., 75 A.L.R. 2d 39 (1961).

[1] 258 N.C. 363, 128 S.E.2d 798 (1963).

of the trust property to be included in her estate for tax purposes was over 2,000,000 dollars. Thus, the probate estate would be exhausted if it was used to pay the taxes.

When Mrs. Cornwell's will was executed, it was uncertain who would survive—Mrs. Cornwell or her mother, Mrs. Huffman—so the testatrix attempted in the will to provide for carrying of the tax burden in either case. The will stipulated that in the event Mrs. Cornwell survived her mother, and the trust properties became hers to pass under the will, then the taxes were to be paid out of the residuary estate; on the other hand, if the mother, Mrs. Huffman, survived Mrs. Cornwell, and the trust property was never subject to Mrs. Cornwell's disposition, the taxes,

> which are levied upon the property passing under this will shall be paid out of my residuary estate as if the property passing under this will constituted my entire estate for the purpose of such taxes, and that all the remainder of such taxes shall be paid out of the principal of the said trust which does not pass under this will.[2]

The Court held that an apportionment of the taxes as directed by the will was proper. Earlier North Carolina cases[3] to the effect the residuary estate is liable for taxes without contribution were distinguished because in the principal case there was an express provision in the will directing an apportionment.

Estate Tax

In *First Nat'l Bank v. Melvin*,[4] the widow dissented from her husband's will. The will provided that all estate and inheritance taxes were to be paid out of the residuary estate. It was held that the widow's one-half share of the net estate was to be estimated before any tax deductions. The Court relied on G.S. § 30-3 (a) which provides:

> Upon dissent... the surviving spouse... shall take the same share of the deceased spouse's real and personal property as if the deceased had died intestate; provided, that if the deceased

[2] 258 N.C. at 366, 128 S.E.2d at 798.

[3] Craig v. Craig, 232 N.C. 729, 62 S.E.2d 336 (1950); Buffaloe v. Barnes, 226 N.C. 313, 38 S.E.2d 222 (1946). In *Craig*, the Court first used the statement, "no contrary testamentary provision appear[ing] in the will" which the Court in the principal case relied on as the distinguishing factor. 232 N.C. at 730, 62 S.E.2d at 336 (1950).

[4] 259 N.C. 255, 130 S.E.2d 387 (1963). This case is discussed in Wills and Administration, *Dissent—Effect on Administration, infra.*

> spouse is not survived by a child or children, or any lineal descendants of a deceased child or children, or by a parent, the surviving spouse shall receive only one half of the deceased spouse's net estate... which one half shall be estimated and determined before any federal estate tax is deducted or paid and shall be free and clear of such tax.[5]

The above statute was passed apparently to overrule the effect of *Wachovia Bank & Trust Co. v. Green*[6] on this point—the *Green* case holding that where a widow dissented from the will, her one-half interest was to be computed after payment of the federal estate tax. In *Green,* as in the principal case, the widow's share was, by intestacy, one-half of the net estate. However, the statute's express terms would not apply in a case in which the surviving spouse's share was something other than one-half, as would be the case if the testator was survived by two or more children.[7]

It is suggested that there is no good reason for this statute not to apply in all cases in which a spouse dissents from the will of a deceased spouse, notwithstanding the fact that the dissenting spouse's share is something other than one-half of the net estate. Thus, an amendment to the present statute would seem to be proper in order to cover such cases.

Sales Tax

In *Sale v. Johnson,*[8] taxpayer brought suit to recover a sales tax paid under protest. Petitioner was in the business of manufacture and sale of chicken coops to farmers and others in the poultry business. He alleged that the coops were used for packaging, delivery, and shipment of poultry by his customers. Taxpayer claimed that these sales were exempt from the sales tax by virtue of G.S. § 105-164.13 (37) which exempts:

> Sales of wrapping paper, labels... coops and barrels... sold to manufacturers and retailers, when such materials are used for packaging, shipment or delivery of tangible personal property which is sold either at wholesale or retail *or* when such articles constitute a part of the sale of such tangible personal property and are delivered with it to the customer.[9]

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[5] N.C. Gen. Stat. § 30-3 (a) (Supp. 1963).
[6] 236 N.C. 654, 73 S.E.2d 879 (1953). See also 31 N.C.L. Rev. 491 (1953).
[7] N.C. Gen. Stat. § 29-14 (2) (Supp. 1963).
[8] 258 N.C. 749, 129 S.E.2d 465 (1963).
[9] N.C. Gen. § 105-164.13 (37) (1958). (Emphasis added.)

The lower court held for the taxpayer, and on appeal the Court reversed. Plaintiff contended that he need comply with only one of the provisions in the statute in order to qualify for the exemption, and that he came within it as the coops were "materials . . . used for packaging, shipment or delivery of tangible personal property which is either sold at wholesale or retail . . . ."

The Commissioner, on the other hand, contended that the last requirement that exemption would be granted "when such articles constitute a part of the sale of such tangible personal property and are delivered with it to the customer" was controlling, and that the petitioner did not allege facts sufficient to bring him within this requirement and that, therefore, the petitioner did not qualify for the exemption.

The Court found that the provision was ambiguous, and then construed the two provisions to read as though joined by *and* instead of *or,* thus requiring taxpayer to meet two tests instead of only one of two alternatives. In support of its construction of the statute, the Court relied heavily upon the rule of construction that exemptions from taxation are never presumed and are to be strictly construed,[10] the legislative intent behind the statute,[11] and the Commissioner's regulations.[12]

VALUATION

In *In Re Property of Pine Raleigh Corp.*,[13] petitioner's property was appraised for tax purposes at over 600,000 dollars. However, this property was the subject of a long term lease from petitioner to a third party beginning January 1, 1952 and ending August 30, 1981, the annual rental being five and one-half per cent of the lessee's gross sales. In the last eight years, the highest rent yield from the property was 44,196 dollars. Petitioner requested that the appraised value of the property be reduced to 400,000 dollars, taking into consideration the long term lease.

[10] Bragg Investment Co. v. Cumberland County, 245 N.C. 492, 96 S.E.2d 341 (1957). See I PAUL AND MERTINS § 3.30 (1934).

[11] 258 N.C. at 757, 129 S.E.2d at 470.

[12] The Court quoted from the Sales and Use Tax Regulations to the effect that: "Items of tangible personal property . . . are not subject to the Sales or Use Tax . . . such items include containers for products sold, wrapping twine and similar items which *actually accompany* delivery of the tangible personal property sold." 258 N.C. at 756, 129 S.E.2d at 470. (Emphasis added.)

[13] 258 N.C. 398, 128 S.E.2d 855 (1963).

The State Board affirmed the appraisal saying that it "did carefully consider all pertinent facts and data in the above appeal."[14] During the course of the hearing, petitioner called the appraiser employed by the county to appraise the property, and he testified that at the time of the appraisal he did not know of the lease on the property and the actual rentals being received by the petitioner, but that "capitalization was taken into consideration in this particular only on a comparable basis with other property in the vicinity."[15]

The Court construed G.S. § 105-295, the statute that instructs assessors to consider income as a factor affecting value,[16] to mean that income that could be obtained from a proper and efficient use of the land. The Court pointed out that any other holding would penalize the competent and diligent and reward the incompetent or indolent.[17] The Court then stated: "If it appears that the income actually received is less than the fair earning capacity of the property, the earning capacity should be substituted as a factor rather than the actual earnings. The fact-finding board can properly consider both."[18] This statement seems to sanction the elimination altogether of the actual rent income as a factor in valuation. Obviously, actual rental was given no weight since the original assessment was affirmed, that assessment admittedly made without consideration of income from the lease. This resulted in the equivalent of not considering it at all in this particular case, and since it clearly affects the value of the premises, seems to violate the terms of G.S. § 105-295 requiring the assessor to consider all "factors which may affect its value."

At another point, however, the Court made the statement, "If petitioner's assertion is correct, the trial court should have allowed its motion to remand . . . and consider income as one of the elements of value."[19]

The Court went on to hold that since petitioner had his witness before the State Board testifying as to rental income, the Board in reality had considered income as a factor. However, some of the language used by the Court sheds doubt on whether this factor must be considered at all.

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[14] 258 N.C. at 400, 128 S.E.2d at 857.
[15] *Id.* at 402, 128 S.E.2d at 858.
[16] N.C. GEN. STAT. § 105-295 (Supp. 1963).
[17] 258 N.C. at 403, 128 S.E.2d at 859.
[18] *Ibid.*
[19] 258 N.C. at 401, 128 S.E.2d at 857.

It is submitted that even if the principal case requires at least consideration of actual income as a factor, income is entitled to much more weight than it was given. Rents produced by a long term lease would surely have a drastic effect on the value of land in the eyes of a prospective purchaser. Further, a literal construction of the instant case would allow little consideration to be given to rents from a long term lease made for a reasonable fixed rental at the time, and then followed by a period of inflation. Surely, here the decreased value of the land could hardly be attributed to the improvidence of the lessor. In the principal case, the rent was a percentage of the lessee's gross sales. This presents the very real question of whether the low rents were a product of the lessor's improvidence, as intimated by the Court, or of the unsuccessful lessee.

TORTS

NEGLIGENCE

Characterization of the Action

Sometimes it is difficult to determine whether a particular action sounds in tort or contract. The general rule in the United States is that there will be liability in tort for misperformance of a contract whenever there would be liability for gratuitous performance without the contract.[1] When an action is brought in such cases, two difficult questions arise: (1) Has plaintiff in fact brought the action in tort or in contract? Usually this is determined by the pleadings. (2) If inconsistent rules of law apply to the two actions, will he be permitted to elect as to which theory he will use, and thus take advantage of the more favorable rule, or will the court make the election for him?[2]

In the past, North Carolina has usually allowed the party to make the election.[3] In *Peele v. Hartsell,*[4] however, the Court made the election for him. Plaintiffs alleged that defendant damaged their house trailer while attempting to move it pursuant to a con-

[1] See PROSSER, TORTS § 81 (2d ed. 1955) [hereinafter cited as PROSSER]. Where only nonperformance is alleged, however, the remedy will usually be limited to the action on the contract. *Ibid.*

[2] See generally PROSSER, SELECTED TOPICS ON THE LAW OF TORTS 407-15 (1954).

[3] See, *e.g.,* Causey v. Davis, 185 N.C. 155, 116 S.E. 401 (1923). See generally 1 MCINTOSH, N.C. PRACTICE & PROCEDURE § 1135 (2d ed. 1956).

[4] 258 N.C. 680, 129 S.E.2d 97 (1963).

tract; the complaint clearly indicated that the action was brought on the theory that defendant had breached the contract. However, in reversing a judgment of nonsuit entered at the close of plaintiffs' evidence, the Court declared that "plaintiffs have misconstrued the nature of the cause of action which they have stated. It is not in contract but in tort."[5] Declaring that this defect is immaterial in view of the North Carolina rule that the relief to which plaintiffs are entitled is determined by the evidence and not by the conclusions of the pleader, the Court proceeded to hold that plaintiffs' evidence was sufficient to go to the jury on the issue of whether defendant had failed to exercise the common law duty to use due care to protect the trailer.

This case may indicate that, in the future, the Court will tend to look more closely at the essence of the claim rather than the theory chosen by the plaintiff. Although in the principal case the plaintiff is not prejudiced by the Court's finding that the breach of the contract was not the gravamen of the action, such a refusal to permit an election can have drastic procedural and substantive effects. For example, if the action is held to be one on the contract, the plaintiff's contributory negligence will not bar the action but will merely be considered on the issue of damages.[6]

In a later case, *Interstate Textile Equip. Co. v. Swimmer*,[7] the Court did not question plaintiff's election to sue in tort rather than on the contract. Plaintiff, a dealer in textile machinery, contracted with defendants, an insurance broker and his agency; the terms of the contract required defendants to provide continuous insurance coverage on plaintiff's machinery. Plaintiff sued on a theory of negligence for damages caused by defendant's failure to have insurance in effect when the machinery was destroyed by fire. In affirming a judgment for plaintiff, the Court rejected defendants' contention that certain instructions to the jury had imposed an absolute contractual standard of conduct instead of the standard of ordinary care, in effect converting a tort action into one for breach of contract. In the major and final portion of his charge, the trial court made no mention of ordinary care, but charged that one

[5] *Id.* at 684, 129 S.E.2d at 99.

[6] See Elam v. Smithdale Realty & Ins. Co., 182 N.C. 599, 109 S.E. 632 (1921), which held that plaintiff was entitled to sue an insurance agent for breach of contract for failure to obtain the coverage requested and so avoid the bar of contributory negligence.

