Survey of North Carolina Case Law

North Carolina Law Review

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[The “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 that are deemed of particular importance; it is not the purpose of the “Survey” to discuss all the cases that were decided during the period of its coverage. The North Carolina Supreme Court will be referred to as the “Courts” or the Supreme Court. 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.” The Editor.]

ADMINISTRATIVE LAW

Frank W. Hanft*

LICENSING—WHEN CERTIFICATE TO PRACTICE
ARCHITECTURE NOT REQUIRED

The statute requiring a certificate from the North Carolina Board of Architecture in order for one to be entitled to practice architecture provides by way of exception, “Nothing in this chapter shall be construed to prevent any individual from making plans or data for buildings for himself . . . .”1 In Board of Architecture v. Lee2 the Court held that the preparation by an individual of plans for an automobile sales and service building on his own property comes within the exception, even though after construction of the building was under way he conveyed a part interest and the owners then rented the building to an automobile agency. The Court declined to read exceptions into the exception when such are not made by the legislature. In another case the Lee decision was held to

*The period covered embraces the decisions reported in 264 N.C. 1 through 266 N.C. 403.

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apply in favor of an individual who constructed from plans prepared by himself eleven different apartment buildings, ranging in cost from 36,000 dollars to 100,000 dollars, on his own property. These decisions disclose a weakness in the statute. Assuming that the requirement of a certificate does “safeguard life, health and property” as the statute recites, then perhaps an exception to the exception should by amendment be added to the statute where the plans made by an individual are for a building to be sold or leased to others.

**Judicial Review**

**Direct Appeal to the State Supreme Court**

In 1963 the General Statutes Commission submitted to the General Assembly a bill rewriting the laws of the state concerning public utilities. With some amendments the General Assembly enacted the bill. One of the amendments was the addition of a section which provided that appeals from an order or decision of the Utilities Commission approving or authorizing an increase in the rates of a public utility shall be made directly to the State Supreme Court without intermediate review in the superior court. In *State ex rel. Util. Comm’n v. Old Fort Finishing Plant* the Court held this provision for direct appeal to the Supreme Court to be unconstitutional. The Court pointed out that article IV of the Constitution of North Carolina was rewritten in 1961, and that the rewritten article, adopted at the general election in 1962, governed the case. Section 10(1) of article IV provides, “The Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below. . . .” The Court accordingly concluded that

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6 N.C. Gen. Stat. § 62-99 (Supp. 1965). Orders of the Commission awarding or denying a certificate of convenience and necessity for construction of any facility for the generation of electricity for furnishing public utility service were added by amendment in 1965. This addition, of course, shares the fate of the rest of the section as brought out hereinafter.


8264 N.C. 416, 142 S.E.2d 8 (1965).

9 Emphasis added.
its appellate jurisdiction relates solely to appeals from "courts below," not from administrative agencies.\textsuperscript{10}

In some jurisdictions appeals from particular administrative agencies are direct to the supreme court of the state.\textsuperscript{11} In the federal system review of numerous administrative agencies is by intermediate appellate courts, namely the United States Courts of Appeals.\textsuperscript{12} If the General Assembly establishes an intermediate appellate court for North Carolina,\textsuperscript{13} the question may arise whether the General Assembly could validly provide for appeals from any state administrative agency to such court. A negative answer would seem to follow from a decision in 1898 that hearing appeals from the Railroad Commission was original jurisdiction and, therefore, could not be placed in the Supreme Court since it exercises only appellate jurisdiction save for claims against the state.\textsuperscript{14} Under the constitutional amendment authorizing an intermediate court of appeals in this state that court also is to exercise only appellate jurisdiction.\textsuperscript{15}

However, in a more recent North Carolina case the Court held that the superior court, reviewing on certiorari a decision of a city board of adjustment concerning zoning of a tract of real estate, was sitting as an appellate court.\textsuperscript{16} In 1964 that case was followed in a decision to the effect that a superior court judge was sitting as an appellate court in reviewing hearings before a city planning and

\textsuperscript{10} It is true that N.C. Const. art. IV, § 3, authorizes the General Assembly to vest judicial powers in "administrative agencies," but this recognizes that they are still administrative agencies, not courts.

\textsuperscript{11} 25 Mich. L. Rev. 178 (1926). At that time fifteen states provided for review of public utilities commission decisions by the state supreme court, but such review provisions had been held invalid by some courts under constitutional provisions limiting the supreme court to appellate jurisdiction. However, in seven states constitutional provisions expressly allowed direct appeals from decisions of the utilities commission to the supreme court.

\textsuperscript{12} 3 Davis, Administrative Law § 23.03 (1958); 70 Harv. L. Rev. 827, 903 (1957).

\textsuperscript{13} N.C. Sess. Laws 1965, ch. 877, provides for amendments to N.C. Const. art. IV to create an intermediate court of appeals when established by the General Assembly.

\textsuperscript{14} State ex rel. Bd. of R.R. Comm'r's v. Wilmington & W. R.R., 122 N.C. 877, 29 S.E. 334 (1898).

\textsuperscript{15} N.C. Sess. Laws 1965, ch. 877, § 1, at 1173, provides that the intermediate court of appeals "shall have such appellate jurisdiction as the General Assembly may provide." No mention is made of any original jurisdiction.

\textsuperscript{16} In the matter of Pine Hill Cemeteries, Inc., 219 N.C. 735, 15 S.E.2d 1 (1941).
zoning commission and the city council. These cases afford a basis for holding that the intermediate court of appeals would be exercising appellate jurisdiction in reviewing decisions of administrative agencies.

Sound policy might dictate that the state follow the federal example and make the intermediate court of appeals the body to review the decisions of some of the state agencies. Bodies like the Utilities Commission and the Industrial Commission might well be placed on a parallel with trial courts, so that their decisions would go to an appellate court for review rather than to a trial court.

One obvious advantage of such procedure would be that the intermediate appellate court would develop expertise in reviewing decisions in these specialized fields.

Review of Industrial Commission—Jurisdictional Facts

In Askew v. Leonard Tire Co. the Court discussed many of its previous holdings as to whether the superior court in reviewing decisions of the Industrial Commission must make independent findings of jurisdictional facts and concluded that there was conflict in

18 It would probably be undesirable to burden the intermediate court of appeals with the taking of additional evidence, but it is already provided that in appeals from the Utilities Commission no evidence shall be received at the hearing on appeal. If there is newly discovered evidence, the superior court may remand the case to the Commission to take the evidence. N.C. Gen. Stat. § 62-93 (1965). However, in cases of alleged irregularities in procedure before the Commission not shown in the record, testimony thereon may be taken in the court. N.C. Gen. Stat. § 62-94(a) (1965). In the case of the Industrial Commission the reviewing court may not receive or consider any evidence not introduced before the hearing commissioner or the full Commission. Huffman v. Douglass Aircraft Co., 260 N.C. 308, 132 S.E.2d 614 (1963). The superior court may remand to the Commission to hear newly discovered evidence. Byrd v. Gloucester Lumber Co., 207 N.C. 253, 176 S.E. 572 (1934). The general judicial review statute for administrative agencies, applicable unless adequate procedure for judicial review is provided by some other statute, N.C. Gen. Stat. § 143-307 (1964), likewise provides for remand to the agency to hear additional evidence. N.C. Gen. Stat. § 143-313 (1964). However in cases of alleged irregularities in procedure before the agency not shown in the record, testimony thereon may be taken by the court, and where no record or an inadequate record was made, the judge in his discretion may hear the matter de novo. N.C. Gen. Stat. § 143-314 (1964). The statutory provisions for review of decisions of certain licensing boards state that the judge shall not take evidence not offered at the hearing except for alleged omissions or errors in the record. N.C. Gen. Stat. § 150-27 (1964). The case may be remanded to the board to hear additional evidence. N.C. Gen. Stat. § 150-29 (1964).
the cases. The Court noted that the question whether an employer-employee relationship exists is jurisdictional. It cited cases in which it had nevertheless held that the Commission's findings of fact relating to this question are conclusive on appeal if supported by substantial evidence, which is the rule applicable to findings of nonjurisdictional facts. The Court accounted for those cases by stating that it had perhaps been "unmindful of the jurisdictional nature of the question . . . ." On the other hand the Court discussed *Aylor v. Barnes* and pointed out that this case also raised a jurisdictional question, this time whether the employee was a resident of North Carolina; that the Commission decided that he was and made an award; that the superior court affirmed all the findings of fact, conclusions of law and award and recited that the entire record had been examined and considered; and that the Supreme Court held that this was not enough and remanded the case to the superior court for *independent findings* of jurisdictional facts by the judge.

Having from these and other cases pointed out the conflict in its decisions, the Court in *Askew* said, "We are not disposed to draw fine distinctions in an effort to harmonize our former decisions, and thereby add confusion to uncertainty." Upon taking this highly commendable view the Court set out to clarify its present position. It declared to be settled law the rule that the superior court has both the power and duty to consider all the evidence in the record and find therefrom the jurisdictional facts without regard to the Commission's finding of such facts. These latter are not conclusive even though supported by competent evidence. The Court then stated how the rule would apply in certain specific situations.

If the superior court judge is of the opinion from the evidence in the record that the Commission's findings of jurisdictional fact

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20 What matters are to be regarded as jurisdictional will not be discussed here. "Apparently no one has ever succeeded in ascertaining the difference between fundamental or jurisdictional facts and other facts." 4 DAVIS, *ADMINISTRATIVE LAW* § 29.08, at 158-59 (1958).

21 This view, which the Court repudiated, has support. Bellini v. Great Am. Indem. Co., 299 N.Y. 399, 403, 87 N.E.2d 426, 428 (1949); 4 DAVIS, *ADMINISTRATIVE LAW* § 29.08, at 162 (1958).

22 264 N.C. at 171, 141 S.E.2d at 283.

23 242 N.C. 223, 87 S.E.2d 269 (1955), discussed, 264 N.C. at 172, 141 S.E.2d at 283.

24 264 N.C. at 173, 141 S.E.2d at 284.
led to an improper assumption or rejection of jurisdiction, it is his duty to make independent findings of jurisdictional facts and set them out in his judgment.

If a party requests the judge to make independent findings of jurisdictional facts, it is error to refuse, and such facts found by him must be set out in the judgment or incorporated herein by reference. However, if his findings are in agreement with those of the Commission, he may by reference adopt the latter as his own. But it is error for him to proceed on the theory that he is bound by them.

Where no party requests the judge to make independent findings of jurisdictional facts, and he makes none but affirms the Commission’s findings, then if the jurisdictional aspect of the findings is first suggested and the findings challenged in the Supreme Court, it will be presumed that the superior court judge reviewed the evidence and his findings were in accord with those of the Commission. His overruling of exceptions to the Commission’s findings and affirmance of them will be deemed an adoption of them as his own, unless it clearly appears from the record on appeal in the Supreme Court that he proceeded on the mistaken view that the Commission’s findings of jurisdictional facts were binding on him and that he was without authority to make independent findings.

Applying its declared guides to the case before it, the Court held that the superior court did not err in failing to set out independent findings of jurisdictional facts. The Supreme Court noted that there was no request in the superior court for independent findings of jurisdictional facts, that the judge reviewed the evidence in the record, that he struck out certain findings, that he overruled exceptions to the material findings of jurisdictional facts by the Commission and affirmed them. There was nothing in the record and judgment to indicate that he considered the Commission’s findings to be conclusive. The Court bolstered its conclusion that the judge was aware of his authority and duty by pointing out that he was the same judge who, in a recent case appealed to the Supreme Court found independently facts on the employer-employee relationship and reversed the Commission.

This application to the principal case of the guides the Court laid down may create confusion of the sort the Court sought to

allay. Granted that the superior court judge overruled exceptions to the findings of jurisdictional facts by the Commission and affirmed them, on what basis did he do so? The statement of the procedure below in the report of the case recites, "[T]he [superior] court held that these findings of fact are supported by competent evidence." The Supreme Court in its opinion stated that the superior court judgment "holds that the material findings of the Commission as to the employer-employee relationship are supported by competent evidence; it overrules appellants' exceptions and assignments of error." The Supreme Court pointed out that there was a conflict in the testimony bearing on the question whether the claimant was an employee or an independent contractor. It would seem, then, that the superior court judge affirmed the Commission's findings of jurisdictional facts on the basis that there was competent evidence to support them. But this, the Supreme Court said in the same opinion, is not the test. It said that the Commission's findings of jurisdictional fact are not conclusive even though supported by competent evidence.

Moreover, in a later case, Burns v. Riddle, the Commission made a finding that an employer sawed and logged more than sixty days during a six-month period and therefore came under the Workmen's Compensation Act. The superior court treated this as a finding of jurisdictional fact. The Supreme Court affirmed and recited in its judgment, "'[T]he Court finds as a fact that there is competent evidence in the record to support the findings of fact . . . .'" Although this was substantially the same recital as that by the superior court in Askew, this time the Supreme Court reversed on the ground that this recital showed clearly that the superior court judge was proceeding on the mistaken premise that the Commission's findings of jurisdictional facts were binding upon him if supported by any competent evidence. The Supreme Court remanded the case to the superior court to make independent findings of the jurisdictional facts. As in Askew there was evidence both ways on the disputed jurisdictional facts.

Apparently the Supreme Court's statements in the Askew and

28 264 N.C. at 170, 141 S.E.2d at 282.
27 Id. at 171, 141 S.E.2d at 282.
29 265 N.C. 705, 144 S.E.2d 847 (1965).
30 See the definition of "employment," N.C. GEN. STAT. § 97-2(1) (1965).
31 265 N.C. 705, 706, 144 S.E.2d 847, 849 (1965).
Burns cases are to be reconciled in the following fashion. Even though the superior court affirms the Commission's findings of jurisdictional facts on the ground that they are supported by competent evidence, still the Supreme Court will affirm the superior court on this point if from the total situation the Supreme Court is convinced that the superior court judge was aware that he was not bound to affirm for this reason but had authority to find the other way if that contrary finding also had support in the evidence.

To avoid possible reversal it would seem that where the superior court judge agrees with the Commission's findings of jurisdictional facts, it would be good policy for him to adopt the findings as his own rather than affirm them on the basis that they are supported by competent evidence.

**Double Jeopardy and Res Judicata**

The proprietor of a tavern, according to the testimony of two officers, sold them whiskey by the drink, and on another occasion W sold them whiskey by the drink in the proprietor's presence. For this the proprietor was tried and found not guilty in the superior court. A *nolle pros.* was taken in the prosecution of W. For the same violations of law the State Board of Alcoholic Control revoked the proprietor's permit. The Supreme Court held that this did not constitute double jeopardy. The rules of evidence in criminal cases, said the Court, require proof of guilt beyond reasonable doubt. The result of the criminal trial did not bind the Board.\(^1\)

The court cited no authority on the double jeopardy point and entered into no extended discussion, but the decision is in accord with the leading case of *Helvering v. Mitchell*,\(^2\) as well as what has been called the modern tendency.\(^3\) In the *Helvering* case Mitchell was prosecuted for a felony for willfully attempting to evade an income tax. He was acquitted. The Commissioner of Internal Revenue found that he had made a fraudulent deduction and also had fraudulently failed to return certain income, found a deficiency

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\(^1\) Freeman v. Board of Alcoholic Control, 264 N.C. 320, 141 S.E.2d 499 (1965).

\(^2\) 303 U.S. 391 (1938).

\(^3\) Annot., 42 A.L.R.2d 634, 639 (1955). This note collects and discusses numerous cases holding that a defendant's former acquittal or conviction of a criminal charge does not bar a civil action for a statutory penalty for the same conduct. A lesser number of cases previous to 1938, the date of the *Helvering* decision, are cited for the opposite view.
of 728,709.84 dollars, and pursuant to statute, added fifty per cent because of the fraud. The deduction and the failure to return above mentioned had been the basis for the criminal prosecution. The United States Supreme Court held that Mitchell's acquittal in the criminal prosecution did not by the doctrine of res judicata bar the fifty per cent addition for fraud, since the burden of proof in civil and criminal cases is different. The acquittal was merely an adjudication that there was not proof of guilt beyond a reasonable doubt. Acquittal on a criminal charge is not a bar to a civil action by the government remedial in nature. The United States Supreme Court further held that double jeopardy did not preclude the fraud addition since the latter was not designed as punishment but as a safeguard for the protection of the revenue and to reimburse the government for the expense of investigation and the loss resulting from the taxpayer's fraud and is therefore remedial. The Court also pointed to the civil nature of the procedure for the collection of the additional fifty per cent and listed many rules and guaranties governing trial of criminal prosecutions which do not apply where civil procedure is prescribed.

CIVIL PROCEDURE (PLEADING AND PARTIES)

Henry Brandis, Jr.*

Verification

In Sisk v. Perkins¹ the Court, quoting from an earlier case,² reiterated the rule that, except when verification is made an essential part of the pleading, the requirement of G.S. § 1-144 (that all pleadings subsequent to a verified pleading must also be verified) may be waived. In both cases failure to verify an amendment to the answer was involved. In the earlier case plaintiff's attorney did not raise the question until after the filing of an adverse referee's report—at which time a request by defendant's counsel to be allowed

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¹ 264 N.C. 43, 140 S.E.2d 753 (1965).
² Calaway v. Harris, 229 N.C. 117, 47 S.E.2d 796 (1948).
to have the amendment verified was denied. In Sisk the attorney for an additional defendant moved to strike an amendment to the original defendant's answer, pleading as res judicata the judgment in another action between the two. This motion, not based upon lack of verification, was denied. A subsequent, but undated, motion to strike was based upon lack of verification. The Supreme Court, in the preliminary statement of facts and in the opinion, assumed that this second motion was not passed upon by the court below and that the moving attorney made no effort to secure a ruling on it. This assumption was erroneous, as, after the jury was impaneled but before the actual trial began, it was denied. At the same time the judge ruled that the prior judgment was not res judicata and that the amendment pleading it could not be read to the jury. He refused to receive it in evidence. Since these latter rulings produced a result identical to that which would have been produced by granting the motion to strike, and since the additional defendant won at the trial, it is understandable why he did not appeal.

The Supreme Court held that the prior judgment was res judicata and should have been admitted in evidence. Since it believed that lack of verification had been raised only by a motion that a non-appealing party had never brought to decision below, the Court said that the merits of the motion to strike were not before it. Nevertheless, the inference is clear that the Court believed that lack of verification had been waived.

Had the Court realized that the motion had been denied below, the absence of a cross-appeal might have been regarded as determinative. However, since the Court was inadvertent to that decision, the waiver must be found either in (a) failure to move to strike for lack of verification until after or during the trial; or (b) failure to bring the motion to timely decision, even if timely made; or (c) failure to include this objection as a ground for the first motion to strike; or (d) some combination of these. Of the first three, only (c) is sustained by the record, but the case may not be read as finding that alone to be a waiver. Yet a decision to that effect would make good sense. To the extent that a pleading in-

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4 The Court points out that the second motion to strike was undated, and since the Court failed to realize that it was decided immediately before the actual trial began, it might have assumed that the motion came later.
corporates the record in a prior action, a verification adds little, if anything, to its probable veracity, and the absence of verification is more exclusively a technicality than it might be in some other situations. Therefore, a motion to strike on some other ground might well be regarded as a waiver of this objection.

PLEADING SPECIFIC MATTERS

Mistake

The Court held that a demurrer should not be sustained to that part of an answer seeking reformation for mutual mistake when the allegations sufficiently show (a) the terms of an oral agreement between the parties; (b) a subsequent written agreement intended by the parties to incorporate the oral agreement, but in fact differing from it; and (c) their mutual but mistaken belief that the writing incorporated the oral agreement. It is not necessary to allege how and why the mistake occurred. While couched in terms of necessary allegations, the same decision would seem to follow as to the proof required. Hence, in essence, the case involves substantive law rather than merely pleading. However, whether regarded as substantive or procedural, the decision seems clearly sound.

Mutual Agreement

In Dixon v. Bank of Washington the issue was whether plaintiff could recover the reasonable value of services rendered to a decedent more than three years prior to his death. This, in turn, depended upon whether the decedent had agreed to compensate plaintiff by will, as, though the contract would be void under the Statute of Frauds, the statute of limitations would not have begun to run until decedent's death. The complaint alleged that plaintiff's services were rendered "upon the understanding" that the decedent would compensate plaintiff by will. It was held that, in context, this was a sufficient allegation of mutual understanding or agreement; and, since the evidence of mutual agreement was sufficient to justify a finding for plaintiff, the judgment in her favor in the court below was affirmed. The decision is a good one.


265 N.C. 322, 144 S.E.2d 57 (1965).

Cf. Grossman v. Schenker, 206 N.Y. 466, 100 N.E. 39 (1912), where the court accepted, as a sufficient allegation of consideration on plaintiff's
Negligence and Proximate Cause

The Court again made it clear that the pleader must allege facts which, if proved, will justify findings of negligence and proximate cause, that the conclusions need not be alleged, and that when alleged they are to be disregarded.8

Fraud

It was also again made clear that there must be factual allegations which would justify a finding of fraud, a mere charge of fraud being insufficient.9

Incorporation by Reference

In the last-mentioned case it was also held that when, in an action for alimony without divorce, a prior separation agreement was attached to the answer and incorporated by reference, it was proper to make the agreement the basis for judgment on the pleadings for defendant, since the exhibit was part of the pleadings for this purpose.

It has repeatedly been held that when recovery is predicated upon the terms of a contract, the terms may be alleged by attaching the contract and incorporating it by reference.10 Obviously the same rule should apply to pleading a contract in bar of recovery. Indeed, there is no reason why any document, so attached and incorporated, should not be treated as an integral part of the pleading. However, it should be recalled that, because the Court refuses to allow the allegations of one cause of action to be incorporated by reference into another part of the same pleading,11 the Court has held that allegations from a pleading in another suit may not be repleaded by attachment and incorporation.12 Presumably this does part, an allegation that it was "mutually agreed" that defendant would pay plaintiff $500 for certain work, despite the absence of an express allegation that plaintiff agreed to perform the work (which, in fact, he never performed, because defendant refused to allow him to do so).

9 Van Every v. Van Every, 265 N.C. 506, 144 S.E.2d 603 (1965). Such factual allegations as were present were regarded as insufficient to justify a finding of fraud.
not prohibit attachment and incorporation in support of a defense of res judicata or prior action pending. This latter, of course, is the common and accepted practice.

**REAL PARTY IN INTEREST**

In *Shambley v. Jobe-Blackley Plumbing & Heating Co.*, insureds brought action against the wrongdoer for damages that had been paid in full by their insurer. By subrogation the insurer had become the sole real party in interest. It was held that the lower court was without power to allow the insurer to be made an additional party and to adopt the complaint, since, in effect, this would be a substitution of parties and would introduce a new and independent cause of action. Concededly this result is supported by the cases on which the opinion relies, but there are other North Carolina cases in which, through some beautifully sensible aberration, a contrary result was reached. Thus, where a partially subrogated insurer attempted to sue alone, though the insured was the real party in interest, the Court upheld the lower court's authority to add insured as a party, saying:

As a general rule the trial court has the discretionary power to make new parties, especially when necessary in order that there may be a full and final determination and adjudication of all matters involved in the controversy. G.S., sec. 1-73, 163.

That the plaintiff alone, without the joinder of the owner, is not entitled to maintain the action does not alter the rule or limit the discretionary power of the judge.

It may be argued that, despite the breadth of the quoted language, this case is not in conflict because the original plaintiff was entitled to part of the fruits of the action and hence was a proper party. However, where a rental agent sued to collect rent and it was held that the landlord was the sole real party in interest, the lower court brought in the landlord and the Supreme Court ap-

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13 *Cf. Sale v. Johnson, 258 N.C. 749, 129 S.E.2d 465 (1963), relied upon by the Court in the Van Every case.*
14 *264 N.C. 456, 142 S.E.2d 18 (1965).*
proved, saying simply that the court has power to make additional parties plaintiff or defendant.\textsuperscript{17}

In both cases it was recognized that the statute of limitations would run against the new party until he became such, but that involves a question quite distinct from the question of power to add a party. This writer believes that, at least where the original plaintiff had some rational connection with the events in litigation, those cases sustaining the power are completely sound and that the more restrictive cases represent an unfortunately technical judicial policy not required by—and, indeed, virtually in defiance of—the controlling statutes.\textsuperscript{18}

In another case involving subrogation,\textsuperscript{19} the answer pleaded that plaintiff had been fully compensated by insurance and, therefore, was not the real party in interest. Contending that this was factually incorrect, plaintiff’s attorney moved to strike the defense. The Court held that denial of the motion was proper, since it was the equivalent of a speaking demurrer; that the factual issue, upon motion and in the lower court’s discretion, could have been determined prior to trial or, in the absence of such procedure, would present a jury question. Probably the case should not be interpreted as meaning that the lower court could, in advance of trial, make findings upon conflicting evidence as to whether plaintiff had been fully compensated, dismissing the case if it found for defendant or eliminating the defense if it found for plaintiff. Wherever resolution of a real party in interest question turns upon a factual dispute, there would seem to be an issue for the jury.

In \textit{First Union Nat’l Bank v. Hackney},\textsuperscript{20} a case of first impression in North Carolina, a wife died from injuries received in a car crash allegedly caused by her husband’s negligence. The husband

\textsuperscript{17} Home Real Estate, Loan & Ins. Co. v. Locker, 214 N.C. 1, 197 S.E.2d 555 (1938). The Court relied on C.S. § 547, which is now N.C. GEN. STAT. § 1-163 (1953).

\textsuperscript{18} “\[W\]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). “The judge or court may . . . amend any pleading, process or proceeding, by adding or striking out the name of any party . . . .” N.C. GEN. STAT. § 1-163 (1953). The prohibition in the latter statute against an amendment changing substantially a claim or defense is confined to amendments conforming to the proof.

\textsuperscript{19} University Motors, Inc. v. Durham Coca-Cola Bottling Co., 266 N.C. 251, 146 S.E.2d 102 (1966).

survived her only a short time. The wife's administrator sued the husband's executor for wrongful death. Four minor children of the marriage would take any proceeds of the wrongful death action, and they were also the sole beneficiaries of the husband's estate. It was held that, despite loose expressions in prior opinions to the contrary, the children were not the statutory real parties in interest in the wrongful death action; that, in the absence of a showing that the husband had no insurance, it was not a litigation between the same parties on both sides; and, that, the underlying reasons for the policy being absent, the action was not barred by the judicial policy against allowing an unemancipated minor child to recover against a parent for negligence. The opinion contains an extensive, enlightening review of cases from other jurisdictions. While in part couched in terms of real party in interest, it is clear that the basic issue here is whether enforceable rights will be recognized as a matter of policy—not whether concededly enforceable rights are enforceable by A or by B.

Other cases held that (a) under the circumstances presented it was not reversible error to include medical expenses in a recovery by an unemancipated minor child whose next friend was his father; and (b) where an insured changed the beneficiary under his life policy from his wife to his "executors, administrators or assigns," and the wife, as executrix, sued for the proceeds, she would not, thereafter, be allowed to sue in her individual capacity for the proceeds, attacking the change of beneficiary on the ground that insured lacked mental capacity to make it.

Recovery would be reduced by any share otherwise going to the husband as a survivor, because of his negligence.

There has never been any doubt about the fact that N.C. Gen. Stat. § 28-173 (Supp. 1965) vests the wrongful death action in the decedent's personal representative, and such representative is the sole real party in interest in the sense of having the exclusive right to bring the action. Prior opinions describing the beneficiaries as the real parties in interest meant only that they are entitled to the fruits of the action—which may, indeed, have meaningful consequences, as in connection with the husband's share of any recovery in the principal case.


In this case the executrix successfully attacked the beneficiary's surrender of the policy for its cash value, without attacking the change of beneficiary, made one day earlier. For a discussion of the insurance aspects of the case, see Dameron, Insurance, North Carolina Case Law, 44 N.C.L. R51. 1022 (1966).
It was held that the denial of a motion for leave to amend is not res judicata and the party may move again for such leave. More precisely, what seems to be involved is the law of the case, rather than res judicata. Even so, and particularly considering the mandatory peregrinations of our superior court judges, one wonders at what point, if ever, it becomes legally impermissible to re-proffer the same amendment. Perhaps the three-strike rule could be borrowed from baseball, though the turn at bat should not be prolonged by a foul ball on the third strike.

**SUPPLEMENTAL COMPLAINT**

In *Crew v. Thompson* it was held that, to the extent the allegations of a supplemental complaint are in conflict with those of the original complaint, the latter are superseded (just as if replaced by an amendment). This, of course, is good common sense as well as good law.

**ELECTION OF REMEDIES**

In one case the lower court granted a motion to require plaintiff to elect between tort and contract theories of recovery. The Su-


Dixie Fire & Cas. Co. v. Esso Standard Oil Co., 265 N.C. 121, 130, 143 S.E.2d 279, 286 (1965). The matter is disposed of in a short paragraph, citing and quoting Overton v. Overton, 260 N.C. 139, 132 S.E.2d 349 (1963), which is almost equally succinct: "[R]es judicata does not apply to ordinary motions incident to the progress of the trial." Overton, in turn, is based upon Revis v. Ramsey, 202 N.C. 815, 164 S.E. 358 (1932), where the amendment sought and allowed differed to some extent from the earlier amendment sought and denied. The Overton opinion also states that the ruling on a motion to amend is "not necessarily" res judicata.

Cf. Guilford Realty & Ins. Co. v. Blythe Bros., 266 N.C. 229, 145 S.E.2d 838 (1966) (prior rulings striking a defense and overruling a demurrer referred to as law of the case); Perfecting Serv. Co. v. Product Dev. & Sales Co., 264 N.C. 79, 140 S.E.2d 763 (1965) (same as to prior ruling on demurrer to a counterclaim). See also Dixie Fire & Cas. Co. v. Esso Standard Oil Co., 265 N.C. 121, 143 S.E.2d 279 (1965), where the Court refrained from ruling on the power of a superior court judge to sustain a demurrer after it had been overruled by another judge.

Dixie Fire & Cas. Co. v. Esso Standard Oil Co., 265 N.C. 121, 143 S.E.2d 279 (1965). Since the judge thereupon denied plaintiff's motion to amend the elaborate the tort theory, it seems that he was not overly sympathetic to plaintiff's case.
preme Court carefully pointed out that the propriety of this ruling was not before it, and it expressed no opinion on the matter. Since the Court does at times express an opinion on matters not technically before it, one could wish that the Court here had indicated its strong disapproval. The granting of such a motion seems little more than an anachronistic resurrection of common-law procedure, now supposedly buried for practically a century.

**Commingling Causes of Action**

In *Monroe v. Dietenhoffer*\(^\text{20}\) the Court followed its more recent rule that where several causes of action are not separately stated, a demurrer on this ground must be sustained, as the causes are "improperly united" (the opinion using the quotation marks). This is expressly made a ground of demurrer by G.S. § 1-127, but, properly interpreted, the statute would seem to apply only where joinder is improper whether or not the causes are separately stated. Failure to state separately causes otherwise properly joined should be treated merely as a matter of form, open to attack only by motion to make more definite and certain.\(^\text{31}\) However, our rule now seems definitely to be settled to the contrary.

There is no practical difference between granting a motion to make more definite and certain and sustaining a demurrer if plaintiff is allowed to amend after the demurrer is sustained. However, as the *Monroe* opinion indicates, sustaining the demurrer relegates the plaintiff to moving for leave to amend under G.S. § 1-131, and the granting or denying of the motion is discretionary. While, in this writer's view, refusal to grant leave to amend in this situation should ordinarily be regarded as abuse of discretion, nothing indicates that it would be such in the eyes of the Supreme Court; and even if it were, an appeal would be required. Conceding that commingling causes of action is professionally sloppy, it still seems questionable to convert a sloppy defect of form into a potentially fatal error of substance. In the present state of the rule, any attorney faced by a demurrer on this ground should rush to file an amended complaint within five days after the demurrer is filed and before decision on it. Under G.S. § 1-129, though the language is none

\(^{20}\) 264 N.C. 538, 142 S.E.2d 135 (1965).

too clear, such an amendment seems to be a matter of right rather than of discretion.\footnote{See Upchurch v. City of Raleigh, 252 N.C. 676, 114 S.E.2d 772 (1960).}

**DEFENSES**

**Statute of Limitations**

In *Jewell v. Price*\footnote{264 N.C. 459, 142 S.E.2d 1 (1965).} plaintiff sought to recover against a contractor for destruction of a house by fire allegedly caused by improper installation of the furnace. The action was begun less than three years after the fire, but more than three years after delivery of the house for plaintiff's occupancy. The Court held that, whether the action be considered as for negligence or for breach of contract, it accrued on the date of delivery and was properly nonsuited because barred by the statute of limitations.

As to the negligence theory the Court's reasoning was (a) when there is a tortious invasion of a right justifying recovery of even nominal damages, the statute then begins to run; (b) nominal damages may be recovered in a negligence action; and (c) it is unimportant that "the actual or the substantial" damage does not occur until later if the whole injury results from the original tortious act. Unfortunately, this reasoning is in one respect defective. Actual damage is a necessary element of a cause of action for negligence.\footnote{See Prosser, Torts, § 30 (3d ed. 1964).} The cases cited by the Court for the proposition that nominal damages may be recovered in negligence actions\footnote{Clark v. Emerson, 245 N.C. 387, 95 S.E.2d 880 (1957); Lieb v. Mayer, 244 N.C. 613, 94 S.E.2d 658 (1956).} do not mean that proof of negligence, without proof of consequent actual damage, will justify recovery. They mean that when actual damage is proved, but there is no proof of monetary amount (as where the evidence clearly shows plaintiff's car was damaged, but there is no proof of dollar amount), nominal damages may be recovered.

Thus, however tough on plaintiffs it is, it might be legally permissible to say that if actual damage, however slight, had occurred at the time of delivery (a factual question), the cause of action accrued at that time, despite failure to discover the damage until later, and even though no substantial damage occurred until later. The Court might possibly have assumed from the evidence in the
principal case that some actual damage did exist at the time of delivery. But, since no cause of action for negligence can exist until there is actual damage, the Court is manifestly in error in stating that the cause may accrue even though actual damage does not occur until later.\textsuperscript{36}

In \textit{Fulp v. Fulp}\textsuperscript{37} plaintiff had contributed to the cost of improvements on land owned by her husband in return for his oral promise to convey her a half interest. In 1952, after completion of the improvements, he repudiated his promise. In 1959, after they had separated, she sued him. The Court held (a) there was no resulting or constructive trust, since no title was acquired with plaintiff's funds, and hence the ten-year statute did not apply; (b) plaintiff could recover on the theory of money had and received and, because of the confidential relationship, she acquired an equitable lien; (c) the confidential relationship did not preclude or suspend the running of the statute of limitations; and (d) the three-year statute applied and the action was so clearly barred that nonsuit was affirmed.

The opinion concedes that refusal to allow the marital relationship to affect the running of the statute is a minority view and that the precise point was one of first impression in North Carolina, as the earlier authority\textsuperscript{38} dealt with a note of the husband acquired by the wife after the statute had begun to run.

In \textit{Bennett v. Anson Bank & Trust Co.}\textsuperscript{39} it was alleged that plaintiff's intestate died in 1936. He and his brother had been in partnership. The brother died in 1944 without ever accounting for the partnership assets, and the brother's widow (also his executrix and sole beneficiary) died in 1963, without having so accounted. The action was then brought by the intestate's "reappointed administratrix" and heirs against the estates of the brother and his widow, demanding an accounting and impression of a trust, alleging that the brother had diverted partnership assets to himself and his wife and that both he and his widow had misrepresented

\textsuperscript{36}Probably a more accurate statement would not have changed the result of the principal case. The evidence tended to show that, at the latest, some actual damage occurred to the house and its furnishings at a time several weeks after delivery, but still slightly more than three years prior to the commencement of the action.


\textsuperscript{38}Graves v. Howard, 159 N.C. 594, 75 S.E. 998 (1912).

\textsuperscript{39}265 N.C. 148, 143 S.E.2d 312 (1965).
the situation to conceal such diversion and had induced plaintiffs to believe that an accounting would be futile. The Court, recognizing that the intestate's administratrix could have demanded an accounting in 1936, held that if the jury believed plaintiffs' version of the facts, the action would not be barred by the statute because, under the circumstances, plaintiffs could bring their action within three years after they discovered, or ought to have discovered, the fraud of the brother and his widow. The confidential relationship could be an excuse for failure to discover it.

The Fulp and Bennett cases are not in conflict. While a confidential relationship existed in both (and the Fulp opinion recognizes that the marital relation is the most confidential of all relationships), in Fulp, even if it be assumed that there was fraud on the part of the husband, it was discovered (not merely discoverable) in 1952 when, by plaintiff's own testimony, he repudiated his promise. The issue there was whether the relationship prevented the running of the statute on a cause of action clearly accrued. In Bennett the issue was whether the relationship delayed the accrual of the cause.

In another unusual case40 the complaint alleged that plaintiff had advanced money to decedent during her life in return for a promise to repay during life or by will; that, not having repaid during life, she left a will devising to plaintiff realty of sufficient value to repay him; that the will had been offered for probate but its validity was contested by the heirs; that plaintiff had filed his claim with defendant administrator, who denied it; and that the clerk had ordered defendant to suspend further proceedings in relation to the estate until the will controversy was concluded. On demurrer the court below dismissed the action on the ground that the cause had not yet accrued, noting that the dismissal was without prejudice to a new suit if plaintiff eventually lost in the will contest. The Supreme Court reversed, holding that G.S. § 28-112 required plaintiff to bring action within three months after denial of his claim by the administrator, that the running of the statute was not suspended by any of the above described events, and that not allowing the suit at this time might eventually cause plaintiff to lose his claim entirely. The result was not changed by the fact that, pending the appeal, the clerk had ordered the will probated, since a caveat re-

mained to be tried. (The Court pointed out that it might be inappropriate to bring the case to trial prior to final determination on the caveat).

Finally, with reference to the statute of limitations, in *Security Nat'l Bank v. Educators Mut. Life Ins. Co.* an issue was whether the three-year or ten-year statute applied, and the answer depended upon whether a seal had been adopted. Both the referee and the superior court concluded that the contract was under seal (a matter on which plaintiff had the burden of proof), but neither made findings of fact with respect to that issue. The Supreme Court remanded, stating that the lower court could make the findings or send the case along to the referee for such purpose.

**Release or Settlement**

Prior settlement is not available as a defense unless pleaded.

**Payment**

In two cases the Court reiterated the rule that payment is an affirmative defense upon which defendant has the burdens of pleading and proof. In the first the rule was applied in a county's action to foreclose a property tax lien, thus indicating that our Court draws no distinction between a simple action on the debt and an action to enforce a lien predicated upon the debt. In the second case the rule was invoked to reverse a nonsuit apparently based upon defendant's evidence of payment.

**Facts Peculiarly Within Party's Knowledge**

Where defendant was being sued for loss of and damage to goods stored in its warehouse, and defendant had also packed and carried the goods to the warehouse, and plaintiff's evidence showed loss and damage while the goods were in defendant's exclusive possession, the burden was on defendant, if it relied on such a

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41 265 N.C. 86, 143 S.E.2d 270 (1965).
42 Bongardt v. Frink, 265 N.C. 130, 143 S.E.2d 286 (1965). For further discussion in this case, see text accompanying notes 92-95 infra.
43 Iredell County v. Gray, 265 N.C. 542, 144 S.E.2d 600 (1965).
45 Such facts as are recited indicate that the judge might properly have charged that if the jury believed the defendant's evidence, it should find for defendant.
defense, to show loss and damage prior to the beginning of storage.46

**Defenses of Insurers**

While reiterating that filing of proof of loss is a condition precedent, the Court held that the defense of failure to file such proof as required by the policy was waived where, though the answer denied that proper proof was filed, the course of the trial demonstrated that whether insured's death was accidental was the only issue litigated, defendant insurer not having tendered any issue or requested any instructions regarding proof of loss.47

Three cases involved defenses under motor vehicle liability policies. In one,48 plaintiff, having recovered against the insured, was seeking to collect from the insurer. Insurer contended that insured had neither given proper notice nor cooperated as required by the policy. (For reasons in controversy, insured did not attend the trial in the action against him.)49 The court below submitted a single issue whether, by defending the case, insurer waived these two potential defenses. The Court held this to be error since, particularly in the light of the charge, no proper account was taken of the difference in the conduct required to waive the two. Judgment for plaintiff was reversed and the case remanded for a new trial involving a new look at whether insured's absence was justified and, if it

46 Jordan v. Eastern Transit & Storage Co., Inc., 266 N.C. 156, 146 S.E.2d 43 (1966). The case also involved an ineffectual attempt by the warehouseman to limit liability by the fine print in the contract.

47 Horn v. Protective Life Ins. Co., 265 N.C. 157, 143 S.E.2d 70 (1965). (Nonsuit was ordered for failure of plaintiff to prove that death was accidental.) Though it is not clear, it seems possible if not probable that defendant had denied liability on the merits during the time allowed for filing proof of loss; and this would clearly be a waiver, standing alone. Dameron, Insurance, North Carolina Case Law, 44 N.C.L. Rev. 1022 (1966). In Gorham v. Pacific Mut. Life Ins. Co., 214 N.C. 526, 200 S.E. 5 (1938), the majority opinion may imply that the mere filing of answer denying liability on the merits waives failure to file proof of loss, pleaded as a defense in the same answer; but this could hardly be sound. The Horn opinion clearly does not go that far. Cf. Fleming v. Nationwide Mut. Ins. Co., 261 N.C. 303, 134 S.E.2d 614 (1964).

48 Connor v. State Farm Mut. Auto. Ins. Co., 265 N.C. 188, 143 S.E.2d 98 (1965). As pointed out by the Court, interpretation of the policy depended upon Virginia law, but since no Virginia authority was cited on the critical question involved, it may be assumed that the case is a valid precedent for future North Carolina cases.

49 His driver likewise failed to attend, it appearing that, for reasons unspecified, she was incarcerated at Goochland, which, upon neither knowledge nor information, the writer assumes to be in Virginia.
did constitute failure to cooperate, whether insurer's continuation of the defense constituted a waiver.