[7] 259 N.C. 69, 130 S.E.2d 6 (1963).

element of actionable negligence was "the failure to perform the duty which the defendants owed the plaintiff by the agreement . . . ."[8] The Court held that, in view of the fact that a previous portion of the charge had applied the ordinary care standard, no prejudicial error was committed.

To support its holding, the Court cited *Elam v. Smithdeal Realty & Ins. Co.*,[9] a case similar on its facts but pleaded and tried under the breach of contract theory. In *Elam* the Court stated the rule that, for breaches of duty involved in the contract of agency, the principal may sue either for breach of contract for faithfulness or in tort for a breach of duty imposed by the contract.[10] However, the Court there noted that tort liability of the insurance agent arose because the law imposed upon him, "the duty, *in the exercise of reasonable care,* to perform the duty he has assumed . . . ."[11] It could be plausibly argued that the *Elam* case supports defendants' position that it was prejudicial in this tort action to leave the jury with the uncorrected impression that the defendants might be found guilty of negligence merely for failing to comply with the contractual obligation to keep the insurance in force, without regard to whether they exercised reasonable care in the circumstances.

Last Clear Chance

Under the doctrine of last clear chance, defendant may be held liable in a negligence action despite plaintiff's contributory negligence if, immediately prior to the harm, he had the superior opportunity, or last clear chance, to avoid it.[12] In North Carolina the doctrine is based on the theory that defendant's negligent failure to avoid the accident intervenes between plaintiff's contributory negligence and the injury and thus becomes the direct and proximate cause.[13] But the real basis has been said to be the courts' dissatis-

[8] *Id.* at 73, 130 S.E.2d at 9.
[9] 182 N.C. 599, 109 S.E. 632 (1921).
[10] *Id.* at 604, 109 S.E. at 634.
[11] *Id.* at 602, 109 S.E. at 633 (Emphasis added.)
[12] See generally PROSSER § 52.
[13] McMillan v. Horne, 259 N.C. 159, 130 S.E.2d 52 (1963). The proximate cause rationale has been criticized by the text writers as not being in accord with current ideas of proximate cause. It has been noted that in an action by an innocent third party, the same act which is here called contributory negligence would be regarded as a proximate cause of the injury even when the last clear chance doctrine is in play. See 2 HARPER & JAMES, TORTS § 22.12 (1956) [hereinafter cited as HARPER & JAMES]. North Carolina cases applying the doctrine are discussed in 33 N.C.L. REV. 301 (1955); 16 N.C.L. REV. 50 (1937); 5 N.C.L. REV. 58 (1926).

faction with the defense of contributory negligence.[14]

Problems have arisen in the North Carolina cases involving the doctrine, probably due to some imprecisely stated qualifications to the rule. For example, the Court has stated in numerous cases that the doctrine does not apply if plaintiff is guilty of contributory negligence as a matter of law.[15] However, these cases still inquire into the issue of whether the defendant in fact had the last clear chance.[16] It has been suggested by a federal court applying North Carolina law that the real meaning of this statement is merely that contributory negligence as a matter of law will bar recovery *unless* defendant had the last clear chance.[17]

Another misleading qualification of the rule that has been announced by the Court is that the doctrine does not apply if the contributory negligence of the plaintiff continues until the moment of impact.[18] Language to this effect was used in *McMillan v. Horne*,[19] in an action for damages allegedly caused by defendant's negligent operation of her automobile, causing it to run over plaintiff, a pedestrian. On defendant's appeal from an adverse judgment, the Court held that it was error to submit the issue of last clear chance to the jury and remanded for entry of judgment denying recovery because of the finding that plaintiff was contributorily negligent. The basis of the holding is that the evidence indicated that defendant did not see plaintiff in his position of peril and could not have discovered him in the exercise of ordinary care in time to have avoided the injury.

This is a correct result since the doctrine is not applicable unless defendant had in fact a clear chance to avoid the injury. However, the Court supports its holding with the statement that plaintiff's contributory negligence continued until the moment of impact. If such a limitation were actually imposed upon the doctrine, it would greatly reduce its effectiveness, since the plaintiff's contributory negligence is a continuing element in many, if not most, of the cases in which the doctrine is applied. This fact was recognized

[14] See PROSSER § 52.

[15] See, *e.g.*, Sherlin v. Southern Ry., 214 N.C. 222, 198 S.E. 640 (1938). See generally 33 N.C.L. REV. 138 (1954).

[16] See, *e.g.*, Sherlin v. Southern Ry., *supra* note 15.

[17] Cagle v. Norfolk So. Ry., 242 F.2d 405 (4th Cir. 1957).

[18] See, *e.g.*, Aydlett v. Keim, 232 N.C. 367, 61 S.E.2d 109 (1950); Ingram v. Smoky Mountain Stages, Inc., 225 N.C. 444, 35 S.E.2d 337 (1945). *But cf.* Redmon v. Southern Ry., 195 N.C. 764, 143 S.E. 829 (1928).

[19] 259 N.C. 159, 130 S.E.2d 52 (1963).

in a prior case[20] which held that it was proper to submit the last clear chance issue to the jury even though the plaintiff's negligence may have continued until the accident.

Apparently the "continuing negligence" exception to the doctrine is not an exception at all, but means merely that there must be a sufficient interval between the time plaintiff's peril was or should have been discovered and the moment of the accident, during which time defendant did in fact have the last clear chance to avoid it.[21] It would be desirable for the Court to discontinue using this language, since it adds nothing but confusion to an already confusing subject.

Scott v. Darden[22] is an unusual case in that defendant, rather than plaintiff, attempted to rely upon the last clear chance doctrine. Plaintiff alleged that his driver was proceeding along a dominant highway when he collided with defendant's truck, which allegedly slowed but failed to stop at a stop sign before entering the main road directly in front of plaintiff's vehicle. Defendant pleaded the contributory negligence of plaintiff's driver, and further pleaded that if defendant were negligent, plaintiff's recovery was barred because plaintiff's driver had the last clear chance to avoid the collision. In reversing a judgment of involuntary nonsuit entered at the close of plaintiff's evidence, the Court held that plaintiff had not proved himself out of court on the issue of contributory negligence. The Court further held that plaintiff's evidence did not show as a matter of law that his driver had the last clear chance to avoid the collision so as to hold plaintiff and his driver solely responsible for the collision, and bar any recovery by plaintiff here.

The clear implication in this decision is that, given a proper factual situation, the defendant as well as the plaintiff should be able to use the last clear chance doctrine.[23] This misconceives the nature and purpose of the doctrine, which is a device to promote, rather than hinder recovery. The reason for the confusion is probably that

[20] Newbern v. Leary, 215 N.C. 134, 1 S.E.2d 384 (1939).

[21] See Cagle v. Norfolk So. Ry., 242 F.2d 405 (4th Cir. 1957).

[22] 259 N.C. 167, 130 S.E.2d 42 (1963).

[23] A small minority of courts ostensibly apply the doctrine to both plaintiff and defendant. *E.g.*, Coble v. Georgia Motor Express, 62 Ga. App. 566, 8 S.E.2d 724 (1940); Heitman v. Davis, 127 Fla. 1, 172 So. 705 (1937). It has been observed, however, that a close analysis of these decisions reveals that the courts are merely allowing the defendant to invoke the contributory negligence doctrine under another name. See Annot., 32 A.L.R.2d 543 (1953).

the Court bases the doctrine on the theory of proximate cause, rather than the policy of barring the defense of contributory negligence when defendant has the superior opportunity to avoid the injury. The use of the last clear chance doctrine by defendant clearly adds nothing to the defense of contributory negligence, and the language of this case suggesting the possibility of such use should be promptly disavowed by the Court.

Release of One Joint Tortfeasor

North Carolina follows the general rule that a release of one joint tortfeasor releases all the joint wrongdoers and is a bar to a suit against any of them for the same injury;[24] this is based upon the theory that the injured party is entitled to but one satisfaction and the release operates to extinguish the cause of action.[25]

By giving a covenant not to sue, rather than a release, however, plaintiff may avoid the effect of having his cause of action against the joint wrongdoers extinguished.[26] In *Simpson v. Plyler*[27] plaintiff executed a covenant not to sue in favor of one tortfeasor, pursuant to which a consent judgment was entered which recited the covenant and decreed that the cause of action against the covenantee should be terminated upon the payment of the agreed amount. Satisfaction of the judgment was duly entered. Even though both the consent judgment and the satisfaction thereof stipulated that plaintiff's cause of action against the other tortfeasor was reserved, plaintiff's action against the other tortfeasor was dismissed upon the trial court's finding that the agreement, consent judgment, and satisfaction operated to release defendant.

On appeal, the Court affirmed and held that, regardless of whether the agreement was a release or a covenant not to sue, the entry and satisfaction of the consent judgment barred and extin-

[24] McFarland v. News & Observer Publishing Co., 260 N.C. 397, 132 S.E.2d 752 (1963).

[25] This rule has been roundly criticized by the text writers as being based upon outmoded concepts of common law procedure. See, *e.g.*, PROSSER § 46. The rule has been abolished in a few jurisdictions on the ground that otherwise a deserving plaintiff may be barred by such a release even though he has received for it far less than adequate compensation. See Breen v. Peck, 28 N.J. 351, 146 A.2d 665 (1958).

[26] Slade v. Sherrod, 175 N.C. 346, 95 S.E. 557 (1918).

[27] 258 N.C. 390, 128 S.E.2d 843 (1963), 42 N.C.L. REV. 429 (1964). This case is discussed in CIVIL PROCEDURE (PLEADING AND PARTIES), *Releases, supra* and TRIAL PRACTICE, *Judgments—Consent Judgment as Waiver of Claim Against Joint Tortfeasor, infra.*

guished the cause of action. The Court further held that the intention of the parties, as expressed in the stipulations in the judgment and satisfaction, does not govern in the face of the judgment terminating the cause of action.[28]

Standard of Care—Negligence of Physician

In *Stone v. Proctor*,[29] plaintiff sued defendant psychiatrist for negligently failing to discover that the first of a series of electroshock therapy treatments administered to plaintiff by defendant had produced a fracture of plaintiff's vertebrae, although defendant had been put on notice of the injury by plaintiff's complaints of severe pain. At trial, the court refused to admit in evidence a section of the Standards for Electroshock Treatment, approved by the American Psychiatric Association, requiring an X-ray examination to determine whether a patient complaining of pain after such treatment had suffered accidental damage. Defendant's testimony concerning the applicability of these standards to the local area was also excluded. On plaintiff's appeal from a judgment of involuntary nonsuit, defendant urged that nonsuit was proper because plaintiff had failed to call a specialist in psychiatry to testify as to the relevant standard of care.[30] The Court reversed, holding that plaintiff should have been allowed to introduce the standards, since defendant had acknowledged their authenticity and their applicability to the local area. The Court held, without admitting the soundness of defendant's contention that only the evidence of a fellow specialist is sufficient to make out a case, that it overlooked the fact that the standards set by the American Psychiatric Association, with which defendant was familiar and which he could have observed, specifically required an X-ray examination under the circumstances of the case. The evidence offered, in connection with that improperly excluded, was held sufficient to go to the jury.

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[28] *Accord,* Eberle v. Sinclair Prairie Oil Co., 120 F.2d 746 (10th Cir. 1941).

[29] 259 N.C. 633, 131 S.E.2d 297 (1963). This case is also discussed in EVIDENCE, *Evidence of Voluntarily Adopted Safety Code, supra.*

[30] The Court set out the general rule in North Carolina as to a physician's civil liability as laid down in Hunt v. Bradshaw, 242 N.C. 517, 88 S.E.2d 762 (1955): "A physician... must meet these requirements: (1) He must possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess; (2) he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case; and (3) he must use his best judgment in the treatment and care of his patient." *Id.* at 521, 88 S.E.2d at 765.

Although the result reached in this case is undoubtedly sound, the rationale underlying the decision is not entirely clear. The generally established rule in North Carolina is that expert testimony is ordinarily required to establish the standard of care in such actions, because appropriate medical procedures are usually outside the range of common knowledge and experience.[31] Yet the Court apparently regards this case as holding that the voluntary adoption by defendant of safety standards established by experts in his field as the guide to be followed for the protection of the public is at least some evidence that a reasonably prudent person would adhere to their requirements.[32] The Court could have prevented possible confusion in this area had it based its holding expressly upon the theory that defendant himself supplied the expert testimony required by the North Carolina rule by testifying in effect that the procedure set out in the standards was in accordance with approved medical practice.[33] Many courts have held that the standard of care for physicians may be so established.[34]

Standard of Care—Violation of Administrative Safety Code

North Carolina has followed the general rule that a violation of an administrative safety code, adopted and given the force and

[31] See Jackson v. Mountain Sanitarium & Asheville Agricultural School, 234 N.C. 222, 67 S.E.2d 57 (1951). Once such a standard is established, departure therefrom may usually be shown by a non-expert witness. *Ibid.*

[32] At least this is suggested by the citation of *Stone* to support the holding in Wilson v. Lowe's Asheboro Hardware, Inc., 259 N.C. 660, 131 S.E.2d 501 (1963), that a violation by a manufacturer of a voluntarily adopted industrial safety code is some evidence of negligence.

[33] It is not clear whether North Carolina qualifies the standard of care with respect to the locality of practice. In an early case, the Court held that a dentist was not to be judged solely by what was approved practice in the same neighborhood. McCracken v. Smathers, 122 N.C. 799, 29 S.E. 354 (1898). Later cases have held that the relevant standard of care is what is in accord with "approved medical practice." See, *e.g.*, Jackson v. Mountain Sanitarium & Asheville Agricultural School, 234 N.C. 222, 67 S.E.2d 57 (1951). *But see* Jackson v. Joyner, 236 N.C. 259, 72 S.E.2d 589 (1952), where the Court suggested that the expert witness should be asked whether the treatment was in conformity with approved medical practice *in the same locality.* Although the facts as stated in the principal case do not show unequivocally that the standards in question were actually followed in the area, the record indicates that defendant admitted that they were followed as a general practice among specialists in North Carolina at the time. Record, p. 103, Stone v. Proctor, 259 N.C. 633, 131 N.C. 297 (1963). Thus the facts in *Stone* would seem to make out a case even under the "local practice" rule.

[34] *E.g.*, Lashley v. Koerber, 26 Cal. 2d 83, 156 P.2d 441 (1945) (failure to make X-rays); Snyder v. Pantaleo, 143 Conn. 290, 122 A.2d 21 (1956).

effect of law by the legislature, is negligence per se.[35] In several cases the Court has applied the rule to hold that a violation of the National Electric Code, incorporated into the North Carolina Building Code and expressly adopted by the legislature, is negligence per se.[36] In one such case,[37] this was regarded as merely an application of the general rule in North Carolina that, when a statute imposes upon a person a specific duty for the protection of others, a violation of such statute constitutes negligence per se. Although violation of the Building Code is a misdemeanor,[38] the previous cases did not regard this fact as determinative of whether the per se rule was applicable; the critical finding was that the administrative code had been given the effect of law, not that its violation was a criminal offense.[39]

In *Swaney v. Peden Steel Co.*,[40] however, the Court seems to regard the provision of a criminal penalty as essential to the applicability of the rule. Plaintiff, an employee of a construction contractor, was ordered by his employer to ride upon a steel truss as it was being hoisted into place by a crane, and was injured when the truss collapsed. Plaintiff brought this action against defendant manufacturer for negligence in the design and fabrication of the truss. In appealing an adverse judgment, defendant urged that the trial court erred in refusing to grant its motions for judgment of compulsory nonsuit. The Court found no error, holding that the evidence was sufficient to go to the jury on the issue of defendant's negligence, and that plaintiff was not guilty of contributory negligence as a matter of law in riding the load in violation of the American Standard Code for Building Construction and certain regulations issued by the North Carolina Department of Labor. Since the American Standard Code had not been adopted as law by the legislature, the Court held that its violation could not be considered contributory negligence per se.[41] Although the Department of Labor regulations

[35] See, *e.g.*, Jenkins v. Leftwich Elec. Co., 254 N.C. 553, 119 S.E.2d 767 (1961); Drum v. Bisaner, 252 N.C. 305, 113 S.E.2d 560 (1960); Lutz Industries, Inc. v. Dixie Home Stores, 242 N.C. 332, 88 S.E.2d 333 (1955).

[36] Cases cited note 35 *supra*.

[37] Lutz Industries, Inc. v. Dixie Home Stores, 242 N.C. 332, 88 S.E.2d 333 (1955).

[38] N.C. GEN. STAT. § 143-138 (1958).

[39] See, *e.g.*, Drum v. Bisaner, 252 N.C. 305, 113 S.E.2d 560 (1960).

[40] 259 N.C. 531, 131 S.E.2d 601 (1963). This case is discussed in EVIDENCE, *Evidence of Voluntarily Adopted Safety Codes* n.44, *supra*.

had been adopted as law by G.S. § 95-11, the Court held that the violation of one of its provisions designed to protect employees from dangerous methods of work may not be asserted by a tortfeasor as contributory negligence of the employee so as to relieve itself of liability for negligently injuring the employee. Instead of stating this result as an exception to the general rule, however, the Court attempted to reconstruct the rule to fit the facts of this case. The Court concluded that the Department of Labor regulations had not been given the same force of law as the Building Code, since the violation of the Building Code was made a misdemeanor, and "therefore" negligence per se, while the regulations were made enforceable only by a civil action instituted by the Attorney General.[42] Under the new rule, the necessity of a criminal penalty is stressed: "When noncompliance with an administrative regulation is criminal, the rule that in the trial of a civil action the violation of a criminal statute, unless otherwise provided, is negligence *per se,* is applicable."[43]

Although this emphasis upon the criminal nature of the offense seems unwarranted, in that it leads to artificial distinctions between essentially similar legislative standards of care, the result in the instant case is sound. It recognizes the strong economic pressure often placed upon employees to violate safety rules when directed to do so by their employers. In holding that the legislature had not intended to establish a standard of care by which to judge an employee in his action against a third party tortfeasor, the Court indicates its unwillingness to apply the strict per se rule in the circumstances of the instant case. Since the Court apparently approved the submission of the regulations to the jury as evidence tending to establish contributory negligence, it has in effect created another exception to the per se rule analogous to the treatment of plaintiffs charged with contributory negligence in failing to walk on the left

[41] See Wilson v. Lowe's Asheboro Hardware, Inc. 259 N.C. 660, 131 S.E.2d 501 (1963).

[42] See N.C. GEN. STAT. § 95-13 (1958).

[43] 259 N.C. at 542, 131 S.E.2d at 609. The cases cited for this construction of the rule are not persuasive. One, Jenkins v. Leftwich Elec. Co., 254 N.C. 553, 119 S.E.2d 767 (1961), merely mentioned the criminal penalty in the process of finding that the Electric Code had the force of law. The other, Hinson v. Dawson, 241 N.C. 714, 86 S.E.2d 585 (1955), contained a statement that, in applying the per se rule to a motor vehicle statute, "the statute must be construed as a criminal statute." *Id.* at 719, 86 S.E.2d at 589. It seems from the context, however, that the Court in *Hinson* meant only that such a criminal statute must be strictly construed in determining whether or not it was in fact violated.

side of the highway as required by statute.[44] In both cases the Court treats the violation by plaintiff of a standard of conduct required by the legislature as merely evidence of negligence.[45] This results in both instances in weakening the defense of contributory negligence and furthering the modern policy toward compensating accident victims and distributing accident losses.

It is unfortunate that the Court found it necessary to justify its holding by redefining the per se rule to exclude from its operation the violation of administrative regulations which have the force of law but which impose no criminal penalty.[46] In a case where a plaintiff is injured as a result of the violation of these regulations, he should be entitled to the same benefit of the per se rule as if he had been injured by the violation of the Electrical Code. While it is true that some courts have ruled that proof of deviation from administrative regulations is only evidence of negligence,[47] the better view would seem to be that breach of either an administrative safety measure or a criminal statute is negligence per se, unless special circumstances justify departure from the standard. In the absence of an attack on the soundness of the administrative safety code or a showing of justifiable violation, the jurors should not be allowed to substitute their own concept of due care for the judgment of the presumably expert and unbiased administrator.[48] The principal case should be regarded by the Court as merely an exception to the general rule laid down in the Electrical Code cases.

[44] The exception to the per se rule in the case of pedestrians is discussed under *Standard of Care—Violation of Statute, infra.*

[45] For a discussion of the possible trend in the courts toward the application of a double standard by regarding the violation of statute by defendants as negligence per se but violation by plaintiffs as merely evidence of negligence, see 2 HARPER & JAMES § 22.10.

[46] The real basis of the per se rule would seem to be not in the fact that the legislature has imposed a criminal penalty, but in the fact that the standard of conduct is regarded as the proper one by the legislature. This point is made by Justice Traynor in Clinkscales v. Carver, 22 Cal. 2d 72, 136 P.2d 777 (1943): "When a legislative body has generalized a standard from the experience of the community and prohibits conduct that is likely to cause harm, the court accepts the formulated standards and applies them ... except where they would serve to impose liability without fault." *Id.* at 75, 136 P.2d at 778.

[47] *E.g.*, Ursprung v. Winter Garden Co., 183 App. Div. 718, 169 N.Y. Supp. 738 (1st Dep't 1918); Weimer v. Westmoreland Water Co., 127 Pa. Super. 201, 193 Atl. 665 (1937).

[48] This position on the proper use of such codes is taken in Morris, *The Role of Administrative Safety Measures in Negligence Actions,* 28 TEXAS L. REV. 143 (1949).

Standard of Care—Violation of Statute

The general rule in North Carolina is that the violation of a statute or ordinance which imposes upon a person a specific duty for the protection of others constitutes negligence per se.[49] The basis of this rule, according to the Court, is that the statute prescribes the standard of care and that the standard fixed by the legislature is absolute;[50] thus, proving breach of the statute proves negligence. Though this is the majority rule, a substantial number of jurisdictions have held that such a violation is merely evidence of negligence to be weighed by the jury;[51] even among the courts applying the per se rule there seems to be a trend away from its strict application, perhaps in order to promote compensation of injured plaintiffs who would otherwise be barred by their own contributory negligence as a matter of law.[52]

Although ordinarily the per se rule is quite simple in its operation, occasionally the wording of the statute affects its application in civil cases. For example, some statutes fix no absolute standard of care but merely codify the common law standard.[53] An example is a statute requiring drivers to use "due care" to avoid hitting pedestrians.[54] In other cases, the statute specifies that the fact of violation of the statutory standard shall not be held in a civil action to be negligence per se, but shall merely be one of the facts in the case to be considered with the other facts and circumstances by the jury in determining the negligence issue.[55]

In *Boykin v. Bissette*[56] both types of statutes were involved. In reversing a judgment of compulsory nonsuit, the Court noted that

[49] Reynolds v. Murph, 241 N.C. 60, 84 S.E.2d 273 (1954).
[50] Aldridge v. Hasty, 240 N.C. 353, 82 S.E.2d 331 (1954).
[51] See generally 2 HARPER & JAMES § 17.6.
[52] *Id.* § 22.10.
[53] The common law standard of care is that standard of care which a reasonably prudent man would exercise under like circumstances. Ingram v. Libes, 250 N.C. 65, 107 S.E.2d 920 (1959). In the absence of statute, a motorist must exercise the degree of care an ordinarily prudent person would exercise under similar circumstances. *E.g.*, Badders v. Lassiter, 240 N.C. 413, 82 S.E.2d 357 (1954); Henderson v. Henderson, 239 N.C. 487, 80 S.E.2d 383 (1954).
[54] N.C. GEN. STAT. § 20-174(e) (1953). In Gathings v. Sehorn, 255 N.C. 503, 121 S.E.2d 873 (1961), the Court recognized that this statute merely codified the common law standard.
[55] See, *e.g.*, N.C. GEN. STAT. § 20-149(b) (Supp. 1963) (failure to give audible warning before passing); N.C. GEN. STAT. § 20-141(e) (Supp. 1963) (outrunning headlights).
[56] 260 N.C. 295, 132 S.E.2d 616 (1963).

there was evidence that defendant had been guilty of reckless driving in violation of G.S. § 20-140(b) and of passing without giving audible warning in violation of G.S. § 20-149(b), as well as common law negligence. The Court properly recognizes that the "audible warning" statute provides that its violation shall be merely a fact to be considered on the issue of negligence. The Court seems to overlook the true function of the per se rule, however, when it states that the reckless driving statute, which prohibits the operation of a motor vehicle "without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property,"[57] establishes an "absolute standard of care," the violation of which is negligence per se.[58] Actually, such a statute clearly calls for the exercise of the jury's function to determine whether due care has been used; it is merely a codification of the common law standard of care, and it is misleading to hold that it constitutes any sort of absolute standard.[59]

Even where the statute purports to create an absolute standard of care, the Court may find that the strict application of the per se rule in a civil case would be unjust. In *Stephens v. Southern Oil Co.*[60] plaintiff alleged that her injuries resulted from a collision caused in part by defendant's operation of its vehicle without adequate brakes, in violation of G.S. § 20-124.[61] Defendant pleaded as a defense that the brake failure was unusual and unexpected, and offered evidence tending to show that the brakes had been over-

[57] N.C. GEN. STAT. § 20-140(b) (Supp. 1963).