In the second case it was held that an insurer's undertaking to defend an action against the insured, but notifying insured and another interested insurer that it reserved all of its defenses and rights, including its prior denial of coverage, did not waive the latter by conducting the defense. Of course, if this is true of denial of coverage, it would seem to follow that it is true of other defenses also.

In the third case plaintiff proved defendant's issuance of a policy to insured, injury to plaintiff within the stated terms of the policy, recovery of judgment against insured, and return of execution unsatisfied. Defendant's evidence proved cancellation of the policy prior to plaintiff's injury, and there was no rebuttal evidence as to this. The lower court nonsuited the case. The Supreme Court reversed, holding that it was improper to nonsuit on the defense of cancellation, on which defendant had the burden of proof, when it was not shown by plaintiff's evidence. The value of this appellate victory to plaintiff must be somewhat discounted since, on a new trial with the same evidence, the only charge to the jury should be, "If you believe all the evidence, you must find for the defendant." In view of the convincing nature of defendant's evidence of cancellation, if the jury nevertheless found for plaintiff, the verdict should be set aside.

Contributory Negligence

When there is evidence that the driver of plaintiff's vehicle was on his own personal mission, G.S. § 20-71.1 (ownership as prima

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51 In the Conner case, note 48 supra, insurer and insured agreed in writing that insurer might investigate, negotiate, settle, deny or defend any claim without waiver; and thereafter insurer employed counsel to defend. The Court said that this was not a waiver of any prior failure of insured (presumably applying to failure to give proper notice). However, as the discussion in the text indicates, this did not preclude consideration of whether insurer's subsequent conduct of the defense constituted waiver. The reason is found in the Court's statement that when an insurer undertakes to defend it must do so diligently and in good faith and if it fails in this, insured's prior failure to give proper notice becomes immaterial.

facie evidence of agency) merely gets the agency issue to the jury and does not justify a nonsuit on the ground of contributory negligence, even if the driver's negligence be conceded, defendant having the burden of proof on that issue.63

**Defendant Acting Under Contract With City**

In an action for damages caused by defendant's use of explosives in constructing a sewer outfall line, defendant properly pleaded as in affirmative defense that it was acting under a contract with a city and as directed by the city, but upon defendant's failure to offer evidence in support, it did not become an issue for the jury.64

**Defenses in Divorce Actions**

In *Hinkle v. Hinkle* the husband first sued in superior court for divorce from bed and board and custody of the children. The parties entered into a separation agreement, embracing a property settlement and award of custody to the wife. It was intended that the divorce action, in which no orders had been entered, be nonsuited, but this was not done. Thereafter the husband sued in the same superior court for absolute divorce, alleging that custody of the children was not involved. The answer denied this allegation and asked for an award of custody to the wife. Thereupon plaintiff moved that custody be awarded to him. After hearing, plaintiff's motion was granted. Defendant then attacked the order on the ground of prior action pending. The Court, after pointing out that the wife first introduced the custody question into the second suit and did not object until after losing on the merits, held that the matter was a mere technicality and would be disregarded, particularly since both actions were in the same superior court.66

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63 Moore v. Crocker, 264 N.C. 233, 141 S.E.2d 307 (1965). This, of course, reflects the same basic rule as to the effect of the statute as is applied when plaintiff is relying on it to prove agency of defendant's driver. 64 Guilford Realty & Ins. Co. v. Blythe Bros. Co., 266 N.C. 229, 145 S.E.2d 838 (1966). 65 266 N.C. 189, 146 S.E.2d 73 (1966). 66 The Court said that if the first action had been in another county and the court there had ruled on custody, a different question would be presented, citing Blankenship v. Blankenship, 256 N.C. 638, 124 S.E.2d 857 (1962), where both factors were present (though the award of custody in the prior action was temporary) and it was held that jurisdiction over custody was still in the first court. It is apparent that four factors present in the *Hinkle* case might possibly be regarded as contributing to the result: (a) the intention of the parties to nonsuit the first action; (b) estoppel or
In O'Brien v. O'Brien the parties entered into a separation agreement and thereafter the wife brought action for alimony without divorce. More than two years after the separation agreement, the husband sued for absolute divorce. In the latter action it was held (a) since there was no attack on the separation agreement, any misconduct of plaintiff prior thereto could not be a defense; and (b) since, not having been pleaded, they could not constitute defenses, the lower court properly excluded from evidence (1) contempt orders entered in the alimony without divorce action and (2) a judgment obtained by the wife in a third action for child support under the separation agreement.

**NECESSARY PARTIES**

Where one partner solicited plaintiff to purchase the other partner's interest, but did not participate in the negotiations, he was not a necessary party to the vendor-partner's action for breach of the sale contract. And in a pupil assignment case, when the school unit to which assignment was being sought had indicated in writing its willingness to accept the child, it was not a necessary party.

**JOINDER OF CAUSES AND PARTIES**

In two cases misjoinder of causes and parties was found, in both because the Court held that all causes did not affect all parties. The first involved an action by members of a church (a) to enjoin the minister from serving as such; and (b) to have plaintiffs, as distinguished from defendant members, declared to be the true and rightful congregation, exclusively entitled to run the affairs of the church and to enjoin the defendant members from holding themselves in waiver; (c) a single court involved; and (d) no award of custody entered in the first action. However, the explicit reference to Blankenship, which makes it a matter of jurisdiction over the subject matter (which cannot be conferred by consent), makes it reasonably clear that the Court would not regard (a) or (b) or both combined as sufficient to justify the result. Further, if the question is one of jurisdiction and not of res judicata, then (d) would not seem to be controlling, because if exclusive jurisdiction is in the other court, whether or not it has entered an order would seem to be unimportant. By this analysis, the most important factor is the identity of the court. And, even if the county is the same, would there be a different result if the courts were different?


selves out as the congregation. The result is consistent with prior North Carolina authority, though there is a most plausible argument to be made, particularly since equitable relief is sought, that the complaint presents a connected story encompassing but a single cause of action.

In the second case plaintiff alleged that decedent died owing him money; that after decedent's death, and before her qualification as executrix, decedent's widow continued to operate his sole proprietorship and made payments to other creditors which, the estate being insolvent, constituted unwarranted preferential payments; that she also opened a special bank account in the name of decedent's business and made unauthorized payments from it; and that a bank honored unauthorized checks on decedent's account after his death and on the special account. The suit was against the widow, individually and as executrix, and the bank, the prayer for relief seeking joint and several judgment against them. The Court reasoned that the facts alleged did not show joint and several liability and that there were separate and distinct causes against the widow individually and the bank. No prior North Carolina case was cited—and this writer knows of none—so similar on its facts as to require the result reached. In essence the case involved an attempt by a creditor to secure a meaningful judgment against an estate, the claims against the bank and the widow individually being ancillary to that basic purpose. Had the Court so construed it, the approach to joinder reflected in some earlier estate litigation cases (though none is precisely in point) would certainly have justified sustaining the joinder.

ALTERNATIVE JOINDER

Conger v. Travelers Ins. Co., in its earlier version, sustaining alternative joinder of parties, was the subject of a student note in this Review. A further footnote may now be added. Its second journey to the Supreme Court reflects the fact that plaintiff lost on both alternatives—on one in the court below and on the other in the Supreme Court.

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64 42 N.C.L. Rev. 242 (1963).
65 266 N.C. 496, 146 S.E.2d 462 (1966).
Cross-Claims (Including Third Party Practice)

The Court reiterated previously announced rules to the effect that (a) while, when plaintiff sues two defendants as joint tortfeasors, one may not cross-claim against the other for contribution, when plaintiff sues only one, the one may bring in the other as an additional defendant and make such a cross-claim;  

(b) an original defendant may not cross-claim against another original defendant or an additional defendant for indemnity based on a contract between them; 

(c) an original defendant may cross-claim against another original defendant or an additional defendant for indemnity based upon primary-secondary liability arising by operation of law.

This writer has, ad nauseam, huffed and puffed against the restrictive aspects of these rules as overly technical, illogical, unrealistic, not required by statute, and in defiance of more modern and efficient notions now well accepted in many other jurisdictions, most notably in the federal courts. Since the huffing and puffing began, the rules have become more and not less restrictive. Foolish as the writer is, he yet does not believe that one more huff or puff will have any effect. And for lawyers there is, quite literally, a silver lining. Whatever the cost in litigation fragmented, public money wasted and judicial manpower squandered, the rules of the game as so intricately and exquisitely played in North Carolina contribute substantially to the economic welfare of the legal profession.

Other cases in the cross-claim area held: (a) Since an original defendant may bring in an additional defendant only if plaintiff could have sued the additional defendant, when the accident took place in a state in which the wife may not sue her husband for negligent injury, the original defendant in an action in North CarolinaPractice and Procedure §§ 722, 1244.5 (Supp. 1964).

See, e.g., the Workmen's Compensation Act.

Wise v. Vincent, 265 N.C. 647, 146 S.E.2d 462 (1965). And the additional defendant may cross-claim against the original defendant for additional defendant's own injuries and damage, though an original defendant may not cross-claim against either another original defendant or an additional defendant for his injuries and damage. See 1 McIntosh, North Carolina Practice and Procedure §§ 722, 1244.5 (Supp. 1964).

This case involved additional complications as to insurance and the Workmen's Compensation Act.


lina may not bring in plaintiff's husband for contribution.\(^7\) (b) Where an original defendant brought in an additional defendant for contribution and the two had previously litigated between themselves over the same occurrence as was involved in plaintiff's action, both having been found negligent, the prior judgment was res judicata on the cross-action—that is, when the original defendant was held to be liable to plaintiff, he was automatically entitled to judgment over against the additional defendant.\(^7\) (c) When two defendants in a prior action had been held liable, but no cross-action was there litigated and there was no subsequent litigation between them, the one paying the judgment but claiming to be only secondarily liable could not proceed for indemnity against the other's insurer.\(^7\)

In the absence of waiver or an admission by the insurer, an actual adjudication of the primary-secondary liability issue was a necessary preliminary to suit against the insurer; and a showing that, in the prior case, the paying defendant was the vehicle owner and the other was the driver was not sufficient.\(^8\)

In \textit{Clemmons v. King}\(^7\) the Court considered the allegations and proof necessary for a cross-action for contribution. The complaint alleged that the original defendant's conduct in crossing the center line of the highway caused the collision. The answer (a) denied the allegation that defendant crossed the center line; (b) alleged that the collision was caused solely by the negligence of the driver of the car in which plaintiff was riding\(^7\)—such negligence being

\(^7\)\textit{Petrea v. Ryder Tank Lines, Inc., 264 N.C. 230, 141 S.E.2d 278 (1965).} This is simply a procedural reflection of substantive law. This case is considered from the point of view of conflict of laws elsewhere in this Survey. \textit{Wurfel, Conflict of Laws, North Carolina Case Law, 44 N.C.L. Rev. 923 (1966).}

\(^8\)\textit{Sisk v. Perkins, 264 N.C. 43, 140 S.E.2d 753 (1965).}

\(^7\)\textit{Ingram v. Nationwide Mut. Ins. Co., 266 N.C. 404, 146 S.E.2d 509 (1966).} The plaintiff was a trustee to whom the judgment had been assigned. For the earlier version of the case, see 258 N.C. 632, 129 S.E.2d 222 (1963). See also Dameron, \textit{Insurance, North Carolina Case Law, 44 N.C.L. Rev. 1022 (1966).}

\(^8\)\textit{In several cases not mentioned in the text, cross-claims were apparently interposed without objection. See, e.g., United States Leasing Corp. v. Hall, 264 N.C. 110, 141 S.E.2d 30 (1965); Dixie Fire & Cas. Co. v. Esso Standard Oil Co., 265 N.C. 121, 143 S.E.2d 279 (1965).}

\(^7\)\textit{265 N.C. 199, 143 S.E.2d 83 (1965).}

\(^8\) It seems to be customary in North Carolina to make an express plea of sole negligence of the third party. Of this it may be observed: (a) the characterization of the third party's conduct as sole negligence or sole proximate cause is a conclusion of law and of no consequence in the absence of factual allegations; and (b) analytically, if there are appropriate denials,
the crossing of the center line by that driver; and (c) on a conditional basis alleged a cross-claim for contribution, requesting that plaintiff's driver be brought in as an additional defendant—which was done. The opinion makes it clear that no notions about consistency furnish a valid objection to such a tripartite answer per se. However, there must be a factual basis for the contribution claim, and where the facts alleged, if true, do not involve conduct which could have concurred with any negligence charged against the original defendant to produce plaintiff's injury, there is no valid claim for contribution, and the claim is not saved by expressly adding a conclusion of law in terms of joint and concurring negligence. In this case, in the view of the Court, both allegation and proof of original defendant were to the effect that the original defendant was on the right side and the additional defendant on the wrong side. Since there was no allegation or proof that original defendant was negligent unless on the wrong side, there was neither allegation nor proof indicating concurrent negligence.

"CONTRIBUTION" BETWEEN INSURERS

In last year's Survey, footnote mention was made of two cases involving this subject. A note on the matter has now appeared in the Review.

particularly of the complaint's allegations designed to show that defendant's conduct was the proximate cause of plaintiff's injury, all evidence defendant may have of sole negligence of a third party may be introduced under the denials without any special plea. Indeed, if there is no claim for contribution, such allegations do not justify bringing in the third party as an additional defendant and might well be stricken as surplusage. Of course, if there is a claim for contribution, as the principal case demonstrates, there must be factual allegations as to the additional defendant's negligence.

To the same effect is Wise v. Vincent, 265 N.C. 647, 144 S.E.2d 877 (1965). Indeed, in that case, a special plea of insulating negligence was also included.

The specific decision was that the cross-claim should have been nonsuited, but it seems clear that a demurrer for failure to state a cause of action would also have been sustained.

The jury, nevertheless, found both negligent. By the Court's analysis of the facts, this verdict was inconsistent and, on the surface nothing indicates which defendant the jury would have preferred had it been directed to find against one or the other, but not both. As to the cross-claim this made no difference, because the Court held that it should never have gone to the jury.

Wise, Civil Procedure (Pleadings and Parties), North Carolina Case Law, 43 N.C.L. Rev. 884 n.44a (1965).

Relation of Pleadings to Proof (Including Variance)

Bunton v. Radford\(^{81}\) presented a most curious situation. The complaint alleged that plaintiff's vehicle was traveling west and the defendant's east on a certain street. These allegations were admitted in the answer, but in a counterclaim, while the directions of travel remained the same, a different street was named. The findings of the trial judge, sitting without a jury, accepted the street named in the counterclaim, but made the directions north and south. The Court sensibly held that this geographical and directional disorientation in no way misled defendant to his prejudice and that the variance was immaterial.

In Moore v. Hales\(^{82}\) in which defendant introduced no evidence, plaintiff's evidence (actually, as to this part, brought out by defendant's attorney on cross-examination) disclosed some facts which conceivably might have justified a finding of contributory negligence. The answer had pleaded contributory negligence, but its factual allegations, as construed by the Court, did not encompass anything covered by plaintiff's evidence. Hence it was held to be error for the lower court to send the issue of contributory negligence to the jury (which, in fact, found for defendant on this issue). Of course, it is well settled that defendant has the burden of proof on contributory negligence. It is also well settled that a complaint is demurrable if contributory negligence is, as a matter of law, shown on its face. The present case falls between the two and might be described as holding that, even if contributory negligence has been pleaded and is shown by plaintiff's evidence, such evidence will not take the issue to the jury unless it supports the specific allegations of the plea. In view of this decision, a defendant's lawyer, finding himself in such a situation, should obviously seek leave to amend to conform his answer to plaintiff's proof. While permission to amend would be discretionary, plaintiff could hardly claim surprise or undue prejudice if permission were granted.\(^{83}\)

\(^{81}\)265 N.C. 336, 144 S.E.2d 52 (1965).
\(^{82}\)266 N.C. 482, 146 S.E.2d 385 (1966).
\(^{83}\)Cf. Robinette v. Wike, 265 N.C. 551, 144 S.E.2d 594 (1965), where the Court found no material variance between plaintiff's evidence and the specification of plaintiff's negligence in defendant's counterclaim and commented that plaintiff could hardly contend that he had been misled.
Necessity of Introducing Pleadings in Evidence

In Edwards v. Hamill\textsuperscript{84} it was held that where allegations in an answer are not responsive to allegations in the complaint, plaintiff cannot use them to repel a nonsuit unless they are introduced in evidence. While there is some prior authority for this, its validity is doubtful, to say the least.\textsuperscript{85} Even if sound, its limits are open to doubt. One way of interpreting it is that anything in the answer that is not an admission must be introduced in evidence. Thus introduction would be required for allegations in a counterclaim or an affirmative defense and for those allegations (technically improper but commonly used in North Carolina) tacked on to or commingled with denials, setting forth facts inconsistent with the complaint's version. Yet, while the parallel is far from perfect, the same allegations may be used to supply a deficiency in the complaint under the doctrine of aider by answer.\textsuperscript{86} Further, if allegations in an answer amount to a counterclaim or an affirmative defense, their sufficiency for that purpose may be tested by a demurrer or motion to strike.\textsuperscript{87}

It seems certain that if Edwards faithfully reflects North Carolina law, its rule, in practice, has been honored more in the breach than the observance. Indeed, on the same day as the Edwards opinion was filed, the Court filed another opinion which, without discussing the matter, seems quite flatly contrary in result.\textsuperscript{88}

\textsuperscript{84} 266 N.C. 304, 145 S.E.2d 884 (1966).

\textsuperscript{85} See the very cautious treatment of it in Stansbury, North Carolina Evidence, § 177 (2d ed. 1963).

\textsuperscript{86} See 1 McIntosh, North Carolina Practice and Procedure, § 1193 (2d ed. 1956). This doctrine is apparently recognized in North Carolina in its broadest form. A complaint omitting a critical allegation may be rendered sufficient by an answer which denies the existence of the fact. See Mizzell v. Ruffin, 118 N.C. 69, 23 S.E. 927 (1896).

\textsuperscript{87} Cf. Van Every v. Van Every, 265 N.C. 506, 144 S.E.2d 603 (1965), where, on the basis of the allegations in a reply to an affirmative defense, which was apparently a voluntary reply the Court affirmed a judgment on the pleadings for the defendant.

\textsuperscript{88} Guilford Realty & Ins. Co. v. Blythe Bros. Co., 266 N.C. 229, 145 S.E.2d 838 (1966). There the complaint alleged that defendants were engaged in a joint venture. At the close of plaintiff's evidence defendants moved for nonsuit for failure to prove this allegation. The Court quoted from the further defense in defendants' joint answer, stated in effect, that these allegations showed a joint venture, and held that the motion for nonsuit was properly overruled. As of this writing, the record has not become available to this writer, but if the answer's allegations were introduced in evidence there is no mention made of that fact. In the Edwards case employer and employee were sued jointly. The defendants' joint answer ad-
WITHDRAWAL OF REPLY

In the 1965 Survey there was discussion of Keith v. Glenn, where plaintiff sued for personal injuries and defendant counterclaimed for his own injuries, crediting on his counterclaim demand the amount he had received in a settlement allegedly made by or on behalf of plaintiff. Plaintiff later moved to strike the counterclaim on the same ground as was alleged as a defense in a reply—that, while plaintiff had not consented to the settlement made by his insurer, it was nevertheless a bar to the counterclaim. Subsequently plaintiff moved for permission to withdraw the reply and, in his discretion, the judge denied the motion. Upon demurrer to his pleadings, plaintiff's action was then dismissed. It was said in the 1965 Survey:

Implicit in the Keith opinion is the proposition that when insured, by reply or motion, simultaneously attempts to assert the bar of settlement and his continuing objection to the settlement, the inconsistency is resolved by giving effect to the former and disregarding the latter.90

In a footnote of the Survey it was said:

As indicated in the text, plaintiff moved for permission to withdraw the reply, but this was denied by the judge in his discretion and plaintiff took no exception to the denial. Further, plaintiff had simultaneously pending a motion to strike the counterclaim. Therefore, the case did not present the question which would be presented if a reply pleading the settlement were filed but, before any further proceedings were had, permission to withdraw the reply, or to amend it to delete the plea in bar, was sought and granted. The writer suspects that the filing of the

mitted that at the critical time the employee was acting in the course and scope of his employment. Plaintiff's only evidence that the employee lighted the acetylene torch which started the fire was evidence of an extrajudicial declaration by the employee, which was admitted against the employee but not against the employer. The Court held that if the same paragraph of the answer contained recitals which might justify the inference that he lighted the torch, such recitals, not having been introduced in evidence, could not be considered on the nonsuit motion. The two cases seem virtually indistinguishable, except in result, and this writer believes that the Guilford Realty case is to be preferred. However, if the Court believes there is merit in having parts of the pleadings appear in the record twice instead of once, trial attorneys should conduct themselves accordingly.

89 Brandis, Civil Procedure (Pleadings and Parties), North Carolina Case Law, 43 N.C.L. Rev. 873, 879 (1965).
original reply would be considered a binding election to ratify, at least in the absence of a showing by plaintiff that he had no understanding of the significance of pleading the settlement and had no intention of ratifying.91

In Bongardt v. Frink,92 a personal injury action, defendant counterclaimed93 and plaintiff replied, alleging that defendant had accepted settlement, which settlement was pleaded as a bar to the counterclaim. Subsequently plaintiff moved for permission to withdraw the reply and defendant countered with a motion for judgment on the pleadings dismissing plaintiff's action. In his discretion, the judge granted plaintiff's motion and thereupon denied defendant's motion, since the pleadings no longer contained allegations that would have justified granting it. At the trial, plaintiff won a substantial verdict and judgment.

It is apparent that Bongardt presented the case suggested in the 1965 Survey footnote. It is also apparent that the Court did not regard the mere filing of the reply as a binding ratification of the settlement by the plaintiff. Neither, apparently, did it require an affirmative showing that plaintiff had no intention of ratifying, though the opinion states that there was no evidence in the record that plaintiff consented to the settlement.94 This writer certainly approves the Bongardt result under the circumstances there presented, but reconciliation of Bongardt and Keith nevertheless presents some problems.

In Bongardt the Court distinguished Keith as follows:

Keith v. Glenn, supra, presents a different factual situation. In that case plaintiff replied to the counterclaim. In his reply he denied any negligence on his part, and alleged as a further defense to the counterclaim his insurance carrier, against his wishes, paid defendant $1,250 in full settlement of defendant's claim.

91 Id. at 879, n.25.
92 265 N.C. 130, 143 S.E.2d 286 (1965).
93 The counterclaim was interposed by amendment. The motion for leave to file it recited that as the result of misrepresentations by a person originally unknown to defendant, but now believed to be a representative of plaintiff's insurer, defendant settled for a grossly inadequate amount.
94 The reply, in addition to being signed by counsel representing the plaintiff throughout, was signed also by a law firm not otherwise appearing in the case. The Court surmised, with a high probability of accuracy, that this firm represented plaintiff's insurer. This, of course does not affirmatively show that plaintiff did not ratify the settlement, but it does have some tendency to show that the reply was not necessarily filed with the idea of enhancing plaintiff's chances of recovery.
against plaintiff. Notwithstanding his allegation that settlement was made contrary to his wishes, he specifically alleges it bars defendant's right to claim damages from plaintiff. Later plaintiff sought permission to withdraw the reply he had filed. Judge Hall in his discretion declined to permit plaintiff to withdraw his reply.\textsuperscript{96}

This does not place any emphasis on the motion to strike, present in Keith and absent in Bongardt, or on the failure of plaintiff in Keith to except to denial of his motion to withdraw. In both cases the reply denied negligence on the part of the plaintiff. The fact that in Keith the reply specifically alleged lack of consent would seem, as of the time of filing the replies, to put the plaintiff in a stronger position than that of the plaintiff in Bongardt, where the explicit plea in bar was unaccompanied by such allegation. There is no parallel in Keith to the fact in Bongardt (not brought out in the above quotation, but mentioned elsewhere in the opinion) that the counterclaim came in by amendment, and only after defendant indicated he regarded the settlement as fraudulent; but that hardly furnishes a sound basis for distinction. In both cases the reply came only after defendant had made a decision to plead a counterclaim rather than to plead the settlement in bar of plaintiff's action; and defendant's motives for the decision would seem to be immaterial. And both cases accept the proposition that if plaintiff elects not to ratify the settlement, defendant is not precluded by it either and is free to counterclaim.

This leaves, as a basis for distinguishing the two cases, that one judge refused permission to withdraw and the other granted it. In both cases the Court treats this as a matter of discretion; and certainly the general rule is that permission to withdraw a pleading is discretionary. But here the real issue is whether plaintiff has ratified the settlement. Bongardt demonstrates that merely filing the reply containing the plea in bar is not a binding ratification, because, if it were, plaintiff could not recover even after withdrawing it. On the other hand, if the judge refuses permission to withdraw merely as a matter of discretion and not on the basis of a finding that plaintiff has in fact ratified the settlement, this exercise of judicial discretion should not be converted into a ratification by plaintiff. In other words, it seems that the question of ratification

\textsuperscript{96} 265 N.C. 130, 137, 143 S.E.2d 286, 291-92 (1965).
should be investigated on its merits, regardless of how the judge exercises his discretion.

**CONFLICT OF LAWS**

*Seymour W. Wurfel*

The year 1965 brought no innovations to North Carolina conflicts law. It did bring concise reaffirmations of three fundamental conflicts principles in the substantive areas of torts, contracts and family law.

**TORTS**

The rule that the substantive *lex loci delicti*, i.e., the law of the place of the wrong, governs tort actions was applied at least four times. In *Conard v. Miller Motor Express, Inc.* the Court said:

>This cause grew out of a rear-end motor vehicle collision in South Carolina. The substantive law of that State controls. The procedural law of North Carolina controls. . . . [W]e hold the plaintiff's evidence fails to make out a case of actionable negligence under South Carolina law. The judgment of nonsuit is affirmed.²

In *Cobb v. Clark*³ the degree of care due to a house guest was involved. In affirming a judgment for defendant, sustaining a demurrer, the Court held:

>Plaintiff [a North Carolina resident] was injured in Georgia. Her right of action, if any, is determined by the law of Georgia. When she seeks to enforce those rights in courts outside of Georgia, procedural questions arising in the enforcement are determined by the laws of the state where enforcement is sought.⁴

In a guest case where the accident occurred on the Blue Ridge Parkway in Virginia,⁵ plaintiff was granted a new trial because the instructions given the jury failed to distinguish between "gross

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² *Id.* at 429, 431, 144 S.E.2d at 271, 272.
³ 265 N.C. 427, 144 S.E.2d 269 (1965).
⁴ *Id.* at 196, 143 S.E.2d at 105.
negligence" and "willful and wanton disregard of the safety . . . of the person." The Virginia guest statute permits recovery under either circumstance. The Court wrote:

Since the automobile accident complained of occurred in the State of Virginia, liability or the lack of it must be determined according to the substantive laws of that State. . . . "In Thomas v. Snow, 162 Va. 654, 174 S.E. 837, the court said: ' . . . It is important to mark the distinction between acts or omissions which constitute gross negligence and those which are termed willful or wanton, because it is usually held that in the former contributory negligence on the part of plaintiff will defeat recovery, while in the latter it will not.'"\(^6\)

Of particular interest is the terse per curiam opinion rendered in Petrea v. Ryder Tank Lines, Inc.\(^7\) Plaintiff, a North Carolina resident, riding with her North Carolina resident husband, was injured in West Virginia in a collision with defendant's tractor-trailer. Defendant denied negligence, alleged negligence of the husband and by cross-action sought contribution from him under G.S. § 1-240. In sustaining a dismissal of the cross action upon demurrer, the Court used these words:

A defendant who has been sued for tort may bring into the action for the purpose of enforcing contribution . . . only a joint tort-feasor whom plaintiff could have sued originally in the same action. . . . The law of West Virginia does not permit one spouse to sue the other in tort. . . . North Carolina applies the lex loci delicti.

"We have in previous decisions held claimant's right to recover and the amount which may be recovered for personal injuries must be determined by the law of the state where the injuries were sustained; if no right of action exists there, the injured party has none which can be enforced elsewhere." Shaw v. Lee, 258 N.C. 609, 610, 129 S.E.2d 288, 288.

Original defendant . . . argues . . . that we should overrule Shaw v. Lee, supra, and thus abandon our well-established conflicts rule, in order to apply the law of the state which has had "the most significant relationship or contacts with the matter in dispute"—in this case, appellant contends, North Carolina. Such an approach is referred to as the "center of gravity" or "grouping of contacts" theory. . . . Not withstanding that ap-

\(^6\) Id. at 477, 478, 139 S.E.2d at 626.

\(^7\) 264 N.C. 230, 141 S.E.2d 278 (1965).
pellant's counsel in his brief and in his oral argument presented his case to this court in the best possible light, the same reasons which dictated our decision in Shaw v. Lee, supra, constrain us to adhere to it. . . . Affirmed.8

It is significant that the practical consequence of the Court's adhering to the lex loci delicti rule in the Petrea case was to deny the trucker's insurance carrier a defense and to leave the "deep pocket" wide open. Most advocates of "the most significant relationship" approach extol it as a "deep pocket" opener. In fact it is double edged and susceptible of being used both ways.

In New York, up to now the principal exponent of "the most significant relationship" doctrine, 1965 brought new limitations to its pocket opening scope. In diversity of citizenship cases federal courts sitting in New York in at least three instances refused to apply New York tort law. Where airline passengers' tickets read for round-trip "international transportation" from United States points to cities in Europe and return, the limitation of liability to 8300 dollars each, under the Warsaw Convention, to which both the United States and Belgium were parties, was held applicable to claims arising from a crash near the Brussels airport.9 The residences of the various plaintiffs were in the United States but in the opinion were not pinpointed to New York.

The law of Italy was applied as to limit damages in a wrongful death case arising from a crash in Italy of a plane on an international flight from Brussels to Rome. The decedent worked in New York and resided in New Jersey. After the accident his widow and children moved their residence to Belgium. A jury found defendant guilty of willful misconduct rendering the Warsaw Convention limitation inapplicable. The parties did not, at the trial in the Federal District Court for the Southern District of New York, contest the applicability of Italian law.10

In Ciprari v. Servicos Aereos Cruseiro,11 the federal court, sitting in diversity, found that the New York Court of Appeals would

8 Id. at 231, 141 S.E.2d at 279 (1965). Shaw v. Lee is noted in 41 N.C.L. Rev. 843 (1963); Wurfel, Conflict of Laws, North Carolina Case Law, 43 N.C.L. Rev. 895, 899 (1965).
apply the law of Brazil to limit liability in a case in which the plaintiff was a resident of New York. Here the plaintiff, a Honeywell employee, purchased a ticket in Rio de Janeiro for a flight to Sao Paulo and was injured in the landing at Sao Paulo. Defendant was a Brazilian corporation wholly owned by residents and nationals of Brazil. The court said: "[T]he only relationship or contact of New York is the fact that plaintiff is a resident of New York. Surely this is not enough, standing alone, to warrant the application of New York law to the issue of measure of damages."

By a four-to-three decision the New York Court of Appeals refused to apply New York law even where both the plaintiff and defendant were New York residents. Defendant drove his New York licensed, insured and based automobile to Boulder, Colorado, to attend summer school. While there he took plaintiff, also a summer school student from New York, for a ride; a collision occurred, and plaintiff was injured. Colorado law denies recovery to automobile guests against the driver except where willful and wanton disregard for the guest's safety is present. The court applied Colorado law and denied recovery, saying the accident "arose out of Colorado based activity" and thus the place of the accident was not "fortuitous." This they felt distinguished it from their previous decision in which they refused to apply an Ontario guest statute when a New York resident guest was injured by a New York resident host in a one-car accident in Ontario during the course of a short trip from New York. There they allowed recovery under New York law since it was a case "affecting New York residents and arising out of the operation of a New York based automobile. . . ."

In a jurisdiction in which "greatest concern with the specific issue raised in the litigation" is its conflicts rule in tort choice-of-law questions, there is never a dull moment, no cloying certainty, no stuffy predictability.

The North Carolina Supreme Court has made it abundantly clear that it intends to follow its traditional *lex loci delicti* rule.

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23 Id. at 825.
25 16 N.Y.2d at 125, 209 N.E.2d at 794, 262 N.Y.S.2d at 467.
27 Id. at 481, 191 N.E.2d at 283, 240 N.Y.S.2d at 749.
This rule possesses the merits of certainty, predictability, simplicity and objectivity, all handmaidens of "justice." Also it comports with the great weight of judicial authority in the United States. It is an area in which the legislature could intervene, but has not seen fit to do so. It is likely that counsel, ever-questing the "deep pocket," will with amaranthine hope further litigate the point. It is probable that the Court will continue to apply the doctrine of stare decisis to this issue.

Contracts

Two new cases involve whether the law of the state of making of a contract, absent an express choice-of-law clause, controls not only the contract's initial validity but also questions of performance or breach where these occur in another state.

In Arnold v. Ray Charles Enterprises\textsuperscript{17} the pertinent substantive law was the same in the three states, celebrationis, solutionis and fori, respectively. The court, sua sponte, raised the issue and was able to leave it unresolved, in this posture:

The contract involved in this case was made in New York, it was to be performed in Virginia, and the action for its breach is brought in North Carolina. Unquestionably the law of the forum . . . governs all matters of procedure. . . . The only question of substantive law . . . involves the proper measure of damages. . . . Throughout, neither party has made any reference to the law of New York or that of Virginia, yet we are required to take judicial notice of foreign law. G.S. 8-4. It appears that the law of New York, lex loci celebrationis, and that of Virginia, lex loci solutionis, are no different with reference to the substantive question here involved. There would be no profit, then, for us to exercise ourselves here to determine which law is to be applied, for to do so would take us into a "highly complex and confused part of conflict of laws."\textsuperscript{18}

The Court then proceeded, relying primarily on North Carolina law, to say: "Ordinarily the law of the forum controls as to the burden of proof . . . and the burden is on defendants to exculpate themselves from liability for their nonperformance."\textsuperscript{19} In resolv-

\textsuperscript{17} 264 N.C. 92, 141 S.E.2d 14 (1965). For a more extended discussion of this case, see Navin, Damages, North Carolina Case Law, 44 N.C.L. Rev. 993 (1966).

\textsuperscript{18} Id. at 96, 97, 141 S.E.2d at 17.

\textsuperscript{19} Id. at 98, 141 S.E.2d at 18.
ing the measure of damages issue North Carolina, New York and Virginia cases, all in harmony, were cited by the Court.

The case is a caveat to the bar that the Court will carry out the legislative mandate\(^2^0\) to take judicial notice of foreign law where conflict rules make it applicable, even though the point is not raised by counsel. It also seems to indicate that the question whether the law of the place of contracting or that of the place of performance, where the two are not the same, is to govern as to matters of performance is not finally settled in North Carolina.

The other recent conflicts contract case appears, in part at least, to resolve this uncertainty. In *Connor v. State Farm Mut. Auto. Ins. Co.*,\(^2^1\) the defendant in Virginia issued an assigned risk automobile liability insurance policy to Auton, whose car thereafter collided in North Carolina with plaintiff's car, injuring plaintiff. In the suit for damages brought by Connor against Auton in North Carolina, Auton failed to appear as a witness. The policy provided: "[I]nsured shall cooperate with the Company and . . . shall attend hearings and trials and shall assist in . . . giving evidence . . . and in the conduct of suits."\(^2^2\) Connor's suit against State Farm Mutual was to collect the judgment obtained against Auton, the insured, and the defense asserted was breach of this policy provision. In granting defendant a new trial the Court held that the issue of waiver by the defendant of this duty of the insured as it had been submitted to the jury was confusing, would not determine the rights of the parties and was error. Only North Carolina authority was cited for this ruling, presumably on the assumption that since it pertained to instructions, it was procedural.

On the substantive contract law issue the Court stated:

The contract on which plaintiff relies was issued in Virginia to a resident of that state. The rights and obligations of insured and insurer are fixed by the laws of Virginia. *Roomy v. Insurance Co.* 256 N.C. 318, 123 S.E.2d 817.

. . . . The[se] policy provisions . . . may be incorporated in Assigned Risk policies issued in Virginia and will there be enforced as those provisions are interpreted by the courts of that state. *Virginia Farm Bureau Mutual Insurance Co. v. Saccio.* 204 Va. 769, 133 S.E.2d 268.\(^2^3\)


\(^{21}\) 265 N.C. 188, 143 S.E.2d 98 (1965).

\(^{22}\) Id. at 189, 143 S.E.2d at 99.

\(^{23}\) Id at 190, 143 S.E.2d at 100.
In *Roomy* defendant issued in New York to a New York resident an automobile liability policy that was silent as to whether claims between husband and wife were covered. In a suit to collect a North Carolina judgment obtained by one spouse against the other for injuries resulting from an accident in North Carolina, the Court applied New York law that the insurer is not liable for interspousal torts unless the policy affirmatively so states. It seems clear that in North Carolina as far as insurance contracts are concerned, at least where the insured is a resident of the state in which the contract is issued, the law of the state of contracting controls questions of performance even where performance is required in another state.

On the broader issue of what law in general governs contracts as to performance to be accomplished outside of the state of contracting, the Court said in *Roomy*:

>'Matters bearing upon the execution, interpretation and validity of a contract are determined by the law of the place where it is made.' . . . 'The interpretation of a contract and rights and obligations under it . . . are to be determined in accordance with the proper law of the contract. Prima facie the proper law of the contract is to be presumed to be the law of the country where it is made.' . . . 'the law of the place where the contract is made is *prima facie* that which the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt, and that such law ought, therefore, to prevail in the absence of circumstances indicating a different intention.'

Prima facie, all performance is to be controlled by the law of the place of contracting. However one may speculate from the dictum of the Court in *Arnold* quoted above that in a noninsurance policy case the Court might "exercise" itself "to determine which law is to be applied" to questions of performance where the contract is made in one state and to be performed in another and where the contract itself is silent as to what law governs. This is

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24 A contrary result was reached on this question in Goulding v. Sands, 237 F. Supp. 577 (W.D. Pa. 1965). This was a diversity case and Pennsylvania for conflict purposes is a "center of gravity" or "points of contact" jurisdiction in both tort and contract cases. A wife was permitted to recover from the insurer, for injury in a Pennsylvania accident caused by the husband, under a policy issued in New York that was silent as to interspousal recovery.

not to imply that the Court would adopt the highly flexible New York "points of contact" rule in contract cases, but rather that effective advocacy might cause it to find, at least in some cases, that the *lex loci solutionis* controls matters pertaining to performance, rather than the *lex loci celebrationis*.

**FAMILY LAW**

Rural settings plus a mobile society produced the raw material that called forth an application of the ultra-modern rule that possession constitutes all points of the law as far as jurisdiction to award child custody is concerned. The factual situation in *In re Craigo* developed in one action-packed year. A mother and father with two small children separated in late 1963. The mother and a man whom she later married took the children to Reno. The father and the maternal grandparents went to Reno and brought the children to North Carolina where they lived with the grandparents until July 1964. The father then took the children to his residence in Georgia, commenced a divorce action, asked for custody of the children and was awarded temporary custody by a Georgia Superior Court order that included this language, [The order] "is not an adjudication of said matter . . . upon the merits." Shortly thereafter the father learned that the mother had obtained an absolute divorce in Florida which decree contained no custody provision. The father took no further action in his pending Georgia divorce, married again and settled on a farm near Ellijay, Georgia. Nine days later the mother and her new husband went to the home of the father, and in his absence forcibly took the children and brought them to North Carolina where the mother then lived. Soon the

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*Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954).*

*The original RESTATEMENT, CONFLICT OF LAWS § 358 provides:
The duty for the performance of which a party to a contract is bound will be discharged by compliance with the law of the place of performance of the promise with respect to: the matter of performance; the time and locality of performance; the person or persons by whom or to whom performance shall be made or rendered; the sufficiency of performance; excuse for non-performance.

However, RESTATEMENT (SECOND) CONFLICT OF LAWS § 346(b) (Tent. Draft No. 6, 1960) provides "the law applicable to minute details of performance of a contract is the local law of the place of performance," and refers all other questions of performance to a "points of contact" solution. This change seems to raise more questions than it answers.

**266 N.C. 92, 145 S.E.2d 376 (1965).**

*Id. at 95, 145 S.E.2d at 378.*
maternal grandparents, residents of Buncombe County, petitioned for habeas corpus to have the children removed from the custody of the mother in North Carolina and to have them awarded to the grandparents. The father intervened contending that the Georgia temporary custody decree was binding on the North Carolina courts under the full faith and credit clause of the United States Constitution. As to jurisdiction the Court said, "In this setting the court had jurisdiction of the children and the parents." Regarding the father's contention, the case held:

"The constitutional provision, Article IV, Section 1, requiring full faith and credit to be given to judicial proceedings in sister States does not require North Carolina to treat as final and conclusive an order of a sister State awarding custody of a minor when the Courts of the State making the award can subsequently modify the order or decree." Cleeland v. Cleeland, 249 N.C. 16, 105 S.E.2d 114.\(^{31}\)

The Court had already cited Graham v. Graham\(^{32}\) as holding that under Georgia law such an order as was here involved was interlocutory. It would seem that no custody decree ever becomes final in the sense that it may always be altered upon proof of change of material circumstances. In Craigo the Court approved trial court findings that the grandparents were proper custodians and that neither parent was a suitable custodian. It did not say whether there was evidence of change of circumstances occurring subsequent to the Georgia decree, nor whether findings to this effect were necessary to comply with the full faith and credit clause. Possibly the transcript was replete with such new evidence, but this cannot be gleaned from the decision. The end result is the one reached by practically all courts. From a sense of compassion, where the unfortunate children are physically present in court, judges seek to do whatever at the moment seems to offer the greatest promise of improving their lot.