[58] The Court has so held many times. *E.g.*, Dunlap v. Lee, 257 N.C. 447, 126 S.E.2d 62 (1962); Stegall v. Sledge, 247 N.C. 718, 102 S.E.2d 115 (1958). The Court has also applied the per se rule to violations of N.C. GEN. STAT. § 20-152(a) (Supp. 1963), which provides that the driver of a motor vehicle shall not follow another vehicle more closely than is "reasonable and proper." See, *e.g.*, Fox v. Hollar, 257 N.C. 65, 125 S.E.2d 334 (1962); Smith v. Rawlins, 253 N.C. 67, 116 S.E.2d 184 (1960).

[59] Even though the statute seemed to create an absolute standard, the Court in Williams v. Tucker, 259 N.C. 214, 130 S.E.2d 306 (1963), held that N.C. GEN. STAT. § 20-154(a) (1953), requiring a driver making a left turn first to ascertain whether the move can be made in safety, was violated only if the driver failed to exercise due care under the circumstances.

[60] 259 N.C. 456, 131 S.E.2d 39 (1963).

[61] N.C. GEN. STAT. § 20-124 (Supp. 1963), provides, in relevant part, that "every motor vehicle... shall be equipped with brakes adequate to control the movement of and to stop such vehicle... and such brakes shall be maintained in good working order and shall conform to regulations provided in this section." In an earlier case, the violation of this statute was held to be negligence per se. Tysinger v. Coble Dairy Products, 225 N.C. 717, 36 S.E.2d 246 (1945).

hauled quite recently and had operated properly up until the time of the collision. The Court reversed a judgment for plaintiff, on the ground that the trial court erred in charging that the violation of this statute constituted negligence per se, without instructing the jury what would excuse the operation of a vehicle with defective brakes. Even though the statute in this case is mandatory in its language, the Court held that if brakes fail to operate because of some latent defect, not discoverable by due care, the operator is not liable in a civil suit, notwithstanding the violation of the statute. The Court stated that the true rule[62] in such cases is that violation of the statutory standard constitutes negligence, but that upon defendant's offering substantial proof of a legal excuse for the violation, it becomes a jury question as to whether the defendant was negligent. A legal excuse may be shown by proof that an occurrence wholly without defendant's fault made compliance with the statute impossible at the moment complained of, and that proper care on his part would not have avoided the occurrence. Clearly such a result is proper if liability for motor vehicle accidents is to be based upon fault.[63]

In view of the principles outlined above, however, the concluding language of the opinion is somewhat confusing. The Court stated that an unexplained failure of the brakes "warranted a finding" of negligence but that defendant's evidence was sufficient to negative the charge of negligence with respect to the brakes. Whether defendant's evidence was sufficient to overcome the showing made by plaintiff was held to be a jury question. This indicates that the Court considers proof of a violation of the statute merely evidence of negligence which is sufficient to make out a prima facie case, but which may be overcome by proof of a proper excuse. If so, the Court's statement is inconsistent with its rule that a violation of the statute is negligence per se. However, confusion could be eliminated by adhering to the per se rule and requiring a binding instruction in the absence of sufficient evidence to justify a finding of excusable violations.[64] Where such evidence is presented, the

[62] This rule is quoted with approval from Wilson v. Shumate, 296 S.W.2d 72 (Mo. 1956).

[63] See generally Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COLUM. L. REV. 21 (1949).

[64] A similar result is reached in the minority of jurisdictions that profess to follow neither the per se rule nor the evidence of negligence rule; these courts hold that the violation creates a presumption of negligence, which

jury should be instructed that, if they believe it, they must determine whether or not defendant was negligent under the circumstances.

The clearest example in North Carolina of the trend toward relaxing the per se rule when the plaintiff's contributory negligence is at issue is the treatment given by the Court of the violation by a plaintiff of G.S. § 20-174(d), making it unlawful to walk along the traveled portion of a highway other than on the extreme left-hand side thereof. Despite the fact that this statute purports to create an absolute standard of care, and contains no provision that its violation is not to be considered negligence per se, the Court has held that a violation constitutes merely "evidence of negligence along with the other evidence"[65] in determining whether plaintiff pedestrian was guilty of contributory negligence.

In *Simpson v. Wood*,[66] the Court affirmed a judgment for defendant based on a jury finding that plaintiff pedestrian was guilty of contributory negligence. Plaintiff assigned as error an instruction to the effect that if the jury found that plaintiff was walking on the right *paved* portion of the highway, "it would be a negligent act on his part . . . ."[67] The Court construed the statute as meaning that it was unlawful to walk along the right-hand shoulder of the highway, and held that plaintiff's evidence that he was walking on this shoulder showed a violation of the statute, which was evidence of contributory negligence. The instructions were held not prejudicial, but favorable to plaintiff, since they indicated to the jury that walking on the shoulder was not a violation. However, the Court overlooks the fact that the charge, in making a violation of the statute a "negligent act," in effect applies the per se rule rather than the "evidence of negligence" rule approved in the case. Since such a charge leaves much less to the discretion of the jury, the chances of the plaintiff's being found guilty of contributory negligence are greater, and the possibility of compensation being awarded is lessened.

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may be rebutted by a showing of an adequate excuse but calls for a binding instruction if no evidence of such excuse is presented. See, *e.g.*, Landry v. Hubert, 101 Vt. 111, 141 Atl. 593 (1928). The same result is reached in most courts applying the per se rule, since they have recognized instances in which a violation of statute is excusable. See PROSSER § 34.

[65] Simpson v. Wood, 260 N.C. 157, 161, 132 S.E.2d 369, 372 (1963). *Accord*, Simpson v. Curry, 237 N.C. 260, 74 S.E.2d 649 (1953).

[66] 260 N.C. 157, 132 S.E.2d 369 (1963) (Bobbitt, J., dissenting without opinion).

[67] *Id.* at 160, 132 S.E.2d at 371.

Standard of Care—Voluntary Adoption of Industry Safety Codes

North Carolina has adopted the strict rule that advisory safety codes which have not been given the force of law by the legislature are not admissible to establish negligence.[68] However, an exception to this rule was laid down in *Wilson v. Lowe's Asheboro Hardware, Inc.*[69] In this case, a purchaser of a ladder made by defendant manufacturer and sold by defendant hardware store sued the vendor for breach of an alleged warranty of fitness and the manufacturer for negligence. After taking a voluntary nonsuit as to the vendor, plaintiff recovered judgment against the manufacturer. At the trial, plaintiff introduced evidence tending to show that the manufacturer had failed to comply with the provisions of the American Standard Safety Code for Portable Wood Ladders, a voluntary code sponsored by several industry and insurance groups. Both plaintiff and defendant acknowledged the general acceptance of the code and defendant admitted on appeal that the code was "the standard to which defendant must adhere at the peril of being guilty of negligence for not so doing."[70] Defendant insisted that it had complied with the code. The Court, while stating the general rule to be that a manufacturer must operate with the degree of care which a reasonably prudent person would use in similar circumstances, held that evidence tending to prove violation of the code was sufficient to take the issue of defendant's negligence to the jury. It based this holding on the ground that "the voluntary adoption of a safety code as the guide to be followed for protection of the public is at least some evidence that a reasonably prudent person would adhere to the requirements of the code."[71]

[68] *E.g.*, Swaney v. Peden Steel Co., 259 N.C. 531, 131 S.E.2d 601 (1963) (dictum); Sloan v. Carolina Power & Light Co., 248 N.C. 125, 102 S.E.2d 822 (1958). Apparently *Sloan* based the rule on the theory that the introduction of the collective judgment of parties not before the court violates the hearsay rule. Although the Court regards this as the majority view, what limited authority there exists seems to hold such evidence admissible, at least for limited purposes. See 20 AM. JUR. *Evidence* § 966 n.8 (1939, Cum. Supp. 1963).

[69] 259 N.C. 660, 131 S.E.2d 501 (1963). This case is also discussed under EVIDENCE, *Evidence of Voluntarily Adopted Safety Code, supra.*

[70] Brief for Appellant, p. 23, Wilson v. Lowe's Asheboro Hardware, Inc., 259 N.C. 660, 131 S.E.2d 501 (1963).

[71] 259 N.C. at 666, 131 S.E.2d at 505. The Court cites Stone v. Proctor, 259 N.C. 633, 131 S.E.2d 297 (1963) in support of its holding. However, the *Stone* case could be regarded as holding only that a medical expert (who may be defendant himself) may establish the standard of care in a mal-

It is unclear why the voluntary adoption of an industry safety code should enable plaintiff to get to the jury upon proof of its violation, whereas the same code is not even admissible if not so adopted. Perhaps if defendant had objected to the admission of the code and had not admitted on appeal that violation of the code was negligence per se, the Court would have adhered to the exclusionary rule; certainly these factors tend to weaken the holding. It would be unfortunate, however, if the Court does not apply the rule asserted here to situations in which the defendant subscribes to the code in his operations, but objects to its admission as evidence of a standard of care.

In any case, since the voluntary code is merely "some evidence" of the proper standard of care, defendant should be protected by proper instructions to the jury. An excellent charge given in an analogous situation was recently quoted in a New York decision.[72] The New York court, in holding that a safety rule promulgated by defendant railroad was admissible against it in a negligence action, approved a charge to the effect that defendant was to be held to the standard of reasonable care, in connection with which the jury might consider the safety rule as a "standard that the railroad sets itself for its employees"; that a violation of the rule is not negligence per se; that whether or not a violation would be negligent depends upon whether or not they find that it sets a standard which reasonable prudence required; and that if it set a higher standard, then plaintiff is to receive no benefit from its adoption by defendants.[73]

Statute of Limitations

In *Thurston Motor Lines, Inc. v. General Motors Corp.*[74] plaintiff brought an action charging the defendants with negligence in selling it a truck with a latently defective carburetor, which caused a fire damaging the truck. The fire had occurred less than three years before the filing of the action, but more than three years had elapsed between the date of the sale and the institution of the action. Defendants pleaded the statute of limitations, and the Court held that the statute had run.[75]

practice suit by testifying that safety rules established by a professional association are applicable under the circumstances.

[72] Danbois v. New York Cent. R.R., 12 N.Y.2d 234, 189 N.E.2d 468 (1963).

[73] *Id.* at 237, 189 N.E.2d at 469-70.

[74] 258 N.C. 323, 128 S.E.2d 413 (1962).

[75] The Court held that the period prescribed for the commencement of the

The decision is rested on the general rule that the statute begins to run from the occurrence of an act or omission which causes injury giving rise to an action for nominal damages, even though the substantial or actual damage is not discovered or does not occur until later.[76] The Court held that the delivery to plaintiff of a truck equipped with a defective and dangerous carburetor, the existence of which defendants knew or should have known, and the failure of defendants to warn plaintiff thereof, was an injury to plaintiff and an invasion of his rights, which then gave rise to an action for nominal damages at least.[77]

Although the Court had previously held that the statute of limitations in a negligence action begins to run from the time of the wrongful act or omission, and not from the time injury occurred,[78] it expressly declined to decide whether it would follow the rule in future cases where there is no injury to plaintiff or invasion of his rights at the time of the defendant's negligent act. Thus the instant case may herald a trend away from the unnecessarily technical interpretation of a right of action adopted in the earlier cases. It cannot be determined from this case, however, whether the Court will consider the mere invasion of a technical right, without actual damages, sufficient to give rise to a cause of action for nominal damages and thus start the running of the statute of limitations. According to the better view, proof of damages is an essential element in a cause of action for negligence, and nominal damages to vindi-

action, whether considered an action for breach of warranty or one for negligence, was three years. N.C. GEN. STAT. §§ 1-15, 1-46, 1-52(1), 1-52(4) (1953).

[76] See, *e.g.*, Baie v. Rook, 223 Iowa 845, 273 N.W. 902 (1937); Johnson v. Beattie, 88 Vt. 512, 93 Atl. 250 (1915). See generally 34 AM. JUR. *Limitation of Actions* §§ 115, 160 (1941).

[77] The Court relied upon Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957), which held that an action for malpractice against a physician accrued at the time he negligently left a foreign object in plaintiff's body following an operation, and not when the injurious consequences were or should have been discovered. In the principal case, the Court held that the decision in *Shearin* was based on the ground that there was a sufficient injury at the time of the negligent act to give rise to an action for nominal damages at least.