With this almost complete fluidity of custody awards generally accepted at the interstate level, it is a bit ironical to find that the multifarious judicial scramble to help children victimized by parental divorce is not tolerated at the intrastate level. On the same day

\(^{30}\) Ibid.
\(^{31}\) Ibid.
it decided In re Craigo, the Court in Stanback v. Stanback\textsuperscript{33} prohibited custody award competition between superior court judges. In that case a factual "domestic conflict" gave rise to a relative rarity, a legal "domestic conflict."

In Stanback the father commenced an action in Rowan County for divorce from bed and board and for exclusive custody of two children. A custody hearing was held on April 22, 1965. Based on the pleadings, forty-three affidavits for plaintiff and four for the defendant, Judge Walker found that the mother, by reason of alcoholic consumption, was not a fit and proper person and awarded exclusive custody to plaintiff "until reversed or amended by the court." On May 8, 1965, defendant filed a motion that "the court ... consider ... the custody ... of [the] ... infant children..."\textsuperscript{34}

On June 19, 1965, this motion was heard by Judge Gwyn, who considered all the material previously passed upon by Judge Walker, plus oral testimony by both the plaintiff and defendant and eighteen new affidavits filed by plaintiff and thirty-eight by defendant. Plaintiff challenged Judge Gwyn's jurisdiction "upon the ground that Judge Walker had decided the controversy and that a change in condition was not alleged and had not taken place."\textsuperscript{35} Judge Gwyn proceeded to find that since the first order "conditions have substantially and materially changed in that ... defendant ... no longer indulges in the use of alcoholic beverages ... is practicing sobriety and has regained her normal emotional equilibrium."\textsuperscript{36} He then awarded custody to both parents, "to be divided equally between the two." Plaintiff appealed, and the Court in reversing Judge Gwyn said:

A fair analysis of the evidence before Judge Walker emphasizes its sharply conflicting character. The affidavits of the three doctors from New York, on the basis of their single examination, do not disclose that any change had taken place in the defendant's condition between April 22, 1965 and the date of their examination on May 27, 1965. The tenor of those affidavits follows that expressed by Dr. Green and Dr. Corpening which were considered by Judge Walker. There is no evidence the fitness or unfitness of either party had changed between the hearings.

\textsuperscript{33} 266 N.C. 72, 145 S.E.2d 332 (1965).
\textsuperscript{34} Id. at 74, 145 S.E.2d at 333.
\textsuperscript{35} Id. at 76, 145 S.E.2d at 334.
\textsuperscript{36} Id. at 74, 145 S.E.2d at 333.
There is no evidence the needs of the boys had changed during that time, or that they were not properly cared for by the father.

This controversy illustrates the difficulty of determining disputed facts from *ex parte* affidavits. When this case is heard on the merits, where the witnesses are before the court and subject to cross-examination, the findings thus established will, or may, justify a change in the order. Judge Gwyn's finding of changed conditions is not supported by the evidence. Absent evidence of change he was without authority to modify Judge Walker's order. A famous Civil War Cavalry hero, asked to explain his successful battle tactics, replied, "Git thar fust." In this case Judge Walker "got thar fust."87

One wonders whether the Supreme Court would have so assiduously reviewed the "disputed facts" if both the original and modifying custody orders had been made by Judge Walker. Yet since the decision is based on the absence of evidence of "changed conditions," the person of the second judicial officer should be immaterial. Even more intriguing is the speculation as to what the decision would have been if, all the other facts remaining the same, the original custody order had been made by a Georgia Superior Court, the mother had forcibly removed the children from Georgia and commenced the North Carolina action, the father had appeared and Judge Gwyn had proceeded as he did. All will agree with a statement made in the Stanback opinion that custody proceedings "are matters of grave concern that the courts, both trial and appellate, may not view lightly."88

In summary, as of now, the North Carolina Supreme Court apparently stands foursquare for three conflicts principles. First, in tort cases the *lex loci delicti* controls. Second, in contract cases the *lex loci celebrationis* controls. Third, in child custody cases as far as jurisdiction is concerned, almost, but not quite, anything goes.

87 *Id.* at 76, 77, 145 S.E.2d at 335.
88 *Id.* at 77, 145 S.E.2d at 335.
Litigation in the Supreme Court of North Carolina for the period under review was skimpy as regards substantive civil rights. Comment will be limited to the one case of consequence.

*State v. Leary*\(^1\) involved the right of peaceable assembly. Three Negroes had been indicted and convicted of participation in what both grand and petit juries officially found to have been a “riot.” The incident occurred on August 29, 1963, following upon thirty-two nights of “demonstrations” involving Negro protest marches, apparently from a church to the business district and return. On the night in question some 200 Negroes, many with placards, marched to the business district. One or more requests by police officers that the crowd “break up and go home” were disregarded, the press of the marchers forced the officers to yield ground, and police reinforcements were called. Upon the arrival of these reinforcements, the “mob,”\(^2\) already “yelling” and “hollering,” resorted to physical violence. “Bricks, bottles and other missiles were repeatedly thrown at the officers by members of the crowd. Members of the crowd threw missiles and broke the windows at the service station . . . and [the offices of the Gas Co.]”\(^3\) Defendants’ convictions were affirmed by the Court in an opinion that made no express reference to constitutional bounds between state power and the civil rights of individuals.

With the absorption of the first amendment into the fourteenth amendment of the Constitution of the United States, freedom of assembly has become a federally protected constitutional right. Moreover, in the area of civil rights, unlike that of property rights, the federal level of constitutional protection tends to be higher than that found by state courts in state constitutions, California ex-

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1 264 N.C. 51, 140 S.E.2d 756 (1965).

2 So described by Sheriff Rawls, thus indicating that reinforcements included other than city police. A further fact statement in the opinion is that defendant Leary “threw a brick at Sheriff Rawls.”

3 264 N.C. at 53-54, 140 S.E.2d at 758.
cepted. Finally, and very significantly, the stricter federal standard is the controlling one, by operation of the supremacy clause, for the reason, as earlier observed, that the United States Constitution sets minimum constitutional guarantees. Although Shepard's Citator discloses no attempt on defendants' part to secure review in the Supreme Court of the United States, many civil rights decisions of state courts are "going up" where funds permit and the federal question has been properly raised in timely fashion. In any litigation the federal standard constitutes the measuring rod of constitutional power and limitation.

At first blush, the Court's basis of affirmance in Leary seems easily to "measure up." Declared the Court: "The State does not controvert the right of its citizens to assemble peacefully for a lawful purpose. On the other hand, lawful original purpose for an assembly cannot excuse subsequent mob action, resulting in wanton destruction of property, and deliberate injury to officers seeking merely to preserve peace." Violence did erupt in the town of Williamston, thus seeming to distinguish such United States Supreme Court cases as Edwards v. South Carolina and Cox v. Louisiana, where state court convictions in "marching" litigation were overturned for absence of "clear and present danger." Yet in each of those cases police officers permitted the Negroes to march to their destination and to stage for a brief period their desired demonstration. Here the officers resisted the march from the outset. At the time this resistance manifested itself, the only offense of the Negroes lay in the fact that the crowd was blocking a street and its sidewalks and overflowing into the yards of private property owners. The first physical violence occurred only after the marchers had reached the business district, police reinforcements had been called, and the crowd had started its "yelling" and "hollering." Given these circumstances, is it so clear that the North Carolina holding can be squared with the federal standard as interpreted in Cox and Edwards? If it can, the saving factor lies in the fact that this episode occurred after many nights of demonstration marching.

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5 See the discussion of Property Rights in text accompanying notes 42-76 infra.
6 264 N.C. at 52, 140 S.E.2d at 757.
The testimony of Sheriff Rawls would be near determinative: "There was a mob of them, they were all over the street and the sidewalks. It is my best knowledge that feeling was running high. For 32 nights I walked in between the two races, spoke on the loud speaker, got on top of cars and did everything I know of to keep from having a riot in this town. I personally know because for 32 nights, I was out there." Assuming this was the situation, there would appear to have existed clear and present danger of a breach of the peace, which the state was entitled to control.

**PERSONAL RIGHTS**

The recent decisions of the Supreme Court of the United States in *Aptheker v. Secretary of State*\(^9\) and *Griswold v. Connecticut*\(^11\) greatly strengthen the evolving substantive right of the individual to considerable freedom from governmental intervention in his personal affairs. Individual rights of a personal character were in origin largely procedural, and many so remain. The North Carolina Court's concern with these latter, for the period under review, is discussed elsewhere.\(^2\) Considered here are the few decisions of the Court concerned with what has become essentially a substantive personal right.

Incarceration for crime of which the individual has been duly convicted is the most recognized form of limitation on physical freedom of the individual.\(^13\) Yet due process and more specific constitutional provisions protect the rights of the accused, and there is some indication of a developing limit on what government can constitutionally designate a crime.\(^14\) Beyond these facets of protection of the accused are the guarantees of the eighth amendment of the federal constitution, now also applicable to the states,\(^15\) and of the Bill of Rights of the North Carolina Constitution,\(^16\) against exces-

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\(^9\) 264 N.C. at 53, 140 S.E.2d at 758.
\(^11\) 381 U.S. 479 (1965).
\(^13\) U.S. Const. amend. XIII; N.C. Const. art. I, § 33.
\(^16\) The wording of N.C. Const. art I, § 14 is all but identical to that of the eighth amendment of the federal constitution.
siveness in bail or fine and cruelty or unusualness in punishment. In *State v. Stubbs*, defendant invoked the eighth amendment in challenge of a seven-to-ten year sentence for the crime against nature. The Court found the contention untenable. "When punishment does not exceed the limits fixed by the statute," as concededly was true in this instance, "it cannot be considered cruel and unusual punishment in the constitutional sense."\(^{18}\)

Undoubtedly, the Court reached the correct result. Although presumably a sentence could be so lengthy in relation to the crime as to be cruel or unusual, the guarantee has been concerned with type, as opposed to length, of sentence.\(^{19}\) However, the Court's reasoning could constitute a trap for the unwary. Of the three decisions cited in support, the earliest is *State v. Stansbury*.*\(^{2}\)

"To the same contention, in a case analogous to *Stubbs*, justice Ervin was careful to explain that "since the sentence in issue finds complete sanction in a valid legislative enactment, it cannot be deemed violative of Article I, Section 14 of the [North Carolina] Constitution, forbidding the infliction of 'cruel or unusual punishments.'"\(^{21}\) A year later, on the other hand, the Justice was not as careful with his language. For violation of the state's Alcoholic Beverage Control Act, defendant received what he felt to be a sentence overly severe in length although within the statute.\(^{22}\) Now the Court deemed it sufficient to observe that, since the "punishment imposed upon the defendant by the judgment of the court is within the limits authorized by the statute. . . . it does not offend Article I, Section 14, of the Constitution, forbidding the infliction of 'cruel or unusual punishments.'"\(^{23}\) It is not nitpicking to challenge this formu-

\(^{17}\) 266 N.C. 295, 144 S.E.2d 262 (1966), 44 N.C.L. Rev. 1118.

\(^{18}\) A similar contention was made and rejected in *State v. Hunt*, 265 N.C. 714, 144 S.E.2d 890 (1965).

\(^{19}\) The opinion of Chief Justice Warren in *Trop v. Dulles*, 356 U.S. 86 (1958), emphasizes this point in an unusual context. In issue was the validity of federal legislation imposing loss of citizenship after dishonorable discharge for wartime desertion from the armed forces. The opinion conceded that the penalty of denationalization was "not excessive in relation to the gravity of the crime," yet insisted that the eighth amendment established "standards of decency" in criminal punishment with which this "penalty" is inconsistent because in leaving a former citizen stateless, it imposes a "condition deplored in the international community of democracies."

\(^{20}\) 230 N.C. 589, 55 S.E.2d 185 (1949).

\(^{21}\) Id. at 591, 55 S.E.2d at 187.


\(^{23}\) Id. at 82-83, 59 S.E.2d at 204.
lation of the law, which is now given further weight by the principal case under review. For by such formulation, the statute rather than the state and federal constitutions is made the measure of personal right. The judicial assertion is in direct conflict with the basic doctrine of American constitutional law that legislation, no less than executive or judicial action, is subject to constitutional limitation. Of course, the Court means to embrace no such unorthodoxy.

Perhaps the difficulty can be traced to confusion with another line of cases of arguable constitutional dimension. *State v. Slade*, decided during the period of this review, presents well the question of the validity of longer sentence after retrial at defendant's request. Slade had been successful in upsetting his first conviction by resort to *Gideon v. Wainwright* in a post-conviction hearing. But his "reward" was reconviction with a seven-to-nine year sentence contrasted with the original three-to-five years. To Slade this appeared unfair to the point of unconstitutionality, although the Court opinion does not indicate on what constitutional provision(s) he relied. The Court's response was brief: "This assignment of error is overruled upon authority of S. N. White, 262 N.C. 52, 136 S.E.2d 205, cert. den. (379) U.S. (1005), 13 L.Ed.2d 707 (1 February 1965); *S. v. Williams*, 261 N.C. 172, 134 S.E.2d 163." In *White*, the North Carolina Court rejected the constitutional argument on both due process and equal protection grounds, citing much state court authority.

The problem posed in *Slade* differs from that presented by *Stubbs*, although both are concerned with limitations imposed upon individual freedom through criminal process. This being so, it would seem wise to avoid cross-citation of the two types of cases that commenced with *State v. Whaley* in early 1965 and is continued in the *Stubbs* opinion by citation of *Whaley* (resentence) with *Welch* and *Stansbury* (both original sentence). Indeed, it

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24 264 N.C. 70, 140 S.E.2d 723 (1965).
25 372 U.S. 335 (1963). This story of this famous litigation is excitingly told by LEWIS, GIDEON'S TRUMPET (1964). Mr. (now Justice) Fortas successfully argued Gideon's contention in the Supreme Court of the United States.
26 264 N.C. at 72, 140 S.E.2d at 725.
27 Note should be taken in passing of a third type of question, that of "credit" for time served under the original conviction. See 44 N.C.L. Rev. 458 (1966), discussing State v. Weaver, 264 N.C. 681, 142 S.E.2d 633 (1965), wherein the court overruled prior holdings that the earlier time served could not be counted.
28 263 N.C. 824, 140 S.E.2d 305 (1965).
looks as though the sentence quoted above from *Stubbs*, and the citations in support thereof, were lifted from the opinion in *Whaley*, adding to the latter only the citation of *Whaley* itself. The constitutional issues differ in the two types of cases in response to their difference in factual character. In the *Stubbs* type, there is the possibility of a cruel and unusual punishment evolving from great disparity between punishment and crime. With the *Slade* type of contention, on the other hand, the constitutional prohibitions against cruel and unusual punishment seem much less relevant than do due process, equal protection and perhaps other guaranties. Whichever the type of situation, the lawyer should be careful of the deceptively easy assertion of the syllabi in all these cases to the effect that sentence within the statutory maximum cannot be cruel or unusual in the constitutional sense. For the statute itself may be constitutionally inconsistent with one or another provision of the North Carolina or United States Constitutions.

**Political Rights**

*Baker v. Carr* has made lawyer and politician alike acutely conscious of the right of the populace to participate effectively in the formulation of governmental policy. During the period under review two quite disparate litigations have dealt with this aspect of constitutional right.

In *Scarborough v. Adams*, plaintiffs invoked the North Carolina due process clause in a challenge of the proposed sale of bonds by the Metropolitan Sewage District of Buncombe County. Proceeds were to be used in the construction of an adequate sewage disposal system for fourteen political subdivisions within Buncombe County. The Metropolitan Sewage District was itself the creature of the fourteen subdivisions, which had petitioned for its creation pursuant to G.S. § 153-297. Action in each instance was by the governing board of the political subdivision and therein the plaintiffs found their grievance; to them, failure to ground the authorization in a favorable vote of the resident freeholders of each sub-

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29 See note 14 Supra.
30 See the careful analysis of Van Alstyne, *In Gideon's Wake*, 74 Yale L.J. 606 (1965). It is familiar constitutional learning that denial of certiorari by the Supreme Court of the United States, as in the *White* case, does not necessarily signify that Court's agreement with the lower court decision.
division constituted a violation of sections 1 and 17 of article I of the North Carolina Constitution. Dismissal of the injunctive action was affirmed. The Court found the constitution satisfied because, presumably, the freeholders had had their day when the separate sanitary districts had been first created pursuant to G.S. § 130-124.

Few in North Carolina are unaware of the reapportionment litigation of the past six months and its political impact. *Drum v. Sewell* is one of the few federal or state court decisions invalidating existing apportionment on all three major levels—congressional, state house, and state senate. The special session of the North Carolina General Assembly of January, 1966, was a necessary consequence of the federal court ruling. The work of that special session was before the same federal court, on retention of jurisdiction, in February of the current year. The realignments of the two houses of the North Carolina General Assembly passed the constitutional test, but congressional redistricting flunked. The considerations contributing to failure were two. The General Assembly had by its deviations from the plan submitted by the joint select committee nearly doubled the population variance ratio from 1.10-to-1 to 1.19-to-1. Even so the ratio was considerably lower than either that for the state senate, 1.32-to-1 or that for the house, 1.33-to-1, both of which gained the court's approval. The court justified its action, however, on the basis of United States Supreme Court language, which it paraphrased, to the effect that "stricter adherence to equality of population between the districts may logically be required in congressional than in state legislative representation." The second factor contributing to the failure was the consequence of the legislature's conceded effort to protect sitting Congressmen, which forced some gerrymandering and some loss of compactness. In combination, at least, these actions resulted in a failure to meet the test of "as nearly as practicable to the equal population" which the United State Supreme Court fashioned in its 1964 extension and refinement of the basic principle of population equality enunciated in *Baker v. Carr*.

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*Id.* at 924.
Comment on these cases has of course been legion. For one evaluation see Strong, *Toward an Acceptable Function of Judicial Review*, 11 S.D.L. Rev. 1 (1966), which cites to much of the mushrooming literature.
Despite the fact that the congressional redistricting flunked the constitutional test, the federal court in its February holding stayed its mandate to permit the congressional elections of 1966 to take place under the legislative plan. Plaintiff Drum's first reaction was one of disappointed acceptance. However, the United States Supreme Court's reversal of Swann v. Adams on February 25 led him to petition the federal District court for relief from the stay, because of the alleged similarity between the North Carolina and Florida situations. On March 8, however, his petition was dismissed, and this action was affirmed in early April by the Supreme Court of the United States.

The political right of citizens to as much equality in representation "as is practicable" finds its constitutional bottom in the equal protection clause of the federal constitution. On the other hand, the contention of plaintiffs in the Adams case was that denial of the right to vote was a violation of the North Carolina due process clause. However, this does not suggest that these plaintiffs lost because they misconceived the basic nature of the political right they sought to vindicate. Many commentators are of the view that the right of equal representation also sounds in due process from the point of view of constitutional theory even though it is articulated through the equal protection clause.

Property Rights

Taking under Eminent Domain

In neither the United States nor the North Carolina Constitution is there a specific limitation on state power to "take" private property by eminent domain. Yet, in both, the familiar requirements of "public use" and "just compensation" were early found resident in their due process clauses. Recurrent litigation in state


and federal courts concerns the concept of "taking," the qualities that make a use "public" in nature, the elements of "just" compensation, and the attendant question as to the body that is to have the final determination in these constitutional issues. During the period under review, the Court dealt with two of these five aspects.42

Highway Comm'n v. Batts43 makes it clear that in North Carolina what uses are "public" remains a judicial question. After citing four of its own decisions in support, the Court declares that Rindge Co. v. County of Los Angeles44 is "to the same effect." Reliance upon a holding of the unreconstructed Supreme Court of the United States is hazardous business. United States ex rel. TVA v. Welch45 started, and Berman v. Parker46 just about completed, the United States Supreme Court's withdrawal from this position. Technically, these are interpretations of the fifth amendment, but, to borrow a phrase from Justice Holmes, to count on this distinction would be to rely upon a slender reed. However, basic constitutional law teaches that the federal constitution requires of the states only adherence to a prescribed minimum of protection of individual rights; the states are free by constitution or statute to provide a higher level of protection. The measure of the constitutional significance of the Batts holding is to be judged from the holding of a badly-split Court that a condemnation by the State Highway Commission pursuant to statute and resolution was not for a public use for the reason that the projected road could be of meaningful benefit only to one family.47

There was no question in the Batts case as to the threat of a "taking"; expropriation of an easement in land in perpetuity for right of way is clearly taking by eminent domain. But other fact situations are not so clear, for the concept is a technical one. In three further cases decided in the period under review, plaintiff prevailed but once. This was in Glace v. Town of Pilot Mountain,48

43 Other aspects of eminent domain, not directly involving the constitutional bases of its exercise, are treated in Dameron, Eminent Domain, North Carolina Case Law, 44 N.C.L. Rev. 1003 (1966).
45 262 U.S. 700 (1923).
46 327 U.S. 546 (1946).
48 Highway Comm'n v. Board of Educ., 265 N.C. 35, 143 S.E.2d 87 (1965) involving priorities in public use as between governmental agencies of the state, is considered in the section on eminent domain.
49 265 N.C. 181, 143 S.E.2d 78 (1965).
wherein evidence that noxious odors from a municipal sewage disposal system were diminishing the value of abutting real property was held sufficient to support a jury verdict, and judgment thereon, for compensation for an acquired easement. The State Highway Commission, on the other hand, was successful in two suits against it. Both cases involved assertions that highway construction was such as to cause damage from the movement of water produced by heavy rains. In neither case could the Court find the requisite of permanent nuisance; in one because of inability to prove measurable damages, and in the other because the provable damage was to personal property as distinguished from fixtures.

The Glace determination sounds in terms of the landmark case of United States v. Causby, the twenty-year-old decision of the Supreme Court of the United States involving a North Carolina chicken farmer. There the High Court, with two dissents, found the "taking" of an easement by the United States as a consequence of "frequent and regular flights . . . at low altitudes" by Army and Navy aircraft at a World War II military airport located near Greensboro. But the narrow distinction between "taking" under eminent domain and noncompensable damage, even where proof is clear and the property real, is demonstrated by two later decisions of the United States Supreme Court which also stemmed from prosecution of the Second World War. Each of these holdings also provoked two dissents, but not by the same Justices. Especially indicative of judicial difficulties in these cases is the fact that whereas Mr. Justice Black and Mr. Justice Douglas disagreed in Causby, they joined in dissent in the first of the two later decisions.

**Taking under Policy Power**

As the cases just discussed illustrate, the line between "taking" for which government must pay and that for which it need not is fine indeed. The classic example is Pennsylvania Coal Co. v. Mahon, in which Holmes and Brandeis divided on the question of the constitutionality of a Pennsylvania statute forbidding the

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40 Midgett v. Highway Comm'n, 265 N.C. 373, 144 S.E.2d 121 (1965).
51 328 U.S. 256 (1946).
52 United States v. Central Eureka Mining Co., 357 U.S. 155 (1958) (closing of gold mines in order to divert miners to more essential work); United States v. Caltex, Inc., 344 U.S. 149 (1952) (demolition of private property to prevent capture by the Japanese).
53 260 U.S. 393 (1922).
mining of anthracite coal in such manner as to cause the subsidence of residential structures located on land in which the Coal Company had retained mineral rights. The period under review includes several instances, other than those already identified, in which the Court faced the question whether "taking" was to be tolerated under what Holmes liked to call "the petty larceny of the police power."

Citing prior authority, the Court in *State v. Walker* reaffirmed that "it is within the police power of the General Assembly and of a city, when authorized, to establish minimum standards, materials, designs, and construction of buildings for the safety of the occupants, their neighbors, and the public at large. . . . In case of conflicting interest the public good is and must be paramount." Accordingly, both a Charlotte ordinance requiring building permits and the empowering state statute were cleared of violation of the North Carolina and the United States Constitutions. The Court's language and reference to the fourteenth amendment of the federal constitution suggest that in its collective mind was the case of *Miller v. Schoene* from Virginia, a celebrated decision of the Supreme Court of the United States which, in most casebooks on constitutional law, is set in juxtaposition with *Pennsylvania Coal v. Mahon*.

"Both the North Carolina and the Federal Constitutions recognize the authority of the State, through its legislative branch, to regulate the sale and distribution of intoxicating liquors. *Zifrin, Inc. v. Reeves*, 308 U.S. 132, *Boyd v. Allen*, 246 N.C. 150, 97 S.E.2d 864." So asserted the Court in *Lampros Wholesale, Inc. v. ABC Board*, involving revocation of a liquor permit, in reaffirming familiar constitutional law. But even businesses subject to a high degree of governmental control enjoy constitutional protection against discriminatory legislation. Thus in *State v. Smith*, the alternative ground for invalidity of a county regulation of night clubs was found in spacial and temporal limitations on oper-

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45 265 N.C. 482, 144 S.E.2d 419 (1965).
46 144 S.E.2d at 421.
47 276 U.S. 272 (1928).
48 260 U.S. 393 (1922).
49 265 N.C. 679, 682, 144 S.E.2d 895, 897 (1965).
50 265 N.C. 173, 143 S.E.2d 293 (1965).
51 The empowering statute was found unconstitutional because violative of N.C. Const. art. II, § 29. See discussion of *Riegel v. Lyerly* in text accompanying notes 78-82 infra.
ation that were without reasonable relation to the legitimate objective of protecting public worship and public school education. In the discriminatory character of the resolution of the Board of County Commissioners, the Court found denial of substantive due process, citing both section 1 of the fourth amendment of the federal constitution and section 17 of article I of the North Carolina Constitution.

Per contra, the state was found guilty, as it were, of attempted grand larceny in two decisions involving 1963 legislation. Wachovia Bank & Trust Co. v. Andrews\textsuperscript{61} was concerned with the interpretation of a testamentary trust that provided on certain contingencies for the payment of portions of the trust income to testator's great nieces and nephews. Subsequent to testator's death in 1946, four children were adopted by one nephew and one niece, respectively. Relying upon G.S. § 48-23 as rewritten in 1963, these four adopted children asserted rights to share in the trust income with the twelve natural born great nieces and nephews. The Court's conclusion that testator intended to include only the natural born is bolstered by its judgment that "Sec. 17, Art. I, of the Constitution of North Carolina, and Sec. 1 of the Fourteenth Amendment to the Constitution of the United States forbid the Legislature from diminishing a vested interest by artificially increasing the class in which the estate has vested."\textsuperscript{62} Paradoxically enough, the greatest strength for the Court's assertion that the federal constitution would preclude a construction favorable to the adopted children is to be found in Mr. Justice Black's recent dissent in El Paso v. Simmons.\textsuperscript{63} For a United States Supreme Court holding in support since judicial reconstruction circa 1937, one has to resort to Wood v. Lovett.\textsuperscript{64} Within this twenty-four-year period the petty larceny of the police power (and some not so petty) has had a field day as far as the fourteenth amendment is concerned.

In the other case, Jewell v. Price,\textsuperscript{65} plaintiffs themselves conceded that "if this action was already barred when it was brought on January 12, 1962, it may not be revived by an act of the legisla-

\textsuperscript{61} 264 N.C. 531, 142 S.E.2d 182 (1965).
\textsuperscript{62} The case is further discussed in text accompanying notes 85-86 infra.
\textsuperscript{63} 379 U.S. 497 (1965).
\textsuperscript{64} 313 U.S. 362 (1941).
\textsuperscript{65} 264 N.C. 459, 142 S.E.2d 1 (1965).
tute, although that body may extend at will the time for bringing actions not already barred by an existing statute. No constitutional provision was cited but the headnoter assumed the assertion had constitutional underpinnings. It is clear that the constitution would have to be that of North Carolina, for Chase Sec. Corp. v. Donaldson reaffirmed the holding in Campbell v. Holt "that where lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the Fourteenth Amendment, may repeal or extend a statute of limitations, even after right of action is barred thereby, restore to plaintiff his remedy, and divest the defendant of the statutory bar." Armstrong v. McInnis suggests another point of differentiation between the due process clauses of the North Carolina and United States Constitutions as regards the scope of state police power. At issue was the constitutionality of the rezoning of vacant property within the city of High Point. For the test of validity the Court quoted at some length from In re Appeal of Parker, a zoning case which had in turn quoted from Euclid v. Ambler Realty Co., the original decision of the United States Supreme Court on the constitutionality of zoning. But the requirement of substantial relationship to the public health, morals, safety, or welfare which Euclid established had meantime undergone considerable judicial adulteration at the hands of the High Court. Now state and federal economic regulation satisfy federal due process if only a rational nexus is shown. The pages of this Review and of other law journals have ably developed the practical significance of this seeming play

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65 Id. at 461, 142 S.E.2d at 3.
67 325 U.S. 304 (1945).
68 115 U.S. 620 (1885).
69 325 U.S. at 311. Note the exception to the general rule. In the Jewell case the suit was for damages for alleged negligent installation of a furnace.
70 264 N.C. 616, 142 S.E.2d 670 (1965).
71 214 N.C. 51, 197 S.E. 706 (1938).
72 272 U.S. 365 (1926).
73 The Carolene Products cases are among the leading decisions. Carolene Products Co. v. United States, 323 U.S. 18 (1944); United States v. Carolene Products Co., 304 U.S. 144 (1938).
on words. If, therefore, as seems to be intended, the Supreme Court of North Carolina is adhering to the stricter test of substantial nexus, the fact that rezoning was validated in *Armstrong* does not minimize the importance to the North Carolina litigant and lawyer of the differing content given by it to section 17 of article I of the state constitution.

**Separation of Powers**

Issues of separation of powers, together with those involving the related concept of delegation of powers, appear in the cases decided during the period under review. These are largely considered elsewhere, and only three will be discussed here.

In litigation over the construction of a will, *Riegel v. Lyerly*, defendants urged that the Rule in Shelley's Case should not apply to personalty. To this contention the Court responded negatively on two grounds: first, it is the settled common law of North Carolina that the Rule is as applicable to personal as to real property; secondly, "If public policy requires a change, we think it should be made by the Legislature." American courts have not, as a general principle, found inconsistency between the constitutional principle of separation of powers and their historic function of fashioning common law. On the other hand, they will on occasion decline to act legislatively. Thus here the Court is unwilling "to change the law of property by judicial fiat." Often it is difficult to determine whether policy or doctrine explains the judicial reluctance. In neither the case under review nor the sole North Carolina precedent cited does the Court explicitly predicate its decision on a constitutional basis, yet each is headnoted to "Constitutional Law."

Policy orientation in the principal case is suggested by the observation made immediately after expression of refusal to alter the

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76 The difference between the holdings of many state courts and of the Supreme Court of the United States, consequent upon the differing phrasing of the constitutional test, is appraised in a larger frame in Strong, *Toward an Acceptable Function of Judicial Review, 11 S.D.L. Rev. 1* (1966).


78 265 N.C. 204, 143 S.E.2d 65 (1965).


80 265 N.C. at 209, 143 S.E.2d at 68.

law. Said the Court, "[T]he change, if made, should apply to instruments thereafter executed." This suggests judicial concern over retroactive application of an overruling decision, the result required by the logic of the fiction that courts declare, rather than make, the law. Yet, increasingly, American courts are overruling prospectively in response to compelling arguments for such judicial boldness. Great No. Ry. v. Sunburst Oil & Ref. Co. has left American courts relatively free of federal constitutional control in this aspect of law administration. On the other hand, the Court's citation of the recent case of Wachovia Bank & Trust Co. v. Andrews in support of its observation suggests that in the Court's mind the due process clauses of the North Carolina and United States Constitutions present an obstacle to retrospective application where property rights are involved.

In accordance with a long accepted principle of American constitutional law, the North Carolina Court deduces from the state constitution's mandate for separation of legislative, executive, and judicial powers a limitation upon the extent to which the General Assembly may constitutionally delegate its power to a coordinate branch or to an agency of its creation. The familiar requirement is that the legislature cannot delegate its full authority but only a portion of its legislative power accompanied by standards under which its delegate must exercise the limited authority given. These standards must be sufficiently specific to canalsize the delegation; in the words of Cardozo, the delegation cannot "run riot." During the period under review the issue of specificity of standards was raised in a modern factual setting. By declaratory judgment pro-

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265 N.C. at 209, 143 S.E.2d at 68.
287 U.S. 358 (1932).
85 264 N.C. 531, 142 S.E.2d 182 (1965). This late decision is discussed in text accompanying note 61 supra.
86 The Andrews case concerned legislative power to diminish vested rights in Property. Compare Wilkinson v. Wallace, 192 N.C. 156, 134 S.E. 401 (1926), applying in a situation involving real property the exception to the traditional rule of retroactivity which forecloses impairment of vested rights through retrospective application of decisions revising interpretations of constitutional and statutory provisions on which reliance has been placed.
87 N.C. Const. art. I, § 8.
procedure, the North Carolina Turnpike Authority sought judicial validation of the legislative delegation made to it in G.S. § 136-89.63. A unanimous Court in *Turnpike Authority v. Pine Island* 88 found the delegation valid. Little limitation remains on Congress in delegating to the Executive Department or to federal administrative agencies. State courts have been more strict, yet decisions such as the turnpike cases suggest increasing state-court liberalization in the content of specificity. 89

Delegations of legislative power to the political subdivisions of a non-home-rule state are not, for one reason or another, subjected to the requirement of meaningful standards generally enforced in attempted delegations to administrative bodies. 90 However, state constitutions may be freighted with other forms of limitation upon delegation to political subdivisions. Such is section 29 of article II of the North Carolina Constitution, which voids any "local, private or special act or resolution" of the General Assembly "regulating labor, trade, mining or manufacturing." This prohibition was held in *High Point Surplus Co. v. Pleasant* 91 to render nugatory G.S. § 153-9(55) as far as it purports to authorize nonuniform ordinances regulative of labor, trade, etc. In consequence a Wake County Sunday-closing ordinance was held to be without basis in law and its enforcement amenable to injunction. 92 Direct precedent for both remedial and substantive holding was found in *Treasure City, Inc. v. Clark.* 93 That case, in turn, refers to the decision in *Surplus Store, Inc. v. Hunter,* 94 which had invalidated an effort of the General Assembly to forbid by state law Sunday sales of specified

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89 Decisions favorable to constitutionality from Indiana, Massachusetts, Michigan and New Jersey are cited and relied upon by the Court. 
90 For this recognized exception to the general rule and its various explanations, see STRONG, AMERICAN CONSTITUTIONAL LAW 1146 (1950).
91 264 N.C. 650, 142 S.E.2d 697 (1965).
92 Two paragraphs in the opinion are parenthetically noteworthy. In one, 264 N.C. at 656, 142 S.E.2d at 702, the Court gives a concise history of art. II, § 29, demonstrating that it was the product of dissatisfaction with nonuniform legislation respecting local government. The other paragraph, 264 N.C. at 657, 142 S.E.2d at 703, makes clear that in the Court's view not all legislation unembracive of the entire State is invalid under art. II, § 29. Rather, the constitutional provision is viewed as directed at geographical classifications which are not reasonably related to the objective of Sunday observance legislation. Cf. discussion in text accompanying note 59 *supra* of State v. Smith, 265 N.C. 173, 143 S.E.2d 293 (1965).
93 261 N.C. 130, 134 S.E.2d 97 (1964).
94 257 N.C. 206, 125 S.E.2d 764 (1962).
items.\textsuperscript{95} Invalidation was predicated upon the "void for vagueness" principle embedded in the due process clauses of state and federal constitutions. Thus the \textit{Hunter} holding is not at odds with the statement with which this paragraph opens, although it does represent a stricter position on state power to enact Sunday-closing laws than does the relevant decision of the Supreme Court of the United States.\textsuperscript{96}

\section*{CORPORATIONS}

\textit{Ernest L. Folk, III*}

The Survey period produced only one corporation law decision of significance, a decision dealing with shareholder record-inspection rights. In addition, there have been several amendments to the Business Corporation Law, noted elsewhere in this issue of the \textit{Review}.\textsuperscript{1}

\subsection*{Inspection of Records}

\textit{Cooke v. Outland}\textsuperscript{2} is the most useful judicial analysis in this state of the shareholder's statutory right to inspect books and records of the corporation, and its resolution and clarification of several problems makes more definite and certain the scope of this right, which as a matter of practice is often presented to attorneys whether acting for shareholders seeking inspection or for corporations resisting such demands.\textsuperscript{3}

In \textit{Cooke v. Outland}, a minority shareholder in a state bank sought but was refused inspection of "the books, records, and statements of the [bank] in reference to the loans made by the

\textsuperscript{96} McGowan \textit{v. Maryland}, 366 U.S. 420 (1961). The \textit{Hunter} Court quotes from \textit{McGowan} but fails to articulate its reasons for believing it inapposite.

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\textsuperscript{1} 44 \textit{N.C.L. Rev.} 1106 (1966).
\textsuperscript{2} 265 N.C. 601, 144 S.E.2d 835 (1965).
Bank..." from 1950 to date, including the deposit accounts of the officers, directors and employees of the bank and also the loan records. The shareholder's asserted purposes were multiple but related: to verify absence of preferential treatment and to determine the bank's true financial condition, the present and potential value of the shareholder's stock, the efficiency of its managers and their good faith, and the extent of the possible assessment liability of his shares. On the bank's refusal to allow the inspection the shareholder brought a civil action in the nature of mandamus. The superior court held, inter alia, that he had not stated a proper purpose for inspecting the bank records, and that in any event such inspection would violate the "confidential relationship" between the bank and its customers. On appeal, the Supreme Court unanimously reversed (one judge not participating).

In reversing the denial of an inspection order, the Supreme Court held that the inspection right provision of the 1955 Business Corporation Law applied to state chartered banks. This was foreseen, somewhat indirectly, by the decision several years ago in White v. Smith recognizing that several cognate provisions of the statute applied to building and loan associations, although that case did not deal with shareholders' rights to inspect "books and records of account." The Court's analysis in holding that inspection rights govern banking corporations is indisputably sound. As the statute indicates, when Cooke v. Outland was decided there was no express exception of banking corporations from the coverage of the act, nor is there some other specific statutory provision par-

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4 265 N.C. at 604, 144 S.E.2d at 837.
5 Ibid.
6 Ibid. at 607, 144 S.E.2d at 839. The Court also held inapplicable the familiar administrative law principle requiring exhaustion of administrative remedies as a precondition to obtaining judicial relief. Here the bank argued that the shareholder should have taken the matter to the North Carolina Banking Commission under the vague statutory provision that the Commission may conduct hearings upon any matter or thing which may arise in connection with the banking laws of this State. N.C. Gen. Stat. § 53-92 (1965). Quite properly, this was held not to oust the shareholder from seeking and getting inspection of records through a court order. Cooke v. Outland, supra at 616, 144 S.E.2d at 845.
8 265 N.C. at 607-10, 144 S.E.2d at 839-42.
9 256 N.C. 218, 123 S.E.2d 628 (1962). This case sustained the right of shareholders of a state chartered building and loan association to obtain inspection of the list of shareholders in preparation for a shareholders' meeting pursuant to N.C. Gen. Stat. §§ 55-37(a)(3), -64 (1965).
ticularly applicable to banks or inconsistent with some provision of the corporation law. Subsequently, the corporation law has been amended so as to restrict the inspection rights of a bank shareholder with respect to loan and deposit records. Since this statutory amendment was inapplicable to the present litigation, it may be ignored here, but its broader impact is discussed elsewhere.

The Supreme Court has helpfully resolved the vexing question whether the shareholder must affirmatively prove proper purpose, or whether the corporation must establish absence of proper purpose (or wrongful purpose). The answer to this question cannot readily be resolved from the relevant statutory provision, for G.S. § 55-38(b) merely says that a qualified shareholder shall have the right to inspect certain documents "for any proper purpose." This could be construed either way on burden of proof without violating statutory language; and, indeed, the common law was never completely settled on the issue, since courts were sharply split on who bore the burden. There is, under the statute, one technical argument, not noted by the Court, that cuts in the direction of the result reached by the decision. Since G.S. § 55-38(f) does expressly require a shareholder to prove proper purpose, there is a negative implication that G.S. § 55-38(b) assumes that the opposite rule applies—that the corporation must show an improper purpose. For G.S. § 55-38(f) governs when other provisions of G.S. § 55-38 are inapplicable, i.e., "notwithstanding the foregoing provisions of this section," and therefore if G.S. § 55-38(f) must declare a specific burden-of-proof rule, it logically indicates that a different rule prevails as to the other provisions of the section.

10 In such event, the more specific provision would apply. N.C. Gen. Stat. § 55-3(a) (1965).
12 The Court, in Cooke v. Outland, 265 N.C. at 607-610, 144 S.E.2d at 839-42 (1965), stressed this point.
13 See note 1 supra.
14 One is a qualified shareholder if he has been a record holder for at least six months preceding his demand, or if, without regard to time of holdings, he is a record holder of at least 5% of any stock class. Voting trust certificate holders may also be qualified for inspection. N.C. Gen. Stat. § 55-38(a) (1965). Cooke v. Outland involved no question under this provision.
15 Robinso, op. cit. supra note 3, § 58, at n.25, implies that the issue had not been resolved in North Carolina at the time of publication of his work (1964).
There is also a weak, but not to be ignored, implication in the language of G.S. § 55-38(d) imposing certain monetary penalties on a corporate officer or agent who refuses to allow a shareholder to exercise his inspection right under G.S. § 55-38(b). In such event, the shareholder sues to recover the penalty. One specific defense is an affirmative proof by the defendants that the shareholder has previously sold shareholder lists or misused information obtained in prior inspections. In effect, the statute allows the defendants to escape liability by proving, from past events, that this shareholder probably is seeking inspection for an improper purpose.

These technical arguments support the Court's desirable holding which reads into the statute the "liberal" common-law rule. Stated more precisely, Cooke v. Outland indicates that the shareholder's written demand (and court petition) must indicate on its face some "proper purpose." At that point, the corporation must prove an improper or unlawful purpose. The Court observes that a mere denial of proper purpose is insufficient; rather the corporation must "show by facts, if they can" the impropriety of the purpose. The Court's discussion also implies that the shareholder must himself show a proper purpose by factual allegations and not by a mere vague generalized statement. In the nature of things, however, a shareholder seeking records to learn specific matters is not in a position to allege facts with any great degree of specificity and should not be held to too strict a standard.

This allocation of the burden of proof applies only to G.S. § 55-38(b), that is, the general statutory right of the shareholder to examine and make extracts from the "books and records of account, minutes and record of shareholders." It is not applicable to a shareholder's demand to inspect other books, e.g., minutes of the board of directors' meetings or of meetings of director committees, correspondence, contracts, intra-office memoranda, and the like. As to these documents, under G.S. § 55-38(f) the shareholder has no inspection as of right but only on court orders; here he bears the burden of affirmatively proving proper purpose; and refusal by corporate officers to permit such inspection does not subject them to G.S. § 55-38(d)'s statutory penalty, although disobedience to a final order entails its own sanctions under G.S. § 55-38(h).

265 N.C. at 615, 144 S.E.2d at 845.

Ibid.
Cooke v. Outland usefully clarifies the content of the proper purpose standard. In this context, "proper purpose" refers to the reason or need to inspect, and the Court approves at least three such reasons: (1) to determine the value of the shareholder's stock, (2) to ascertain the financial condition of the corporation, and (3) to determine whether the corporation is efficiently managed. The general test, as indicated by the Court, is whether the purpose is "germane to his status as a shareholder" of the corporation. This formulation finds support in the language of G.S. § 55-38(e) making it a misdemeanor to use information obtained by inspection "for any purposes other than those incident to ownership of the shares as to which such information was obtained." Thus, the test indicates quite properly that the shareholder is not confined to seeking information relating to a specifically corporate matter, e.g., suspected breach of duty, but may inquire into matters reasonably related to his position as shareholder and the value of his stock.

Improper purposes—which the corporation must establish by facts—are often matters of a shareholder's bad motive. Thus the Court lists the following: (1) the requested inspection is not "in good faith and would tend to advance a purpose inimical or hostile to the corporation or the other stockholders," (2) the shareholder seeks only to gratify his curiosity, or (3) primarily to harass the corporation of its management, or (4) to "advance a speculative purpose," or (5) (as a catchall) "some other improper purpose." This is consistent with established authority. Obviously, it is not always easy to say when some forbidden motive dominates the legitimate purposes for which inspection is sought, and this determination will often turn upon matters of fact and the trial court's impression of the plaintiff and the character of his demands. Thus, inspection would properly be denied if the shareholder's purpose is to obtain information to advance his own business affairs, e.g., where he is in a competitive business; or to dig up possible grounds

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18 Ibid. Presumably, determination of a shareholder's possible assessment liability would also be a proper purpose in the relatively few cases where this might arise. The shareholder had indicated this as one reason for the inspection he sought. Cooke v. Outland, 265 N.C. at 604, 144 S.E.2d at 837. 265 N.C. at 615, 144 S.E.2d at 845. 20 Ibid. 21 Robinson, op. cit. supra note 3, § 58, at nn.20-25, indicates decisions in North Carolina construing "proper purpose."
for litigation with a view to having a "strike suit" bought off at a handsome price; or to obtain a sucker list of shareholders to be sold to others. Certainly, inspection is properly denied if its purpose is merely to "gratify his curiosity," but a line must be drawn between idle curiosity and a sincere desire to satisfy oneself that the affairs of the corporation are being properly managed. Thus, a shareholder's genuine suspicion that all is not well need not be treated as idle "curiosity," for after all his purpose may be simply to feel assured that all is in fact in order. Although the meaning of "advanc[ing] a speculative purpose" is not clear, presumably it seeks to block fishing expeditions or inspections for idle curiosity. In short, most of the proscribed objectives could be subsumed under the rubric that they do not relate to or advance the interest of the shareholder qua shareholder but qua some other personal status.22 Thus, in this case, the Court thought that records of the deposits of directors, officers and employees were not germane to the status of shareholder.23 This would probably be correct without more; but if the shareholder should assert a sincere and not unreasonable belief that bank personnel had misappropriated funds, the relevance of such records is evident.24

22 Elsewhere I have suggested that, while this standard is good as far as it goes, it might prove slightly restrictive if the reason for inspection is to determine some matter germane to the individual's interest not as a shareholder but as, say, a former officer or director of the corporation. Folk, supra note 3, at 832 n.271. This would be true in a close corporation where a shareholder's interest as director or officer may be more important to him than his interest as a shareholder. For instance, if a minority shareholder were removed from a compensated office without explanation, he would want to obtain inspection of records; but what has been done to him does not especially affect his position as shareholder, although it may grievously impair his interests in other ways, such as cutting off his salary or voice in corporate affairs. Certainly inspection would be proper here. While incumbent directors (and presumably incumbent officers) have inspection rights at common law, the posture of ousted or former directors (and, a fortiori, officers) is considerably less certain. ROBINSON, op. cit. supra note 3, § 96.

23 265 N.C. at 615, 144 S.E.2d at 845.

24 The Court, unfortunately, put its seal of approval upon a familiar but erroneous "proposition that those in charge of the banking corporation are merely the agents of the stockholders, who are the real and beneficial owners of the property, the legal title to which is held by the banking corporation . . ." so that inspection by a shareholder of his corporation's records is "one merely for the inspection and examination of what is his own." Cooke v. Outland, 265 N.C. at 610, 144 S.E.2d at 841. This is a nice fiction but meaningless and erroneous. In no real sense are the shareholders the real and beneficial owners of corporate property; the shareholder's right is simply to receive dividends if as and when declared, to vote on matters as
PERFECTION OF SECURITY INTERESTS IN MOTOR VEHICLES

The 1961 General Assembly revised the statutes governing the perfection of security interests in motor vehicles subject to licensing by requiring the security interest to be noted on the certificate of title. An announced reason for the revision was that "a certificate of title that can be relied upon as a ready means by which all legal interests in motor vehicles may be determined would be in the public interest. . . ." Of course, the statute does not completely fulfill the policy indicated by the preamble because express exceptions to its coverage permit perfection of three types of "legal interests" by methods other than notation on the certificate of title. Artisan's or storage liens, governmental liens, and security interests created by a manufacturer or dealer who holds the vehicle for resale will not be indicated on the certificate of title.

In an elusive opinion, the North Carolina Supreme Court has engrafted an additional exception onto the statute. The Court has held that the secured party may perfect by taking possession of the vehicle although leaving the debtor in possession of the "clean" cer-

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2 N.C. Sess. Laws 1961, ch. 835, preamble. (Emphasis added.) Another reason was stated to be: "The certificate of title, [under prior law] often regarded as absolute, is not conclusive as to liens and may not be relied upon to show good title for purpose of sale or encumbrance."

3 N.C. GEN. STAT. § 20-58.9 (1965).
In April and May of 1963, Long, a new and used automobile dealer, gave to the plaintiff, Wachovia Bank, chattel mortgages on twelve used automobiles as security for a loan. Subsequently, in April, May and June of 1963, Long executed in favor of the defendant, Wayne Finance Company, chattel mortgages covering the same twelve automobiles. The defendant took possession of the certificates of title to the automobiles. On June 19, 1963, the plaintiff took possession of the automobiles and recorded its chattel mortgages in the register of deeds office. A few hours later, on June 20, 1963, the defendant recorded its chattel mortgages. Thus, the plaintiff had possession of the automobiles and the first-recorded chattel mortgages. The defendant had possession of the certificates of title and the subsequently-recorded chattel mortgages. The court held that the plaintiff had the prior claim to the proceeds of the agreed-upon sale of the automobiles. The reason given was that recording acts have never been held to be applicable where the secured party takes possession of the collateral. Furthermore, the Court stated: "People do not normally purchase or lend money on second hand automobiles merely upon the exhibition of the certificate of title." If this statement had effect in leading to the conclusion of the Court, this writer would think it counter-balanced by the assumption that people should not purchase or lend money on a second hand automobile without taking possession of the certificate of title as well as the automobile.

The Court stated that the defendant would have had the prior lien if it had transmitted the certificates to the Department of Motor Vehicles within ten days after the mortgages were executed, but this statement appears to be founded upon the fact that the plaintiff took possession nineteen days after the date of execution of the defendant's last mortgage. It would appear that if the plaintiff had taken possession before the execution of the defendant's mortgages, their perfection by transmission of the certificates to the Department of Motor Vehicles thereafter would have been unavailing, for the Court said "the Legislature did not intend to prevent a mortgagee who has actual possession of the pledged vehicle from ac-

5 Id. at 715, 138 S.E.2d at 484. This fact, if it is a fact, does not appear in the record of the case.
quiring a lien having priority over liens not then perfected." Nevertheless, standing alone, this conclusion has not greatly altered the degree of reliability of the certificate of title that is dictated by the express terms of the statute. The prospective lender or purchaser is, in any event, bound at his peril to determine whether the vehicle is subject to an artisan's possessory lien, which will not appear on the certificate of title. However, by choosing this broad ground as a basis for the decision, the Court has cast in doubt the interpretation and applicability of another section of the statute that has far more importance to commercial lenders.

The parties stipulated that at all relevant times, Long was "engaged in the business of buying and selling new and used automobiles." G.S. § 20-58.9 (3) exempts from notation on the certificate of title "a security interest created by a manufacturer or dealer who holds the vehicle for resale...." Although the statute does not specifically so provide, it may reasonably be inferred that such security interests may be perfected in the manner applicable generally to the type of security interest, e.g., filing or recording in the county where the dealer maintains his place of business. In the instant case, the prevailing party did record first, and it seems that the Court could have disposed of the case on that relatively simple ground without mentioning possession.

The only serious objection to such a disposition of this case would be that the exception from notation on the certificate of title is intended to apply only to the financing of new automobiles for which no certificate of title has been issued. And the grouping of manufacturers and dealers within the same exception lends some weight to the argument. However, it is believed that other considerations override such a construction.

The annual volume of used automobile sales and the conse-

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8 Ibid.
10 Record, p. 4.
11 G.S. §§ 47-20, -20.2(2) (Supp. 1965). The Uniform Commercial Code will require that security interests not noted on the certificate of title be filed in the office of the Secretary of State and, if the debtor (dealer) has a place of business in only one county, the security interest must additionally be filed in that county. N.C. Gen. Stat. § 25-9-401 (1965).
12 Eleven million, three hundred thousand used automobiles were purchased in the United States in 1963. Automobile Manufacturers Ass'n, Automobile Facts & Figures 43 (1965). Totals for North Carolina are not available, but an estimate based upon proportion of United States popula-
quent volume of inventory that passes through the hands of dealers makes unduly burdensome a rule that would require the transmittal to Raleigh of the certificate of title to each inventory vehicle that is used as collateral for credit by the dealer. And during the period in which the certificate was in transit to Raleigh and back to the dealer's financer, the vehicle would not be saleable.

A primary reason for requiring notation of liens on the certificate of title is the mobility of the automobile, which makes desirable, if not necessary, some certain place where the status of title may be determined. However, considered in conjunction with the provision that a buyer in the ordinary course of business from the dealer will have priority over any security interests created by the dealer, the mobility factor loses importance when the automobile is in the hands of the dealer. The dealer's place of business, not necessarily the location of any specific automobile owned by him, is the point around which credit inquiries revolve. The dealer's place of business is presumably not so mobile. Therefore, it would seem that the dealer's creditors or bulk purchasers could be adequately protected if there is a public record of the security interests in the county where the dealer has a place of business. In fact, creditors would be better served if there was a single location where the security interests could be recorded, rather than a notation on each certificate of title.

In the absence of express limitation on the term "dealer," it is submitted that G.S. § 20-58.9(3) should be construed to apply to new and used automobile dealers. And an argument for the application of G.S. § 20-58.9(3) was made as the first point in the plaintiff-appellee's brief. The Court did not mention that section of the statute in its opinion. Thus, trying to project the Court's future interpretation of G.S. § 20-58.9(3) by choosing between unexpressed alternatives in the instant case would not be profitable. But it is believed that the application of G.S. § 20-58.9(3) to similar

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1 N.C. GEN. STAT. § 20-58.9(3) (1965).
12 Brief of Appellee, p. 2-3.
cases that might arise in the future would result in the soundest interpretation of the statute.

In National Bank of Sanford v. Greensboro Motor Co., the Court dealt with the validity of motor vehicle chattel mortgages that were executed prior to the time the certificates of title were issued in the mortgagor's name. On December 4, 1961, Carolina Concrete purchased two trucks from Fields and the certificates of title were assigned to Carolina. On December 14, 1961, Carolina executed a chattel mortgage in favor of plaintiff as security for a loan of 8500 dollars. The chattel mortgages were recorded December 18, 1961. However, the certificates of title were not forwarded by Carolina to the Department of Motor Vehicles until May and November of 1962. Carolina sold the trucks to the defendant in November 1962, and certificates of title were issued in the defendant's name. The plaintiff brought an action for conversion.

The Supreme Court, in affirming the decision of the superior court, held for the defendant. The Court reasoned that, under the Motor Vehicle Act, title does not pass to a purchaser until application for the new certificate is made. Therefore, at the time the mortgages were executed, Carolina did not have title to the trucks, and the "mortgages" were merely "contracts to mortgage" if and when Carolina acquired title. In support of this conclusion, the Court cited Chandler v. Cameron, thus giving new credence to a decision that would be best forgotten. In Chandler the Court held that a contract to convey absolute timber rights in a tract of land that was executed at a time when the grantor owned a one-sixth interest, but recorded after the grantor acquired an additional one-sixth interest by conveyance from his sister, was not valid as to the second one-sixth interest as against a subsequent grantee who recorded after the first grantee. In such a situation, the "estoppel by deed," or "feeding the estoppel" doctrine as theretofore interpreted by the Court would dictate that when the grantor acquires the second one-sixth interest, legal title would vest in the first grantee, subject

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18 264 N.C. 568, 142 S.E.2d 166 (1965).
14 Recording was the proper method of perfection at that time because the requirement of notation of liens on the certificate of title did not become effective until Jan. 1, 1962. N.C. GEN. STAT. § 20-58.10 (1965).
15 The defendant had sold the trucks to a third party before this action was commenced.
19 229 N.C. 62, 47 S.E.2d 528 (1948).
to the restrictions of the recording acts. A recording made before the grantor acquired title has not been recognized as valid because it is off the "chain of title" of the grantor. But it was assumed that a recording made after the grantor acquired title is valid as against any subsequently recorded interest. However, in Chandler the Court held that the contract to convey, insofar as it related to property not owned by the grantor at the time of execution, was a "mere personal contract" that could not be recorded. Consequently, even though the contract was in fact on record, it was not notice to the subsequent grantee, who prevailed with respect to the second one-sixth interest.

Heretofore, Chandler might have been dismissed as an excursion for the sake of justice or as "contract to convey" law. However, current introduction of the case into chattel mortgage law in National Bank of Sanford appears to add an additional and unnecessary condition to the general "estoppel by deed" doctrine. In Chandler the Court expressly stated that the "personal contract" was valid between the parties. But this is little protection to a grantee or mortgagee who holds the unrecordable "personal contract." The grantor or mortgagor can, after acquiring title, convey to a third person who, by recording, will have priority. To have an interest that could be recorded, the first grantee would be required to procure a new conveyance from a probably reluctant grantor. This might require equitable action for specific enforcement of the "personal contract," a totally unnecessary additional step when the first grantee already holds a warranted conveyance from the grantor, the only defect of which is the antecedent date.

Thus, it is the opinion of the writer that the revival of Chandler is undesirable and probably unnecessary in the instant case. Here,

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19 Builders Sash & Door Co. v. Joyner, supra note 18 (dictum).
20 There is another possible theory that could explain the result of Chandler on the precise facts, but it requires disregarding much of the opinion and doing some violence to the general recording rules. The first contract to convey was recorded on December 16. The second contract was executed on December 14 and recorded on December 18. It might be theorized that the holder of the first contract has a recordable equitable interest, not subject to the normal race recording rules, which will be cut off by a bona fide purchaser who acquires his interest before recording of the equitable interest. But, as indicated, although this might explain the result, it is not consistent with the court's assumption that the first contract was personal and not, under any circumstances, subject to recording.
there was no attempt by the plaintiff to re-record or perfect the chattel mortgage subsequent to the time the mortgagor acquired title. The Court could have applied the rule that the recording made before the mortgagor acquired title is not valid and reached the same result.\footnote{\textsuperscript{21}}

It should be noted that the Uniform Commercial Code will require an entirely different approach to the problem in the case of personal property. Disregarding transitional problems,\footnote{\textsuperscript{22}} the Code offers at least two grounds for reaching a different result in similar cases. Section 9-204\footnote{\textsuperscript{23}} provides that a security interest “attaches” when there is an agreement that it attach, the secured party gives value, and the debtor has “rights” in the collateral. The Code does not purport to define generally the time at which the debtor acquires rights in the collateral.\footnote{\textsuperscript{24}} However, it seems that “rights” may be something less than “title,” else the latter, more restrictive term would have been employed.\footnote{\textsuperscript{25}} In \textit{National Bank of Sanford} the debtor had possession of the trucks and the certificates of title under a completely executed contract of sale. The debtor’s interest was not defeasible by the vendor or the vendor’s creditors or purchasers. The only step required for acquisition of “title” was the purely

\footnote{\textsuperscript{21}} See note 18 \textit{supra.}  
\footnote{\textsuperscript{22}} If the Code were superimposed upon the exact situation in \textit{National Bank of Sanford}, questions concerning the transition from filing of security interests in motor vehicles to them on the certificate of title under the Motor Vehicle Act would unduly complicate this general discussion. For example, if the security interests were deemed not to have “attached” on December 14, 1961, there would be a question as to the validity of the filing or recording beyond January 1, 1961. The following discussion disregards such questions and assumes that filing or recording was at all relevant times a proper method of perfection of the chattel mortgages on motor vehicles.  
\footnote{\textsuperscript{24}} N.C. Gen. Stat. § 25-9-204(2) (1965) contains some specific, limited rules on acquisition of rights in crops, animals, fish oil, gas, timber, contract rights and accounts. Why the drafters deemed necessary a specific rule that a debtor has no rights in “fish until caught,” N.C. Gen. Stat. § 9-204(2)(b) (1965), and deemed unnecessary an attempt at general definition is not explained.  
\footnote{\textsuperscript{25}} In Cain v. Country Club Delicatessen of Saybrook, Inc., 25 Conn. Supp. 327, 203 A.2d 441 (1964), the court assumed in dictum that a debtor acquires rights in collateral when the goods are “identified” to a contract of sale. N.C. Gen. Stat. § 25-2-501(1) (1965). And N.C. Gen. Stat. § 25-2-501(2) (1965) clearly contemplates that goods may become identified to the contract before “title” passes to the buyer. The court in \textit{Cain} left unanswered the question whether the debtor acquires “rights” at the time of execution of the contract of sale and before identification of the specific goods to the contract. But the court held that mere possession does not give the debtor rights in the collateral.
formal step of making application for issuance of the certificates. Therefore, under the Code, the chattel mortgage (security interest) probably would have "attached" on December 14, 1961, the date of execution.

Moreover, insofar as the basic validity of the security agreement is the issue, it makes no difference when the debtor acquired rights. There is no specified order in which the three events necessary for attachment must occur. The security agreement may be executed at any time. The security agreement that is executed before the debtor has rights in the collateral is not a "mere personal contract" or "contract to mortgage"; it becomes a lien without additional action when the secured party gives value and the debtor acquires rights in the collateral.

Furthermore, as to personal property other than motor vehicles, the notice filing concept incorporated into Article 9 contemplates that financing statements may be filed before the security agreement is executed or the interest attaches. The financing statement is effective for sixty days beyond the maturity date of the obligation, if the date is stated, or for five years. It will operate to perfect any security interest in described collateral that attaches within the effective period. Thus, a chattel mortgage that is executed and filed as a financing statement under the Code will become a perfected security interest, valid against subsequent purchasers and creditors, whenever the debtor acquires rights in the collateral and the secured party gives value.

NOTICE OF FORECLOSURE

In Woodell v. Davis, the plaintiff brought an action for wrongful foreclosure that was based upon an alleged agreement by the defendant to refrain from foreclosure as long as interest was paid and to give plaintiff personal notice in advance of foreclosure. The defendant foreclosed by exercise of the power of sale and did not attempt to give plaintiff personal notice. The Court affirmed dismissal of the complaint on the ground that no consideration for

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defendant's agreement was alleged. The Court noted that the statute governing notice of exercise of the power of sale requires only proper advertisement. Thus, in absence of agreement to the contrary, the debtor is not entitled to personal notice or service.

In Certain-Teed Prods. Corp. v. Sanders, the Court extended the principle of the Woodell case to junior lien holders. The defendant sold a vacant lot to Howze. Howze executed a deed of trust to defendant as security for 595 dollars of the 750-dollar purchase price. Subsequently, Howze executed a deed of trust to the plaintiff's assignor to secure a 10,908.84-dollar note. The note was given for the price of materials and labor that were used to construct a house on the lot. After construction of the house began, the defendant procured foreclosure of his deed of trust. The foreclosure proceeding was properly advertised and conducted. The defendant bid 300 dollars at the sale. No upset bid was filed and a deed to the property was in due course given to the defendant. Plaintiff sought, by this action, to have the foreclosure declared void. Plaintiff alleged that it did not have actual notice of the foreclosure and that the property had a market value of 5000 dollars or more at the time of the sale.

The Court held, inter alia, that the fact that the plaintiff received no personal or actual notice of the sale did not render the sale defective. Notice by advertisement is all that is required. The Court expressed reluctance at ordering reversal and nonsuit. However, the statutory requirements for foreclosure were complied with and the Court had little choice. The only alternative, under the present state of the law, would be to embark upon a potentially unsettling and undesirable scrutinization of the adequacy of price obtained at foreclosure sales.

A statute that would minimize the possibility of a first mortgagee's acquiring the property at such a patently inadequate price is clearly called for by Sanders. If the junior secured parties were assured of receipt of actual notice of the foreclosure under the first mortgage, it would be unlikely that cases such as Sanders would arise. Almost certainly the plaintiff would not have stood aside and permitted the security for the 10,000-dollar note to disappear for 300 dollars, had it received actual notice of the fore-

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closure. Furthermore, a statute facilitating the receipt of actual notice by junior lien holders would offer considerable protection of the debtor's interest.

Some jurisdictions require that the first mortgagee must give personal notice of the foreclosure to all parties who hold recorded interests in the property at a specified time prior to foreclosure.\(^3\) Such a rule, of course, requires the first mortgagee to search the title to the property subsequent to the mortgage and before commencement of foreclosure proceedings. This requirement for real property probably imposes an unnecessary burden on the mortgagee and imposes additional cost upon the debtor.

A far preferable solution to the problem is that adopted in California.\(^4\) Any subsequent mortgagee or lien holder may record a request for notice of foreclosure. The recording officer is directed to note this request on the recorded copy of the first security interest. Prior to foreclosure, the first mortgagee is required by the statute to send, by certified or registered mail, notice of foreclosure to all persons whose request for notice is noted on the recorded copy of the first mortgage. Thus, the interested junior secured parties are assured of the ability to actively participate in the foreclosure of the first mortgage.

The North Carolina General Statutes Commission presently has under consideration for recommendation to the General Assembly a statute similar in purpose to the California statute. This proposed statute, as presently drafted, requires that the junior secured party send a copy of his request for notice to the first secured party, in addition to recording the request. Also, it provides that failure of the first secured party to comply with requests for notice will not invalidate the sale as to third parties, but the defaulting party shall be liable for damages to the junior secured party. The proposed statute achieves a very satisfactory balance of convenience for all parties concerned, and it is hoped that it, or a statute of similar import, will be enacted in North Carolina.

The Uniform Commercial Code provides that the secured party, upon exercise of the power of sale, must send "reasonable notifica-

\(^3\) E.g., Wis. Stat. Ann. § 297.04(2) (1958) requires the mortgagee to serve, in the manner of service of summons in a civil action, notice of foreclosure upon the mortgagor and any other mortgagee or grantee whose interest is recorded.

\(^4\) Cal. Civ. § 2924b.
tion of the time and place of any public sale . . . to the debtor, and except in the case of consumer goods to any other person who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this state or who is known to the secured party to have any interest in the collateral.

Thus, when the Code becomes effective, the personal property secured party will be responsible for searching the records prior to foreclosure to ascertain whether there may be subsequently filed financing statements covering the collateral. However, the Code does not invalidate the sale made to a bona fide purchaser who has no knowledge of the defects, but provides that the selling secured party is liable for any loss caused the subsequent parties through failure to comply with these requirements of notice.

OBLIGATIONS OF THE ASSUMING GRANTEE—CHATTEL SECURITY

The traditional law of real property mortgages dictates that, where the mortgagor transfers his equity of redemption to a grantee who assumes payment of the mortgage obligation, the relationship of surety and principal debtor results between these two parties. The effect of this relationship is to give the grantor who is faced with payment of the debt because of default of the assuming grantee the benefit of suretyship rights, such as exoneration, reimbursement, and subrogation to rights and security held by the creditor-mortgagor. In Hatley v. Johnston, the Court has logically extended that doctrine to the law of chattel security. On February 7, 1962, Hatley purchased a truck under a conditional sales contract. The purchase price was payable in twenty-four monthly installments. Pursuant to contractual authorization, GMAC, the seller's assignee, procured is-

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7 The North Carolina Court has held that the principal-surety relationship exists only as between the two parties—the grantor and the assuming grantee—and the relationship between the grantor-mortgagor and mortgagor is not changed by the conveyance. E.g., Brown v. Turner, 202 N.C. 227, 162 S.E. 608 (1932). The effect of this conclusion was to deny the grantor-mortgagor the benefit of suretyship defenses against the mortgagee. However, several of the suretyship defenses, such as extension of time, release of collateral, and release of the principal debtor, have since been made available to the debtor by N.C. GEN. STAT. § 45-45.1 (Supp. 1965). Many American jurisdictions have given the grantor the benefit of some suretyship defenses without express statute. See OSBORNE, MORTGAGES § 270 (1951).
8 265 N.C. 73, 143 S.E.2d 260 (1965).
suance of a credit life insurance policy insuring Hatley's life for the amount unpaid in the event of Hatley's death. The contract stated that sixteen dollars of the time-price differential was allocated for the insurance. On February 1, 1963, Hatley sold the truck to Johnston, who assumed payment of the remainder of the installments due. On February 18, 1963, before Johnston had made any payments on the contract, Hatley died. The insurance company paid GMAC the amount due on the purchase price, and GMAC marked the lien satisfied. Johnston applied for and was issued a new certificate of title to the truck. Hatley's estate brought suit against Johnston for the amount of the installments due at Hatley's death.

The Court held, in reversing a nonsuit, that the relationship of surety and principal existed as a result of Johnston's assumption of the obligation under the conditional sales contract. Therefore, Hatley's estate, to the extent that it paid any part of the obligation owed by Johnston on the assumption contract, was entitled to reimbursement and subrogation to the rights of GMAC on the conditional sales contract. The Court, in effect, held that the payment by the insurer was a payment by Hatley's estate. Thus, the estate was entitled to subrogation to the entire amount paid by the life insurance.

The Court can scarcely be faulted for its conclusion in this case. The insurance company did not refuse payment and was not here involved. Therefore, a more-or-less unexpected 1300 dollars had to be disposed of as between the three parties. GMAC claimed no role other than as agent of Hatley in procuring the insurance. Johnston had no relationship to the insurance; he had made no payments on the contract and in no sense contributed to the price of the insurance. Hatley had furnished, directly or indirectly, the funds with which the insurance was purchased, a sufficient ground it seems to deem him the owner of the policy and alone entitled to its benefits.

However, anticipation of this problem when buying goods in these circumstances could probably give the benefit of the insurance policy to the assuming grantee. A primary reason for not doing so in this case was the grantee's lack of insurable interest in the grantor's life. If the contract of sale had contained an express provision for the assignment of the policy as a part of the consideration for the sale, the lack-of-insurable-interest objection would
not have been present. An assignee of a valid policy normally needs no insurable interest as a basis for enforcement of the policy.\textsuperscript{39}

This case, of course, raises many problems of insurance and equity that are beyond the scope of this Survey.\textsuperscript{40} But it should be noted that despite the extensive use of credit life insurance, many of these conceptually difficult, if not frequent, problems are yet to be dealt with.

\textbf{CONVEYANCE OF EQUITY OF REDEMPTION TO CREDITOR—MERGER}

In \textit{Farmers Co-op. Exch., Inc. v. Holder},\textsuperscript{41} the Court applied another familiar real property doctrine—merger—to chattel security. The defendant had purchased from plaintiff's agents a farm tractor. The purchase was financed under a conditional sales contract. When the first installment fell due, the defendant refused to pay on the ground that the plaintiff was not furnishing maintenance service as agreed. The defendant offered to return the tractor to the plaintiff. This offer was accepted by the plaintiff in May, 1962. In July of that year the defendant signed, at plaintiff's request, an instrument that released to the plaintiff "all title and interest" in the tractor and authorized the plaintiff to repossess "free from any and all claims on the part of [defendant]. . . ." The plaintiff retained the tractor for about ten months. During the period that it was in the possession of the plaintiff, the tractor was used by one of the plaintiff's directors for his personal use. In March, 1963, the plaintiff sold the tractor at an auction and sought a deficiency judgment against defendant and the guarantors of the obligation. The Court held that the conveyance of the equity of redemption by the "release" resulted in a merger of the legal and equitable estates in the plaintiff conditional vendee. Therefore, no deficiency judgment could be recovered.

The result of this case is eminently correct. But this writer has

\textsuperscript{39} \textit{E.g.,} McNeal v. Life & Cas. Ins. Co., 192 N.C. 450, 135 S.E. 300 (1926).

\textsuperscript{40} For example, could the insurance company in this situation refuse to pay until the assuming grantee has defaulted on the ground that until such time the face amount of the policy cannot be determined? To whom should the benefit of the proceeds go if the creditor purchases the insurance without direction from the initial debtor? See generally 43 Tex. L. Rev. 580 (1965).

\textsuperscript{41} 263 N.C. 494, 139 S.E.2d 726 (1965).
a largely semantic quibble with the general assumption that the doctrine of "merger" is the key to proper disposition of this type of case. A security interest will not exist without an obligation to support it, but the obligation—the debt—may exist without the benefit of security. And concluding that merger, which joins the legal and equitable estates in the property, destroying the security interest, ipso facto destroys the severable personal obligation does not take proper account of that latter fact. The essential, and more realistic, question in these cases is whether the parties intended that the conveyance of the equity of redemption should constitute payment or satisfaction of the personal obligation, not whether the parties intended that "merger" should occur. Merger is the appropriate doctrine to justify cases where the mortgagee is competing with intervening junior lien holders, but it has little place as the sole basis for results in the situations here under consideration.

The emphasis in analysis should be placed upon construction of the contract to determine the intent of the parties with respect to payment. Assuming a specific conveyance of the equity of redemption under a conditional sales contract or other security interest retained by a vendor, it is suggested that a rule of construction should presume that the conveyance is accepted by the creditor in total satisfaction of the obligation. The creditor has the ability to accept a return of possession of the collateral for foreclosure without prejudicing his right to a deficiency judgment. When, however,

42 If the only evidence of the personal obligation was contained in the mortgage instrument, it would be easy to see how the "merger" theory would be appealing. But the mortgagor or conditional vendee of any substantial items who does not sign separate notes today is probably rare. Of course, the roots of the current misapplication of the term "merger" are far deeper. See Osborne, Mortgages § 272 n.60 (1951).


44 With that type of purchase-money security interest the value of the property presumably has a direct relationship to the amount of the unsatisfied obligation. Unless otherwise agreed, the debtor should have a reasonable, justifiable expectation that the specific conveyance requested by the creditor will have the effect of satisfying the obligation. Of course, if a security interest retained by the vendor of real property were involved the vendor would not be entitled to a deficiency judgment in any event. N.C. Gen. Stat. § 45-21.38 (1950).

In other types of security transactions, there perhaps should be no presumption; rather the question of intention could be resolved on the basis of such factors as the relationship between actual value of the property and the unpaid obligation, or whether the mortgagee had some special use for the property.
the creditor additionally requests a specific conveyance of the 
debtor's interest in the collateral, the burden should be upon him to 
specify the terms under which the conveyance is accepted, if those 
terms are other than total satisfaction of the obligation. The fact 
that a merger will take place by the conveyance, thus destroying 
the relationship of mortgagor and mortagee with respect to the 
property, aids this rule of construction.

In the instant case, the facts that the creditor was obviously 
trying to discharge the contract so as to avoid possible liability for 
breach of the maintenance agreement and that the creditor retained 
the property and used it as its own for nearly a year only reinforce 
the suggested rule and result.

CRIMINAL LAW AND PROCEDURE

Kenneth L. Penegar*

SANCTION LAW

No decisions in the processes of the criminal law are more 
directly related to the long-range purposes and objectives of the 
criminal law than those involving the kind and length of restraint 
which the state imposes on persons convicted of crimes. It is never-
theless open to serious question how far developed concepts of fair-
ness and scrupulous regard for the need for individualization in 
sanctioning have emerged in the practice of the courts. Several of 
the cases from the North Carolina Supreme Court during the survey 
period are illustrative.

The need for more precision as to how and what matter may 
be considered in the sentencing hearing, for example, is suggested 
by the Court's per curiam opinion in State v. Caddell.1 Appellant 
had been convicted of felonious breaking and entering of a service 
station, wherefrom he took a television set and some twenty-five 
dollars in cash. In deciding to award an active sentence of six-to-
ten years, the trial judge considered a fingerprint record from F.B.I. 
files. The record did not reveal what had resulted from the several

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1 265 N.C. 563, 144 S.E.2d 621 (1965).
arrests indicated. Nor does the trial record indicate what if any explanations or arguments were made with respect to this "evidence." The Court is nevertheless moved to conclude there was no error committed since: "We are sure the careful and conscientious Judge did not give any improper consideration to the fingerprint record." This sweeping presumption of fairness, while it might be justified in particular cases, seems peculiarly out of place generally in a system that purports to insist upon a rational nexus between ends and means and strives to institutionalize procedures by which the rationality can be seen by independent observers or appellate decision-makers.²

Where adequate procedures are in existence by which one's liberty—even if it is of the qualified sort such as in probation—can be modified, the Court can more easily appraise what happened to change the status of the appellant. In State v. Seagraves,⁴ appellant's conviction had resulted in a suspended sentence and conditions of probation were enumerated in detail. Among these were the typical ones such as that the probationer must (1) avoid persons or places of disreputable or harmful character, (2) report to the probation officer as directed. The probation officer tried to invoke these conditions by asserting to the court that the probationer had been seen with a gun and that he had visited a tavern—all in violation of the "Probation Officer's instruction and advice." No other evidence was before the trial court except the probation officer's report. In holding that the state had not sustained its burden of proof that any of the conditions of probation had been violated, the Court quite properly called attention to the fact that the judicially imposed conditions did not include following the "probation officer's instructions and advice." Furthermore, it was pointed out that if something untoward was involved in the enumerated activities of the

² Id. at 564, 144 S.E.2d at 622.
⁴ 266 N.C. 112, 145 S.E.2d 327 (1965).
appellant, such as visiting a tavern, it remained for the state to spell out the circumstances making it so.\(^5\)

The problem of what length of active sentence is appropriate when a retrial of the case has been ordered following appellate review was raised again during the last term of the Court.\(^6\) In *State v. Slade*,\(^7\) the Court—not unexpectedly—reiterated its position that it is neither an abuse of discretion nor a violation of any constitutional right for the court after the second trial to impose a more severe sentence than the court in the first trial saw fit to do. Nor does the Court insist on any showing of changed circumstances that would warrant the different sentence. The only limits are those set by the statute punishing and defining the offense. Of course if resort is made merely to the conceptual explanation of this result, viz., that the new trial is de novo, the slate is wiped clean, etc., then it is sensible in terms of logic to speak not of an “increased” sentence but of the only valid sentence in the case. This rationale, while it has the merit of simplicity and logic, does not invite laudable responses from observers who cannot ignore the fact that one judge has already exercised some discretion relative to the goal of our criminal sanctions. The feeling is inescapable that the final sanction owes at least a part of its quantity to a sense of resentment

\(^5\)Having adequate procedures in being to make the decision process faithful to the demands of rationality and fundamental fairness does not mean, however, in the contemporary context anyway that the full “rigors” of the due process clause—as tested in the areas of pre-trial, trial, and appeal—are applicable to the probation revoking procedures. See note 3 supra. In the recent case of *State v. White*, 264 N.C. 600, 142 S.E.2d 153 (1965), the Court sustained an order revoking probation where officers had entered without a warrant and found intoxicants on the appellant's premises. It appeared that the appellant had earlier been convicted of making liquor and had been awarded probation on condition first, that he not have on his premises any intoxicants or materials for their manufacture, and secondly, that he “permit any lawful officer to search . . . with a search warrant.” While this is in accord with the weight of current authority, it seems at best a questionable step toward the rehabilitation of an offender to insist upon the waiver of primary constitutional rights. It is interesting that the discovery here in question was apparently not that of a probation officer making a supportive visit but rather of police officer who should normally be proceeding under warrants anyway. *Quaere* is there a practice in being whereby local officers are apprised of probationers in their bailiwicks who become victims of routine if random investigation, depending on their offenses?


\(^7\)264 N.C. 70, 140 S.E.2d 723 (1965).
that appellant had taken up the court's time with an unnecessary second trial.8

Of related interest are the cases that raise the issue whether a sentence within the limits allowed by statute may nevertheless be held "cruel and unusual" within the meaning of the eighth amendment to the United States Constitution. The view of the North Carolina Court is evidently that the answer must necessarily be no. In State v. Garris,9 it is said: "The punishment imposed in a particular case, if within statutory limits, is within the sound discretion of the presiding judge."10 And in State v. Slade11 even more explicitly it is said: "Judge Campbell's judgment on the first count in the indictment was within the limits authorized by the statute, and this being true it does not offend constitutional provisions forbidding the infliction of 'cruel or unusual' punishment."12 In fairness it should be said that these opinions did not fully explore the ramifications of what was being decided in these particular cases, that is, that arguably these cases did not present facts of the sort properly to invoke the eighth amendment. Yet in another case where the argument was pressed, it would appear with more cogency, the Court held to the same view, namely that "when punishment does not exceed the limits fixed by statute, it cannot be considered cruel and unusual punishment in a constitutional sense."13 This case in-

8 See generally Van Alstyne, "In Gideon's Wake: Harsher Penalties and the Successful Criminal Appellant," 74 YALE L.J. 606 (1965). If there are no satisfactory constitutional arguments for the delimitation of sentences in this situation by the terms of the first judgment, still there would appear to be sound reasons in policy for not sustaining the heavier penalty. It would appear that such cases would be good candidates for appellate review of sentences, a system statutorily authorized in at least two sister jurisdictions. See generally Penegar, "Criminal Law Sanctions in Two Civil Rights Cases," 43 N.C.L. REV. 667, 670-72 (1965). The disparity problem was raised explicitly in two cases before the North Carolina Court last term. In State v. Gibson, 265 N.C. 487, 144 S.E.2d 402 (1965), the appellant was comparing his two-year sentence for prison escape with those received by prisoners similarly situated and making the argument that such a sentence was excessive especially when considered in light of the fact that his accumulated "good time" was forfeited by the offense and conviction. The Court disposed of these contentions in these terms: "Obviously, the simple statement of defendant's contentions discloses they are wholly without merit. Further discussion is unnecessary." 265 N.C. at 488, 144 S.E.2d at 403. See also State v. Garris, 265 N.C. 711, 144 S.E.2d 901 (1965).

9 265 N.C. 711, 144 S.E.2d 901 (1965).

10 Id. at 712, 144 S.E.2d at 902.

11 264 N.C. 70, 140 S.E.2d 723 (1965).

12 Id. at 72, 140 S.E.2d at 725.

involved a charge of sodomy based on homosexual acts apparently between consenting males. The sentence was for seven-to-ten years. The Court was unwilling to concede that any constitutional attack on a sentence falling within the statute could be sustained.\textsuperscript{14}

Nor are all sentences to be tested by statutory guidelines. The uncertainty that surrounds the sentencing phase of the criminal law process is heightened by the preservation of such common-law concepts as the "infamous offense." This is illustrated in the recent case of \textit{State v. Alston},\textsuperscript{15} where the trial judge imposed a life sentence for the offense of conspiracy to murder. On a petition for certiorari growing out of a post-conviction hearing the Court held that the life sentence was "clearly unlawful and excessive." The reason is to be found in the fact first, that conspiracy to murder has no specific punishment assigned to it, and secondly, in the provisions of G.S. § 14-2. This statute provides that every felony for which no specific punishment is prescribed by statute carries a maximum two-year sentence but "if the offense be infamous," then imprisonment may be for four months up to ten years.\textsuperscript{16}

That consolidation of offenses for the rendering of one judgment has its pitfalls, too, has been illustrated by \textit{State v. Seymour}.\textsuperscript{17} Appellant was charged with eight separate incidents of house breaking and larceny, each of which constitutes a felony punishable by up to ten years in prison.\textsuperscript{18} Apparently for administrative convenience the trial judge awarded one sentence of twenty years, which would not have been longer than the aggregate of the possible sen-

\begin{footnotes}
\footnotetext[14]{We postpone for further consideration the matter of the social desirability of criminally punishing this kind of conduct. See section on "Substantive Matters," text accompanying notes 38 to 54 \textit{infra}. The emphasis here is on the theoretical question, its importance is not diminished thereby, whether the Court accurately perceives the constitutional argument addressed to it in these cases. The United States Supreme Court has recently said that while a punishment may be called for by statute, still punishment so authorized may not be considered in the abstract. The punishment must be considered in light of the crime condemned as well as other factors, such as severity. In \textit{Robinson v. California}, 370 U.S. 660 (1962), the Court held it was cruel and unusual punishment for a state to punish a person for being a narcotic addict. See also \textit{Driver v. Hinnant}, 356 F.2d 761 (4th Cir. 1966) (holding it cruel and unusual to punish one for being a chronic alcoholic). And see generally \textit{Packer}, "Making the Punishment Fit the Crime," 77 \textit{Harv. L. Rev.} 1071 (1964); 16 \textit{Stan. L. Rev.} 996 (1964).}
\footnotetext[15]{264 N.C. 398, 141 S.E.2d 793 (1965).}
\footnotetext[16]{See generally \textit{Penegar}, \textit{supra} note 8, particularly at notes 13 and 14; 28 N.C.L. Rev. 103 (1949).}
\footnotetext[17]{265 N.C. 216, 143 S.E.2d 69 (1965).}
\footnotetext[18]{N.C. GEN. STAT. § 14-54 (1953).}
\end{footnotes}
tences on the eight offenses. The Court on review of the case on a
writ of certiorari held that for crimes of this kind the maximum
sentence is ten years since only one judgment was entered. It is
not apparent that the trial judge had he known of this requirement
would not have gone to the extra trouble of entering a series of
separate judgments on which he could have imposed the length of
sentence he thought the appellant needed.