[78] *E.g.*, Hooper v. Carr Lumber Co., 215 N.C. 308, 1 S.E.2d 818 (1939); State *ex rel.* Bank of Spruce Pine v. McKinney, 209 N.C. 668, 184 S.E. 506 (1936); State *ex rel.* Daniel v. Grizzard, 117 N.C. 105, 23 S.E. 93 (1895). See also Powers v. Planters Nat'l Bank & Trust Co., 219 N.C. 254, 13 S.E.2d 431 (1941), where it was held that the statute ran from the time defendant negligently leased plaintiff a house infected with tuberculosis germs, not when the injury was discovered. The *Powers* case is noted and the harsh North Carolina rule criticized in 19 N.C.L. REV. 599 (1941).

cate a technical right cannot be recovered where no loss has occurred.[79]

Absolute Liability

Recovery for Concussion Damage Caused by Blasting

In *Guilford Realty & Ins. Co. v. Blythe Bros. Co.*,[80] the Court held that one conducting blasting operations which produce concussions and vibrations damaging plaintiff's property is absolutely liable, irrespective of negligence.[81] Plaintiffs alleged that their property had been damaged by concussion from the ultrahazardous blasting operations conducted by defendant contractors in the construction of a sewer line for the City of High Point; no negligence in carrying out the blasting was alleged. The Court held that the complaint stated a good cause of action and rejected the minority rule that consequential damages for concussion cannot be recovered where the blasting was conducted at a lawful time and place and in the exercise of due care.[82] Thus North Carolina has joined the growing majority[83] of states which impose absolute liability for damages caused by blasting operations.

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[79] See, *e.g.*, Northern Pac. R.R. v. Lewis, 162 U.S. 366 (1896); Sullivan v. Old Colony St. Ry., 200 Mass. 303, 86 N.E. 511 (1908). See Prosser § 35. According to this view, the statute of limitations does not begin to run on a negligence action until damage has occurred. White v. Schnoebelen, 91 N.H. 273, 18 A.2d 185 (1941). The *White* case held, contra to the principal case, that the cause of action for negligently installing a lightning rod that caused plaintiff's property to be damaged by fire accrued at the time of the fire and not at the time of the negligent act.

[80] 260 N.C. 69, 131 S.E.2d 900 (1963). This case is discussed under Eminent Domain, *supra* and Municipal Corporations, *Municipal Immunity, supra.*

[81] For a discussion and analysis of the North Carolina cases involving liability for blasting, see 40 N.C.L. Rev. 640 (1962).

[82] In upholding the judgment sustaining plaintiff's motion to strike the asserted defense that defendant was not liable because it was carefully using the explosives in accordance with a contract with the City and for necessary governmental purposes, the Court held that defendant could not thus bring itself within the immunity of the City, since the City was not immune under the circumstances. See the discussion of this point under Municipal Corporations, *Municipal Immunity, supra.* The Court deemed it improper upon the "meager" factual allegations in defendant's pleading, to decide whether it would follow the rule that a contractor acting on behalf of a principal with eminent domain power cannot be held personally liable in the absence of negligence for damage done by him in connection with a proposed public improvement. The authorities are divided as to the applicability of the rule. See generally 19 Minn. L. Rev. 129 (1934).

[83] See, *e.g.*, Hay v. Cohoes Co., 2 N.Y. 159 (1849) ("trespass" by rocks and debris); Federoff v. Harrison Const. Co., 362 Pa. 181, 66 A.2d 817

It is not clear from the opinion whether the holding is based upon the theory that absolute liability results because of the trespass by debris or vibrations, or the policy decision that since blasting operations are ultrahazardous, they must be made to pay their own way.[84] As a practical matter, however, there would seem to be little difference between the two theories, and both lead to the unquestionably sound result reached in this case.

Owners and Occupiers of Land

Duty to Invitees

The owner or proprietor of a business establishment, while not an insurer of the safety of his invitees, is under a duty to exercise ordinary care to keep the portion of his premises designed for their use in a reasonably safe condition.[85] But the duty to warn of unsafe conditions is limited to those of which the proprietor had notice, express or implied, and the failure to allege or prove that an unsafe condition had existed long enough to give him at least constructive notice thereof, is fatal.[86]

In *Norris v. Belk's Department Store*[87] the Court, in affirming a nonsuit entered at the close of plaintiff's evidence, held that evidence tending to show that plaintiff slipped and fell when she stepped on a cylindrical stick from a candy sucker concealed by a piece of tissue paper, without a showing of how long the stick had been there, was insufficient to be submitted to the jury on the issue of the proprietor's negligence. The Court held further that, in view of the fact that there was no evidence that the goods sold in the store were likely to be dangerous if dropped on the floor, or that the floors were slippery, it was unforeseeable that injury would result

(1949) (damage caused by concussion only). See generally Annot., 20 A.L.R.2d 1372 (1951), which cites twenty cases in accord with the principal case to the effect that recovery may be had for concussion damage without proof of negligence.

[84] The Court cites with approval a recent South Carolina case, Wallace v. A. H. Guion & Co., 237 S.C. 349, 117 S.E.2d 359 (1960), based upon absolute liability for ultrahazardous activity; however, it also discusses the unwarranted distinction asserted by some courts between a trespass by debris thrown on plaintiff's premises and an invasion of his land by concussion and vibrations.

[85] Waters v. Harris, 250 N.C. 701, 110 S.E.2d 283 (1959); Sledge v. Wagoner, 250 N.C. 559, 109 S.E.2d 180 (1959).

[86] Revis v. Orr, 234 N.C. 158, 66 S.E.2d 652 (1951).

[87] 259 N.C. 350, 130 S.E.2d 537 (1963).

from what appeared to be merely a piece of paper lying flat on the floor.[88]

In *Raper v. McCrory-McLellan Corp.*[89] plaintiff sued to recover for her injuries sustained when she fell as a result of stepping in vomit on the landing of a staircase in defendant's store. The Court reversed a judgment of involuntary nonsuit, holding that it was a jury question whether the vomit had remained there long enough to the knowledge of defendant's supervisor for her in the exercise of due care to have removed it, or to have given proper warning of its presence to plaintiff. The Court noted that it is "hornbook law" that in considering a motion for judgment of involuntary nonsuit plaintiff must be given the benefit of every fact and of every reasonable inference of fact arising from the evidence and that all conflicts therein must be resolved in his favor.[90] Nevertheless, in two recent cases involving similar questions, the Court does not appear to be applying the rule liberally.

In *Berger v. Cornwell*[91] a nonsuit was sustained on the ground that the evidence of plaintiff invitee showed that she was contributorily negligent as a matter of law. The evidence tended to show that plaintiff slipped on a patch of ice in defendant's parking lot while returning from defendant's animal hospital to her taxi. The patches of ice in the vicinity of the taxi were difficult to see. Defendant had not sanded these patches or given any warning of their presence. Nevertheless, the Court held that plaintiff's contributory negligence was established by the fact that part of the lot was free from ice and that plaintiff could have seen the ice-free areas and walked there. This seems clearly wrong in principle; a plaintiff should not be barred because he fails to choose a safe path across defendant's premises if there is no reason to believe that the path taken is unsafe.[92]

The Court took a somewhat similar approach in construing the evidence in *Harrison v. Williams.*[93] Plaintiff, an invitee, alleged

[88] *Accord,* Smith v. American Stores Co., 156 Pa. Super. 375, 40 A.2d 696 (1945).

[89] 259 N.C. 199, 130 S.E.2d 281 (1963).

[90] *Id.* at 204, 130 S.E.2d at 284.

[91] 260 N.C. 198, 132 S.E.2d 317 (1963) (per curiam).

[92] Perhaps the Court was influenced by the fact that plaintiff failed to look down as she walked. However, this should not be material if her evidence is taken as true that the ice was difficult to see; if plaintiff would not have seen the ice in the exercise of due care if she had looked, her failure to look would not then be an actual cause of her fall.

[93] 260 N.C. 392, 132 S.E.2d 869 (1963).

that she was injured in a fall caused by the negligent failure of defendant to provide adequate lighting over a step-down between floor levels. In affirming a judgment of nonsuit, the Court held that plaintiff's evidence was too vague and indefinite to go to the jury.[94] However, plaintiff testified that the area was dimly lighted and that there was no overhead or floor light in the area where she fell. The Court made much of the fact that while the plaintiff testified that "it was dark in there," she also testified on cross-examination that "it was not light enough . . . to see . . . [the step] *automatically*. . . ."[95] The Court stated that the word "dark" was a relative term, and suggested that it could not be too dark if plaintiff could have seen the step by the exercise of due care, even if not "automatically."[96] The suggestion that if plaintiff had used due care she could have seen the step, even though she testified that it was too dark to see adequately, indicates that the Court is not really following its often-announced rule that all conflicts in plaintiff's evidence must be resolved in his favor in considering a motion for nonsuit.[97]

Obvious Dangers

The proprietor is not under a duty to warn an invitee of a condition which is obvious[98] or of which the invitee has equal or superior knowledge.[99] These exceptions to the general rule were illustrated in two recent cases. In *Coleman v. Colonial Stores, Inc.*[100] the Court applied the obvious danger rule in affirming a judgment of nonsuit. Plaintiff's evidence tended to show that after purchasing groceries at defendant's store, he approached the glass exit door

[94] The Court suggested that plaintiff should have presented floor plans, diagrams, photographs, *etc. Id.* at 396, 132 S.E.2d at 872.

[95] *Id.* at 396-97, 132 S.E.2d at 872. Compare the recent case of Reason v. Singer Sewing Mach. Co., 259 N.C. 264, 130 S.E.2d 397 (1963), in which the plaintiff's case depended upon proof that oil squirted on her by defendant's machine was "hot"; the Court affirmed a judgment of compulsory nonsuit on the ground that plaintiff testified that the oil was "warm." It would seem that if "dark" is a relative term enabling the Court to construe it against plaintiff, then "warm" is sufficiently relative to enable the Court to construe it for plaintiff.

[96] 260 N.C. at 397, 132 S.E.2d at 872.

[97] See, *e.g.*, Myers v. Southern Pub. Util. Co., 208 N.C. 293, 180 S.E. 694 (1935).

[98] *E.g.*, Garner v. Atlantic Greyhound Corp., 250 N.C. 151, 108 S.E.2d 461 (1959).

[99] Harris v. Nachamson Dept. Stores Co., 247 N.C. 195, 100 S.E.2d 323 (1957).

[100] 259 N.C. 241, 130 S.E.2d 338 (1963) (per curiam).

while carrying two sacks of groceries; these bags were carried higher than his shoulders and partially obstructed his vision. When the door opened automatically to the left, he passed through, spoke to someone outside, and turned right, tripping over a metal screen extending from the wall to the ground. The Court held that the evidence failed to establish any duty of defendant to warn of a condition "obvious to any ordinarily intelligent person" and that it plainly indicated that the plaintiff was guilty of contributory negligence.

It would seem that in this case the Court adopted an unduly strict approach to the problem of obvious dangers. Modern authorities tend to hold that the fact that a condition is obvious does not always remove all unreasonable danger where the plaintiff would not in fact expect to find it where it is, or is likely to have his attention distracted as he approaches it, or for some other reason is not likely to see it.[101] Several cases[102] have applied this doctrine, and in a previous North Carolina case,[103] the Court at least considered such evidence on the issue of defendant storekeeper's negligence in failing to warn of an obvious condition at the exit. In finding no such duty, the Court stated that:

> In the instant case, the weather was clear, the entryway was not crowded, only a few persons were passing on the sidewalk, *and the plaintiff was not carrying bundles of merchandise.* In the absence of some unusual condition, the mere fact that the entryway and sidewalk sloped, and that there was a drop-off of varying height at the sidewalk, did not constitute negligence.[104]

The Court in future cases should give serious consideration to the theory that a proprietor should be under a duty to warn of a condition that may injure his invitees, if he can reasonably foresee

[101] See Annot., 26 A.L.R.2d 675 (1952). See generally 2 HARPER & JAMES § 27.13; Keeton, *Personal Injuries Resulting from Open and Obvious Conditions,* 100 U. PA. L. REV. 629 (1952).

[102] See, *e.g.,* Nicolls v. Scranton Club, 208 F.2d 874. (3d Cir. 1954) (plaintiff's attention diverted and vision obstructed by luggage he carried); Walker v. County of Randolph, 251 N.C. 805, 112 S.E.2d 551 (1959) (plaintiff's attention diverted by bulletin board); Seng v. American Stores Co., 384 Pa. 338, 121 A.2d 123 (1956) (plaintiff left store with arms piled high with bundles).

[103] Garner v. Atlantic Greyhound Corp., 250 N.C. 151, 108 S.E.2d 461 (1959).

[104] *Id.* at 159, 108 S.E.2d at 467. (Emphasis added.) See Grady v. J. C. Penney Co., 260 N.C. 745, 133 S.E.2d 678 (1963) (recognizing the "diverted attention" doctrine).

that, though ordinarily obvious, the invitee may be injured by it under conditions likely to exist. If this rule had been applied in the instant case, it would have been for the jury to decide if defendant should have reasonably foreseen that heavily laden customers would be likely to trip over the screen, even though it would be obvious to one not so burdened.

In *Henry v. White*[105] the invitee had an equal or superior knowledge of the hazard, and the Court affirmed a judgment of involuntary nonsuit entered in an action to recover damages for the wrongful death of the invitee. Plaintiff's evidence was held to establish that decedent, an independent contractor who came onto the premises to repair refrigeration machinery (which he had originally installed), was killed when caught by an exposed belt in the machinery. The Court held that, since decedent knew the hazards of the machine as well as or better than defendant, defendant was under no duty to warn of any defects in the machinery. This seems clearly correct.[106] The same result could also have been reached on the theory that decedent had assumed the risk.[107]

TRIAL PRACTICE

Process—Waiver of Immunity

Under G.S. § 15-79 a non-resident, who is brought into North Carolina on a criminal charge by or after waiver of extradition, is not subject to the service of personal process in civil actions arising out of the same facts as the criminal charge until he has been convicted, or, if acquitted, until he has had a reasonable opportunity to return to his home state.

In *Reverie Lingerie, Inc. v. McCain*[1] four non-resident individuals were being sued for tortiously damaging plaintiff's plant. Criminal proceedings were also pending in this state against those individuals based upon the same alleged acts of tortious destruction. Three of the individuals had been arrested outside of North Carolina

[105] 259 N.C. 282, 130 S.E.2d 412 (1963).

[106] See Harris v. Nachamson Dept. Stores Co., 247 N.C. 195, 100 S.E.2d 323 (1957) (no duty to warn where invitee has equal or superior knowledge of danger).

[107] See generally Prosser § 55.

[1] 258 N.C. 353, 128 S.E.2d 835 (1963). This case is discussed in Agency and Workmen's Compensation, *Agency, supra;* Labor Law, *Vicarious Liability for Local's Misconduct, supra.*

and had waived extradition to this state. The fourth had voluntarily appeared in this state a month before the criminal term at which the cases were to be tried and had posted bond for his appearance in the criminal case. On September 27, 1960, while all four defendants were in the Superior Court of Orange County defending the criminal charges against them, they were served with civil arrest process in the above entitled case. The order for civil arrest had fixed the bail at 10,000 dollars. On the same day the civil arrest process was served, the trial judge signed an order, which had been consented to by the four defendants and the plaintiff, reducing the amount of bail fixed in the order from 10,000 to 7,500 dollars. It does not appear on whose motion this reduction was made. The Supreme Court as to this says,

> Probably what happened was this: Counsel for the plaintiff and counsel for the defendants agreed privately to present an order to the court consenting to the reduction of the bail bonds. The court signed the order which had been consented to in writing by each of the four defendants and by counsel of record for the plaintiff.[2]

On October 17, 1960, all the individual defendants moved to quash the service of process in the civil suit on the ground of immunity. The trial court denied the motions and on appeal the Supreme Court affirmed. The Court recognized the immunity provided by G.S. § 15-79 but declared that the action of the defendants, in consenting to the reduction of the amount of bail called for in the civil arrest order, constituted a general appearance and thus waived immunity. As to the defendant who had posted a bond for his appearance, the Court declared he had no immunity whatsoever. Justice Bobbitt dissented as to the three defendants who had waived extradition without stating his reasons.

The action of the Court, in so far as the defendant who had posted bond for his appearance is concerned, is in line with prior case law.[3] No precedent in point, however, is cited by the Court for its action in construing the consent order reducing the amount of bail as a waiver of immunity. The Court relies on general expressions contained in decided cases that if a defendant makes an appearance for any purpose other than to attack the jurisdiction of

[2] *Id.* at 362, 128 S.E.2d at 842.

[3] *E.g.*, White v. Ordille, 229 N.C. 490, 50 S.E.2d 499 (1948); Hare v. Hare, 228 N.C. 740, 46 S.E.2d 840 (1948).

the Court, his appearance is general. Although the Court concedes it does not know whether a motion for reducing the amount of bail fixed in the arrest order was made by defendants or made by the trial court *ex mero motu,* it does appear that the written consent of each defendant was on the order reducing the bail. Hence the Court says,

> When the consent order authorizing the reduction of bail... was signed, these defendants invoked the power of the court in their behalf and for their benefit which, in our opinion, constituted a general appearance and waived any defect in connection with the service of process.[4]

While this reasoning of the Court would support its conclusion as to the three defendants who had waived extradition and consented to reduction of the bail called for, one may wonder if the action of the Court is in keeping with the purpose of the statute affording the immunity in instances of this kind. Suppose the trial judge had said of his own accord,

"Methinks the amount of bail fixed in this order for civil arrest is too high. I will reduce it if you defendants have no objection."

Defendants then reply, "We do not object, your Honor, you have our consent to make the reduction."

Could it truly be said that the defendants in such case waived the immunity from service of civil process? The lesson of the case is clear. A defendant faced with the service of civil process in a situation such as confronted the three defendants who had waived extradition should do *nothing more* than move to quash the service because of the immunity provided for in G.S. § 15-79.

JUDGMENT—CONSENT JUDGMENT AS WAIVER OF CLAIM AGAINST JOINT TORTFEASOR

In *Simpson v. Plyler*[5] plaintiff was injured while a passenger in Crenshaw's car which collided with a truck operated by the Charlotte Florist Supply Company. Crenshaw died in the collision and plaintiff sued Crenshaw's administratrix and the Florist Supply Company as joint tortfeasors. After issues had been joined and the case transferred to the civil docket, plaintiff executed a covenant not to sue and to hold harmless the administratrix. The agreement recited that the plaintiff "desires to settle and adjust any claim which he...

[4] 258 N.C. at 362, 128 S.E.2d at 842.
[5] 258 N.C. 390, 128 S.E.2d 843 (1963).

might have against . . . administratrix . . . by reason of said injuries . . . and further to execute a consent judgment as to . . . administratrix . . . so as to avoid any suit or other legal action."[6]

The agreement also stated a consent judgment was to be entered in the present action in so far as the administratrix was concerned and that it was understood that the agreement was only a "covenant not to sue and is not a release of any claim or cause of action" against the corporate defendant and *"all rights, causes of action and remedies against . . . [corporate defendant] are expressly reserved."*[7]

The agreement went still further and stated that the sum paid as consideration was neither paid nor accepted as a satisfaction of the injuries sustained. In due course, a judgment was entered in the cause in the amount of the consideration for the agreement and consented to by the plaintiff and administratrix. The judgment recited the execution of the covenant not to sue. On the same date a satisfaction of judgment was entered in which it was stated that the judgment against the administratrix had been paid and satisfied in full. This instrument also purported to reserve plaintiff's cause of action against the corporate defendant.

There can be no doubt that what the parties intended was clearly and readily discernible. But what they intended was not to be what they were informed by the Court they had done! After the filing of the aforesaid satisfaction of judgment, the corporate defendant moved for a dismissal of the action against it on the ground that the satisfaction of the consent judgment operated as a release of a joint tortfeasor and hence released the other joint tortfeasor.

The Court recognized the rule that a covenant not to sue does not operate as a release of a joint tortfeasor but, in this case, despite the clear intention of the parties, the Court held that the satisfaction of the consent judgment entered against one joint tortfeasor operated as a release of the other joint tortfeasor and hence, contrary to the intent of the parties, the plaintiff had lost any right to proceed against the corporate defendant. The Court expressly stated, "It is our view that intention does not govern in the face of the judgment terminating the cause of action. . . . The court is without authority, after extinguishment of the cause of action as to one joint tortfeasor, to retain and reserve it as to another."[8]

[6] *Id.* at 392, 128 S.E.2d at 844.
[7] *Ibid.* (Emphasis added.)
[8] 258 N.C. at 398, 128 S.E.2d at 849. This case is discussed in CIVIL

It is unfortunate that, in the face of a growing trend which gives to a release of one joint tortfeasor the effect of a covenant not to sue, the Court in this instance of a clearly declared intent of the parties saw fit to disregard that intent and to give to a covenant not to sue which had been molded into a consent judgment thereafter satisfied, the effect of a release of one joint tortfeasor as at common law.[9]

DEFAULT JUDGMENTS—EXCUSABLE NEGLECT

It is well settled law in North Carolina that when husband and wife are jointly sued and the husband assures the wife that he will attend to the litigation, his failure to do so is not chargeable to the wife and a default judgment against her will be vacated.[10]

In *Jones v. Statesville Ice & Fuel Co.*[11] the husband alone was sued. After service on him he left the suit papers with his wife who assured him she would see that they were given the necessary attention. On the wife's failure to do so, default judgment was entered. The trial court, on the husband's motion, refused to vacate the judgment charging the negligence of the wife to her husband. On appeal the Court held that the trial judge had not abused his discretion and that cases giving the wife relief where the spouses are jointly sued are not pertinent.

One may well ask what the ruling of the Court would be if the husband and wife had been jointly sued and the husband had relied on the wife's assurance that she would attend to the suit. The Court did not imply that the husband in such case would be granted relief. Rather, it said, "We find no case in which it has been held that a husband, when served with process in a civil action, may rely on his wife to assume the responsibility of filing answer and defending the suit."[12] It looks very much as if, when both spouses are jointly sued, that what is sauce for the goose may not be sauce for the gander!

PROCEDURE (PLEADING AND PARTIES), *Releases, supra;* TORTS, *Negligence, supra.*

[9] See McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943); Breen v. Peck, 28 N.J. 351, 146 A.2d 665 (1958); 40 N.C.L. REV. 89-90 (1961).

[10] *E.g.,* Abernethy v. Nichols, 249 N.C. 70, 105 S.E.2d 211 (1958); Wachovia Bank & Trust Co. v. Turner, 202 N.C. 162, 162 S.E. 221 (1932).

[11] 259 N.C. 206, 130 S.E.2d 324 (1963).

[12] *Id.* at 210, 130 S.E.2d at 327.

TRUSTS

Incorporation by Reference

In *Godwin v. Wachovia Bank & Trust Co.*,[1] husband and wife entered into an inter vivos trust agreement without compliance with G.S. § 52-12 requiring a private examination of the wife. Simultaneously, husband and wife executed reciprocal wills giving the property of each respectively to the trustee to be disposed of as provided in the trust agreement. The court, assuming but not deciding that the trust agreement was void as an inter vivos agreement for failure to comply with G.S. § 52-12, held the dispositions of the trust to be validly incorporated in the will of each party. This case is fully discussed in a Note appearing in the *Review*.[2]

Modification of Investment Provisions

The trust indenture establishing the Duke Endowment restricts the trustees in their investment of surplus funds to the stocks and bonds of Duke Power Co. and its subsidiaries, and federal, state, and municipal bonds. In *Cocke v. Duke University*,[3] the trustees sought to modify these investment restrictions so as to permit investment in other corporate securities on grounds that: (1) Sound investment policy dictated greater diversification than allowed by the indenture; and (2) Inflation had rendered investment in government bonds economically unsound. There was no evidence that the trust corpus was in danger of immediate depletion or that refusal to grant the relief sought would frustrate the purposes of the trust. In fact, there was evidence that the corpus had increased substantially through the years and that present investments were yielding an adequate return. Applying New Jersey law, the Court refused to modify the restrictions, holding that the mere possibility of corpus shrinkage due to inflation or a desire to produce more income than investment in governmentals would yield are not sufficient grounds to overrule the express directions of settlor with respect to investment of trust funds. This case is fully discussed in a Note appearing in the *Review*.[4]

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[1] 259 N.C. 520, 131 S.E.2d 456 (1963).
[2] 42 N.C.L. Rev. 493 (1964).
[3] 260 N.C. 1, 131 S.E.2d 909 (1963).
[4] 42 N.C.L. Rev. 486 (1964).

PROPER VENUE FOR ACTION AGAINST TESTAMENTARY TRUSTEE

In *Lichtenfels v. North Carolina Nat'l Bank*,[5] testatrix's will, probated in Buncombe county, appointed her executors to serve also as testamentary trustees. Defendant, a national banking association with offices in Mecklenburg county, was subsequently appointed substitute trustee by order of the Clerk of Buncombe County Superior Court. Plaintiffs, beneficiaries of the trust, instituted an action for an accounting in Buncombe county. Defendant moved to have the action removed to Mecklenburg county as a matter of right.[6] The superior court judge ordered the cause removed to Mecklenburg. The Court reversed.