One of the most recurring issues in the law of sanctioning has
to do with a little known rule sometimes referred to as the Hirab-
ayashi rule. Surely no term of our Supreme Court passes but
that at least one case raises, among other issues of irregularity be-
low, whether if two sentences are imposed for different offenses
but to run concurrently, error as to one has any effect on the judg-
ment entered. The last term was no exception in this regard, for
in State v. Wilson, the Court took occasion to reiterate that where
two sentences run concurrently, error with reference to one count
is not prejudicial. If regard is had only for the actual difference a
reversal would make in the active sentence imposed, then the rule
certainly makes practical sense. If, however, it is also remembered
that the additional conviction stands on the record and poses po-
tential hazards to the individual's future, then the rule loses some
of its cogency and fairness.

Three additional cases from the last term deserve special men-
tion because of the peculiarly difficult policy considerations they
pose for the rational application of sanctions to certain kinds of
socially harmful behavior. The first is State v. Massey, where
appellant received two consecutive six-month sentences for escape.
The last one of these escapes occurred at a time when he was in
unlawful detention, an erroneous sentence having been imposed for
car theft. The Court in dictum said: "Nevertheless, his remedy
was a petition for habeas corpus, not escape." The Court cited
the recent case of State v. Goff. Quaere if that long a sentence is
indicated when the escape was from a period of unlawful detention.

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19 Hirabayashi v. United States, 320 U.S. 81 (1943), to the effect that
where sentences on each count of the indictment run concurrently, it is
unnecessary to consider questions raised with respect to other counts if one
count must be sustained.

20 264 N.C. 595, 142 S.E.2d 180 (1965).

21 265 N.C. 579, 144 S.E.2d 649 (1965).

22 Id. at 581, 144 S.E.2d at 650.

23 264 N.C. 563, 142 S.E.2d 142 (1965).
Two other cases may be considered in tandem. They both pose the same kind of problem for the policy-oriented decision-maker, namely, what sort of restraints are indicated for certain kinds of offenses, disregarding the individualization that otherwise would be called for in the particular case. Much of the routine thinking in this regard is done for us by the use of the convenient historical differences between felony and misdemeanor. That is, traditionally the one kind of crime regularly carries with it more severe sanctions than the other. But which label to give the particular category of proscribed conduct, that is the harder question and one that in modern times has been assumed by the legislative branch even in the common-law world. One notable distinction has long been made between threats to the sanctity of life and the person on the one hand and threats to property on the other. Accordingly it may cause some surprise to learn that in North Carolina larceny if by breaking and entering carries the felony label while an aggravated assault with a deadly weapon inflicting bodily harm is denominated a misdemeanor.

SUBSTANTIVE MATTERS

Crimes

Conspiracy is a common-law crime which has for good reason variously been called “that elastic, sprawling and pervasive offense,” a chameleon and the “darling” of the prosecutor. One reason this is so is that many persons may be tried at once, but sometimes the efficiency gets in the way of individual rights. When that happens, the state (and the defendants for that matter) may be put through the trial ringer all over again. Such a case is State v. Littlejohn, where the familiar rule was applied that statements
of one alleged conspirator are incompetent and prejudicial as to the others when made in their absence. Clearly the statements would be admissible against the maker as indicating his involvement with somebody for a nefarious purpose, but because there was no evidence against the other alleged conspirators in the same trial except these statements, all are entitled to new trials. The opinion does not indicate whether there was a motion for severance, but this kind of case indicates how—sometimes at least—the "slop-over" effect may work to the defendant's advantage. It would seem preferable for courts—on their own motion if need be—to avoid the many potential pitfalls of the group trial and grant separate trials for each. In the long run it might be more economical.

Robbery and attempt to rob: both crimes require a specific intent to steal, but the words "to rob" or "robbery" in an instruction on either crime connotes the necessary intent. This is the holding of State v. Spratt.31 The opinion in this case properly emphasizes that the essence of robbery as a crime is the use of force for the taking of property not under a claim of right. The common understanding is that the thing taken will not belong to the defendant.

Furthermore in robbery the value of the thing taken or attempted to be taken is of no consequence.32 But there must be some proof that whatever is taken is tangible property. This is the thrust of the Court's holding in State v. Guffey.33 It is accordingly not sufficient to allege that "value," merely, was taken from the victim. The common-law explanation for this of course is that to be the subject of robbery, the property had to be subject to larceny. Common-law larceny protected only chattels. In other words the common law left to one side trespass to realty as by severing a tree; and it also left to one side the securing of choses in action or other nontangible property by force or fraud as punishable in other ways, if at all.34 In the instant case it would have appeared sufficient to allege the taking of so many bills totalling in value 1000 dollars, instead of merely the taking of 1000 dollars "in value." A fine point, to be sure, but one which illustrates the internal sense of the

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31 265 N.C. 524, 144 S.E.2d 569 (1965).
33 Ibid.
34 Larceny by trick, taking by fraud, forgery, and extortion—all developed in response to the maturing complexity of society's commercial life. But the development left gaps and doubts.
common law. In other words the whole structure of the common law of crimes has a certain logical symmetry, cohesion, and rationality; and part of its ability to respond to felt needs of a society across time, the assumption has been, relates to this logical symmetry.35 "[B]ut there is a danger of becoming fascinated by the beauty of a machine which one makes constantly more perfect for a specialized purpose. The machine tends to exist in and for itself and to acquire a greater importance than the purpose it was meant to fulfill; and the purpose itself often disappears."36 How much more sensible—with all homage to the fundamental tradition in our legal heritage, rationality—it would be today to charge persons in our courts for what we really deplore in their acts. In the context of robbery this would mean the coercive act directed at another person motivated by monetary gain.37

Sex, the Law, and Judicial Theology

Two cases from the Court during the period here surveyed relate to the common-law crimes of rape and sodomy. Both of these crimes are heavily proscribed by statutes in North Carolina.38 Both are considered particularly reprehensible as forcible aggressions of body and personality against another human being. But of course not every act in these two categories is always accompanied by true force. Indeed it is not uncommon that persons arrested and convicted for sodomy are consenting adults. It has not been made clear in modern times why society should (sufficient to warrant its representatives to establish ten-year prison terms—and longer—for it) continue to punish what the common law in this jurisdiction traditionally refers to as "the abominable crime against nature"

36 Id. at 13.
38 N.C. Gen. Stat. § 14-21 provides the death penalty for forcible rape or having carnal knowledge of a girl under twelve. N. C. Gen. Stat. § 14-177 (1953) prior to 1965 provided a minimum of five years, maximum of sixty years imprisonment for crimes against nature.
Of course it rather depends upon one's conception of nature to say that certain sexual acts are natural, others are not. Even if one assumes that what is customary is also natural, the ground is no surer. Kinsey should have disabused this generation of any smugness about conventions among sex-partners—be they spouses, or otherwise. And of course more recent studies illustrate that homosexual relationships are not uncommon in our contemporary society. Still numbers do not mean "rightness," but what does in this area? Most of our crimes are directed at conduct which threatens to or actually does invade some clearly discernable interest of a person or persons, directly or indirectly (as by evasion of taxes). Such crimes as murder, assault and battery, kidnapping, robbery, larceny—all clearly protect the individual's values of life, bodily security, and wealth. Likewise the crime of forcible rape protects against unconsented violations of body and personality, supports the values of respect and affection (of others with whom the victim chooses to share attributes of these values such as intimacy).

Cf. Model Penal Code art. 207, comment (Tent. Draft No. 4 1955): Sexual Offenses: The Code does not attempt to use the power of the state to enforce purely moral or religious standards. We deem it inappropriate for government to attempt to control behavior that has no substantial significance except as to the morality of the actor. . . . Our proposal to exclude from the criminal law all sexual practices not involving force, adult corruption of minors, or public offense is based on the following grounds. No harm to the secular interests of the community is involved in a typical practice in private between consenting adult partners. This area of private morals is the distinctive concern of spiritual authorities.

See also New York State Comm'n on Revision, Proposed New York Penal Law 343-44 (1964): "A majority of the Commission is of the opinion that, in light of modern sociological and psychiatric principles, criminal prosecution of homosexual acts privately and discreetly engaged in between competent consenting adults, serves no salutary purpose. This follows the approach adopted by both the Model Penal Code and by the 1961 revision of the Illinois Criminal Code." "The inherent physiological capacity of an animal to respond to any sufficient stimulus seems the basic explanation of the fact that some individuals respond to stimuli originating in other individuals of their own sex—and it appears to indicate that every individual could so respond if the opportunity offered and one were not conditioned against making such responses. . . ." Kinsey, Sexual Behavior in the Human Female 447 (1953).

One estimate has it that there are twenty convictions for homosexual behavior for every 60,000,000 such acts performed. New Jersey Commission on Habitual Sex Offenders, quoted in Bloch & Geis, Man, Crime and Society 306 (1962).

And Kinsey estimates that between 30% and 45% of American males have engaged in some homosexual activity. Kinsey, Sexual Behavior in the Human Male 651 (1952). The incidence among women is much lower.
What values of society, however, are protected by the crime of sodomy—as it concerns consenting adults?

In the recent case of State v. Stubbs, the appellant argued that one who commits acts of "perversion" may be diseased and hence not subject to rigors of the criminal sanction in the statute. This was consistent with a theory that there is some utility in the sanction, in the definition, itself. It is not likely that a constitutional argument, based on a means–ends test, would have faired any better, although it comes straighter to the real point of contention now besetting our society. The Court was here content to rest its decision in upholding the conviction (for homosexual acts between males of greater than sixteen years of age) and sentence (of from seven-to-ten years in prison) upon the familiar but unruly and imprecise notion of "public decency and morality." The source, according to our Court, of this felt morality which is supported by the crime of sodomy is the Christian religion, for the Court takes pains to quote from an earlier North Carolina opinion to this effect: "According to Blackstone, the English law treated the offense in its indictments as unfit 'to be named among Christians.' IV Blackstone's Commentaries, p. 215. Our courts are no less sensitive than their English predecessors." Is the law of criminal sanctions, which deprives a man of years of his liberty and exposes him to the new restraints, torments, and temptations of prison, then to be justified at bottom on the sensitivities of judges? If judges in Blackstone's day and before were shocked by homosexual acts, maybe also were the people who lived under the law. In fairness, of course, it must be added that these judges did not initiate the concept of sodomy, but their performance here in this case—

42 Id. at 298, 145 S.E.2d at 902.
43 Homosexual activity, many times of the forced variety, is not uncommon in the prisons of America. See CLEMMER, THE PRISON COMMUNITY (1958).
44 "The North Carolina legislation is directly traceable to that which was probably the first English statute on the subject, a law passed in the year 1533 during the reign of King Henry VIII." Spence, The Law of Crimes Against Nature, 32 N.C.L. Rev. 312 (1954). But by English interpretations this statute referred only to intercourse between man and beast, bestiality, between man and man per bestiality, between man and man per annum, buggery. "Sexual copulation per os [i.e., by the mouth] was not sodomy at the common law." Id. at 314.
See also District Judge Craven's thoughtful opinion in Perkins v. North Carolina, 234 F. Supp. 333 (W.D.N.C. 1964), where it is said: "Imprison-
reaching back into a time when church and state were at least jointly responsible for the total salvation of the person, reaching for justification on natural law principles—indicates the need for a new look by society and its representatives at just what it intends by the laws punishing such conduct.45

The other notable case in this category is State v. Carter,46 where the indictment charged forcible rape in violation of G.S. § 14-21. The victim was a nine-year-old, the defendant the girl’s stepfather living in the same house. The principal issue on appeal was whether the state had proved the element of force, there being nothing in the record to indicate that the girl had made any resistance—although the state’s case may be characterized as showing that the defendant used considerable force in the act itself. The victim’s own testimony included this statement: “No, I did not resist Poochy [defendant] in any way.”47 The Court, reviewing several cases from other jurisdictions where the prosecutrixes were over twelve years of age, concluded that fear might reasonably take the place of force in one so young against one so strong, i.e., no actual show of resistance is required in these circumstances. This may be valid in the abstract, but there is no evidence of fear on the girl’s part (indeed she may not have had time to display it under the facts here) in this case as there was in State v. Thompson,48 one of the cases relied upon by the Court. Some doubt in this regard is probably responsible then for the Court’s cautious conclusion “that the mere failure of this nine-year-old child in the
power of defendant, a grown man, to resist, and most probably induced by fear and violence not to resist, was no consent. . . .

The most curious thing about this decision is that the Court was obviously straining to fit this case into the forcible rape category when for reasons of the aims of the criminal law it seems to have been quite unnecessary. The State could have prosecuted this defendant under the second clause of G.S. § 14-21, namely that part which makes it a capital offense of "carnally knowing and abusing any female child under the age of twelve years." In other words the same sanction is provided in either event, so strongly does society feel about the need to protect the innocence of youth. Part of the utility of this clause in the statute surely has been to obviate any need in particular cases to go into the troublesome question of the girl's state of mind. One result, therefore, of this decision is to becloud further the concept of consent in rape cases where that consent is or should be a genuine issue: for example, in the cases of what would otherwise merely be fornication or adultery but for the statutes making it legally impossible for a fifteen-year-old girl to give her consent, though her paramour may have in good faith taken her for sixteen or older.

Some explanation for this bit of judicial elephant-swallowing may be seen in the otherwise inexplicable and gratuitous recitation of a piece of scripture: "Over nineteen centuries ago, Jesus was with his disciples in Galilee, and he called a little child unto him and set him in the midst of them and said: 'But whoso shall offend one of these little ones which believe in me, it were better for him that a millstone were hanged about his neck, and that he were drowned in the depth of the sea.' The Gospel according to St. Matthew (King James' version), chapter 18, verse 6." Just prior to this passage the Court recited that the girl had testified that she was nine years old and that she "put (her) trust in God." Even as-

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40 265 N.C. at 633, 144 S.E.2d at 830. (Emphasis added.)
41 In this regard the other two cases upon which our Court principally relied seem inopposite, since they both involved girls above the age of twelve. State v. Cross, 12 Iowa 66, 79 Am. Rep. 519 (1861) (fifteen-year-old); Bailey v. Commonwealth, 82 Va. 107 (1886) (fourteen-year-old).
42 Reasonable mistake in age was held to be a valid defense to a charge of statutory rape in People v. Hernandez, 61 Cal. 2d 529, 393 P.2d 673 (1964).
43 265 N.C. at 633-34, 144 S.E.2d at 831.
44 Id. at 633, 144 S.E.2d 831 (1965).
The Confession Thicket

Certainly the most troublesome set of problems facing not only our Court but most other state courts as well nowadays is that associated with the admissibility of confessions. What makes this area particularly thorny now is the sixth amendment's right to counsel applied to pre-trial stages. In surveying the ten or so cases in which our Court was faced with one or more aspects of this problem area, the impression is gained that the Court has been the match of any other in its inability to come to grips with the fundamental issues as they are currently being hammered out in the Supreme Court of the United States.

An extra-judicial confession may be legally or constitutionally inadmissible for any one of several different if related reasons. It will prove useful in appraising our Court's trend of decision in this area if a summary sketch of the general authorities is given first. In the current state of the law it seems fair to divide the categories of cases into three broad areas—namely (I) confessions rendered inadmissible because they were involuntarily made in contravention of the due process clause (of either the fifth or fourteenth amendments); (II) confessions rendered inadmissible because they were made in the absence of counsel in contravention of the sixth amendment, carried over to the states through the

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84 And it seems questionable that the context is taken into account. According to one scholar what Jesus was doing in the events as chronicled by Matthew was delivering a lecture to the members of his group, telling them to have no pride of place, to be as children in this regard. Specifically therefore it is possible to read the word 'children' in verse 6 as meaning disciples, i.e., those who were His followers. These persons should not be "given a hard time" because of their belief in Him. See Gerhardt Barth, Mattheaus's Understanding of the Law, in TRADITION AND INTERPRETATION IN MATTHEW (1963).


fourteenth amendment's due process clause; and (III) confessions rendered inadmissible because they were products of illegal detention. This third category admits of a two-part subdivision. In subdivision (a) are included those cases wherein there has been a violation of the accused's fourth amendment rights, in other words the detention is improper because of the way in which it was brought about. Or, the detention may be improper because of what happens after an otherwise proper custody has begun. In this sub-category, (b), are the cases resting (1) in the federal courts on the statutory authority of Federal Rule 5(a), calling for prompt production of the accused before a magistrate; (2) in some states on similar statutory authority; and (3) in either system sometimes on extended constitutional concepts crystallized from categories I and II. It has sometimes been argued that a third sub-category ought to be created under heading III, namely for those cases in which the arrest simpliciter was invalid, but no other fourth amendment violation appears; in other words, to void the proceedings after an unlawful arrest—whether or not a confession is made. Thus far this argument, the rationale of which is beyond the scope of this Survey, has failed to persuade any court to rule that the Constitution requires such an extension of the exclusionary rule.

58 Several states have prompt arraignment statutes similar to Federal Rule 5(a). See the collection of such statutes in McNabb v. United States, 318 U.S. 332, 342-43 n.7 (1943). Only a few of these, however, have an exclusionary rule like McNabb-Mallory. Vorhauer v. Delaware, 212 A.2d 886 (Del. 1965); People v. Hamilton, 359 Mich. 410, 102 N.W.2d 738 (1960); CONN. GEN. STAT. Rev. § 54-1c (Supp. 1963). North Carolina has neither the rule of prompt arraignment nor any effective way to insure an early, impartial warning of the accused's rights. Cf. N.C. GEN. STAT. § 15-47 (1965).
59 I.e., combining elements of denial of access to relatives or a lawyer with length or quality of detention and factors of susceptibility (e.g., state of health, social sophistication) to reach a result that requires exclusion of the confession. E.g., Haynes v. Washington, 373 U.S. 503 (1963) (decided prior to Escobedo); United States v. Drummond, 354 F.2d 132 (2d Cir. 1965); Thompson v. Cox, 352 F.2d 488 (10th Cir. 1965); Montgomery v. State, 176 So. 2d 331 (Fla. 1965).
60 See, e.g., Frisbie v. Collins, 342 U.S. 519 (1952); Ker v. Illinois, 119 U.S. 436 (1886). This is the rule today even though an illegal "seizure" of the person clearly violates the fourth amendment. Henry v. United States,
In contrast to this somewhat complicated structure the North Carolina Court has for all practical purposes one test for inadmissibility of extra-judicial confessions or admissions. And that is, was it voluntary? Several instances of this test, simple in name but broad in factors to be considered, appeared in the opinions of our Court in the period surveyed. In *State v. Pearce*,\(^6\) for example, there was an arrest in late February for the crime of rape, then an appointment of counsel in early May. Relying on G.S. § 15-4.1, calling for appointment of counsel in cases of indigent persons accused of capital felonies and within five days of being bound over, and relying on the 1932 case of *Powell v. Alabama*,\(^2\) (to which our statute seems the equivalent response), the Court said, "[S]uch long delay . . . constituted a denial of the prisoner's statutory and constitutional right to the benefit of counsel. . . ."\(^63\) The Court held, however, that what this amounted to when considered in light of the fact that the admissions were given in the detective bureau interrogation room was an involuntary confession. Hence on that basis it was excludable.

In five other cases during the time being surveyed here the Court decided cases involving periods of unlawful detention but in which the Court found that the confessions or admissions were voluntary. Furthermore in none of these cases was a lawyer present, although in two of these the Court found that the police had warned the accused that he could remain silent, and could call anyone he wished. In other words, none of the cases presented the precise factual situation of *Escobedo v. Illinois*,\(^6\) but they did present issues of the sort other jurisdictions have dealt with in terms of category III above. And at least two of this group of cases also presented other fundamental constitutional issues, although it is not clear that the points were argued strongly, under the same category III.

*State v. Hines*\(^6\) provides a convenient introduction to this group of cases. Four persons, all of whom were indicted, tried, and convicted of armed robbery, are involved in this appeal. One of them

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361 U.S. 98 (1959). *But see* the suggestion of at least one commentator that no court should have jurisdiction of any accused person brought before it by virtue of an illegal arrest in 100 U. PA. L. Rev. 1182 (1952).

\(^6\) 266 N.C. 234, 145 S.E.2d 918 (1966).

\(^2\) 287 U.S. 45 (1932).

\(^3\) 266 N.C. 234, 236, 145 S.E.2d 918, 920 (1966).


\(^5\) 266 N.C. 1, 145 S.E.2d 363 (1965).
was George McNeill, who was "picked up for questioning" and handcuffed and taken to police headquarters. There was conflicting evidence as to what was told him, but the trial court could find, as it did, that he was given a warning that he did not have to say anything, that if he did it could be used against him, and that he could call a lawyer. He called no one. Finally he was told, in the words of the Court, that "he could be arrested for armed robbery" of a named store. Thereafter McNeill confessed to participation in the robbery. Then a warrant was procured for his arrest, this after he had already been taken into custody. Much the same procedure was used with respect to one of the other appellants, Leak, except that on appeal different counsel argued different theories of exclusion. This point will be treated subsequently.

In State v. Keith66 appellant and another were tried and convicted for "safecracking," under these circumstances: the accused were asleep at the home of one of them when the police came in—without warrants, having just left the scene of the break-in—and "asked [them] to go to the Police Department to answer some questions; they consented." A search of the car of one of the accused revealed a sledge hammer, crowbar, and screwdriver. During the ensuing hours at police headquarters when no warrant had issued both appellants confessed to the crime, although at different times, but after having had some warning.

In every one of the appeals just described the Court held that the confessions were "voluntary." In other words, in the view of our Court as long as no promises or threats were made or other clearly coercive tactics were employed, no taint attached to the inculpating statements even though there may be other irregularities in police practice. Beyond this, however, it is not completely clear what factors the Court considers critical on the voluntariness issue, for in both Keith and Hines the fact that warnings had been given was stressed in the Court's opinion. Yet in State v. Upchurch67 no warnings were given; an inculpating statement was made; and it was ruled to have been voluntarily made. In this latter case a warrant was used in making the arrest.

It would appear that the Court is confused as to the role the Escobedo rule should play, in that it evidently feels the access to counsel is important on the one hand for it is discussed in a signifi-

67 264 N.C. 343, 141 S.E.2d 528 (1965).
cant way in the Keith and Hines cases. Yet, when the Escobedo rule is specifically argued, as it was in one of the appeals in the Hines case (as to Leak, mentioned above) and as it was in the Upchurch case, the Court takes an exceedingly narrow view of its scope and application. Thus, in Upchurch the Court summarily dispenses with the Escobedo argument in these terms: it "was decided by a five to four court on entirely different facts, and ... [is not] applicable here to the free and voluntary conversation (an officer) and defendant had." Voluntariness of course was not an issue which the Court ruled on in Escobedo, and the right to access to counsel in pre-trial accusatory interrogation which that decision guarantees is an entirely separate concept. It may be involved in a case where voluntariness is also an issue, but it is not the same issue.

A more thoughtful response to the argument that a confession should be excluded on the basis of the rule in Escobedo can be seen in Leak's appeal in the Hines case. There the Court held: "We do not interpret Escobedo to mean that counsel must immediately be afforded one taken into custody before he is interrogated by officers, under all circumstances, particularly where no counsel is requested, as in the instant case." But here again one is left to speculate in

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88 Id. at 347, 141 S.E.2d at 531.
89 266 N.C. 1, 16, 145 S.E.2d 363, 373 (1965). "In support of our opinion as to the Escobedo case, see People v. Hartgraves, 31 Ill. 2d 375, 202 N.E.2d 33 (1964)," and six other cases from five more jurisdictions. Ibid. Contra, e.g., United States ex rel. Russo v. New Jersey, 351 F.2d 429 (3d Cir. 1965); People v. Dorado, 62 Cal. 2d 338, 398 P.2d 361, cert. denied, 381 U.S. 937 (1965). See 44 N.C.L. Rev. 161 (1965). [Since this writing, the United States Supreme Court decided Miranda v. Arizona, 34 U.S.L. Week 4521 (U.S. June 14, 1966), in which the following rules were laid down:

Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

Id. at 4523. In Johnson v. New Jersey, 34 U.S.L. Week 4592 (U.S. June 21, 1966), both Escobedo and Miranda were declared not to have retroactive effect. Ed.]
light of the Court's evident narrow view of Escobedo what significance attaches to the discussion in these cases of the warning given to the accused of his right to call a lawyer, etc.\textsuperscript{70}

Finally, since it is clear that the Court has made a kind of fetish out of the voluntariness rule, which as pointed out above is only one of several tests now applicable to confession situations generally throughout the nation, it is perhaps a little surprising to find that the Court does not take a rigorously conservative view as to the judicial procedures by which the rule they do have is made operative. In \textit{State v. Painter}\textsuperscript{71} the Court held that no separate hearing is required on the objection to the introduction of the confession in all cases. Where the defendant offers no evidence and "there is plenary evidence" of the confession's voluntary quality, the court's admitting the confession amounts to a finding that the confession was voluntary.\textsuperscript{72}

\textbf{Confessions and Fourth Amendment Violations}

The two cases of the five above referred to which raise the most serious questions about the enlightened administration of criminal

\textsuperscript{70}Voluntariness of course may be affected by the absence of such a warning, but likewise the way in which the warning is given may be equally important. One attorney active in the practice of criminal law of North Carolina has told the writer of the practice in one city whereby police manage to interject a number of ingratiating remarks—such as talk of baseball scores—throughout the beginning of the interrogation when the warning is being given. This practice suggests that the impact of the admonition about silence and access to counsel (assuming the accused knew of one or felt bold enough to call a lawyer if he did know one), conceding that in the way it was given the impact may have initially been quite limited, would likely be considerably dissipated by the time critical questions are actually posed. In other words the failure to ask for a lawyer may be due to "ignorance, confusion, or intimidation." 79 Harv. L. Rev. 935, 1003 (1966).

"Besides, to interpret the significance of a request and its denial in terms of intimidation appears to be a reworking of the voluntariness test . . . , an approach the [Supreme] Court conspicuously avoided in Escobedo. Thus there seems to be no rational justification for a different result in cases in which the accused requests a lawyer and those in which he does not." \textit{Ibid.}

\textsuperscript{71}265 N.C. 277, 144 S.E.2d 6 (1965).

\textsuperscript{72}It would appear that most jurisdictions, whether they use the "orthodox," the New York, or the Massachusetts rule, assume that the trial judge will make specific findings after hearing both sides—even if the defense only cross-examines. See generally Meltzer, \textit{Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury}, 21 U. Chi. L. Rev. 317 (1954). Jackson v. Denno, 378 U.S. 368 (1964), in which the Court held the New York procedure violative of due process (in that in close cases the judge could pass the buck to the trial jury along with the issues on the merits of the charge), seems to require a hearing sufficient enough to render it clear upon what facts and premises the judge makes his determination of voluntariness.
procedure are ones where, in addition to some period of illegal detention, there is also an invasion of the accused's residential privacy followed by incriminating statements and the production of other damaging evidence. In State v. Mitchell defendants were convicted of breaking and entering and larceny of articles of clothing, money, and other personality. Police attention was drawn to the two appellants, Mitchell and Hinton. Hinton was questioned about the large number of coins he had been seen with; in this interview, which took place in a police car in front of Hinton's home, Hinton explained by saying he had won the money in gambling. The officer, named Blackley, then went on to Mitchell (we are not told what transpired on this first encounter) and "took him to Police Headquarters" where Mitchell subsequently admitted his part in the break-in. What followed, concerning the co-defendant Hinton, is a classic example of the worse tradition in American law enforcement, the "smash and grab" techniques so fully documented a generation ago in the Wickersham Committee report. In the words of summary of the Court:

About 11:00 P.M. the same night Blackley, officer Perry and defendant Mitchell went to Hinton's home. Hinton's aunt admitted Blackley. Hinton was asleep. Blackley awakened him and told him to get the items of clothing which had been taken from Antone's Department Store. Hinton got them from a closet on the back porch; they consisted of pants, a coat and a sweater. Hinton then admitted his part in two of the 'break-ins.' He was then arrested.

With this wholesale affront to the fourth amendment before it, the Court waltzed directly into its discussion of the voluntariness test and concluded that the court below had made a determination on that issue and it was not lightly to be disturbed. The only nodding recognition given to the possible presence of any other substantial issue is in this remark: "In the instant case the incriminating statements were made in the ordinary course of investigation. Defendants were found with stolen goods in their possession. They were not held incommunicado. They were not questioned over long periods of time. . . ."

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73 265 N.C. 584, 144 S.E.2d 646 (1965).
74 Id. at 586, 144 S.E.2d at 648.
75 Ibid.
The conceptual companion piece to the *Mitchell* case, and on its facts ranks with that case in terms of the degree of police departure from lawful processes, is *State v. Egerton*.76 Egerton and two others were tried and convicted of armed robbery. The circumstances leading to this result which are of interest here are as follows: as a result of something told them by a “reliable informer” police went to a certain rooming house, got some sort of “permission” from one Barnes “who was in charge of the building” and went to a room where they found one of the two other defendants in bed “with the covers tucked under his chin.” The officers removed the bed covers and found Egerton in the same bed. In an adjoining room they found the third defendant. Subsequently, it does not appear whether there at the rooming house or at police headquarters, but presumably within the same period of custody which began at the rooming house, each defendant made admissions of guilt. The Court concluded: “Competent evidence supports the court’s finding and conclusion that the admissions were free and voluntary. These admissions were received at the time the officers were making their investigation.”77

In neither of these opinions was there a single indication that the Court was aware of the possible violations of the accuseds’ rights “to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.” In the *Egerton* opinion the Court does, however, at least address itself to the arrest aspect of the case: “We think the information in possession of the officers was sufficient to authorize the arrest without a warrant.”78 What information, gained as of what time, gained how? These questions remained unanswered. The Court goes on to recite the early morning visit to the rooming house bedroom. *Then* the Court concludes, presumably in support of the last quoted sentence above: “The officers were in possession of such facts as to justify taking the three into custody until they could be identified by (the victims of the robbery).”79 In support of this conclusion the Court cites the statute authorizing arrest of felons who are likely to evade arrest if not immediately apprehended and a recent decision of the Court

76 264 N.C. 328, 141 S.E.2d 515 (1965).
77 Id. at 331, 141 S.E.2d at 517.
78 Id. at 330, 141 S.E.2d at 517.
79 Id. at 331, 141 S.E.2d at 517.
addressed to the problem of citizens aiding in the arrest of felons.\textsuperscript{80} If there was probable cause for an arrest prior to going into the rooming house, there was no excuse on the showing made here for not first obtaining a warrant.\textsuperscript{81} If probable cause existed only after the discovery of Egerton and his cohorts, then the arrest that followed—if that is when the Court thinks it was made—was justified in the final analysis by what was turned up by the search of the living quarters of the appellants.\textsuperscript{82}

In any event these last two cases—\textit{Mitchell} and \textit{Egerton}—and one of the cases discussed above in another connection, \textit{Keith}, seem to present situations calling for the application of the "fruit of the poisonous tree" doctrine as extended by the case of \textit{Wong Sun v. United States}.\textsuperscript{83} In that case federal agents entered Toy's house without probable cause, and during an exchange with these officers Toy made incriminating statements. Toy was arrested in his bedroom. The Supreme Court, stressing the fact that Toy's fourth amendment rights had been violated, held that his admissions could not be used against him in the subsequent trial for violation of federal narcotics laws. And since the fourth amendment was held to apply in all respects to the states in \textit{Ker v. California},\textsuperscript{84} \textit{Wong Sun} would

\textsuperscript{80} N.C. GEN. STAT. § 15-41 (1965) is the statute. State v. Brown, 264 N.C. 191, 141 S.E.2d 311 (1965), is the case.

\textsuperscript{81} In this connection it must be added that neither the aunt in \textit{Mitchell} nor the manager of the rooming house in \textit{Egerton} had any authority from the appellants to consent to a search touching their rights. See Stoner v. California, 376 U.S. 483 (1964) (a hotel guest); McDonald v. United States, 335 U.S. 451 (1948) (a boarding house occupant). And see State v. Hall, 264 N.C. 559, 142 S.E.2d 177 (1965), where our Court recently clearly enunciated a husband's rights vis-à-vis those of his wife in a search of their home.

\textsuperscript{82} It has been established in the decisions of the United States Supreme Court that arrests cannot be justified by what is produced by an unreasonable search. See Chapman v. United States, 365 U.S. 610 (1961); People v. Brown, 45 Cal. 2d 640, 290 P.2d 528 (1955). If, however, the state takes the view that an entry of a dwelling by its officers was not for the purpose of a search for things but for the arrest of a person or persons, still there are constitutional doubts. The precise question does not appear to have yet been authoritatively decided, but see Jones v. United States, 357 U.S. 493 (1958), where it is said that such an argument presents "a grave constitutional question, namely, whether the forceful nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment."

\textsuperscript{83} 371 U.S. 471 (1963).

\textsuperscript{84} 374 U.S. 23 (1963).
appear to apply to state as well as federal prosecutions. And it
should be noted here that the method and nature of the entry into
the defendants' apartment in the Ker case valid under California
law—an emergency situation demanded the entry by stealth in view
of the ease with which marijuana could be disposed of—was held
not to violate the fourth amendment but only after a considered
discussion of the inherent reasonableness of the procedure. None
of the entries in the cases being discussed here—Mitchell, Egerton,
and Keith—seem to fit into this category. Indeed there is really no
discussion of this facet of the case in the Court's opinions.85

85 In one case during the Court's last term the Court did seem called
upon to apply the "poisonous tree doctrine." State v. Hall, 264 N.C. 559,
142 S.E.2d 177 (1965), where it was held that a wife may not consent to
a search which incriminates her husband, involved the seizure of stolen
goods, a clock and a radio, which were shown to defendant in jail, where-
upon he confessed to the crime. In this confession defendant also told of
the whereabouts of a truck which had also been stolen. Alluding to the
problem of the admissibility of evidence about the truck, a problem surely
to be faced on re-trial, the Court said: "At the next trial the court may
determine whether the confession was actually free and voluntary or whether
it was triggered by the use the officers made of the fruits of their illegal
search to such an extent as to render it inadmissible in evidence." Id. at
563, 142 S.E.2d at 180. Again the fetish of voluntariness, but this time the
Court is on surer ground. Prior to the United States Supreme Court's
decision in Fahy v. Connecticut, 375 U.S. 85 (1963), it would have been
more accurate to characterize the problem in terms of one of the clear
exceptions to the "poisonous tree doctrine," namely whether an indepen-
dent source would have produced the evidence anyway. Silverthorne Lumber
Co. v. United States, 251 U.S. 385 (1920) (dictum). See Coplon v. United
For an application of the rule and its exception in circumstances analogous
to the instant case see Somer v. United States, 138 F.2d 790 (2d Cir. 1943),
where the court said as to evidence later obtained from the defendant him-
self (analogous to the discovery of the whereabouts of the truck in Hall):
"As the record stands, it was the information unlawfully obtained which
determined their (the officers') course."

In the Fahy case the police obtained evidence which tended to incrimi-
nate defendant during an unconstitutional search of defendant's premises,
then he was arrested and made incriminating statements. The Supreme
Court reversed on several grounds, but declared that defendant "should
have had a chance to show that his admissions were induced by being con-
fronted with" the illegally seized evidence. In other words it is implied
that such speculative criteria as the accused's susceptibility, the length of
time between being confronted with the other evidence and his later con-
fession, etc., are to be employed. This is likely to prove to be a complex
test to apply; perhaps it would be better to go back to the rigorous dictum
of Silverthorne, namely, that evidence illegally seized should not be used at
all—judicially or nonjudicially. And the sanction for using it would be the
exclusion of any evidence that cannot be shown to have had, potentially at
least, an independent source.
DAMAGES

Walter D. Navin, Jr.*

WRONGFUL DEATH

Under the North Carolina wrongful death statute damages for such a loss are limited to those that are "a fair and just compensation for the pecuniary injury resulting from such death."\(^1\) Wrongful death statutes—described by Sir William Holdsworth as "a conservative reform... conservatively construed"\(^2\)—created a cause of action where none existed at common law. A carefully guarded exception to the rule expressed in that fine old Latin maxim, *Actio Personalis Moritur cum Persona*,\(^3\) it is one cause of action that does not exist in the absence of damages, at least in North Carolina. As the Court has phrased it "negligence alone, without 'pecuniary injury...’ does not create a cause of action."\(^4\)

The measurement of damages in an "ordinary" wrongful death action gives rise to some perplexing legal questions as the excellent student comment at an earlier page in this volume of the *Review* illustrates.\(^5\) But whether the amount of damages is measured by the loss-to-the-estate-of-deceased or the loss-to-the-beneficiaries rule, that there is damage when the income-producing head of a family unit is wrongfully killed is conceded. Doubts may exist when the decedent happens to be a wife and mother;\(^6\) and substantial concern about damages has been voiced when the decedent is a child, although here, too, recovery seems clear, "notwithstanding greatly increased difficulty in application [of the pecuniary injury damage rule]."\(^7\)

Suppose, however, that the child is mentally retarded, or sup-

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\(^1\)N.C. GEN. STAT. § 28-174 (1949).

\(^2\)15 HOLDSWORTH, A HISTORY OF ENGLISH LAW 220 (1965).

\(^3\)Ibid.


\(^7\)Russell v. Windsor Steamboat Co., 126 N.C. 961, 36 S.E. 191 (1900).
pose it is, in the delicate language of the law, *en ventre sa mere*, having existed only eight months of the mother's term of pregnancy when it expires as a result of defendant's wrongful negligence. Has the death of such a child resulted in a pecuniary injury?

In 1965 three cases placed this question before the North Carolina Supreme Court for resolution. They were *Gay v. Thompson*, *Godfrey v. Smith*, and *Scriven v. McDonald*.

At the age of eleven Anthony Scriven "could do about the same things as the five-year-old child could." His I.Q. score was about 30, putting him in "a severely retarded range." He had been to no public school but had spent nearly a year at a school for the mentally retarded. At the time of his death as a result of allegedly negligent conduct on the part of defendants, Anthony was living at home, and "the mental picture gained from a reading of the record is one of tenderness and consideration for a beloved but seriously retarded and handicapped boy." But the statute leaves no room for sentiment; it confers a right only for pecuniary loss. The burden of proof is upon the plaintiff to show pecuniary loss and, in the Court's view, the evidence negates rather than shows such loss since the only reasonable conclusion to be drawn is that Anthony would have continued to be a dependent person rather than a person capable of earning a livelihood. A trial court decision awarding plaintiff (Anthony's administrator) $5,750 dollars was accordingly reversed.

In *Gay v. Thompson* alleged malpractice on the part of the pregnant mother's attending physician resulted in the wrongful death of Baby Gay, stillborn during the eighth month of pregnancy. In this action the defendant had demurred to pleadings seeking a 50,000-dollar recovery, and the trial court overruled the demurrer. Wrongful death damages are at best speculative, said the Court, but where there are sufficient facts and it is necessary, a jury may indulge in such speculation. Damages may not be assessed on the basis of pure speculation with no factual substantiation whatever.
In the case of a prenatal death it is impossible to predict whether the unborn child would have given anyone pecuniary benefit or not. The death of a foetus represents no pecuniary loss. The prenatal child born alive but disabled as a result of prior negligence may recover but this is in reality a type of common-law action and not a wrongful death statutory proceeding. Since the damages are too speculative, the demurrer should have been sustained. The same logic and result was applied in Godfrey v. Smith, an opinion filed contemporaneously with Gay v. Thompson. In Godfrey the foetus had been destroyed as a result of an automobile accident. The decision in Godfrey was controlled by the Thompson case.

Other jurisdictions have allowed wrongful death recovery on facts analogous to those in the Gay and Godfrey cases. The Gay opinion is a compendium of cases and other authority on the issue. But after examining the decisions carefully Justice Parker followed a New Jersey case, Graf v. Taggart, which denied recovery, and set to one side the precedent allowing recovery apparently on the ground that the lead case, Verkennes v. Corniea, did not distinguish between prenatal death and prenatal injury.

On the other hand, Justice Bobbitt, authoring the Scriven decision, found no direct authority and little analogous material. It is apparently a case of first impression. The problems these cases raise are quite difficult to resolve and perhaps are of such a fundamental concern as to be a matter for legislative action. It seems difficult to rebut the argument that even a mentally retarded child contributes something of value to a family relationship, a value that within the limits of judge-control of the process can be measured in dollars by a jury. Funeral expenses, if they represented a direct out-of-pocket expenditure by the principal beneficiaries under the statute, ought at least to be recovered since the amount is readily ascertainable and is a present expense, a direct consequence of the negligent act.

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17 Ibid.
20 229 Minn. 365, 38 N.W.2d 838 (1949).
21 Cf. Schreck v. State, 25 Misc. 2d 929, 231 N.Y.S.2d 563 (Ct. Cl. 1962), where recovery of funeral expenses was allowed when epileptic children in a state institution were negligently slain.
22 Cf. Davenport v. Patrick, 227 N.C. 686, 44 S.E.2d 203 (1947). If nominal damages are recoverable, then costs may be assessed against the defendant, otherwise not. See Justice Parker's dissent in Armentrout v.
As for the unborn child, the fact of birth is so fundamental an occurrence that it may well serve also to measure the beginning of the wrongful death cause of action.