G.S. § 1-78 declares the proper venue for actions against executors and administrators to be the county in which they qualify. Notwithstanding the statute's express limitation to executors and administrators, the Court interpreted this statute "to encompass all fiduciaries, irrespective of technical titles, who act by reason of court appointment and are by law required to account to the court appointing them."[7] Construing this statute *in pari materia* with G.S. § 28-53 requiring testamentary trustees to account to the court in which the will was probated, it was held that Buncombe county was the proper venue for the action in this case.[8]

PURCHASE MONEY RESULTING TRUST—DEGREE OF PROOF REQUIRED

In *Vinson v. Smith*,[9] plaintiff sought to establish a purchase money resulting trust[10] in her favor, alleging that she furnished the

[5] 260 N.C. 146, 132 S.E.2d 360 (1963).

[6] Defendant relied on a federal statute granting permission to sue national banks in the county in which they are located as grounds for its motion to have the cause removed to Mecklenburg. The Court held that this statute did not affect the jurisdiction of state courts but was merely enacted for the convenience of national banks and could be waived. 260 N.C. at 150, 132 S.E.2d at 363, citing First Nat'l Bank of Charlotte v. Morgan, 132 U.S. 141 (1889). Defendant's acceptance of fiduciary duties with knowledge that the law required it to account to the court appointing it was, in effect, deemed to be a waiver of this privilege.

[7] 260 N.C. at 149, 132 S.E.2d at 363.

[8] The Court had previously held G.S. § 1-78 to be applicable to actions against guardians. Cloman v. Stanton, 78 N.C. 235 (1878).

[9] 259 N.C. 95, 130 S.E.2d 45 (1963).

[10] When the purchase price of property is furnished by one person and title is taken in the name of another, to whom the person furnishing the purchase money owes no obligation of support, a presumption arises that the person in whose name title is taken holds the property as trustee for the person furnishing the purchase money. Hoffman v. Mozely, 247 N.C. 121,

purchase money for property, title to which was taken in the name of defendant, her half-sister. At the trial conflicting evidence was presented as to who actually furnished the purchase money. In submitting this issue to the jury, the trial judge instructed that the plaintiff must carry the burden of proving this fact "by the evidence and by its greater weight."[11] On appeal from a verdict for the plaintiff, the Court held this instruction to be error.

A person seeking to establish a purchase money resulting trust in his favor must carry the burden of proof by a degree of evidence greater than the ordinary preponderance required in most civil actions.[12] Such a degree of evidence is variously referred to as "clear, strong, and convincing"[13] and "clear, strong, cogent, and convincing."[14] Though it is recognized that such evidence is greater in intensity than a "mere" preponderance, its precise limits are incapable of definition. It has been said that the jury must be convinced beyond equivocation[15] or beyond a reasonable doubt.[16] It is clear that the words "clear, strong, and convincing" are employed in their usual sense and intended to mean what they are generally understood to mean, and thus it is proper for the trial judge to instruct the jury as to the dictionary definition of the words.[17] However, it is error for the trial judge to define this degree of proof by way of comparing it with the meaning ascribed to carrying the burden of proof by a preponderance of the evidence.[18]

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100 S.E.2d 243 (1957). See generally Edwards & Van Hecke, *Purchase Money Resulting Trusts in North Carolina,* 9 N.C.L. REV. 177 (1931).

[11] 259 N.C. at 99, 130 S.E.2d at 48.

[12] *Ibid.* This has long been the rule in North Carolina, Summers v. Moore, 113 N.C. 394, 18 S.E. 712 (1893), and accords with the majority view throughout the country. See, *e.g.,* Adams v. Adams, 348 Mo. 1041, 156 S.W.2d 610 (1941). See generally Annot., 23 A.L.R. 1500 (1923); BOGERT, TRUSTS § 74 (Hornbook series 1952); 89 C.J.S. *Trusts* § 137 (1955).

Though this stronger degree of proof is required to establish the fact that the plaintiff furnished the purchase money, the amount of purchase money furnished may be proved by a preponderance of the evidence. Paul v. Neece, 244 N.C. 565, 94 S.E.2d 596 (1956).

[13] Vinson v. Smith, 259 N.C. 95, 99, 130 S.E.2d 45, 48 (1963).

[14] Shue v. Shue, 241 N.C. 65, 67, 84 S.E.2d 302, 303 (1954).

[15] See Summers v. Moore, 113 N.C. 394, 18 S.E. 712 (1893).

[16] Clark v. Clark, 398 Ill. 592, 76 N.E.2d 446 (1948).

[17] McCorkle v. Beatty, 226 N.C. 338, 38 S.E.2d 102 (1946).

[18] McCorkle v. Beatty, 225 N.C. 178, 33 S.E.2d 753 (1945).

TRUSTEE'S POWER OF SALE— NECESSITY OF ALLEGATIONS IN ACTION

Absent an express or implied power of sale, the trustee has no authority to sell trust property, and any sale made without such power is invalid.[19] In *Johnson v. Johnson*,[20] plaintiff sought to enforce a trustee's agreement to sell an interest of the trust in a partnership. The Court held that a demurrer to the complaint for failure to state a cause of action against the trustee was properly sustained, since the complaint failed to disclose that the parties had ever reached a final agreement as to the sale. In the course of the opinion, the court stated: "Further, there is nothing in all of plaintiff's pleadings to indicate that [the trustee] . . . had any power to sell the trust property held by her in the partnership."[21]

The implication from this statement is that a complaint otherwise alleging a firm agreement of sale between a vendee and a trustee-vendor would nevertheless fail to state a cause of action for specific performance against the trustee, absent an allegation that the trustee has the power to sell. It is not clear whether the *Johnson* case actually stands for this proposition, since the court's statement seems to be added merely in support of their decision which is apparently based on other grounds. No cases dealing precisely with this point have been found.[22] It is arguable that a complaint which alleges a trustee's agreement to sell without alleging a power in the trustee to effectuate the sale fails to set out a valid, enforceable contract against the trustee and would, therefore, be demurrable.[23] On the other hand, it is arguable that lack of capacity to enter into the contract in the first instance or inability to execute its terms is matter

[19] Morris v. Morris, 246 N.C. 314, 98 S.E.2d 298 (1957); Maxwell v. Barringer, 110 N.C. 76, 14 S.E. 516 (1892); *cf.* Robinson v. Ingram, 126 N.C. 327, 35 S.E. 612 (1900).

[20] 259 N.C. 430, 130 S.E.2d 876 (1963). This case is discussed in CIVIL PROCEDURE, (PLEADING AND PARTIES), *Demurrer—Dismissal or Amendment, supra.*

[21] *Id.* at 439, 130 S.E.2d at 883.

[22] The Court cites Maxwell v. Barringer 110 N.C. 76, 14 S.E. 516 (1892), and 54 AM. JUR. *Trusts* § 433 (1945), in support of its statement. Both authorities support the general proposition that a trustee must have the power of sale to effectively dispose of trust property, but neither authority deals with the power of sale as related to the pleadings in an action to enforce the trustee's contract of sale.

[23] Thus, in Webber v. Spencer, 148 Neb. 481, 27 N.W.2d 824 (1947), it was held that a guardian having no power to sell his ward's property could not make a valid contract to sell the property, and that such a contract could not be specifically enforced.

of defense to be raised by the answer rather than anticipated in the complaint.[24] In any event, in view of the court's statement, it behooves the vendee's attorney, in actions to enforce the trustee's contract of sale, to allege facts in the complaint sufficient to indicate a power of sale in the trustee.

WILLS AND ADMINISTRATION

Adopted Children

In *Thomas v. Thomas*[1] there was an action to construe a will executed in 1926 in which the testator devised property to his son for life, remainder in fee to the children of the son living at his death, and if there were no such children, then to the brothers and sisters of the son in fee simple. At the time of the death of the testator the son had no children but later adopted a child who was living at the death of the son. The Court held that the child adopted after the death of the testator could not take. This decision is in accord with the majority view which holds that where there is a testamentary provision for the children of a named person, an adopted child is presumed not to be included unless there is language in the will, or there are other attendant circumstances present at the time of the making of the will, which make it clear that the adopted child was intended to be included.[2]

In adopting the majority view the Court applied the law in effect in North Carolina in 1926, the time of the execution of the will. This decision was based on the settled rule that the intent of the testator is to be ascertained from a consideration of the language he used in the light of the circumstances *existing at the time the will was made*.[3] Since at that time, there was nothing in our statutes of descent and distribution or our adoption laws, or in the will itself to indicate that an adopted child would or could be the ultimate taker, it followed that the child should be precluded.[4]

[24] See Rachou v. McQuitty, 125 Mont. 1, 229 P.2d 965 (1951). See generally Clark, Code Pleading § 97 (Hornbook series 1947).

[1] 258 N.C. 590, 129 S.E.2d 239 (1963).

[2] *Id.* at 592, 129 S.E.2d at 240. The Court cited Smyth v. McKissick, 222 N.C. 644, 24 S.E.2d 621 (1943), on this point and numerous cases from other jurisdictions. See Annot., 86 A.L.R.2d 12 (1962).

[3] 258 N.C. at 594, 129 S.E.2d at 241.

[4] 258 N.C. at 594, 129 S.E.2d at 242. The Court pointed out that a distinction between devises and inheritances with respect to an adopted child is still made in most jurisdictions and made the comment that, if there

There were two dissenting judges who thought the child should take. They cited G.S. § 48-23, enacted in 1955, and argued that the testator selected the date of the death of his son as the time for the remainder to go to the child and on such date the law of North Carolina embodied in G.S. § 48-23, was that the adopted child was the son's child *for all purposes.* The dissent discredited the majority's argument that the testator did not know the law of adoption might ultimately be changed to give an adopted child full family status, it being their opinion that neither did he know to the contrary. On the lack of uniformity in the attitude of the courts toward adopted children, the dissent commented that "some are inclined to take them by the hand; others by the seat of the pants."[5]

CONSTRUCTION

In *Yount v. Yount*[6] there was a proceeding under the Declaratory Judgment Act[6a] to secure the interpretation of a will and codicil. In the will the names of the two executors were typed *below* the signature of the testator and opposite the signature of the witnesses, thereby raising the question of whether the executors were effectively appointed. The Court held that when the clerk of the superior court probated the will he adjudicated that these words were a part of the will and that this adjudication was binding on the Court and the parties until vacated on appeal from the clerk or declared void in a direct proceeding.[7] Apparently the Court felt that the clerk was on sound ground, for in a dictum it ventured further and pointed out that North Carolina statutes have never required a testator to subscribe his signature to a will.[8] It was also noted that the signatures of the witnesses were subscribed and that no provisions relating to disposition or administration were written below these signatures.

In the codicil the testator again designated two executors but

were a question of inheritance here, G.S. § 48-23 would control, and the adopted child would not be precluded. Although at the time action was commenced in this case G.S. § 48-23, as construed, applied only to inheritances, a 1963 amendment to the statute specifically states that the word "child" or its plural form in a deed, grant, will or other written instrument is to be held to include adopted children whether the written instrument is executed before or after the entry of the order of adoption and whether the instrument was executed before or after the enactment of this section. N.C. GEN. STAT. § 48-23(3) (Supp. 1963).

[5] 258 N.C. at 598, 129 S.E.2d at 244.

[6] 258 N.C. 236, 128 S.E.2d 613 (1962).

[6a] N.C. Gen Stat. §§ 1-253 to -267 (1953).

[7] *Id.* at 238, 128 S.E.2d at 616.

[8] *Id.* at 239, 128 S.E.2d at 616.

only one of them was the same as in the will, thus raising the question of whether this designation in the codicil revoked that in the will or whether all three should serve as executors. The Court noted that cases construing appointments of other or additional executors than those named in the will are few. Two English cases were cited where both those named in the will and in the codicil were held to be co-executors.[9] But the Court did not deem these cases to be persuasive and held that the testator by his codicil revoked the appointments in his will, this decision being based on the ground that he meant to substitute completely those named in the codicil for those in the will.[10]

It is a rule of construction that for a codicil to revoke any part of a will, its provisions must be so inconsistent with those of the will as to exclude any other legitimate inference than that the testator had changed his intentions.[11] However rules of construction must bend to the testator's intention, and here the Court read the instruments as evidencing an intent on the part of the testator to revoke the appointment in the will and to substitute the appointment made in the codicil. On this issue there was a strong dissent premised on the fact that the rule of construction together with the two English cases should control; and therefore, all three should be executors.[12]

In *Wachovia Bank & Trust Co. v. Dodson*[13] there was another proceeding under the Declaratory Judgment Act for the construction of a will and codicil. The testatrix left to her sisters, *A* and *B*, the income from her estate, made up largely of corporate stock, for life and on the death or marriage of either, the survivor was to get the whole of the income, not exceeding twelve hundred dollars per year. Upon the death or marriage of the survivor of *A* and *B*, *C* and *D* were to receive a *specified number* of shares of the corporate stock, which produced part of the life income received by *A* and *B*.