EMINENT DOMAIN

Another cause of action requiring the presence of substantial damage before it can be maintained is that involving the taking of real property by the creation of a continuing nuisance by the state. One way of answering the question, has the state appropriated plaintiffs' property for a public purpose by creating a continuing nuisance, is to ask whether the damage has been substantial. One would think three feet of ocean water standing in and on your business property would cause such damage, but a claimant has to prove it, and in Midgett v. Highway Comm'n the plaintiffs' evidence fell short.

The State Highway Commission, in building new highway 158 along the inland side of the Outer Banks near Nags Head, intersected an old east-west road running from the ocean to the sound. In the course of construction it was found necessary to raise the roadbed about five feet above the natural grade and this in turn dammed a natural water runoff that carried ocean water into the sound when storms occasionally drove the ocean "over the dune line." Drains were placed beneath the roadway but debris and sand apparently clogged them. The Midgetts owned buildings and land nearby, toward the ocean side of the banks, and had since first realization of the project protested the construction of the roadway. During the early morning hours of March 7, 1962, an ocean storm of moderate intensity drove the waves over the dune line flooding the natural runoff and, allegedly because of the roadway's acting as a dam, flooding plaintiffs' property.

An uncompensated taking? No. Plaintiffs introduced evidence showing the difference in value of their property before and after construction of the new highway, that his business premises were flooded to a depth of three feet, and that a garden was destroyed. But if there were damages, said the Court, they did not occur until


24 265 N.C. 373, 144 S.E.2d 121 (1965).

24 The facts are taken from the opinion, 265 N.C. at 374-76, 144 S.E.2d at 122.
the storm of March 7, 1962. The cause of action occurred only when damage had been inflicted. Thus the evidence as to value before and after construction offered by plaintiffs is "wholly irrelevant, entirely prospective and speculative, and of no probative value." Furthermore, plaintiffs' argument that he can avoid a nonsuit since there is evidence of at least nominal damages is incorrect. The only way plaintiffs can recover is on a theory of continuing nuisance, an actual, permanent invasion of their land amounting to an appropriation of, and not merely damage to, the property. To do this, substantial damages must be shown. Recovery cannot be based on guesswork. Each individual in the community, said the Court in quoting an earlier North Carolina private nuisance case, must put up with a certain amount of annoyance, inconvenience or interference, and all must take a certain amount of risk in order that all may get on together. Three feet of water in your place of business is certainly an inconvenience; it probably also would have been a taking but for the fact that culverts had been provided for the runoff and they may have been clogged with sand and debris. The question becomes whether the construction of the bypass itself caused the damage or whether state employees were negligent in failing to clean out the debris. If the damage caused flows from a circumstance temporary in nature, there is a mere injury, not a taking; a negligence, not a nuisance, cause of action. The State Highway Commission is not liable in tort for the negligent omissions of its employees even under the provisions of G.S. § 143-291, the state tort claims act. Since plaintiff's evidence left to the realm of speculation the cause of his damages, the trial court's nonsuit was affirmed.

Contracts

Ray Charles, leader of an aggregation entitled "The Sixteen plus the Raelets, Musicians," failed to make a scheduled appearance in Roanoke, Virginia. Oliver W. Arnold, who promoted the event, thereupon brought suit against Mr. Charles for breach of contract. Just why the suit was maintained in North Carolina on a contract

26 265 N.C. at 377; 144 S.E.2d at 124.
28 265 N.C. at 377; 144 S.E.2d at 125.
29 See Milhous v. Highway Dep't, 194 S.C. 33, 8 S.E.2d 852 (1940).
30 Midgett v. Highway Comm'n, 265 N.C. 373, 144 S.E.2d 121 (1965).
signed in New York and to be performed in Virginia does not appear. The terms of the contract, so far as they can be inferred from the opinion, guaranteed the performers 3500 dollars plus fifty per cent of the gross in excess of 7000 dollars less admission taxes. The entrepreneur was to keep what remained. As the trial court determined, gross receipts (less taxes) amounted to 12,900.90 dollars. The trial judge awarded Arnold fifty per cent of that figure, 6,300.45 dollars. On appeal to the North Carolina Supreme Court, the judgment was affirmed, although Charles argued the amount should be reduced by the amount Arnold saved as a result of the breach. In particular Mr. Arnold did not pay 1000 dollars to a local Y.M.C.A., apparently for promotional activities, that he had agreed to pay. (With whom he had agreed does not appear.)

In giving Arnold the full amount the Court stated that the terms of the contract called for this sum, there was nothing speculative about it, and had the contract been fully performed, this is exactly what Arnold would have received; his expenditures were of no concern to the defendant.

That the injured party is entitled to be placed in the same position in which he would have been had the contract been carried out is often said to be the appropriate rule. But phrased in this manner and this broadly the statement is deceptive since it tends to accentuate measurement of damages solely in terms of plaintiff's gross dollar disappointment. A fairer statement of the appropriate rule would add to the language above the words, "at the least cost to the defendant." In the instant case, plaintiff would have been 1000 dollars poorer had the contract been carried out, as a result of his payment to the Y.M.C.A. But this does not end the inquiry. The nature of the savings to plaintiff must be examined. The line to be drawn is between a performance by the plaintiff that is part of his cost in acquiring the defendant's promise and that which

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81 Id. at 100, 141 S.E.2d at 20.
82 McCormick, Damages, § 137 (1935).
83 Restatement, Contracts, § 329, comment a (1932).
84 As an initial step it is helpful to consider the differences in legal theory between a suit for a money debt as for the purchase price of property when title has passed and an action for damages when something plaintiff promised remains to be done. See 5 Corbin, Contracts §§ 995, 1036, 1038 (1964 ed.).
is not.\textsuperscript{35} Thus, if Arnold owed a duty to Charles to utilize the Y.M.C.A. as a promotional device, or if payment of the 1000 dollars to the Y.M.C.A. was a condition precedent to the appearance of the musicians, Arnold has saved a part of his cost of acquiring defendant's promise and his recovery should be reduced by that amount. On the other hand, if the payment were unrelated to the Charles promise, no deduction need be made. Considering the nature of the enterprise it seems likely that Charles probably sought satisfactory local promotion and that Arnold probably was under a duty to Charles to provide it. It is the net amount of losses caused and gains prevented in excess of savings made possible by the defendant's breach that measures plaintiff's recovery.\textsuperscript{36}

**MISCELLANEOUS**

Several other decisions involving the law of damages in one way or another were handed down during the past year. In *Jenkins v. Harvey C. Hines Co.*,\textsuperscript{37} plaintiff's attorney over objections of defendant's attorney, who "anticipat[ed] that he was going to evaluate," translated his client's pain and suffering the result of a cut hand and finger when a soft drink bottle exploded into 86,100 dollars by multiplying the minutes in the waking hours of his client times her life expectancy and charging defendant a cent per minute. The Supreme Court found it did not have to rule directly on the question whether such argument is proper because the injured party while testifying remarked that although her finger felt drawn up and tight, "it doesn't give me any pain . . . ."\textsuperscript{38} A trial court verdict for 15,000 dollars was reversed for a new trial on all issues.

The fact that an injured party has recovered workmen's compensation for his disability is irrelevant and incompetent in that party's suit against the third-party tort-feasor. Thus where defendant's attorney elicited such information from plaintiff on cross-examination, the resulting judgment for defendant was reversed


\textsuperscript{36}RESTATEMENT, CONTRACTS § 329 (1932).

\textsuperscript{37}264 N.C. 83, 141 S.E.2d 1 (1965).

\textsuperscript{38}Id. at 91, 141 S.E.2d at 7.
in *Spivey v. Babcock & Wilcox Co.* The Court pointed out that plaintiff does not necessarily get a double recovery, since under an appropriate statute the State Industrial Commission may have an interest in the money received.

In *Slaughter v. Slaughter* a father set off firecrackers outside the window of a room in which his sons were watching television. His mother was also in the room and became so frightened that she rushed from the room, tripped, fell and injured herself. In awarding the mother recovery the Court remarked that as a general rule damages for mere fright are not recoverable, but where there is a contemporary physical injury, there may be recovery.

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**DOMESTIC RELATIONS**

*M. P. Katz*

**CUSTODY**

Where both parties to a custody dispute are “persons of good character and fit and suitable persons to have the care and custody of the child,” any decision as to what the “best interests of the child” require of the court becomes, ultimately, an effort to predict the unpredictable. In *Jolly v. Queen* the trial judge had awarded custody to the father of an illegitimate child. The Supreme Court reversed, holding that “when there is a specific finding that the mother ‘is now of good character and reputation and is a fit and suitable person to have the custody of minor children,’ she ought to have custody of the child.

The mother’s subsequent marriage and the existence of a child of the marriage appear to have been influential factors—the Court may well have taken the view that this was a more “natural” family situation for a ten-year-old boy than being the only child of a middle-aged couple. Yet there is always the possibility that the

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1 264 N.C. 711, 142 S.E.2d 592 (1965).

2 Id. at 715, 142 S.E.2d at 596.
removal to another environment could prove upsetting to the child. It is regrettable that the Court dealt with the issue at such an abstract level, instead of articulating the factors it regarded as relevant in making its prediction. In cases such as *Jolly v. Queen*, the Court is in an impossible situation—someone will have to be hurt and there is always the risk that the prediction will turn out to be inaccurate. The Court might have taken this opportunity to recommend the use of child psychologists or welfare workers, to allow a clearer picture of the issues to be developed.

In *Hinkle v. Hinkle*, the lower court had found on the facts that both parents were "fit and suitable" to have the custody of the children. As in *Jolly v. Queen*, there was no impartial evidence from social caseworkers or other skilled persons as to the needs of the children. The Court decided that the "best interests" of the children would be served by placing them with the father. The position of the Court, with nothing on record to permit a prediction, is an unenviable one. The best it can do is guess. In this case defendant might have utilized expert testimony to reinforce the testimony of the children as to their preferences.

In *re Craigo* presented a pathetic situation: Neither parent being fit to have custody, the Court granted it to the grandparents of the children. In *Stanback v. Stanback*, the children had become embroiled in a bitter custody dispute. After a custody hearing on the merits, the lower court granted custody of the two children to the husband. The court found as a fact that "the defendant . . . has over a long period of time . . . consumed excessive amounts of alcohol and by her action and conduct has not been and is not now a proper or fit person to have the custody of her two minor children." Subsequently, the wife sought to reopen the matter in order to gain custody. A further hearing was held before a second judge, who set aside the first order and gave the wife custody, since "the defendant is now sober and is practicing sobriety and has regained her normal emotional equilibrium." The Supreme Court set the

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*266 N.C. 189, 146 S.E.2d 73 (1966).*  
*266 N.C. 92, 145 S.E.2d 375 (1965).*  
*266 N.C. 72, 145 S.E.2d 332 (1965).*  
*Id. at 73, 145 S.E.2d at 333.*  
*Id. at 74, 145 S.E.2d at 333.*
second order aside since the Court felt that the "finding of changed conditions is not supported by the evidence."\textsuperscript{8}

Broader considerations are involved in the court's determination. As the Court observed:

The pleadings and the affidavits show the intense bitterness existing between the parents of the two boys. . . . Whether the one or the other should be awarded exclusive custody, or whether in the light of the background the boys should be required to switch from one to the other each week, are matters of grave concern that the courts, both trial and appellate, may not view lightly.\textsuperscript{9}

In sum, the custody order should be respected unless good reasons present themselves for a new decree. The primary interest of the children includes the psychological need for stability in a situation conducive to emotional distress. The trial courts, the Court suggests, should be wary of feelings of sympathy. Unless the children are distressed at being placed where they are, it is best to allow a minimum time period to close before reopening such matters.

\textbf{Divorce}

The traditional philosophy of divorce, requiring moral blameworthiness on the part of the defendant, has to a great extent been bypassed by legislation taking note of the realities of life: It is frequently unrealistic and usually quite gratuitous to require proof of moral turpitude where the problem is the common and yet complex one of incompatibility. Most jurisdictions now allow divorce after a period of separation. G.S. § 50-6 was passed to effectuate this policy. The 1965 General Assembly has liberalized the law by reducing the separation period from two years to one year.

The Court has responded to the problem of the incompatible spouses in an ambivalent fashion. It has at times taken a somewhat narrow and unsympathetic approach. In \textit{Brown v. Brown}\textsuperscript{10} it held that a party guilty of wilful abandonment is barred from obtaining a divorce. Again, in \textit{Moody v. Moody}\textsuperscript{11} the Court concluded that since G.S. § 50-6 requires mutual consent, a defendant who had

\textsuperscript{8} \textit{Id.} at 77, 145 S.E.2d at 335.
\textsuperscript{9} \textit{Ibid.}
\textsuperscript{11} 253 N.C. 752, 117 S.E.2d 724 (1961).
suffered a head injury such as rendered him incompetent to give his consent, a divorce decree could not be granted. These decisions, while undoubtedly motivated by admirable sentiments, ignore the hardship imposed by forcing people having no will to do so to continue as man and wife.\textsuperscript{12}

In \textit{Edmisten v. Edmisten}\textsuperscript{13} an action for divorce was instituted under G.S. § 50-6. Defendant pleaded misconduct on plaintiff's part prior to the date of deed of separation. Plaintiff demurred successfully, and the decree was ordered as prayed. On appeal, the lower court was affirmed. In a per curiam opinion, the Supreme Court held that "prior misconduct of one will not defeat his action for divorce under G.S. § 50-6."\textsuperscript{14} This would appear to mark a change in the Court's approach to the problem from that in \textit{Moody v. Moody}\textsuperscript{15} and may lead to a reappraisal of the rationale underlying G.S. § 50-6. To allow evidence showing the failure of the marriage to prevent the Court from reaching a pragmatic result would be an exercise in frustration. \textit{Edmisten v. Edmisten} indicates the Court's willingness to confront marital difficulties in a realistic fashion, to reach the result both fair to the parties and responsive to the needs of society.

\textbf{EMINENT DOMAIN}

\textit{Charles E. Dameron}\textsuperscript{*}

\textit{State Highway Comm'n v. Batts}\textsuperscript{1} raised the question whether or not the proposed taking and condemnation of property of the defendants was for a public purpose. The Commission instituted proceedings to condemn property encompassing an old farm road 3,316 feet in length running from an existing secondary road and ending in a cul de sac on property immediately to the rear of defendants' property. Defendants contended the proposed road was sole-\textsuperscript{12,13,14,15}

\begin{footnotesize}
\textsuperscript{1} See 40 N.C.L. Rev. 808 (1962).
\textsuperscript{12} 265 N.C. 488, 144 S.E.2d 404 (1965).
\textsuperscript{13} Id. at 489, 144 S.E.2d at 405.
\textsuperscript{14} 253 N.C. 752, 117 S.E.2d 724 (1961).

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\textsuperscript{1} 265 N.C. 346, 144 S.E.2d 126 (1965), 55 N.C.L. Rev. 1142 (1966).
\end{footnotesize}
ly for the private use of the adjoining property owners, pointing out that the proposed road would lead to no other road nor would it have any scenic value. In a four-to-three decision the Court reversed the trial court and upheld the defendants' position, holding that such a proposed use would not be a public use and any use by the public would be merely incidental to the private use of the adjoining property owners, whose interests would be primarily served.2

In State Highway Comm'n v. Greensboro City Bd. of Educ.3 the defendant contested the Commission's right to condemn property owned by it and presently in use for a public purpose. The trial court enjoined the Commission from proceeding with the condemnation, finding that the proposed taking was unreasonable and without justification. The Court reversed, pointing out that the defendant's answer did not raise the question of arbitrary or capricious action on the part of the Commission in locating the proposed highway; therefore the question of unreasonableness was not to be considered, but only the question whether or not the Commission had the authority to condemn the property of the defendant. The Court pointed out that this case involved the taking of property for a "controlled-access facility" by an agency of the state when such property was put to a present public use by a subordinate division of the state and did not involve a taking by the state of property owned by the state, and that the statute authorizing a taking for controlled access facilities referred to a taking of private "or public property and property rights."4 The Court concluded that the legislature had thus expressly given authority to the Commission to condemn property of a subordinate state agency although such property was being put to a public use at the time of the taking.

2 The dissenters would have affirmed the trial court's findings of fact and conclusions of law to the effect that the proposed appropriation was for the purpose of constructing a public road and that it was for a public use. 265 N.C. at 362, 144 S.E.2d at 138.
3 265 N.C. 35, 143 S.E.2d 87 (1965).
4 N.C. GEN. STAT. § 136-89.52 (1964).
EVIDENCE¹

Henry Brandis, Jr.*

ORDER OF PRESENTING EVIDENCE

In State v. Jackson² it was held that it was within the discretion of the trial judge (a) to allow further evidence after both sides had rested and arguments had been made to the jury, and (b) to limit the scope of subsequent arguments.

EFFECT OF STRIKING TESTIMONY

Ordinarily when a witness gives an unresponsive answer that is stricken on motion, the judge should immediately instruct the jury not to consider it. However, the Court held that, when the record indicated the jury could only have interpreted the granting of the motion as meaning that the evidence was not to be considered, failure to give the instruction was not reversible error.³

COMPETENCY OF WITNESSES

The Court reiterated the rule that, while a wife may testify as to illicit relations tending to prove that her husband is not the father of her child, she is not competent to testify to the husband's nonaccess.⁴ In another case⁵ defendant was being prosecuted for assault by tying the victim's hands and feet and then setting her afire. After this tender courtship and before trial, he married her. Explaining that the solicitor told her that she had to testify, she gave evidence as to the assault. The Court held that she was a competent witness under G.S. § 8-57.⁶

¹ See also in this Survey, under Civil Procedure (Pleading and Parties), "Necessity of Introducing Pleadings as Evidence."
² 265 N.C. 558, 144 S.E.2d 584 (1965).
⁴ State v. Wade, 264 N.C. 144, 141 S.E.2d 34 (1965). The husband also is incompetent to testify to nonaccess. The justification for receiving the illicit relations testimony is that frequently this would otherwise be impossible to prove. And may not the same plausibly be said of nonaccess? Bluntly stated the rule seems to be that the wife may not testify that the child is, in any event, bound to be a bastard, but she may testify that the child is, in fact, a bastard by the cooperation of X.
⁵ State v. Price, 265 N.C. 703, 144 S.E.2d 865 (1965).
⁶ Under this statute, in general, a spouse is not compellable to testify.
When the competency of a nine-year-old child was challenged because of age, the Court held that this was for determination by the trial judge in his discretion; and the record, reflecting his consideration of the matter in the absence of the jury, demonstrated that he did not abuse his discretion in declaring her to be competent.  

**Impeachment of Witnesses**

In *Junior Hall, Inc. v. Charm Fashion Center, Inc.*, an action to recover the price of merchandise that defendant, a retailer, contended was defective and not marketable, a defense witness testified that she saw the goods and in her opinion they were not marketable. On cross-examination, over objection, it was brought out that she had also testified for the same defendant in another action brought by a vendor. The judge instructed the jury that this was only to show bias, if in fact it did so. The Court held that this was not error.

In another case defendant, on the issue of contributory negligence, contended that plaintiff was driving under the influence. Defendant's witness, a patrolman who arrived at the scene thirty minutes after the crash, testified that he detected the odor of whiskey in plaintiff's car. On cross-examination plaintiff's attorney wished to introduce in evidence a written statement, acknowledged by the witness to be his own, made (by the dates given) twenty-nine days or (by the Court's computation) twenty-eight days after the collision. It was to the effect that he could not say whether any of the parties had been drinking. The judge excluded the statement. The Court reversed, holding that the exclusion deprived plaintiff of his right to full and fair cross-examination.

**Corroboration**

Our Court's rather consistent practice of allowing much evidence, otherwise inadmissible, to enter the case as "corroboration" is, in the view of this writer, often eminently sensible. Recent examples of its invocation are (a) to admit prior consistent statements against the other spouse, but one of the stated exceptions is in case of assault by husband against wife. In the principal case, she was not a wife at the time of the assault, but the Court clearly interpreted the statute sensibly.

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7 State v. Carter, 265 N.C. 626, 144 S.E.2d 826 (1965).
8 264 N.C. 81, 140 S.E.2d 772 (1965).
of the prosecuting witness in a criminal case;¹⁰ and (b) in an action for diminution in value of plaintiff's homeplace, caused by defendant's sewer system, to allow plaintiff, as a witness, to read the telegram he sent defendant saying the "sewage stench forces me to abandon my home" (even though the actual emigration was deferred for some time thereafter).¹¹

**OPINION EVIDENCE**

*What Is Opinion?*

Witnesses make statements which, dependent upon the circumstances, might be interpreted as a mere opinion or conclusion not based upon minimally adequate observation, or as only indicating something less than absolute certainty as to what was in fact observed. In *State v. Bridges*¹² testimony of a prosecution witness, that "I think" defendant was the man witness observed committing a hold-up, was properly classified as the latter, the lack of certainty going to weight and not to admissibility.

Witnesses also make statements which, dependent upon the circumstances, might be interpreted as mere opinion or as a "shorthand statement of fact." It is a far from easy line to draw. In *Gooding v. Tucker*¹³ a witness's statement that plaintiff "couldn't close" his car door was classified as the latter. Other testimony in the case, throwing much light on what was meant by this, adequately justifies the decision.

**Inferences for Jury**

In a wrongful death case¹⁴ defendant's contention was that intestate's car jerked to the left as defendant, traveling in the same direction, was attempting to pass. The trial judge, though finding a plaintiff's witness to be an expert traffic engineer, refused to allow him to be questioned regarding whether or not the 1959 Ford intestate was driving could "fishtail." The Court affirmed, holding that an opinion of even an expert is not admissible as to matters within the ordinary experience of men; that the jury is deemed

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¹⁰ *State v. Norris*, 264 N.C. 470, 141 S.E.2d 869 (1965). The fact that there were slight variations in the prior statements did not destroy their corroborative effect or make them inadmissible.


¹³ 264 N.C. 142, 140 S.E. 2d 719 (1965).

capable of deciding such questions without the aid of opinion evidence; and that most jurors are thoroughly familiar with the operation of automobiles and are thus capable of determining what inferences the facts will permit or require.

This does not literally invoke the "jury province" rule in the sense that it bars opinion evidence because it is on the very question the jury must decide, though in this case the place of impact, in reference to the center line of the highway, was the most critical fact in controversy. Exclusion here, as indicated, is based upon the notion that the jury can draw inferences as well as the expert, whether or not the issue is the critical one to be decided by the jury. Presumably the witness would have testified that the car could not have fishtailed, or at least that such was highly improbable. And can it be seriously contended that the average juror, sitting on a case in the fall of 1964, would be familiar with the fishtailing propensities of a 1959 Ford?

Surely the evidence was relevant. Defendant's own testimony claimed jerking or fishtailing. While plaintiff had some evidence that intestate's car never left its side of the road, both intestate and his passenger were killed in the wreck. The credibility of defendant's testimony was critical, and exclusion of the proffered evidence deprived the jury of an aid in appraising such credibility. (The jury found that both defendant and intestate were negligent.) It is possible that the Court believed that any expert opinion as to fishtailing—at least of a nature helpful to plaintiff—would be inherently incredible, but the decision is not rested on that ground.

For a gingerly exploration of that great judicial morass, see Stansbury, North Carolina Evidence, § 126 (2d ed. 1963) [hereinafter cited as Stansbury].

See Stansbury § 124.

The exact nature of the testimony sought from the witness is left somewhat speculative, as the trial judge refused to allow counsel to get into the record the questions to be asked and the answers to be given. Since the rule is that the offeror must get at least the substance of the testimony into the record in order to predicate error upon its exclusion, this seems to have been unreasonably arbitrary conduct on the part of the judge, though the Court did not condemn it.

The opinion states that what a car would do in rounding a left curve involved many imponderables—speed, inflation of tires, power used in acceleration, mechanical condition of car, road conditions (particularly whether there was loose sand or gravel), whether the cars were in their proper lanes, etc. All this may well be true (though, by defendant's own testimony, whether intestate's car was in the wrong lane would depend upon fishtailing, and not vice versa). The more true it is, the more doubt it casts upon the
In another and much less questionable case\(^\text{10}\) it was held that the opinion of a nonexpert witness on the issue of negligence is not admissible when the material facts can be placed before the jury.

In *Dixon v. Edwards*\(^\text{20}\) plaintiff’s attorney, in presenting his wrongful death case, used an expert mechanical engineer specializing in traffic accident reconstruction who had examined the cars and the scene sixteen days after the accident to describe what he found and testify, in answer to hypothetical questions proper in form, as to his opinions regarding the relative positions of the vehicles, the angle of impact, the parts first colliding, and the amount of overlap. After defendant’s evidence, the witness was recalled and, again in answer to hypothetical questions proper in form, opined, in effect, that the collision could not have occurred in the manner described by defendant’s witnesses. On neither occasion did he express an opinion as to the location of the vehicles, at the time of the impact, in relation to the center line. The Court expressed no opinion whether he could properly have done so, though it recognized that there is a split of authority on the matter in other jurisdictions and said that the matter has not been decided in North Carolina.\(^\text{21}\) The Court also expressed no opinion as to the propriety of the evidence actually given by the witness as, even considering this testimony, it found that plaintiff should have been nonsuited. It is apparent, however, that the purpose of the expert’s rebuttal

\(^{10}\) Beanblossom v. Thomas, 266 N.C. 181, 146 S.E.2d 36 (1966). See also McDaris v. Breit Bar “T” Corp., 265 N.C. 298, 144 S.E.2d 59 (1965), holding that the statement of a witness that he was familiar with boundaries “as contained in the deed” is a conclusion which the jury might draw from competent evidence, but which may not be drawn by the witness.

\(^{20}\) 265 N.C. 470, 144 S.E.2d 408 (1965).

\(^{21}\) In Cheek v. Barnwell Warehouse & Brokerage Co., 209 N.C. 569, 183 S.E. 729 (1936), a nonexpert witness, who described what he found at the scene after the crash but did not observe the crash, was not allowed to give an opinion as to where on the highway the crash took place, since that was “the very question the jury was called upon to answer.” Whether the Court will distinguish between expert and nonexpert testimony remains to be seen. Such a distinction has been recognized in some situations. See STANSBURY § 126. In both civil and criminal cases the Court has ruled out testimony of a highway patrolman as to speed, based upon his examination of the scene, when he did not see the crash. Tyndall v. Harvey C. Hines Co., 226 N.C. 620, 39 S.E.2d 828 (1946); State v. Roberson, 240 N.C. 745, 83 S.E.2d 798 (1954) (and, even when admitted, it is without probative value).
evidence was akin to the purpose for which the expert's opinion was offered in the fishtailing case.

**Speed from Lights**

Where plaintiff testified that he observed defendant's car lights while the car traveled some 130 yards and that the car was swaying back and forth from speed, it was permissible for him to testify that defendant was traveling from seventy-five to eighty miles per hour.²

**Mental Competence**

In full harmony with prior authority involving various documents, it was held that lay witnesses, whose testimony demonstrated an adequate opportunity to observe decedent, could testify that in their opinion decedent did not have sufficient mental capacity to know and understand the nature and effect of signing a paper cancelling his life insurance policy and requesting its cash value.²² In the same case a medical expert who examined decedent for the first time three days after the paper was signed testified that decedent had cirrhosis of the liver, with jaundice, was acutely ill, nervous and drowsy, and was moderately disoriented; that these conditions could have existed prior to the date of the examination and possibly did; and that in the opinion of the witness it was unlikely that decedent "could understand legal matters for a few days prior" thereto. The Court held that all of this was clearly admissible, except that it thought the reference to "legal matters" was not to be commended, though under the circumstances this was not thought to be prejudicial to defendant or confusing to the jury. Such a view of the matter is certainly sensible. It is fortunate that the Court did not equate this to testimony, condemned by prior cases, that in the opinion of the witness a person did not have sufficient mental capacity to make a deed or will.²⁴

**Party As Own Expert Witness**

In *Galloway v. Lawrence*,²⁵ a malpractice case, defendant (who had other experts, also) offered himself as an expert witness. Plain-

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²⁴ See STANSBURY § 127.
tiff's attorney did not desire to question him regarding his qualifications. The Court held that defendant could qualify and testify as an expert, but that it was error for the trial judge to say, in the hearing of the jury: "Let the record show that the Court finds as a fact that Dr. Lawrence is a medical expert, to wit: an expert physician in surgery." This should have been said out of the hearing of the jury since, as an expression of opinion by the judge it was in violation of G.S. § 1-180. In some settings this might well seem strained and overly technical. However, in this case, a critical question was whether defendant had visited plaintiff. He alone testified that he did. While this was a matter of veracity rather than of expertise, the judge's statement might conceivably have influenced the jury in appraising his credibility. The wisdom of the statute is open to serious debate, but it is still on the books.

*Other Matters Involving Experts*

In the absence of case authority one might suppose that a properly qualified expert should be allowed to testify either that fact $A$ caused fact $B$, or that fact $A$ could or might have caused fact $B$, dependent upon the degree of certainty existing in his mind. However, our Court has shown a decided preference for the latter type answer, even when the witness feels no such uncertainty, and the questions must be phrased accordingly. This preference was manifested in two cases—one involving the cause of a fire and the other the cause of the cracking and bulging of building walls. The first also held that hypothetical questions are improper when they assume facts not in evidence; and the second held (a) that

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26 A question might be raised whether the same result would follow had plaintiff's counsel, in the presence of the jury, objected to his acceptance as an expert or, short of that, had conducted a cross-examination as to his qualifications designed to insinuate that they were none too good. A question might also be raised whether, when a witness is challenged for age or lack of mental capacity, the judge may, in the presence of the jury, pronounce him qualified.

27 See STANBURY § 137; 43 N.C.L. Rev. 979 (1965).


30 Cf. Bryant v. Russell, 266 N.C. 629, 146 S.E.2d 813 (1966), decided after the period covered by this Survey. There a hypothetical question was excluded because the evidence then did not support an assumption stated in it. The evidence was later supplied, but by then the expert had been excused and was not recalled. The Court held that it was not error to exclude the answer of the witness, offered at the close of plaintiff's evidence, since the witness was not then available for cross-examination.
a hypothetical question is improper when it calls for an answer on
the basis of premises not clearly stated in the question, and (b)
that a witness, whatever his qualifications, may not be permitted to
express an opinion based upon his observations when it appears that
the observations were, in the eyes of the Court, inadequate for the
purpose.\textsuperscript{31}

Under the rule that whether a witness is a qualified expert is
a preliminary question for the trial judge, where there was compe-
tent evidence to support his findings, the Court refused to review
findings that, while the chief of a municipal fire department was
an expert fireman, he was not an expert in the detection of the
causes of fires and explosions.\textsuperscript{32}

The Court approved the reception of expert testimony (a) that a
still the witness examined was capable of making whiskey and that
mash he observed was fermented and ready to run and be manu-
factured into whiskey,\textsuperscript{33} and (b) that everyone who has an alcohol
content of 0.15 per cent in his blood is under the influence of
alcohol.\textsuperscript{34}

\textbf{Relevance}

\textit{Prior Offenses}

In a prosecution for forgery it was held that evidence of prior
forgeries by defendant is generally admissible as bearing on defen-
dant's intent in the forgery charged.\textsuperscript{35}

In a murder case, in which defendant was not a witness, it was
held to be reversible error for the state to attempt to prove, without
\textsuperscript{31} See also Branch v. Dempsey, 265 N.C. 733, 145 S.E.2d 395 (1965),
44 N.C.L. Rev. 1146 (1966), where the testimony of a physician as to cause
of death was excluded because his own observation was an inadequate basis
for an answer and he was not asked proper hypothetical questions.
\textsuperscript{33} State v. Little, 265 N.C. 440, 144 S.E.2d 282 (1965). Why not limit
him to saying that it could or might have been ready to run?
\textsuperscript{34} State v. Webb, 265 N.C. 546, 144 S.E.2d 619 (1965). As the opinion
indicates, similar testimony, including testimony by the same witness, had
been approved in prior cases.
\textsuperscript{35} State v. Painter, 265 N.C. 277, 144 S.E.2d 6 (1965). The evidence
of the prior forgeries was part of a confession admitted in evidence, but
the Court's statement regarding admissibility is a general one. Cf. State v.
Welch, 266 N.C. 291, 145 S.E.2d 902 (1966), another forgery case, where
there was some testimony with regard to checks other than those covered
by the indictment, but the jury was instructed to disregard it, and the
Court found no reversible error.
directly connecting it with the homicide in any way, that defendant was a sexual pervert.36

When defendant in a criminal case takes the witness stand, he may be cross-examined about prior offenses for impeachment purposes, though the state is bound by his answers; and the Court followed its prior decisions allowing not only questions regarding prior convictions, but also (and much more questionably) questions regarding prior indictment.37

Character of Premises

Where defendant was charged with possession of nontaxpaid whiskey for the purpose of sale and defendant neither took the stand nor offered character evidence, since evidence of his own reputation would have been inadmissible, it was error to admit evidence that his house had a bad reputation for having whiskey for sale.38

Evidence of Occurrence or Condition at One Time as Proof of Same at Another Time

The Court approved (a) evidence that on prior occasions plaintiff had been seen driving with his car door open, as evidence that it was open at the time of the collision in litigation;39 (b) evidence that X was seen driving a car on various occasions ranging from some five hours to a few minutes before the wreck, as evidence that he was driving at the time of the wreck;40 (c) evidence of the

36 State v. Rinaldi, 264 N.C. 701, 142 S.E.2d 604 (1965). The solicitor argued to the jury that this showed a character that would not hesitate to murder. Justice (now Chief Justice) Parker and Justice Sharp dissented.
37 State v. Brown, 266 N.C. 55, 145 S.E.2d 297 (1965). Actually, one of the questions was whether defendant had been "charged . . . or indicted."
38 State v. Tessnear, 265 N.C. 319, 144 S.E.2d 43 (1965). The Court points out that since defendant was not charged with maintaining a nuisance, N.C. GEN. STAT. §§ 19-1, -3 (1953), authorizing such evidence, were not applicable.
39 Gooding v. Tucker, 264 N.C. 142, 140 S.E.2d 719 (1965). The opinion does not indicate the time lapse between the prior occasions and the collision. Possibly the opinion could be interpreted as approving such evidence as corroborative only, but it states that the evidence was competent as bearing upon the condition of the car and as tending to corroborate the other testimony.
40 Rector v. Roberts, 264 N.C. 324, 141 S.E.2d 482 (1965). Here no question of corroboration was involved. This evidence was held sufficient to carry to the jury the issue of the driver's identity. There is no discussion of whether evidence of the earlier occasions would have been admitted in the absence of the evidence as to the occasions very close to the wreck in point of time.
speed of a vehicle some two-tenths of a mile from the wreck, as evidence of speed at the time of the wreck⁴¹ (but, in another case, under the circumstances presented, the Court rejected evidence of speed two or three miles away);⁴² and (d) evidence of lack of mental capacity within a reasonable time before and after the critical date, as evidence of such capacity on that date.⁴³

When the issue involved a safety device on an amusement ride, as well as the conduct of the attendant with respect thereto, it was permissible to allow others who patronized the ride, before and after plaintiff's injury, to testify to the condition of the device and the attendant's conduct when they rode.⁴⁴

*Price as Evidence of Value*

Reviewing the rules regarding admissibility, in condemnation cases, of evidence of price paid by the condemnee, the Court allowed use of evidence of price paid nineteen months before the condemnation.⁴⁵

*Offer in Compromise or to Pay Medical Expense*

Where the testimony was that defendant offered to give notes for the entire amount in controversy, this was evidence of an admission, not of an offer in compromise, and hence was admissible.⁴⁶

The Court also held that, under the circumstances, defendant's offer to borrow money and pay plaintiff's hospital bills was not an admission of liability and was incompetent.⁴⁷


⁴² Greene v. Meredith, 264 N.C. 178, 141 S.E.2d 482 (1965).


⁴⁴ Dockery v. World of Mirth Shows, Inc., 264 N.C. 406, 142 S.E.2d 29 (1965). The exact time lapse was not mentioned, but, since it appears that a fair was in progress, it may reasonably be assumed that the time lapse was relatively short.

⁴⁵ Northgate Shopping Center, Inc. v. State Highway Comm'n, 265 N.C. 209, 143 S.E.2d 144 (1965). A complicating factor, which did not prevent admission, was that the tract purchased and the land condemned were not identical.


**Scientific Evidence**

Two cases involved the "breathalyzer." In the first, it was held that the qualifications of the person making the test were amply demonstrated and that his testimony was competent under G.S. § 20-139.1. The opinion rather clearly demonstrates the Court's own approval of the validity of such evidence.

The second case involved the statutory prohibition against the giving of the test by an arresting officer. The Court classified as such an officer one who was present at the scene and was prepared to assist, if necessary, even though the actual arrest was made by another officer. Of course, once the statute is construed to go beyond the technical making of the arrest, other problems of construction are bound to arise; but any other decision would have flagrantly disregarded the spirit of the statute, particularly where, as in the principal case, the testing officer had directly observed defendant, had called for help, and was approaching defendant when his fellow officer arrived.

In another case, the trial judge admitted a "stopping chart" prepared by the State Department of Motor Vehicles showing, for various speeds, distance traveled during reaction time before braking, and distance traveled from first braking to full stop. Noting that the great majority of jurisdictions passing on the question have excluded such charts, the Court reversed, saying that, if it be assumed that the chart is keyed to average drivers, cars and road conditions, nothing indicated what those averages were or how they compared to the situation in litigation; that it was not the equivalent of expert opinion as to stopping time under stated circumstances; that the compilers were not present and subject to cross-examination; and that it was inadmissible hearsay. It was also true that the chart was not properly authenticated, but the Court deliberately rested its decision upon the broader ground.

**The Hearsay Rule and Exceptions Thereeto**

*Declarations of an Agent*

One case in this area has been made the subject of a note

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51 See also the discussion of Hughes v. Vestal, supra note 50.
elsewhere in the Review. It held inadmissible, as against the principal, evidence of a post-occurrence extrajudicial declaration of an agent tending to show liability where principal and agent were being sued together and there was prima facie proof of agency at the time of the occurrence.

In another case it was held that, while extrajudicial declarations of an agent are not admissible against the principal to show the agent's authority, where there was sufficient evidence to justify a finding that the principal ratified a new contract made by the agent, purportedly on behalf of the principal but without authority, the extrajudicial declarations became admissible as evidence of the terms of the new contract. The declarations in question were apparently made at the time the new contract was negotiated, and the case would not necessarily be authority for admitting declarations made after the making of the contract but stating its terms.

Deceased Declarant

The Court held that, in an action against the principal and the administratrix of the deceased agent, the trial court properly excluded evidence of the declarations of the agent not contended to be part of the res gestae. Since defendant's attorney was the proponent of the evidence (through cross-examination of a plaintiff's witness and direct examination of his own witness), it may safely be assumed that no question of a declaration against interest was involved and that the declaration was not only hearsay, but was also self-serving.

Testimony at a Former Trial

In Norburn v. Mackie plaintiff subpoenaed a witness who did not appear. He had testified at a former trial in the same case. Upon a showing that he resided more than one hundred miles away, that he was at least sixty-five years of age, and that (as shown by an affidavit from his physician) a trip to court would be detrimental to his health, the trial judge admitted the prior testimony. The

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84 See also Edwards v. Hamill, 266 N.C. 304, 145 S.E.2d 884 (1966), where the same rule was applied.
87 264 N.C. 479, 141 S.E.2d 877 (1965).
Court approved, and this is certainly well within the requirements for reception of such evidence.\textsuperscript{68}

\textit{Deposition Taken in Another Action}

Defendant offered in evidence a deposition taken on adverse examination in another action, growing out of the same occurrence, to which plaintiff in this action was not a party. Plaintiff had no opportunity to cross-examine the deponent. The Court held that the deposition should have been excluded under G.S. § 1-568.24 and that, since it was excluded by statute, the fact that a different ground of objection was advanced in the court below did not make its admission proper.\textsuperscript{59} The validity and extent of this latter rule are open to serious question.\textsuperscript{59} Should a different rule apply to hearsay barred by statute than to hearsay barred by judicial decision? Indeed, in this case, the judicially developed hearsay rule would, upon proper objection, exclude the evidence, even in the absence of the statute. Further, the statute upon which the Court relied was probably not intended to apply to the situation before the Court.\textsuperscript{61}

\textit{Death Certificates and Coroner's Reports}

It is provided in G.S. § 130-73 that any copy of the record of a birth or death properly certified by the State Registrar shall be prima facie evidence of the facts therein stated. In \textit{Branch v. Dempsey}\textsuperscript{62} the trial judge nevertheless excluded a duly certified copy of a death certificate, as well as a certified copy of the report of the coroner (who had also signed the death certificate). The Court

\textsuperscript{68} See \textit{Stansbury} § 145.

\textsuperscript{69} Glenn v. Smith, 264 N.C. 706, 142 S.E.2d 596 (1965). The statute cited bars use of the deposition against any party not notified of its taking, and, since the present plaintiff was not a party, he received no such notice. (The Court calls attention to the fact that it was not pointed out to the trial judge that the deposition was taken in another action.) The actual objection made in the court below was, under N.C. \textit{Gen. Stat.} § 8-83(9) (1953), that the witness resided within forty miles of the place of trial.

\textsuperscript{60} See the discussion of the rule in \textit{Stansbury} § 27 n.92. The Court's opinion in the principal case cited as authority 2 McIntosh, \textit{North Carolina Practice and Procedure} § 1532 (2d ed. 1956). The rule is there stated, but the one case cited does not really support the proposition, as is explained by Stansbury. On the other hand, Stansbury cites other North Carolina cases that do support it.

\textsuperscript{61} N.C. \textit{Gen. Stat.} § 1-568.24 (1953) seems pretty clearly designed only to govern admissibility of a deposition against parties to the same action in which it is taken.

\textsuperscript{62} 265 N.C. 733, 145 S.E.2d 395 (1966).
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held that this was not error, since the documents contained state-
ments from unidentified sources to which the coroner could not have
tested, over objection, had he been on the witness stand. The
Court said:

The purpose of the statute appears to be to permit the death
certificate to be introduced as evidence of the fact of death, the
time and place where it occurred, the identity of the deceased,
the bodily injury or disease which was the cause of death, the
disposition of the body and possibly other matters relating to the
death. We think it was not the purpose of the Legislature to
make the certificate competent evidence of whatever might be
stated therein.63

Despite the fact that this leaves some considerable uncertainty,
the decision in the case, under the circumstances presented, seems
reasonable. A literal acceptance of the broadest possible statutory
meaning clearly would open the way for much double (or more
multiple) hearsay, speculation, and groundless conclusions regarding
the manner in which the fatal injury was caused. It does seem
most unlikely that the legislature intended such a result.

In another case64 the Court held that it was error to exclude the
death certificate, but the error was harmless, as the signer of the
certificate was a witness and testified to all the matters reflected in
the certificate.

Business Entries

In a prosecution for wilfully disposing of mortgaged property,
a ledger account sheet was sufficiently identified and was admissible
when the owner of the business testified that it contained entries
made in the regular course of business by his secretary.65 This
seems well within the rules prescribed by the more recent North
Carolina cases.66

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63 265 N.C. 733, 748, 145 S.E.2d 395, 406 (1965). Presumably the certifi-
cate would still be admissible in part, with the usual rules, as to documents
only partly admissible, applying.
7 (1965).
65 State v. Dunn, 264 N.C. 391, 141 S.E.2d 630 (1965). The case also
held that N.C. GEN. STAT. § 8-18 (1953) is not applicable where an original
instrument is offered in evidence with the certificate of the Register of
Deeds as to the time and place of recording; and that, further, the original
instrument is admissible, whether recorded or not.
66 See STANSBURY § 155.
Hearsay Opinion

In a condemnation proceeding exception was taken to the award of the commissioners and there was trial de novo in the superior court. The commissioners, as witnesses, testified to their estimate of damage caused by the taking. Upon objection, they were not permitted to testify that they had been appointed by the clerk of the superior court to ascertain the damages. The Court held that exclusion was proper, since the good reputation of the witnesses could be established only by evidence of such reputation—not by evidence of the esteem in which they were held by some particular person.67

Analytically, when offered to prove character, evidence of reputation is just as much hearsay opinion as the evidence proffered in this case, though it involves collective opinion and is admissible under an exception to the hearsay rule.

The decision in the principal case is undoubtedly correct and is consistent with prior authority excluding evidence, offered on the issue of mental competence, that the person whose competence was in issue had held public office or was allowed to serve on a jury.68 Where the issue is mental competence, conversely to the situation when the issue is character, opinion evidence is admissible and reputation evidence is not;69 but in both situations, when extra-judicial conduct or statements are relevant only on the theory that they imply an opinion held by the actor or declarant, they are hearsay.70

Statements Taken for a Report to the ICC

In Craddock v. Queen City Coach Co.71 the Court held that, since under 49 U.S.C. § 320(f) an accident report to the Interstate

68 In re Will of Crabtree, 200 N.C. 4, 156 S.E. 98 (1930); Ray v. Ray, 98 N.C. 566, 4 S.E. 526 (1887). The opinions in these cases do not contain an analysis of the essential nature of the evidence and thus perhaps leave the reason for exclusion open to some doubt. For the classic—and correct—analysis see Wright v. Tatham, 5 Cl. & Fin. 670 (H.L. 1838). See also STANSBURY § 143. Cf. Jackson v. Parks, 220 N.C. 680, 18 S.E.2d 138 (1942) (letter written to plaintiff, more directly indicating belief in plaintiff's sanity, excluded).
70 See Wright v. Tatham, 5 Cl. & Fin. 670 (H.L. 1838).
71 264 N.C. 380, 141 S.E.2d 798 (1965).
Commerce Commission is barred from use in evidence or for any other purpose in a suit arising out of the accident, a statement taken from defendant's employee by defendant's counsel for use in preparing such a report would not be made available to plaintiff's counsel; that to require its production would make the statute worthless.

**JUDICIAL NOTICE**

The Court took judicial notice that "nowadays both covenants not to sue and releases are ordinarily prepared by attorneys representing the insurance company of the covenantee or releasee, and that they are intended for use in the several states. . . ." The case was on demurrer, and it is not to be inferred that the Court would, by taking judicial notice, dispense with proof if there was an issue as to the identity of the draftsman.

In another case, on appeal by plaintiff from an involuntary nonsuit, the Court said:

> Any person who operates an automobile which is equipped with an automatic transmission knows that when it is left in "drive" with the motor running, a jolt may cause it to move forward under its own power; that sometimes vibrations from within the motor itself will feed gas to the carburetor and set the vehicle in motion; and that slight pressure on the accelerator will start the car forward. . . . Furthermore, it is a matter of common knowledge that, absent warning devices installed for that purpose, any automobile can be driven for an appreciable distance with the parking brake set before the driver notices that he has not released it.

Though it seems clear that these observations affected the decision in the case, whether they rise to the level of judicial notice—or whether they ought to do so—is, at least as to the first sentence, somewhat problematical. If they do so rise, then the body of common knowledge is somewhat broader than the knowledge of this common observer.

In *Hughes v. Vestal* the Court held that the trial judge, in effect, had taken judicial notice of the information in a "stopping chart" published by the North Carolina Department of Motor Ve-

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74 264 N.C. 500, 142 S.E.2d 361 (1965).
hicles, and that this was error, at least for the purpose for which the information was used. References to such charts in earlier cases were distinguished, as were earlier cases in which judicial notice was taken of—for example—the fact that a car traveling at thirty-three miles per hour could be stopped within 480 feet. Disapproval in the instant case is phrased in terms of the impropriety of noticing something outside judicially recognized limits, it being outside such limits to notice the information as, in effect, providing a standard by which to measure the conduct of a driver in a particular case. Essentially the error seems to lie in using the chart to show that plaintiff was traveling faster than he asserted in his testimony, in effect assuming that the chart was prepared on the basis of average drivers, cars and road conditions, when there was nothing to show what the averages signified or how they compared with the situation involved in the litigation. Having held that the chart was not admissible in evidence, it would hardly have been realistic to hold that it was nevertheless a proper subject for judicial notice.

The Court closes with the sweeping statement: "But we now make it clear that such tables are not admissible as evidence in the trial of cases and are not proper subjects of judicial notice for the purposes of trials of cases in Superior Court." Is this intended to prohibit any possible use, or only such use as was attempted in the instant case?

77 In two of these cases—Brown v. Hale, 263 N.C. 176, 139 S.E.2d 210 (1964), and Ennis v. Dupree, 262 N.C. 224, 136 S.E.2d 702 (1964)—the issue in respect to which the Court mentioned the chart was whether, taking the driver's own testimony as to speed and distance, he could have stopped in time. In the third—Clayton v. Rimmer, 262 N.C. 302, 136 S.E.2d 562 (1964)—plaintiff proved the length of the skid marks made by defendant's car, and the Court said that this was not sufficient evidence of excessive speed, citing a chart which showed that the skid was much shorter than the stopping distance required by a car traveling at a speed lawful for the place involved. In all three cases, therefore, the information was brought to bear on some aspect of a negligence issue.


As to the cases cited in note 75 supra, the opinion states that the references to charts were "rhetorical and illustrative" and did not amount to "judicial notice to support decision." It also states that "perhaps" they could be construed to take judicial notice within judicially recognized limits. Also, before the quotation in the text, it states that the references to charts in these cases may be misleading. It is thus fair to ask whether the Court is really disapproving the use made of the information in the prior cases.

One possible interpretation of the quotation is that the Supreme Court, in appraising the result of a trial, may use information which the superior
INSURANCE

Charles E. Dameron*

ACCIDENT AND HEALTH INSURANCE

In *Walsh v. United States Ins. Co. of America* the Court had occasion to construe again the "confinement clause" of a policy of insurance, which policy defined "confinement" as "confinement of the Insured continuously inside the house because of such sickness, except that the right of the Insured to recover under the policy shall not be defeated because he visits his physician for treatment or goes to the hospital for treatment when such treatment cannot be administered in the house of the Insured." The Court pointed out that this was the only case found in which the policy had defined confinement, that such definition bound the parties, and that a more liberal interpretation of the clause was thus precluded. Thus the Court held evidence of the plaintiff that he went for short walks on his farm, occasionally drove his car, and made trips to the beach entitled the defendant insurer to nonsuit.

court is prohibited from using in arriving at that result. However, it seems rather difficult to believe that such a meaning is intended. The opinion cites one other case which is probably not affected. In Burgess v. Mattox, 260 N.C. 305, 132 S.E.2d 577 (1963), the Court took judicial notice of the fact that is, as plaintiff's evidence showed, defendant's truck was stopped within thirty-three feet, it could not, as plaintiff contended, have been going forty-five miles per hour. This depended upon no chart, and the statement is certainly sound. However, the case, in the light of the instant opinion, serves to raise these intriguing questions: If charts are verboten, where does the Court find its common knowledge? What is the relation of the driving experience of the justices to the body of common knowledge?

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1 265 N.C. 634, 144 S.E.2d 817 (1965).

2 The "confinement clause" of such a policy entitles the insured to additional benefits if he, in addition to being totally disabled, is confined continuously within doors. The most recent North Carolina case prior to *Walsh* was *Suits v. Old Equity Life Ins. Co.*, 249 N.C. 383, 106 S.E.2d 579 (1959).

3 The Court has previously construed such a clause to be descriptive of the character and extent of the illness rather than to place a limitation on the conduct of the insured. Duke v. General Acc. Fire & Life Assur. Corp., 212 N.C. 682, 194 S.E. 91 (1937); Thompson v. Mutual Benefit Health & Acc. Ass'n, 209 N.C. 678, 184 S.E. 695 (1936).
AUTOMOBILE LIABILITY INSURANCE

In a case of first impression in North Carolina, the Court in *Buck v. United States Fid. & Guar. Co.*\(^4\) held that an uninsured vehicle within the protection of an uninsured motorist endorsement of a policy of insurance included a vehicle being operated by one who was not the agent of the owner of the vehicle. Plaintiff, injured in an automobile accident, had brought suit against the driver and the owner of the other vehicle involved in the accident which resulted in a judgment against the driver but not against the owner because of a determination by the jury that the driver was not operating the vehicle as the agent of the owner at the time of the accident. Execution against the driver was returned unsatisfied. In the principal case, the plaintiff brought suit against her own liability insurer seeking to recover under the uninsured motorist endorsement, which defined “uninsured automobile” as being one where there was no insurance policy “applicable to the accident with respect to any person or organization legally responsible for the use of such automobile.” The trial court found as a fact that at the time of the accident the other vehicle was being operated without the permission, knowledge, or consent of the owner but denied recovery on the ground that such vehicle was not an “uninsured vehicle.” The Court reversed, pointing out that the applicable section of the Motor Vehicle Safety and Financial Responsibility Act of 1953\(^5\) did not define the term “uninsured motor vehicles” but that the policy did and that there was no insurance policy of the owner applicable to the accident. The Court acknowledged that literally there was insurance on the owner’s vehicle but that the endorsement must be construed to protect the insured and to carry out the intention of the legislature in regard to financial responsibility of motorists.

*Griffin v. Hartford Acc. & Indem. Co.*\(^6\) involved the cancellation of a policy of insurance by the loan company financing the cost of the premiums on an assigned risk policy pursuant to a power of attorney given the loan company by the insured. The cancellation was requested after the insured failed to make the installment payment that was due. The policy was cancelled, and the unearned

\(^4\) 265 N.C. 285, 144 S.E.2d 34 (1965).
\(^5\) N.C. GEN. STAT. § 20-279.21(b)(3) (Supp. 1965).
\(^6\) 264 N.C. 212, 141 S.E.2d 300 (1965).
premium returned to the loan company. Shortly thereafter the insured was involved in an accident that resulted in a judgment against her in favor of the plaintiff who then sought recovery against the cancelling insurance company. The plaintiff, in the trial court, was allowed to introduce evidence to the effect that the loan company had not notified the insured of her nonpayment, and had not notified her of its intention to request cancellation, and that the unearned premium refund resulted in a balance due the insured that would have been sufficient to keep the policy in force through the date of the accident if so applied. The Court held that the introduction of such evidence was prejudicial error, pointing out that the policy authorized cancellation by the insured and specifically provided that payment or tender of any unearned premium was not a condition of cancellation. Further, the Court pointed out, relying on Daniels v. Nationwide Mut. Ins. Co., that an insured has the right to cancel either in person or by an authorized agent and that no notice of such effected cancellation need be given by the insurer to the insured.

In Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co., a prospective purchaser of an automobile was involved in an accident while test-driving the automobile. Plaintiff insurance company, the insurer of the automobile sales company under a garage policy, brought an action against defendant insurance company, insurer of the prospective purchaser's father, seeking a declaratory judgment as to the liability of each for damages resulting from injuries sustained in the accident by other parties. The garage policy provided coverage only if no other liability insurance was available. The father's policy excluded from coverage a nonowned automobile used in the automobile business by the insured and also limited coverage to a "relative" of the insured (the father) and defined "relative" as one who was a resident of the same household as the insured. The evidence revealed that the son was twenty-nine years old, had previously left home to work, had been married but was presently separated, had been away during service in the Army,

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8 The Griffin case again came to the Court on appeal by the plaintiff after a new trial and a judgment of nonsuit. The Court reversed stating that cancellation of the policy was a matter of defense and the defendant's evidence in that regard should not be considered on motion of nonsuit. Griffin v. Hartford Acc. & Indem. Co., 265 N.C. 443, 144 S.E.2d 201 (1965).
9 266 N.C. 430, 146 S.E.2d 410 (1966).
and was living at his father's home only until he could make other, more suitable, arrangements. The Court affirmed the trial court's judgment in favor of the plaintiff insurance company and held that the son was a resident of the same household. The Court discussed the various definitions of "residence" as applied to different legal situations and argued that in the context of an insurance contract it should be given a meaning consistent with a layman's understanding of the term. In the principal case the Court decided that the son was a resident of his father's house because he had no other home. The Court also held that the exclusion of the defendant insurance company's policy did not apply reasoning that use in the automobile business by the insured meant that the insured must be engaged in the automobile business for the exclusion to have any application.

In Mayberry v. Home Ins. Co., also a case of first impression in North Carolina, the Court held that a liability insurer was obligated to pay interest on the entire amount of the judgment rendered from the date of judgment until the date of payment of the amount due under its policy into court rather than just to pay interest on the amount of its obligation under the policy. In the instant case there was judgment for 79,500 dollars and the insurer's liability was 5,000 dollars. The Court, reversing the trial court, allowed the plaintiff to recover interest on the full amount of the judgment from December 12, 1962 (date of judgment), to April 5, 1963 (date of payment into court). The reasoning of the court was based on the policy language to the effect that the company would pay "all interest accruing after entry of judgment."

Life Insurance

Horn v. Protective Life Ins. Co. was an action based on the death-by-accidental-means clause of a policy. The plaintiff's evidence was to the effect that the insured, a seventy-two-year-old man with a history of heart disease, accidentally drove his car off a road

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10 This interpretation is generally consistent with prior North Carolina cases involving the same language. E.g., Newcomb v. Great Am. Ins. Co., 260 N.C. 402, 133 S.E.2d 3 (1963).
11 264 N.C. 658, 142 S.E.2d 626 (1965).
12 It should be noted that the policy in suit was an assigned risk policy and that ordinary family policies specifically provide for payment of interest on the entire amount of the judgment.
13 265 N.C. 157, 143 S.E.2d 70 (1965).
one snowy night, across two ditches, down a ninety-foot embankment, and into a large tree. There was expert medical testimony that there were no major injuries resulting from the wreck sufficient to cause death and that death was due to a heart attack. The Court reversed the trial court and held that a nonsuit should have been granted because the plaintiff's evidence did not show that the death resulted "directly and independently of all other causes" from injuries caused by accidental means as was required by the policy language. This decision is in line with prior North Carolina cases dealing with death by accidental means holding that where pre-existing disease and accidental injuries combine to cause death the latter cannot be the cause independent of all other causes.14

Moore v. New York Life Ins. Co.15 involved the question whether or not the surrender of a policy for its cash surrender value could be set aside after the death of the insured upon a showing of mental incapacity at the time of the surrender. The Court held that it could be set aside reasoning that the surrender of a policy was akin to other agreements entered into by one who was mentally incompetent in that such are voidable and can be disaffirmed after death by either the heirs or the personal representative of the deceased. In this case the insured had signed both a request for cash surrender value and a request for change of beneficiary on April 24, 1963 (although the latter was dated April 23, 1963). The insured died May 17, 1963, never having cashed the cash surrender value check. The widow, who was the original beneficiary, sued as executrix of the estate, not contesting the change of beneficiary to the estate of the insured. The Court affirmed an award for the plaintiff. The Court also stated that the widow had, by her actions

14 Penn. v. Standard Life Ins. Co., 160 N.C. 399, 76 S.E. 262 (1912), as quoted by the Court in the principal case, set out these guidelines:

"1. When an accident caused a diseased condition, which together with the accident resulted in the injury or death complained of, the accident alone is to be considered the cause of the injury or death.

"2. When at the time of the accident the insured was suffering from some disease, but the disease had no causal connection with the injury or death resulting from the accident, the accident is to be considered as the sole cause.

"3. When at the time of the accident there was an existing disease, which, cooperating with the accident, resulted in the injury or death, the accident cannot be considered as the sole cause or as the cause independent of all other causes."

265 N.C. at 163, 143 S.E.2d at 75.

subsequent to death of the insured, acquiesced in the change of beneficiary so that a judgment in the present action would preclude her from recovering in her individual capacity in a later action.\textsuperscript{16}

In Clinard v. Security Life & Trust Co.\textsuperscript{27} the insured died November 5, 1961, and notice and proof of death was not filed with the insurance company until October 1, 1963. The certificate of group life insurance in suit contained a provision requiring that notice and proof of death be submitted to the company within ninety days after the date of death. The Court held that a judgment of nonsuit entered by the trial court should be reversed. The plaintiff beneficiary's evidence to the effect that she had heard the insured speak of a policy and that she had searched for it but had failed to find it until she happened upon it in an old dresser in the basement of her home only twenty-four hours prior to filing with the company was sufficient to excuse the beneficiary's delay and avoid a forfeiture of the policy. The Court, citing cases from many other jurisdictions, states the rule to be that such a forfeiture provision as contained in the policy in suit can be avoided by evidence showing that the beneficiary is ignorant of the existence of the policy and is not negligent in failing to discover the existence of the policy.

\textbf{REAL PROPERTY}

\textit{William B. Aycock*}

Several cases involving real property were decided by the Court. For the most part they were cases concerning Landlord and Tenant, Recordation, Lis Pendens and the Rule in Shelley's Case.

\textbf{LANDLORD AND TENANT}

\textit{Apportionment of Rent as to Time}

At common law, rent does not accrue from day to day, like interest, but becomes due only upon the day named for payment.

\textsuperscript{16} An interesting question, which the Court specifically does not answer, is whether or not a beneficiary of a policy that contains a right to change the beneficiary has any right to contest such a change on the basis of mental incapacity of the insured either before or after death.

\textsuperscript{27} 264 N.C. 247, 141 S.E.2d 271 (1965).

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Hence rent which is due at the time of the death of the lessor passes to his personal representative for administration as an asset of the decedent's estate, while rent which becomes due after that time becomes the property of the heirs or devisees who are entitled to the reversion, as an incident thereof.\(^1\) Further, if an owner, after making a lease for years, dies between two rent days, there is no apportionment of the rent between the personal representative and the heir, devisee or trust beneficiary. The rent follows the reversion and all the rent for this period will go to the heir, devisee or trust beneficiary.

The common-law rule of no apportionment of rent has been altered in North Carolina by three statutes which require an apportionment in certain situations. The Court in *Wells v. Planters Nat'l Bank & Trust Co.*\(^2\) clarified some of the misunderstanding concerning the extent to which the common-law rule of no apportionment has been changed by statute. In that case farmland held in an inter vivos trust to A for life, with corpus distributable free of the trust to specified remaindermen in fee at A's death, was leased by the trustee for the calendar year 1962. Rents reserved were one third of the tobacco sales, payable as the tobacco was sold. On June 28, 1962 (178th day of the one-year lease period), before any tobacco had been sold, A died. The remaindermen, relying on the common-law rule of no apportionment, claimed all the rent from the tobacco sales. On the other hand, the administrator of A's estate contended that the rent should be apportioned equally between A's estate and the remaindermen. In a declaratory judgment proceeding the Court disagreed with both parties and held that the estate of A was entitled to rent for the 178 days of the lease period which elapsed before A's death. The remaindermen were entitled to the balance. Apportioned on this basis 48.77 per cent of the rent went to the estate of A and the other 51.23 per cent to the remaindermen.

The Court relied on G.S. § 42-6 and G.S. § 37-4 in making its decision.

G.S. § 42-6 provides that in all cases where rents, or any other payments of any description, are made payable at fixed periods to successive owners *under any instrument*, and where the right of any owner to receive payment is terminated by a death or

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\(^2\) 265 N.C. 98, 143 S.E.2d 217 (1965).
other uncertain event *during a period in which a payment is* growing due, "the payment becoming due, next after such terminating event shall be apportioned among the successive owners according to the parts of such periods elapsing before and after the terminating event."\(^8\)

G.S. § 37-4 makes G.S. § 42-6 applicable to trusts. In *Wells*, \(A\) and the remaindernen took under the same trust instrument; therefore G.S. § 42-6 and G.S. § 37-4 were applicable.

G.S. § 42-7 provides for apportionment of rents on farm leases in lieu of emblements when the life tenant dies during the lease year. This statute, however, is limited to farm leases that are determined, *inter alia*, by the death of the life tenant. In *Wells* the farm leases made by the trustee extended beyond the duration of the trust; hence they did not terminate at \(A\)'s death. For this reason G.S. § 42-7 was deemed inapplicable.

G.S. § 42-6, G.S. § 42-7 and G.S. § 37-4 do not entirely abrogate the common-law rule of no apportionment.\(^4\) For example, where \(X\), owner of land in fee simple, leases it and dies during the lease period, there would not be an apportionment of rent not due at \(X\)'s death. The rent would follow the reversion. \(X\)'s successor would be entitled to all the rent payable after his death. G.S. § 42-6 and G.S. § 37-4 would not apply because \(X\) and his successor (heir, devisee, or trust beneficiary) do not take under the same instrument. G.S. § 42-7 also would not apply in this situation because the lease did not terminate at \(X\)'s death.

**Liability of Lessee for Negligent Acts of Sublessee in the Use of the Premises**

*Dixie Fire & Cas. Co. v. Esso Standard Oil Co.*\(^5\) is an important case in the law of landlord and tenant. A filling station building was leased to Esso Standard Oil Company which subleased the premises. The building was damaged by fire in excess of 8,000 dollars as a result of the alleged negligence of the sublessee while

\(^8\) *Id.* at 105, 143 S.E.2d at 222.

\(^4\) *In re* Estate of Galloway, 229 N.C. 547, 50 S.E.2d 563 (1948); First-Citizens Bank & Trust Co. v. Frazelle, 226 N.C. 724, 40 S.E.2d 367 (1946). In *Wells v. Planters Nat'l Bank & Trust Co.*, 265 N.C. 98, 143 S.E.2d 217 (1965) the Court eliminated Phillips v. Gilbert, 248 N.C. 183, 102 S.E.2d 771 (1958), as having any bearing on the question of apportionment of rent inasmuch as this aspect of the case was not presented to the Court by counsel.

\(^5\) 265 N.C. 121, 143 S.E.2d 279 (1965).
he was servicing an automobile. In accordance with a provision in the lease respecting repairs, the owner of the premises had the building repaired. The owner was insured by the plaintiff insurance company. After reimbursing the owner and, being subrogated to the rights of the insured, the plaintiff insurance company instituted suit to recover from the lessee, Esso Standard Oil Company, the amount it paid to the owner.

Plaintiff upon being required to make an election of remedies elected to proceed in negligence. Defendant, Esso, then demurred *ore tenus* on the ground that "the complaint fails to allege a cause of action in negligence." The trial judge sustained the demurrer. On appeal the judgment sustaining the demurrer was reversed. The Court decided that the plaintiff was entitled to proceed on the theory of negligence. The following appears to be the basis upon which the Court arrived at this conclusion:

It is true that the sublessee was not the agent of Esso in the ordinary sense, and Esso's liability to lessor is not based on the principle of *respondeat superior*. But it is also true that Esso put sublessee in possession and control of the property and assumed the risk that sublessee might breach the covenants, express and implied by which Esso had bound itself in its solemn contract with lessor. *Liability of Esso to lessor was imposed by breach of the implied covenant that waste would not be committed by negligence in the use of the property—the observance of the covenant being a duty which, by terms of the lease, Esso could not delegate to a sublessee so as to relieve it of responsibility. *

The creation by the Court of an implied covenant on the part of the lessee that waste will not be committed by a sublessee is obviously a development of considerable significance in the law of landlord and tenant. Consideration of the full implication of this decision is beyond the scope of this Survey.

**Extension of Term**

Two cases dealt with the question of extension of the original term in leases. In each case the lease provided an option for exten-

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6 *Id.* at 128, 143 S.E.2d at 284. (Emphasis added.) There was a provision in the lease sufficient to hold Esso liable for negligence of a sublessee, but consideration of this covenant by the Court apparently was foreclosed by the election of the plaintiff to proceed in tort. The extent to which the indemnity provision in the lease influenced the Court's decision in this case remains to be seen.
sion by the lessee upon condition precedent that written notice be given the lessor within a specified time. Such notice was not given in either case. Nevertheless, the decision in both cases was to extend the original term of the lease on the ground that there was a waiver of the notice requirements in the leases. In one case the lessee's conduct was responsible for the waiver whereas in the other case the acts of the lessor were responsible.

In Coulter v. Capitol Fin. Co. the lease provided that the lessee had the option to extend the term for two additional years at an increased rental of fifty dollars per month by giving written notice thirty days before the termination of the original term. When the original term ended, the lessee continued in possession without having given the lessor notice of its intention to exercise the option to extend the term. Instead, the lessee paid rent at the increased rate of fifty dollars per month. Six monthly payments were made (two by original lessee, two by the assignee, and two by the reassignee) before the reassignee gave written notice to the lessor that in thirty days the lease would be terminated. The lessee, assignee and reassignee in turn were under the impression that after the termination of the original lease they were tenants from month to month. They relied on the following provision in the lease:

"Should the lessee remain in possession of the leased premises beyond the expiration of the original term or any renewal or extension of this lease, which shall result in a tenancy from month to month, this lease may be terminated by either party upon the giving of thirty (30) days' written notice to the other party."  

The Supreme Court considered this provision "ambiguous." Since the lease was prepared by the lessees, it was construed in favor of the lessor. Thus the provision for a month-to-month tenancy would not apply if the option to renew were exercised. The Court concluded that when the original lessee held over and then paid rent at the rate which was to be paid only if it exercised the option to extend for two additional years, and the lessor accepted this increased rental, the extension of the lease was effected. Both parties were bound for two years beyond the original term.

In Kearney v. Hare the lease for one year provided for an op-
tion to extend for a year at the time for not more than four times by the lessee's giving the lessor written notice within a specified time. During the one-year term, the lessor requested the lessee to pay the rent for the following year before the lessor was entitled thereto. The lessee paid two thirds of the requested advance payment before the first year of extension began and the remainder of the full year's rent shortly after the beginning of the first year of extension. The lessor, who wanted to terminate the lease at the earliest possible date, contended that the lessee was only a tenant from year to year without right to exercise the option to extend for each of the following three years inasmuch as the lessee did not give the lessor the written notice specified in the lease. The Supreme Court held that the lessor waived "further" notice by requesting and accepting payment of rent for the first year of extension. The Court also indicated that the rental check under the circumstances might be deemed sufficient to provide the notice of extension required in the lease.

Recordation

North Carolina's recordation statute (G.S. § 47-18, The Connor Act) is the "pure race" type. Stress is placed on the time of filing for registration (recordation), and the fact that a purchaser who filed for registration first had actual notice of a prior purchase of some or all the interest in the same property is immaterial. North Carolina stands alone in adhering to the view that no notice, however full or formal, to a subsequent purchaser will supply the want of registration of a deed. All other states by either statute or judicial decision have incorporated the "notice" feature into their recordation laws on deeds and, with few exceptions, in respect to all types of instruments transferring an interest in real property.\(^{11}\)

G.S. § 47-18 (The Connor Act) provides in part:

(a) No conveyance of land, or contract to convey, or lease of land for more than three years shall be valid to pass any property as against lien creditors or purchasers for a valu-

\(^{10}\) Id. at 274.

\(^{11}\) Id. § 913. The race type still prevails as to mortgages in Arkansas, as to mortgages and oil and gas leases in Ohio, and as to mortgages, other than purchase money mortgages in Pennsylvania.
able consideration from the donor, bargainor or lessor but from the time of registration thereof in the county where any portion of the land lies, . . . to be effective as to the land in that county.

In *Bourne v. Lay & Co.* the defendant, a Tennessee corporation, leased certain property from the owner for five years effective July 1, 1961, at a rental of seventy-five dollars per month with an option to renew for five years. This lease was not filed for registration until September 10, 1962, approximately fifteen months after its execution. On December 2, 1961, the lessors conveyed the leased premises to the plaintiff. The deed was filed for registration on December 6, 1961, which was several months before the defendant filed its prior lease for registration. Two other facts, however, were involved. First, the deed of the lessor to the plaintiffs contained the following provision: "There is a lease on the above described property in favor of Lay & Company which lease is for a period of 10 years and the grantors do not warrant this property as to the provision of said lease agreement." Secondly, plaintiffs accepted rent from the defendant for two years and one month. Then they notified the defendant that the rent was to be increased in a substantial amount. Defendants refused to pay the increase but tendered the monthly rent specified in the lease.

In a declaratory judgment proceeding the Court held that the plaintiffs were not bound by the lease since they had filed their deed for registration before the defendant filed its lease for registration. Notice in the deed was wholly immaterial. Further, the acceptance of rent by the plaintiff was not an estoppel since the receipt of the money for the use of the premises did not mislead the defendant nor put him to any disadvantage and it was not inconsistent with a demand for possession. The Court concluded that the defendant was "wholly responsible for its present situation" by lack of diligence in filing its lease for registration.

The Court intimated that this unregistered lease might have prevailed had the references in the deed met the requirements previously laid down by the Court. The Court repeated these requirements by quoting from *Hardy v. Fryer*:

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12 264 N.C. 33, 140 S.E.2d 769 (1965).
13 Id. at 34, 140 S.E.2d at 770.
14 194 N.C. 420, 139 S.E. 833 (1927).
The principles deducible from our decisions upon the subject of the sufficiency of the references necessary to impart vitality to a prior unregistered encumbrance, may be stated as follows:

1. The creditor holding the prior unregistered encumbrance must be named and identified with certainty.
2. The property must be conveyed 'subject to' or in subordination to such prior encumbrance.
3. The amount of such prior encumbrance must be definitely stated.
4. The reference to the prior unregistered encumbrance must amount to a ratification and adoption thereof.\textsuperscript{16}

The plaintiffs had ample notice of the lease, but this notice was not equivalent to a ratification of it.

The primary function of the recordation statute is to protect purchasers for value and lien creditors. In \textit{Bowden v. Bowden}\textsuperscript{16} the dispute was between an heir of Henry Bowden and the devisees of his wife, Daisy, who survived him. A deed to Henry Bowden and wife was sufficient to convey a tenancy by the entireties. An error in recording omitted "and wife" in the granting clause and added these words in the recital of consideration. If the recorded version of the deed prevailed over the deed, the heirs of Henry Bowden would succeed to his property but if the deed prevailed over the recorded version, the devisees of Henry's wife, Daisy, would be entitled to the property.

Plaintiff, an heir of Henry Bowden, contended that the content of the recorded version of the deed put him in a favored position by reason of certain presumptions and evidentiary values which flow therefrom, to wit: (1) it is presumed that a public official (Register of Deeds) in the performance of official duty has acted correctly, in good faith and in accordance with law (\textit{Huntley v. Potter}, 255 N.C. 619, 122 S.E.2d 681), and (2) the record of a deed, in the public registry, is \textit{prima facie} evidence of the correctness of its terms (\textit{Sellers v. Sellers}, 98 N.C. 13).\textsuperscript{17}

The Court rejected this contention of the plaintiff. This case did not involve purchasers for value or lien creditors. Thus the ultimate inquiry was not what the record showed but what were the terms of the original deed. The original deed conveyed a tenancy

\textsuperscript{16} \textit{Bourne v. Lay & Co.}, 264 N.C. 33, 36, 140 S.E.2d 769, 771 (1965).
\textsuperscript{17} \textit{Id.} at 302, 141 S.E.2d at 626.
by the entireties, and this deed was admissible to correct mistakes in the record and the register of deeds had a duty to correct error. The Court concluded that once an error in registration is corrected, the presumption arises on and the evidentiary advantages of the first record are at least neutralized by the corrected record as between the parties to the deed and as to those claiming under the parties to the deed by gift, inheritance or devise.

**Lis Pendens**

The effect of lis pendens and the effect of registration (registration) are in their nature the same thing. They constitute different examples of the operation of constructive notice.\(^{18}\) In respect to constructive notice the common-law rule of lis pendens has been replaced in North Carolina by statute.\(^{19}\) The lis pendens statute has been strictly construed. Two cases provide examples.

In *Cutter v. Cutter Realty Co.*\(^{20}\) Cutter and Company approved a contract for sale of a building by its wholly owned subsidiary, Cutter Realty Company. The plaintiffs, certain shareholders of the parent company, opposed the sale and instituted suit to restrain it. Notice of lis pendens was filed. The Court approved the order of the trial judge cancelling notice of lis pendens. Plaintiff's suit, according to the Court, was "not for the purpose of bringing about any change in the record title, but is brought for the purpose of preventing a change therein."\(^{21}\)

In *McLeod v. McLeod*\(^{22}\) the Court held that an action to set aside for fraud a consent judgment embodying the provisions of a separation agreement is not an action "affecting title to real property" within the meaning of the lis pendens statute even though the

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\(^{18}\) In North Carolina actual notice of lis pendens, unlike the registration statutes, constitutes notice. Whitehurst v. Abbott, 225 N.C. 1, 33 S.E.2d 129 (1945).

\(^{19}\) N.C. Gen. Stat. § 1-116(a) (Supp. 1965):

Any person desiring the benefit of constructive notice of pending litigation must file a separate, independent notice thereof, which notice shall be cross-indexed in accordance with G.S. 1-117, in the following cases:

1. Actions affecting title to real property;
2. Actions to foreclose any mortgage or deed of trust or to enforce any lien on real property; and
3. Actions in which any order of attachment is issued and real property is attached.

\(^{20}\) 265 N.C. 664, 144 S.E.2d 882 (1965).

\(^{21}\) Id. at 669, 144 S.E.2d at 885.

\(^{22}\) 266 N.C. 144, 146 S.E.2d 65 (1966).
wife might have certain rights pursuant to G.S. § 29-30 in her husband’s estate should he die intestate.

THE RULE IN SHELLEY’S CASE

The Rule in Shelley’s Case has been characterized as “a relic, not of the horse and buggy days, but of the preceding stone cart and oxen days.”23 The exact reasons for the Rule, which was developed in the feudalistic society of England, are not known.24 Its origins have been traced back to 1324,25 approximately two and one half centuries before the case whose name it bears was decided. England abolished the Rule in 1925, and most of the states have discarded it either by legislation or by judicial decision.26

In 1897 the Court referred to the Rule in Shelley’s Case as the “Don Quixote of the law, which, like the last knight-errant of chivalry, has long survived every cause that gave it birth and now wanders aimlessly through the reports, still vigorous, but equally useless and dangerous.”27 The Rule has continued to flourish in the law of real property. Three cases involving it were decided by the Court during the few months period covered by this Survey. However, one of these cases did provide a surprise. In Riegel v. Lyerly28 the Court announced that the Rule applies to personal property as well as to real property. This is not a new application of the Rule in North Carolina, but apparently the most recent prior decision applying it to personal property was in a pre-Civil War case involving slaves.29 Since this was the law and since it has not been rejected, it is, according to the Court, still the law. Frequently, the Court has asserted that it was unwilling to change the Rule in Shelley’s Case by “judicial fiat” and that if public policy requires a change, it should be made by the legislature.30

24 Block, The Rule in Shelley’s Case in North Carolina, 20 N.C.L. Rev. 48 (1941). One explanation is that the Rule prevented landowners from avoiding their feudal obligations. The heirs would take by inheritance rather than as purchasers.
25 Abel’s Case, Y.B. 18 Edw. 11, 577 (1324).
26 The Rule has been abrogated wholly or largely in thirty-seven states. 3 Powell, Real Property, 239 (1952) and (Supp. 1965).
27 Stamper v. Stamper, 121 N.C. 251, 254, 28 S.E. 20, 22 (1897).
28 265 N.C. 204, 143 S.E.2d 65 (1965).
29 Block, supra note 24.
30 Riegel v. Lyerly, 265 N.C. 204, 209, 143 S.E.2d 65, 68 (1965), and cases cited therein.
The main justification for the Rule in modern law is that it serves to make property alienable at an earlier date. On this basis there is as much, perhaps more, reason to apply the Rule to personal property as to real property. This point will be discussed in the context of another case decided since Riegel v. Lyerly.

In Wright v. Vaden the testator bequeathed and devised all his property (real, personal, and mixed) to his wife for her lifetime and then to Elsie May Johnson for her lifetime and then "to the children or other lineal descendants of said Elsie May Johnson, to have and to hold the same to them and their heirs, executors and administrators absolutely." The testator's wife was deceased and the only issue before the Court was whether the Rule in Shelley's Case applied to give Elsie May Johnson a fee tail (converted by G.S. § 41-1 into a fee simple) or only a life estate with the remainder to her children and other legal descendants. Ordinarily, when the remainder is given to the "children" or "issue" of the person designated to take a life estate, the Rule does not apply. The words "children" or "issue," standing alone, are usually construed not to refer to an indefinite line of succession from generation to generation essential to invoke the Rule. But in Wright v. Vaden the use of the additional words "other lineal descendants" might make a difference. Obviously a close question was involved, and it could have been decided either way. The Court decided that the words "children or other lineal descendants" are words of purchase and that the Rule in Shelley's Case did not apply. Elsie May Johnson took only a life estate and at her death her children then surviving, together with the issue of any predeceased child, will take the fee simple in all the property.

In order to focus again on the application of the Rule to personal property, let us suppose that the Court had decided that "children or other lineal descendants" were words of limitation and the Rule applied to give Elsie May Johnson a fee simple. If the Rule were limited to real property, she would have taken a fee simple in the real property, but her interest in the personal property would have been only for life. Riegel v. Lyerly makes it clear that whether the duration of her interest be for life or an outright ownership, it applies to real and personal property alike. This result is in keeping

\footnote{266 N.C. 299, 146 S.E.2d 31 (1966).}
with the modern trend of discarding distinctions between real and personal property developed in the feudal society of England.

In *Wright v. Vaden* the Court quoted the Rule as stated in Shelley's Case in 1581:

"'When an ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, the word heirs is a word of limitation of the estate, and not a word of purchase.'"\(^{32}\)

This is an inadequate statement of the North Carolina version of the Rule in Shelley's Case. For example, "estate of freehold" does not suggest that the Rule would apply to personal property. Also this definition fails to reflect other distinctions which have been made by judicial decision. *Wells v. Planters Nat'l Bank & Trust Co.*\(^{33}\) illustrates another distinction long recognized by the Court. A trust provided that at the death of the life beneficiary the corpus of the trust would go to his heirs generally. Did the Rule in Shelley's Case apply to give the life beneficiary outright ownership of the property? The answer was clearly no. Why? Because, for the Rule to apply, the interest of the life beneficiary and the interest of their heirs must be either both legal or both equitable. In this case the interest of the life beneficiary was equitable and the interest of his heirs was legal.

The Rule in Shelley's Case needs to be redefined to reflect more accurately the law applied in North Carolina today.

The Court is cognizant of the basic criticism of the Rule in Shelley's Case and had this to say in *Wright v. Vaden*:

Without doubt, testator intended that Elsie May Johnson (Wright) should take only a life estate in his property. If, however, the rule in Shelley's Case is applicable, she is entitled to the entire corpus of testator's estate, for it operates 'as a rule of property without regard to the intent of the grantor or devisor.'\(^{34}\)

The Rule is a trap for the "unwary" and sometimes for those who have considerable knowledge of the Rule itself. Whether the utility of the Rule in North Carolina today outweighs its disadvantages cannot be determined without considerable study not only of the

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\(^{32}\) Id. at 301, 146 S.E.2d at 34.

\(^{33}\) 265 N.C. 98, 143 S.E.2d 217 (1965).

\(^{34}\) 266 N.C. at 301-02, 146 S.E.2d at 34 (1966).
Rule but also of the alternatives. The usual alternative is to create a contingent remainder in the heirs of the life taker. Contingent remainders, like the Rule in Shelley's Case, cannot claim to have enjoyed a long history free of difficulty.\textsuperscript{35}

### TORTS: PART I

*Robert G. Byrd*

**PROOF OF NEGLIGENCE**

**Unexplained Automobile Accidents**

The Court's decisions continue to be troublesome in cases in which a guest automobile passenger seeks to recover for injuries sustained when the defendant's automobile in which the passenger is riding leaves the road for unknown reasons. In many jurisdictions \textit{res ipsa loquitur} is applied in this fact situation when it is shown that weather, traffic and highway conditions were such that little likelihood exists that they contributed in causing the accident.\textsuperscript{1} The North Carolina Court, however, has flatly stated on numerous occasions\textsuperscript{3} that \textit{res ipsa} does not apply to permit an inference of negligence when the car defendant is driving unaccountably leaves the road and injures a guest passenger.