One of the issues before the Court was whether the legatees of

[9] In the Goods of John Howard, L.R. 1 P. & D. 636 (1869); Evans v. Evans, 17 Sim. 86, 60 Eng. Rep. 1060 (1849). In the Goods of Daniel Lowe, 3 S. & T. 478, 164 Eng. Rep. 1361 (1864), was also cited by the Court. In that case the wife was named "sole executrix" in a codicil, and this was held to be tantamount to a revocation of the appointment in the will because it implied an intention that no other person should be associated with her in the office of executrix.

[10] 258 N.C. at 240, 128 S.E.2d at 617.

[11] Armstrong v. Armstrong, 235 N.C. 733, 71 S.E.2d 119 (1952).

[12] 258 N.C. at 243, 128 S.E.2d at 619.

[13] 260 N.C. 22, 131 S.E.2d 875 (1963).

the stock were specific or demonstrative. In deciding that they were specific, the Court cited and approved the following general statements concerning the two types of legacies:

> If the thing bequeathed is... undividuated so that it is distinguishable from all others of the same kind, it is a "specific legacy"[14].... A demonstrative legacy is a bequest of money or other fungible goods, payable out of... a particular fund in such a way as not to amount to a gift of the corpus of the fund ... and so described as to be indistinguishable from other things of the same kind.[15]

The Court was then confronted with the question of how to treat the stock dividends, stock splits and cash dividends derived from the corporate stock, both during the lives of *A* and *B* and during the life of the survivor. As to the stock dividends and stock splits the matter was settled by following the rule almost universally recognized by the courts that legacies carry with them all accretions of dividends, and the like, that accrue after the death of the testator but before the actual satisfaction of the specific legacies.[16]

The cash dividends from the stock, however, demanded a different treatment, and the problem was complicated by the unusual wording of the bequest to *A* and *B*, who were to receive the income for life or until marriage, the survivor to receive the whole of the income, not exceeding twelve hundred dollars per year. The problem was resolved as follows:

(1) *During the Lives of A and B.* The life interest of the income from the testator's estate, which *A* and *B* were to receive, manifested an intent on the part of the testator that the specific legacies not carry with them cash dividends during the lifetime of *A* and *B*.[17]

(2) *After the Death of One of the Life Tenants.* Although the Court was unable to find any cases from any jurisdiction construing a will using the same language as the one here, it was held that the gift to the survivor of *A* and *B* of the whole of the income, but not

[14] *Id.* at 34, 131 S.E.2d at 883, quoting from Heyer v. Bullock, 210 N.C. 321, 328, 186 S.E.2d 356, 360 (1936).

[15] 260 N.C. at 34, 131 S.E.2d at 883, quoting from Shepard v. Bryan, 195 N.C. 822, 828, 143 S.E. 835, 838 (1928).

[16] 260 N.C. at 36, 131 S.E.2d at 884, citing Annot., 116 A.L.R. 1129 (1938), and a number of North Carolina cases that have followed this rule.

[17] The "universal rule" that was followed in determining how to dispose of the stock dividends and stock splits is subject to an exception where there is a contrary intent evidenced in the will. This exception was invoked here with respect to the cash dividends. 260 N.C. at 37, 131 S.E.2d at 885.

exceeding twelve hundred dollars per year, entitled the survivor to a maximum of twelve hundred dollars per year and no more.[18] The Court noted that it was impossible to reconcile the language "whole of said income" with "not exceeding twelve hundred dollars per year," but cited a great number of cases from other jurisdictions in support of its conclusion. This meant that after the death of one of the life tenants, the specific legacies of the stock carried with them all cash dividends that were not required to make up the twelve hundred dollars per year that was to go to the survivor.

DISSENT—EFFECT ON ADMINISTRATION

In *First Union Nat'l Bank v. Melvin*[19] the widow of a *childless* testator dissented from the will, under which she received less than one half of his net estate.[20] Action was brought to determine the effect of the dissent upon the distribution and administration of the estate.

One of the issues before the Court was whether a widow who has dissented from her husband's will takes her year's allowance in addition to, or as part of, her statutory share of his estate.[21] The Court held that after her dissent the widow was no longer a beneficiary of the will, and therefore, under G.S. § 30-15 she was entitled to her year's allowance in addition to her statutory intestate share of the estate.

Another key question to be determined was whether, where a

[18] 260 N.C. at 40, 131 S.E.2d at 887.

[19] 259 N.C. 255, 130 S.E.2d 387 (1963). This case is discussed in TAXATION, *Estate Tax, supra.*

[20] Under the provisions of N.C. GEN STAT. § 30-3(a) (Supp. 1963), as a dissenting widow of a deceased husband who was not survived by any lineal descendants or parent, she was entitled to one half of the net estate as defined in N.C. GEN. STAT. § 29-2(3) (Supp. 1963).

[21] 259 N.C. at 260, 130 S.E.2d at 392. The Court pointed out that G.S. § 30-15, rewritten in 1961, for the first time in North Carolina allowed a year's allowance in the case of testacy, but it is in that case to be charged against the share of the surviving spouse.

Also discussed was Dudley v. Staton, 257 N.C. 572, 126 S.E.2d 590 (1962), which held that a husband could not dissent from his wife's will. The Court's language to the effect that he can have no year's allowance if his wife disinherits him because he cannot dissent would seem to be no longer valid in the light of the recent constitutional amendment which enables the legislature to equalize the property rights of husband and wife. The law which enacted the amendment that was subsequently ratified by a general election says in pertinent part: "From and after date of certification of the amendment... wherever the word "spouse" appears in the General Statutes with reference to testate or intestate succession, it shall apply alike to both husband and wife." N.C. Sess. Laws 1963, ch. 1209, § 4.1.

widow dissents, the residuary estate is first liable for her share or whether it is to be taken pro rata from the shares of all the named beneficiaries. The Court noted that prior to July 1960, the effective date of G.S. § 30-3(c), North Carolina was in accord with the majority view that when a widow's dissent makes it necessary for other beneficiaries to contribute to her statutory share, the residuary estate is first liable.[22] However, now under G.S. § 30-3(c) the share of the estate in excess of that devised or bequeathed her which must be set aside for her is not to be taken from the residuary estate, but is to be taken pro rata from the shares of all the beneficiaries, unless the will otherwise provides.[23] Here, since the will did not provide otherwise, the statutory method of pro rata contribution by other beneficiaries had to be employed.

Finally it was held that upon the filing of her dissent the widow became vested with title to her statutory share of the real property, a one half undivided interest, and therefore, was entitled to one half of the income therefrom from the date of the death of the testator.[24]

Election

In *North Carolina Nat'l Bank v. Barbee*[25] the testator named his wife executrix of his will, left her a life estate in all of his property, both real and personal, and purported to devise to his children three lots which he had held as tenant by the entirety with his wife. The Court held that the wife's offer of the will for probate and her qualification as executrix did not constitute an election to take only under the will or to waive her claim as survivor to the entireties properties, which the will purported to devise to the children.

The Court noted the majority rule is that merely qualifying as executor or administrator c.t.a. is not sufficient, standing alone, to constitute an election to take under the will.[26] North Carolina follows this rule, unless the executor is by the terms of the will required to make an election.[27] The Court cited a long line of North Carolina

[22] 259 N.C. at 261, 129 S.E.2d at 393. See generally Annot., 36 A.L.R.2d 291 (1954).

[23] 259 N.C. at 261, 129 S.E.2d at 393.

[24] 259 N.C. at 264, 129 S.E.2d at 394. See Annot., 50 A.L.R.2d 1253 (1956) and Annot., 116 A.L.R. 1129 (1938).

[25] 260 N.C. 106, 131 S.E.2d 666 (1963).

[26] *Id.* at 108, 131 S.E.2d at 669. See Annot., 166 A.L.R. 316 (1947).

[27] For an earlier holding contra to the instant case, see Mendenhall v. Mendenhall, 53 N.C. 287 (1860), where the act of qualifying as executrix and the undertaking to carry out provisions of the will were considered to constitute an irrevocable election to abide by the terms of the will.

cases on the point that where, in a purported disposal of a beneficiary's property to third parties, the testator has mistaken it to be his, the law will not imply an election.[28] This, coupled with the presumption that a testator means only to dispose of that which is his own, effectively prevented a construction that would give rise to the finding that the widow had made an election.

Evidence—Possibility of Issue Extinct

In *Hicks v. Hicks*[29] an action was brought to determine the ownership of government bonds and cash which represented the proceeds from the sale of land which had been devised to the plaintiff for life, and then to her children. The plaintiff's son, her only child, had died leaving a wife as the sole beneficiary under his will. The son's wife transferred all her right, title and interest in the bonds and cash to the plaintiff.

In affirming the lower court's decision that the plaintiff was the absolute owner of the bonds and cash, the Supreme Court held that medical testimony that the plaintiff was seventy-three years old and that her ovaries had been surgically removed was sufficient to rebut the legal presumption that possibility of issue is not extinct until death and to establish that she was incapable of bearing children.[30]

Executors and Administrators

In *Spivey v. Godfrey*,[31] the plaintiff was one of the next of kin of a deceased intestate. The defendants held in trust a fund of money which was to be ratably divided among all of the next of kin of the intestate. The plaintiff had received less than one half of his share and sued for the balance due.

In affirming the lower court's dismissal of the plaintiff's action the Supreme Court followed the general rule that the administrator, and not the creditors or next of kin, is the proper party to bring an action to collect a debt due the estate or to recover specific personal property.[32] The Court noted that there are execptions to this gen-

[28] 260 N.C. at 111, 131 S.E.2d at 671. See Annot., 60 A.L.R.2d 736 (1958), where the North Carolina cases and those from other jurisdictions are discussed.

[29] 259 N.C. 387, 130 S.E.2d 666 (1963).

[30] The Court followed and quoted at length from United States v. Provident Trust Co., 291 U.S. 272 (1934). The possibility of issue extinct is the topic of annotations in Annot., 67 A.L.R. 538 (1930) and Annot., 146 A.L.R. 794 (1943).

[31] 258 N.C. 676, 129 S.E.2d 253 (1963).

[32] *Id.* at 677, 129 S.E.2d at 254.

eral rule. If the administrator has refused to bring the action to collect the assets; if there is collusion between a debtor and a personal representative; or, if there is some other peculiar circumstance that warrants it, the creditors or next of kin may bring the action which the personal representative should have brought.[33] There was nothing alleged in this case to bring it within one of the stated exceptions.

PROBATE

In *In re Will of Marks*[34] two writings of the same testator were admitted to probate in the same county—one dated January 1961 and probated in March 1961, the other dated February 1961 and probated in April 1961. The latter was probated by means of an exemplified copy of a South Carolina probate proceeding. The clerk, after a hearing, ordered the transcript of the South Carolina proceeding stricken from the record.[35]

On appeal from an affirmance of the clerk's order, the Court noted that there is a division of authority on whether it is necessary to caveat a writing previously admitted to probate in order to establish a later writing as a will. North Carolina adheres to the rule that the proper way to challenge the validity of a probate in common form is by caveat.[36] Thus it was held here that the South Carolina proceeding could not be probated in North Carolina until the judgment establishing the January writing as the testator's will had been set aside, and to do so it was necessary to caveat the previously probated will.

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[33] *Id.* at 677-78, 129 S.E.2d at 254-55.

[34] 259 N.C. 326, 130 S.E.2d 673 (1963).

[35] *Id.* at 328, 130 S.E.2d at 675. On the possibility of both a North Carolina court and a South Carolina court each finding that the testator was domiciled in its jurisdiction, the Court said that this was a question of fact of which different courts may reach different conclusions without invading constitutional rights and cited Riley v. New York Trust Co., 315 U.S. 343 (1942).

[36] 259 N.C. at 331, 130 S.E.2d at 667. *Accord* Holt v. Holt 232 N.C. 497, 61 S.E.2d 448 (1950); In re Will of Puett, 229 N.C. 8, 47 S.E.2d 488 (1948).