When the physical facts at the scene of an accident or other circumstantial evidence indicate specific acts of negligence by the defendant, the North Carolina Court is more likely to find that a case for the jury has been made.\textsuperscript{3} For example, in \textit{Drumwright v. Wood},\textsuperscript{4} defendant's car left the road on a curve and the circumstances indicated that he had been traveling at a high rate of speed. The Court held that the defendant's motion for nonsuit had been

\textsuperscript{35} For instance, are contingent remainders in North Carolina subject to the common-law rules of destructibility? See McCall, \textit{The Destructibility of Contingent Remainders in North Carolina}, 16 N.C.L. Rev. 87 (1938).

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\textsuperscript{1} \textit{PROSSER, TORTS} 219 (3d ed. 1964).

\textsuperscript{2} E.g., Privette v. Clemmons, 265 N.C. 727, 145 S.E.2d 13 (1965).

\textsuperscript{3} Southern Nat'l Bank v. Lindsey, 264 N.C. 585, 142 S.E.2d 357 (1965) (intoxication); Wilkerson v. Clark, 264 N.C. 439, 141 S.E.2d 884 (1965) (speed); Rector v. Roberts, 264 N.C. 324, 141 S.E.2d 482 (1965) (speed).

\textsuperscript{4} 266 N.C. 198, 146 S.E.2d 1 (1966).
properly overruled. This result seems correct even in light of the Court's unwillingness to apply *res ipsa* to unexplained single car accidents generally. The evidence would support a finding that defendant negligently drove too fast and the accident was of a type likely to be caused by excessive speed. Under these circumstances the more probable inference is that defendant's negligence caused the accident.

The Court still thought it necessary to negate other factors as possible causes of the accident: "[T]here is no evidence that he [defendant] was not well and in the full possession of his mental and physical faculties. . . . There is no evidence of any other traffic on the road at the time. There is no evidence of any mechanical failure of the station wagon." Why the Court attempted in this negative way to discount all possible causes of the accident other than the defendant's negligence is difficult to see. Yet, this may be significant since the Court's refusal to apply *res ipsa* in unexplained single car accidents generally appears to be founded in part on this same insistence that all factors which could have caused the accident be eliminated before an inference that defendant's negligence was its cause can be indulged. Evidence which indicates causes of the accident other than defendant's negligence or which tends to eliminate such other causes must be considered in determining if the case should be submitted to the jury, but as long as the plaintiff has the burden of proof, the mere absence of evidence should not be a basis for discarding possible causes about which evidence is lacking. However, even when some possible causes remain unaccounted for, the plaintiff's evidence may still permit a reasonable inference that defendant's negligence caused the accident. Before circumstantial evidence can be relied on for the proof of negligence every inference other than that of defendant's negligence need not be precluded. If the inference that the defendant's negligence caused the happening is more likely than other permissible inferences as to its cause, the case should go to the jury.

The Court's readiness in *Drumwright* to discount some possible causes of the accident on the grounds that there was no evidence relating to them should be compared with its approach to the same problem in *Crisp v. Medlin*, a case in which a nonsuit granted in

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6 Id. at 204, 146 S.E.2d at 5-6. (Emphasis added.)
7 *Prosser, Torts* 222 (3d ed. 1964).
8 264 N.C. 314, 141 S.E.2d 609 (1965).
the trial court was affirmed. In Medlin the physical facts at the scene of the accident also indicated that defendant's car was traveling at a high rate of speed at the time the accident occurred. The following excerpt from the Medlin opinion will provide a basis for such a comparison:

There is no evidence in the record as to whether the highway was slick, wet, or dry at the time of the wreck, or the condition of the highway. Was the Chevrolet automobile forced off the highway to avoid a collision with an approaching automobile suddenly pulling into its lane of traffic, or was it caused to leave the highway by reason of being sideswiped by a passing automobile, or was its wreck due to a tire blowout? The record contains no evidence answering these questions. . . . There is no evidence in the record that the automobile was traveling at the time of the wreck in a restricted speed zone. . . . In our opinion, and we so hold, the mere fact that it can be reasonably inferred from the evidence that the Chevrolet automobile was traveling at a very rapid speed when it wrecked is not sufficient to permit a jury to find that such speed caused the wreck, and that its driver was guilty of actionable negligence.8

In Drumwright, the Court dismissed some factors as possible causes of the accident because of the absence of any evidence relating to them; in Medlin from the absence of evidence the Court concocted visions of the defendant's car being sideswiped or forced off the road by an unidentified vehicle to support its conclusion that the cause of the accident was left in the realm of conjecture. On the facts present in the two cases both decisions may be right. Nevertheless, these cases, as prior cases have, (1) suggest that the Court's analysis of the facts in a particular case may be designed more to justify a result than to aid in determining what the result should be in the first instance, and (2) raise a question of how realistically the Court evaluates various factors which might possibly have caused an accident to determine if a reasonable inference of the probable cause of the accident can be made.

8Id. at 318-19, 141 S.E.2d at 612. In Drumwright the Court indicated the following inferences were permissible from circumstances which indicated speed: (1) failing to decrease speed in a curve in violation of N.C. Gen. Stat. § 20-141(c) (1965); (2) exceeding fifty-five miles per hour in violation of N.C. Gen. Stat. § 20-141(b)(4) (1965); (3) operating in a reckless manner in violation of N.C. Gen. Stat. § 20-140(b) (1965); and (4) failing to keep a proper lookout. 266 N.C. at 205, 146 S.E.2d at 6 (1966).
Similar Instances Rule

The North Carolina Court has also rejected the application of *res ipsa* to "exploding bottle" cases, but the Court's rejection here has been softened by the "similar instances rule" which is somewhat unique to North Carolina.

[W]hen the plaintiff has offered evidence tending to show that like products filled by the same bottle under substantially similar conditions, and sold by the bottler at about the same time have exploded, there is sufficient evidence to carry the case to the jury, as such facts and circumstances permit the inference that the bottler had not exercised that degree of care required of him under the circumstances. Such similar instances are allowed to be shown as evidence of a probable like occurrence at the time of plaintiff's injury when, and only when, accompanied by proof of substantially similar circumstances and reasonable proximity in time.\(^{10}\)

*Jenkins v. Harvey C. Hines Co.*\(^{11}\) presented the question of whether one similar instance in close proximity in time was sufficient to carry plaintiff's case to the jury. The Court found it unnecessary to decide whether a single similar instance, standing alone, would be sufficient to permit the jury to find that the explosion of the bottle was caused by defendant's negligence. The Court held that one similar instance is of evidentiary value if other evidence of negligence is present and may be considered with the other evidence in determining whether the case should go to the jury. Although the Court did not decide whether proof of nothing more than a single similar instance is enough to submit the case to the jury, the decision leaves the clear impression that no generally applicable rule as to the sufficiency of such proof to withstand nonsuit will be adopted by the Court. The following statement indicates the approach of the Court: "In our opinion, whether a case should be submitted to the jury should not depend solely upon whether there is evidence of only one or of more than one 'similar instance.' Depending upon the circumstances, one such instance may well be of greater significance than two or more others."\(^{12}\)

In the *Jenkins* case the plaintiff's proof other than the one simi-
lar instance was (1) a good percentage of bottles returned to defendant's plant were broken, chipped, scuffed, cracked, or defaced; (2) inspection to detect defective bottles was made by two girls who observed the bottles as they passed by them on a conveyor belt at the rate of 240 to 250 bottles per minute; (3) bottles had burst in the washers and the fillers in defendant's plant; and (4) expert testimony that sound bottles have five times the strength necessary to withstand the pressure normally present and that the bottle cap is designed to permit the escape of internal pressure when it becomes abnormally high. Although the Court did not consider the sufficiency of any of this evidence to show defendant's negligence either in the use of defective bottles or in failing to reasonably inspect to discover defective bottles, one apparent importance attached to it was that it tended to isolate the cause to a defective bottle. Thus, the Court concluded that, as the bottle cap had not been forced off, the internal pressure in the bottle apparently was not abnormally high and thus that "it would seem reasonable to infer that the explosion occurred on account of a defect in the bottle."

Proof of specific negligence in the Jenkins case certainly increases the probability that the explosion was caused by such negligence, and evidence tending to eliminate other possible causes makes this probability stronger. Again it might be asked, however, whether, once careful handling of the bottle from the time it left defendant's hands until the time of the accident was shown, a reasonable inference might not be drawn that either of the two causes considered by the court—defective bottle and excessive pressure—existed as a result of defendant's negligence so that even without evidence of specific negligence the case would be one for the jury.

**Immunity**

In First Union Nat'l Bank v. Hackney, the mother and father of four children died from injuries received in a car accident caused by the father's negligence. The mother predeceased the father and her administrator sued the father's estate for her wrongful death. Three defenses to his action were asserted: (1) Any recovery in the action should be reduced to the extent that the father would

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13 Id. at 89, 141 S.E.2d at 5.
benefit from it. (2) No true adversary proceeding existed as the children, as sole survivors of their mother and father, were the beneficiaries of both estates and of any wrongful death recovery and thus were the real parties plaintiffs and defendants. (3) Parent-child immunity would bar the action.

Under our wrongful death statute a husband, who survives his wife, normally shares any recovery for her wrongful death along with surviving children.\(^5\) Equally well established rules, however, (1) prohibit a beneficiary whose wrongdoing has contributed in causing the death for which damages are recovered from participating in that recovery so as to deny him benefit from his own wrongdoing\(^6\) and (2) provide that any recovery is to be reduced by the share that would have gone to the wrongdoer.\(^7\) Thus the Court sustained the first of defendant's so-called defenses.

The real-party-in-interest problem raised by the second of defendant's defenses is discussed in another part of this Survey.\(^8\) However, the decision on this point may have significance outside the procedural area since the real problem presented, whether raised as a real-party-in-interest question or in some other context, is whether the presence of liability insurance should affect the outcome of the case. The Court properly refused to permit defendant's insurance company to use the real-party-in-interest statute as a shield to avoid its liability under the policy. The full significance of the case will depend upon the Court's willingness to extend this practical view to other areas in which the basis of a legal rule disappears when defendant carries liability insurance.

One such area is that of parent-child immunity. Under North Carolina law an unemancipated child cannot recover damages for personal injuries caused by his parent's negligence.\(^9\) Recognition of the parent's immunity from suit has been based primarily on the prevention of disruption of family harmony and the undermining of parental discipline.\(^10\) In holding that the children were not the real parties defendant in the action, the Court said: "During his [father's] lifetime, it [liability insurance] would protect him in

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\(^{10}\) Id. at 20, 145 S.E.2d at 355.
\(^{17}\) Cox v. Shaw, 263 N.C. 361, 139 S.E.2d 676 (1965).
\(^{20}\) Ibid.
respect of his personal liability and preserve his general estate from depletion; and, upon his death, such policy would constitute a valuable asset of his estate and safeguard the general assets of his estate for distribution to the beneficiaries."\textsuperscript{21} This reasoning would seem applicable to any suit by a child against his parent or the parent's estate and a failure to recognize this may result in loss to the injured child, who receives no compensation for his injury, and the parent whose assets must be used to pay medical and other expenses of the child. Under such circumstances it cannot be seriously suggested that a child's suit against his parent threatens either to disrupt family harmony or to destroy parental discipline when the parent is protected by liability insurance.

In earlier decisions,\textsuperscript{22} the presence of liability insurance has not affected the immunity rule and the Court has denied a child recovery from his parent even though the parent was insured. To say that Hackney overrules these earlier cases may go too far; however, it does seem appropriate to suggest a reconsideration of the question is now in order. Only a few courts\textsuperscript{23} have found liability insurance a sufficient reason to override family immunity but many of the courts that hold differently do so on the rather technical ground that liability insurance is of no consequence until liability has been established.\textsuperscript{24} Other courts have refused to abrogate immunity because of the danger of collusion against the insurance company.\textsuperscript{25}

Defendant's contention in his third defense that parent-child immunity barred the wrongful death action could have been disposed of by the Court on the basis of precedent. The Court has held\textsuperscript{26} that a wrongful death action against one parent for the other parent's death, the recovery from which will benefit the wrongdoer's children, does not come within the parent-child immunity rule. For this purpose the action has been considered in the decedent's administrator rather than in the children-beneficiaries. The Court relied in part on this rule to reject defendant's claim of immunity.

\textsuperscript{21} First Union Nat'l Bank v. Hackney, 266 N.C. 17, 22-23, 145 S.E.2d 352, 357 (1965).
\textsuperscript{22} Gillikin v. Burbage, 263 N.C. 317, 139 S.E.2d 753 (1965); Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923).
\textsuperscript{23} Prosser, Torts 889 (3d ed. 1964).
\textsuperscript{25} E.g., Villaret v. Villaret, 169 F.2d 677 (D.C. Cir. 1948).
\textsuperscript{26} Cox v. Shaw, 263 N.C. 361, 139 S.E.2d 676 (1965).
A second reason seems to have been relied on by the Court for its decision. The Court quoted extensively from decisions of other jurisdictions which hold that family immunity cases when the reasons for it are no longer present because of the death of the parent or other cause. The opinion seems to follow these decisions and to adopt the rule that parent-child immunity terminates with the death of the parent from whom recovery is sought:

Here, by reason of the death of the mother and father, there exists no child-parent or other family relationship that may be disturbed by this action. In this factual situation, according to the weight of authority and sound reason, the immunity doctrine has no application. . . .

Since the policy reasons on which the immunity doctrine rests do not apply to the factual situation under consideration, we are of opinion, and so hold that the immunity doctrine is of no avail to defendant in this action.27

Although in Hackney both the mother and father were dead at the time the action was begun and such fact is recited in the quotation set out above, neither the reasoning nor authority cited in support of the decision seems to limit the rule terminating immunity to situations where both parents are dead. The fact that seems significant to terminate immunity is the death of the parent against whom the action is brought.

The significance of that portion of the Court's opinion dealing directly with the question of parent-child immunity is difficult to evaluate because the Court, before developing the termination of immunity concept as an additional basis for its decision, expressly stated that the suit was not one by a child against his parent. Its impact is further clouded by earlier decisions which appear inconsistent with it but which were in no way mentioned by the Court. In Cox v. Shaw,28 decided in 1964, the action was by the administrator of a deceased mother against the estate of her deceased unemancipated child; in Capps v. Smith,29 also decided in 1964, the suit was between the administrator of a deceased unemancipated child and the child's living parent. In each the Court recognized parent-child immunity as a bar to the action. Despite these factors,

28 263 N.C. 361, 139 S.E.2d 676 (1965).
29 263 N.C. 120, 139 S.E.2d 19 (1964).
however, any fair interpretation of the opinion compels a recognition of termination of immunity as one of the grounds for the Court's decision. Otherwise, over six pages of the Court's opinion must be discarded as idle ramblings. This portion of the opinion is too thoroughly documented by authority from other jurisdictions to be dismissed so lightly.

If termination of immunity is accepted as one of the grounds for decision in *Hackney*, serious doubt arises as to whether either *Cox* or *Capps* continues as authority, although neither was expressly overruled by the Court. Neither *Cox* nor *Capps* involves an action against a deceased parent, but this factual distinction seems unimportant as the disruption of family harmony is as unlikely in one case as the other. All who have considered the problem apparently treat the death of either parent or child, without regard to who brings the action, as sufficient to terminate immunity when the basic rule that death terminates immunity by destroying the reason for it has been adopted. Thus, unless what would appear to be artificial factual distinctions are made by the Court or unless the Court later abandons the position taken in *Hackney*, *Cox* and *Capps* should no longer be the law.

**TORTS: PART TWO**

*Philip C. Thorpe*

**FRAUD**

*Fox v. Southern Appliances, Inc.* was an action for specific performance of a contract to purchase land. The defendant refused to purchase, claiming that it had been misled by plaintiff's representations that the property could be used for commercial purposes, when in fact it was restricted to residential use. Although the zoning ordinance permitted commercial structures, restrictive covenants prohibited such a use. The contract provided that the sale was made

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80 See Harlan Nat'l Bank v. Gross, 346 S.W.2d 789 (Ky. 1961); Oliveria v. Oliveria, 305 Mass. 297, 25 N.E.2d 766 (1940); Logan v. Reaves, 209 Tenn. 631, 354 S.W.2d 789 (1962). In all these cases, other grounds may have been the primary basis for the decision.

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1 264 N.C. 267, 141 S.E.2d 522 (1965).
subject to restrictions appearing as a matter of record title. Plaintiff demurred to the defense on the theory that defendant's neglect in failing to check the record title made the defense of fraud insufficient. Despite the contract's provisions, the Court held that the pleaded defense was sufficient.

To what extent must a person make an independent investigation as to the truth or falsity of representations made to induce a sale? In actions for fraud, plaintiff must not only have relied upon the representations, but his reliance must have been reasonable. The precise question raised by Fox is whether reliance is reasonable when an investigation would have disclosed the falsity of the representations. In an earlier day the doctrine of caveat emptor prevailed. The buyer was under an obligation to beware and was required to investigate. Today there is little need to undertake an independent investigation. Several reasons explain this change in attitude. First, if the basis of the claim is an intentional misrepresentation, negligently failing to investigate would not defeat the claim. More importantly, courts have been moving away from strict caveat emptor for many years. In 1906 our Court stated:

It seems plausible at first sight to contend that a man who does not use obvious means of verifying the representations made to him does not deserve to be compensated for any loss he may incur by relying upon them without inquiry. But the ground of this kind of redress is not the merit of the plaintiff, but the demerit of the defendant; and it is now settled law that one who chooses to make positive assertions without warrant, shall not excuse himself by saying that the other party need not have relied upon them....

In general, a person may reasonably rely upon representations without investigating their truth. A few cases have required some investigation as to the truth of represented facts but they are not

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3 Harper & James, Torts § 7.12 (1956).
in conflict with the line of authority represented by Fox. In such cases, an investigation was either simple to make, or the party claiming to have relied was better equipped to determine the truth or falsity of the representations than was the maker. Clearly, reliance on a statement is not reasonable in either situation. However, where an investigation would require an outlay of time, expense, or the hiring of special help, an independent investigation will not and ought not be required. Thus, in Fox, a title search would require an attorney's services. It follows that defendant did not act unreasonably in relying upon the plaintiff's representations of the permitted use of the property without obtaining the title search.

**Strict Liability**

Since the 1963 decision in *Guilford Realty & Ins. Co. v. Blythe Bros.*, the Court has been committed to the modern strict liability theory of the Restatement of Torts. We can anticipate decisions from time to time clarifying the Court's position concerning the application of the theory to a variety of situations. In *Trull v. Carolina-Virginia Well Co.*, plaintiff claimed that strict liability should be applied where his house received damage from vibrations caused by well-drilling on his land. Noting that the only similarity between *Guilford* and *Trull* was the claimed damage by vibration, the Supreme Court affirmed the granting of an involuntary nonsuit in *Trull*.

The modern theory of strict liability rests upon the ultrahazardous nature of the injury-causing activity. Subsection 520(a) of the Restatement of Torts defines an ultrahazardous activity as one which "necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care...." Plaintiffs who wish to make use of

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10 RESTATEMENT, TORTS §§ 519-23 (1938).
12 264 N.C. 678, 142 S.E.2d 622 (1965).
13 See RESTATEMENT, TORTS §§ 519, 520 (1938).
strict liability must be prepared to prove that the activity which caused their injury was ultrahazardous within this definition. Not only did plaintiff in Trull fail to do so, but his initial pleading was based upon negligence. Furthermore, the way in which damages are caused is irrelevant. The Supreme Court was clearly correct in disregarding this argument in Trull.

A more interesting question was presented in Trull, as well as in the appeal, after trial below, of Guilford Realty & Ins. Co. v. Blythe Bros. Modern liability for ultrahazardous activity is not absolute. However the defenses which will defeat a claim of strict liability are not clear. Trull and Guilford suggest defenses that can be used. In Trull, the Court based its holding in part upon the fact that plaintiff had contracted for the defendant's services and thus could not rely upon strict liability to recover. The Court's position is clearly in accord with section 523 of the Restatement, which denies use of the theory to any person who "takes part in it" (i.e., the ultrahazardous activity). It seems clear that anyone who invites such activities upon his land should be proscribed from recovery without a showing of fault. This is akin to the assumption of risk defense in negligence actions. Several cases have denied to plaintiffs any reliance upon strict liability where the ultrahazardous activities were carried on for their benefit. In Guilford, the defense was governmental immunity. The defendant argued that since the city of High Point was supervising its activities, it was entitled to the city's immunity. The Court held that since the city was not immune from liability for inherently dangerous activities, the defense could not benefit defendant.

Trull, Guilford, and a third case decided this year, Keith v. United Cities Gas Co., raised a problem for practitioners in North Carolina. The term "inherently dangerous" has been used in the past in several senses in the law of torts. For many years, it described those products to which privity of contract did not serve to bar actions against the manufacturer. In Guilford, it was used both to justify imposing liability without fault and to limit munici-

15 E.g., E.I. DuPont de Nemours & Co. v. Cudd, 176 F.2d 855 (10th Cir. 1949).
16 See 18 McQuillan, Municipal Corporations § 53.76(c) (3d ed. 1963).
17 266 N.C. 119, 146 S.E.2d 7 (1966).
18 Prosser, Torts § 96 (3d ed. 1964).
pal governmental immunity. The Keith case used "inherently dangerous" to describe standards of due care. Because of the multiple usages, care should be taken to determine the correct use in a given context before concluding that resort to liability regardless of fault is warranted.

**Contribution, Indemnity and Settlement**

Prior to 1965, the Court took the position that an insurer of one joint tort-feasor had no right to contribution from the other joint tort-feasor. Two recent cases appear to overturn in part the no-contribution rule. In *Pittman v. Snedeke* the plaintiff sued one of two potential defendants. The original defendant filed a cross-action against the other potential defendant. The jury found both defendants' fault contributed to plaintiff's injury. The original defendant's insurer satisfied plaintiff's judgment, and the original defendant, pursuant to the right of contribution granted by the judgment in accordance with G.S. § 1-240, sought execution against the third-party defendant. Although the third-party defendant argued that *Herring v. Jackson* denied the right of contribution against a joint tort-feasor to an insurer who paid the judgment on behalf of another joint tort-feasor, the Court affirmed the lower court's refusal to enjoin execution by the original defendant. In *Safeco Ins. Co. of America v. Nationwide Mut. Ins. Co.* the Court allowed the original defendant's insurer to recover from the third-party defendants under substantially the same facts.

Since earlier authorities were not overruled by *Pittman* and *Safeco*, the Court apparently has distinguished two situations. Where a plaintiff sues and obtains judgment against all joint tort-feasors, the insurer of one of them cannot get contribution from the others after satisfying plaintiff's judgment. However, where plaintiff sues one, or less than all joint tort-feasors, contribution is possible if the defendant brings the other joint tort-feasors into the suit by a cross-action. The basis for this distinction seems to

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22 264 N.C. 749, 142 S.E.2d 694 (1965); 44 N.C.L. Rev. 142 (1965).
be the following. In the first situation, all tort-feasors have been sued by the plaintiff. Because the defendants may not cross-claim for contribution, the right to contribution remains inchoate, pending a second action. In the second situation, the cross-claim is permitted, and the right to contribution is adjudicated prior to satisfaction by the insurer. Subrogation then occurs pro tanto when the plaintiff's judgment is satisfied.

The situation is, of course, anomalous. Under present law, the insurer's right to recover contribution depends upon plaintiff's choice of defendants. In defense of the Court, it must be pointed out that neither the contribution statute nor any other statutes lend themselves to a construction which would solve this particular hiatus. By ruling as it has in Pittman and Safeco, the Court has at least made it possible for the insurer to obtain contribution in some cases. The obvious solution is an amendment to the contribution statute, making clear the insurer's right to contribution under all circumstances upon satisfying its insured's obligation to the plaintiff.

An additional aspect of contribution was before the Court in 1965. In Clemmons v. King contribution was denied because the pleadings did not properly raise the question. The original defendant, although he brought in a third-party defendant by means of a cross-action, at no time alleged that his own negligence concurred with that of the third-party defendant to cause plaintiff's injury. Careful counsel will make certain that concurrent negligence is pleaded. This can be done as an alternative to other theories, with the concurring negligence pleaded conditionally.

Gibbs v. Carolina Power & Light Co. raised an interesting question involving a claim for indemnity. Plaintiff's employer was performing construction and maintenance work for defendant when the plaintiff was injured because of the negligence of defendant's employees. Defendant, claiming plaintiff's employer had agreed by contract to indemnify defendant, sought to bring in the employer by a cross-action for indemnity. The Court affirmed the trial court's striking of the cross-action. It held that since the cross-action was

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26 265 N.C. 199, 143 S.E.2d 83 (1965).
27 Id. at 202, 143 S.E.2d at 86.
28 265 N.C. 459, 144 S.E.2d 393 (1965).
not germane to plaintiff's claim, it was not proper. Since the Workmen's Compensation Act clearly indicates that neither the employer nor the compensation insurer are to be joined in actions by the employee against a third person, there was no authorization for the cross-action.

The significant thing to note here is that the problem is peculiar to workmen's compensation situations. In other actions involving indemnity claims plaintiff could assert his claim against either defendant. The cross-action would then be "germane" to plaintiff's action and would be permissible.

Two cases involving settlements need only brief comment. In Sell v. Hotchkiss the Court construed a covenant not to sue which had been obtained by one joint tort-feasor to permit plaintiff to bring an action against the other joint tort-feasor. Although the case was made difficult because of the complex and ambiguous language of the covenant, the Court found the intent of the parties was to reserve to plaintiff his right of action against the joint tort-feasor who had not settled. The second case, Bongardt v. Frink presented to the Court a case understood best in contrast to its earlier decision in Keith v. Glenn. In Keith, plaintiff's insurer had made a settlement with defendant. Plaintiff brought an action for personal injuries, and defendant counterclaimed for his personal injuries. Plaintiff filed a reply, asserting the prior settlement, but alleging it was made against his wishes and without his consent. The Court held that plaintiff could either affirm the settlement, thus barring defendant's counterclaim but also barring his own action; or plaintiff could refuse to ratify the settlement, thus retaining his claim, but permitting the counterclaim by defendant. This case follows a series of earlier decisions establishing the rules permitting the insured's action, and the defendant's counterclaim.


264 N.C. 185, 141 S.E.2d 259 (1965).


tion in Bongardt was somewhat different. There the plaintiff filed a reply to the defendant's counterclaim, setting forth the earlier settlement between defendant and his insurer. The plaintiff then was permitted to withdraw the reply and the case went to trial upon both plaintiff's claim and defendant's counterclaim. The Court held that defendant was not prejudiced by the withdrawal of the reply. Thus, after a settlement by the insurer, the insured is permitted to sue, and defendant is permitted to counterclaim despite the settlement. The plaintiff may rely either upon the settlement, or go to trial upon his claim, and defend against the counterclaim without insurance protection. Although it is best to be certain as to the insured's choice before proceeding, the trial court, according to Bongardt, has discretion to allow a withdrawal of a pleading which acts as a ratification of the settlement. An ill-made choice may be reversed, if done quickly.

TRIAL PRACTICE

Herbert Baer*

Process

G.S. § 1-105.1 authorizes service of process by serving the Commissioner of Motor Vehicles in cases where the defendant at the time of the accident in question was a resident of this state but has, since the accident, established residence outside of this state or departed from this state and remained absent for sixty days or more continuously whether such absence is intended to be temporary or permanent. G.S. § 1-98.2(6) authorizes service of process by publication where the "defendant, a resident of this state, has departed therefrom or keeps himself concealed therein with intent to defraud his creditors or to avoid the service of summons."

In Harrison v. Hanvey plaintiff passenger alleged that defendant

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1 265 N.C. 243, 143 S.E.2d 593 (1965).
dant motorist was a resident of this state at the time of the accident. Service of summons being returned unfound, plaintiff obtained an order for service by publication predicking his right to the same on G.S. § 1-98.2(6) aforesaid. In his affidavit, on which he obtained such order, he alleged that the defendant could not be found in this state, that at the time of the accident he was a resident of this state, and that since then he "has departed the state, or keeps himself concealed in this state to avoid summons."

On motion made by defendant's insurer to quash alleged service by publication thereafter made by plaintiff, the superior court judge upheld the service. On appeal the Supreme Court reversed. Several reasons for reversal were given by the Court. In the first place, the Court held the affidavit on which the order of publication was made was inadequate in that plaintiff did not allege that defendant departed the state with intent to defraud his creditors. Plaintiff, said the Court, had "alleged that he [defendant] has departed the state or, in the alternative, that he keeps himself concealed here to avoid his creditors. . . . [T]he mere departure of a resident from the state will not authorize service by publication in an action such as this."2

Consequently, the Court declared, the plaintiff's right to service by publication must arise, if at all, "on the alternative allegation that defendant keeps himself concealed herein to avoid service of process."3 If it be assumed that an averment of absconding or concealment in the terms of the statute is sufficient to obtain an order of publication, when a defendant moves to vacate the order and quash the service based on it, "the court must hear evidence [and] find the facts."4 On review of the affidavits submitted before the superior court judge on the motion to quash, the Court finds that there was no evidence presented and no facts were found that the defendant had departed or concealed himself in this state to avoid service of process. There was no evidence that defendant even knew of this action or that he owed any debts in North Carolina. Evidence that defendant could not be found in North Carolina is not sufficient to establish that he keeps himself concealed in this state to avoid service of process.

The Court found other reasons why the service by publication

2 Id. at 253, 143 S.E.2d at 601. (Emphasis is the Court's.)
3 Ibid.
4 Id. at 254, 143 S.E.2d at 601.
in the instant case was ineffective. (1) The affidavit on which the order was based contained no reference to the residence of the defendant, and "although it alleges that after due and diligent search defendant cannot be found within the state and service of process cannot be had on him within the state, there is no averment in the words of the statute that diligent search and inquiry have been made to discover his residence and that it is set forth as particularly as is known to plaintiff." (2) A second defect in plaintiff's attempt to serve by publication was that the published notice to defendant, had he read it, would have informed him that he was required to make defense not later than September 2, 1963, but "it omitted, however, to inform him of the penalty for failing to make defense." While the Court notes that this defect alone "might not" have been fatal, it was one of several. (3) The publication should have been made in a paper in Mecklenburg County of which county it is alleged defendant was a resident at the time of the institution of the suit. The publication had been made in the Statesville Record and Landmark in Iredell County. This publication did not satisfy the requirements of the statute. "Publication in an obscure paper or one far removed from any location with which defendant has ever had any contact will not constitute service of summons by publication."

In the light of the ease with which publication might have been made on the Commissioner of Motor Vehicles under G.S. § 1-105.1, it is apparent that much grief may be avoided by utilizing that statute instead of proceeding with the more exacting publication statute. That, at least, is one of the lessons to be learned from Harrison v. Hanvey and is indirectly suggested by the Court in its comments that service was not attempted under G.S. § 1-105.1.

**Discovery**

In Craddock v. Queen City Coach Co. plaintiff was a passenger in defendant's bus which had been involved in a collision. Plaintiff desired to find out the contents of a report of the accident made by defendant's driver and also the names and addresses of other passengers on the bus known to defendant. On petition of plaintiff,

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*Id. at 255, 143 S.E.2d at 602.*
*Id. at 256, 143 S.E.2d at 603.*
*Id. at 257, 143 S.E.2d at 603.*
*Id. at 247, 143 S.E.2d at 597.*
*264 N.C. 380, 141 S.E.2d 798 (1965).*
the assistant clerk of court issued an order authorizing the examination of Hal J. Love, vice-president and assistant general manager of the defendant. The assistant clerk also issued a subpoena duces tecum directing the said Love to bring with him a copy of the accident report made by the driver.

At the time of the adverse examination, Love refused to permit examination of the accident report and would not testify as to its contents. On return of an order to show cause why Love should not be held in contempt, Judge Patton entered an order directing Love to appear before a commissioner for adverse examination and at that time to have with him the original or copy of the accident report and the names and addresses of all passengers on the bus. From this order defendant petitioned for certiorari, which was allowed.

Chief Justice Denny, speaking for a unanimous Court, stated that it appeared the only accident report made by the driver was taken by counsel for the defendant for use in making up the report required by the Interstate Commerce Commission on a specific form furnished by the I.C.C. The Court referred to the federal statute, 49 U.S.C. § 320(f), which states that no report made pursuant to the requirements of the I.C.C. shall be admitted as evidence, or used for any other purpose, in any suit or action for damages growing out of the matter mentioned in the report.

On the basis of this statute the Court held the defendant was not required to produce the report or state its contents. But as to the names and addresses of bus passengers known to defendant, they were to be supplied to the plaintiff and were in no way privileged by reason of the attorney-client relationship.10

**Discovery—Exclusion of Adverse Party Examination in Related Case**

In *Glenn v. Smith*11 the plaintiff, Herbert V. Glenn, Sr., as administrator of the estate of Herbert V. Glenn, Jr., brought an action for wrongful death against Brantley Smith and Herbert Smith. The action arose out of a two-car collision. The deceased, 10 Although not cited by the Court, this aspect of the case was the subject matter of the famous decision in Hickman v. Taylor, 329 U.S. 495 (1947). See in this connection Baer, *Discovery and Pre-Trial Examination in the Federal Courts*, 6 S.C.L.Q. 294 (1954); 37 A.L.R.2d 1152 (1954); 25 N.C.L. Rev. 313 (1947).

11 264 N.C. 706, 142 S.E.2d 596 (1965).
Herbert V. Glenn, Jr., was the driver of one of the cars in which his wife Jo Ann Lasater Glenn was a passenger. Jo Ann was also killed in the accident. The defendant Brantley Smith was the driver of the other car in which were riding Frances Carpenter, Carolyn Carpenter, and John Slaughter.

Prior to the trial of the instant action, Mrs. J. R. Lasater, as administratrix of Jo Ann Lasater Glenn, deceased, had brought an action against Brantley Smith, Frances Carpenter, Carolyn Carpenter, and John Slaughter. In that proceeding, plaintiff, Mrs. J. R. Lasater, administratrix, had obtained an adverse examination of the defendant John Slaughter in accordance with G.S. § 1-568.4 for the purpose of enabling her to prepare and file her complaint. No notice of that examination was given to Herbert V. Glenn, Sr., administrator in the instant action, because he was not a party to the action filed by Mrs. J. R. Lasater as administratrix.

At the trial of the instant action, defendant offered in evidence the aforesaid adverse examination of John Slaughter. Plaintiff, Herbert V. Smith, Sr., administrator, objected and gave as a ground for his objection that the deposition of Slaughter was not admissible because he resided in Henderson, North Carolina, which was within forty miles of Durham, the place of trial. He relied on the deposition statute, G.S. § 8-83(9). The trial court overruled the objection and admitted the adverse examination.

On appeal the Court reversed. It cited G.S. § 1-568.24, which provides that the deposition taken under the statute of an adverse party shall not be used as evidence against any party not notified of the taking thereof. Since no notice had been given to the plaintiff, Herbert V. Glenn, Sr., the deposition was barred by the statute and had to be excluded. The fact that counsel did not urge G.S. § 1-568.24 as a basis for exclusion but relied on the deposition statute was immaterial. Chief Justice Denny, for the Court said, "Ordinarily, an objection made upon certain grounds stated, only those stated can be made the subject of review upon appeal, except where the evidence is excluded by statute."12

MOTION TO NONSUIT

The generally accepted rule is that on motion to nonsuit the plaintiff's evidence must be taken as true. In Keith v. United Cities

12 Id. at 710, 142 S.E.2d at 600. (Emphasis added.)
Gas Co.\textsuperscript{13} the Court held that this rule does not apply to an opinion by a witness who was not present at the event that a condition existed which is contrary to scientific truth so well established that the Court will take judicial notice of it.

The scientific truth referred to is stated by the Court as follows: 
"[I]t is established scientific truth that natural gas present in quantity will explode immediately in the presence of fire."\textsuperscript{14} The Court rejected evidence of plaintiff's expert that in his opinion the explosion in question was caused by an electric spark getting in contact with natural gas when a finding, supported by the greater weight of the evidence, established that a fire had been burning on the interior of the premises in question ten minutes before the explosion was heard. In view of the character of the fire involved, the Court found the expert's opinion testimony was contrary to scientific fact and was not to be accepted as true on motion for nonsuit.

**Nonsuit by Court for Lack of Prosecution**

In *Stanley v. Basinger & Co.*\textsuperscript{15} the action was originally tried in May 1961 and the trial judge set aside a verdict for the plaintiff as against the weight of the evidence. Thereafter, neither plaintiff nor defendant moved to calendar the case for trial. In March 1965 the case, with others, was put on a so-called "clean-up" calendar. When defendant received notice of this calendar, his counsel wrote the court to dismiss the case on the call of the said calendar.

When the case was called on March 18, 1965, neither the defendant nor his counsel was present, but plaintiff and his counsel were in attendance and announced they were ready for trial. Thereupon the court asked counsel for plaintiff why the case had been allowed to remain dormant, and counsel replied that there was not much involved and no one pushed it. Thereupon the judge nonsuited the case on the ground that the plaintiff had been guilty of laches for failure to prosecute.

On appeal from this nonsuit ruling the Supreme Court reversed. It declared that if the plaintiff had not appeared on the call of the "clean-up" calendar, or if he appeared and announced he was not prepared to go on, the court could have dismissed the action as of

\textsuperscript{13} 266 N.C. 119, 146 S.E.2d 7 (1966).

\textsuperscript{14} Id. at 130, 146 S.E.2d at 15.

\textsuperscript{15} 265 N.C. 718, 144 S.E.2d 861 (1965).
nonsuit either under G.S. § 1-222(4) or its inherent power for failure to prosecute. But when plaintiff announced his readiness to go to trial on the call of the case, the judge was without authority to dismiss the action.

REFERENCES

In *Security Nat'l Bank v. Educators Mut. Life Ins. Co.* action was brought to recover commission alleged to be due the estate of a deceased agent of the defendant. A compulsory reference was had and jury trial waived. One of the issues involved was whether the plaintiffs' claim was covered by the three-year or the ten-year statute of limitations. If by the former, the action was barred. If by the latter, as an action on a contract under seal, it was not barred.

The referee concluded that the contract was under seal and the action was not barred. The superior court affirmed the referee's findings and entered judgment for plaintiffs. Defendant appealed alleging as ground for reversal that the contract was not under seal. The only seal appearing on the contract was that opposite the name of the deceased agent.

The Supreme Court declared that the burden was on the plaintiffs to show that the corporate defendant had adopted the seal that was opposite the name of the agent, or that the corporate seal had been impressed on the original contract, or that there were other facts that would preclude the application of the three-year limitation statute. No such facts had been found by either the referee or the superior court.

Accordingly, the case was remanded to the superior court with instructions to make the necessary findings of fact and conclusions of law. To that end the superior court judge may recommit the matter to the referee or may himself make the necessary findings.

**Evidence of Liability Insurance and Mistrial**

Is the defendant in an auto accident case entitled to a mistrial when, in these days of compulsory insurance, plaintiff on cross-examination refers to the defendant's liability insurer? In *Fincher v. Rhyne* our Court divided five-to-two on the question with the majority reversing the trial judge who had denied defendant's motion for mistrial after plaintiff had introduced evidence that defen-

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17. 266 N.C. 64, 145 S.E.2d 316 (1965).
dant carried insurance for liability. The case is particularly interesting in view of another five-to-two decision of our Court in *Hoover v. Gregory* in which the majority refused to reverse a verdict for the defendant when the trial judge charged the jury that every motorist must have liability insurance or put up a bond under our statutes and that premiums charged for such insurance are determined by the amount of losses the insurers have to pay.

In the *Fincher* case, after plaintiff had mentioned defendant's liability insurer, defendant moved for a mistrial. Before ruling on the motion, the trial judge charged the jury at great length that insurance had no bearing on the case and should not affect their verdict. He then told the jurors that all who felt they could give an impartial verdict, despite the evidence regarding insurance, should raise their right hand. All jurors raised their right hands and the judge then denied the motion. In his charge the court again instructed the jury as to the element of insurance and commented on the fact that everyone knows the law requires motorists to carry liability insurance but that such insurance had nothing to do with the jurors' verdict.

In reversing the trial judge, Justice Moore, speaking for the majority, noted that in some jurisdictions, since the enactment of compulsory insurance laws, it is not deemed error to mention the existence of insurance. He also recognized what the Court had held in *Hoover v. Gregory* and noted that in some decisions our Court had held an instruction to the jury to disregard the reference to insurance to be adequate. Nevertheless, he concludes that it is best to adhere to the rule that introduction of evidence relating to defendant's insurer requires a mistrial. Such rule he finds "is simple to understand and administer."

As the Court recognizes, the critical problem is whether, in the light of our compulsory insurance statutes, testimony relating to defendant's liability insurer requires a mistrial. To the majority, such evidence is prejudicial notwithstanding common knowledge of compulsory insurance, and its introduction entitles defendant to a mistrial. The "dismiss it from your mind and erase it from your memory" instruction is deemed to be inadequate, even though prior

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19 Ibid.
20 Ibid.
21 Citing, for example, Lane v. Paschall, 199 N.C. 364, 154 S.E. 626 (1930).
22 266 N.C. at 71, 145 S.E.2d at 321.
to compulsory insurance such instruction was held to dispel the adverse affect of the insurance evidence.  

In his dissent, Justice Higgins, who is joined by Justice Sharp, said,

We may rest assured Judge Huskins would not have signed the judgment if he felt the jury had disregarded his instructions and violated its pledge. In order to justify a new trial it is necessary to assume the jurors failed to follow the instructions, failed to keep their individual pledges, and gained their first information the defendant had insurance from the plaintiff's inadvertent reference. May we not assume the jurors already had knowledge that the State law required a showing of financial responsibility?

To the writer it appears that the majority has been too rigid. It would be much better practice to leave the ruling in a case of this sort to the discretion of the trial judge. If on appeal the Court should conclude that under the specific facts the trial judge abused his discretion in failing to declare a mistrial or in refusing to set aside an obviously exorbitant verdict for the plaintiff, the Supreme Court could then reverse.

ADMISSION OF NEW EVIDENCE AFTER SUMMATION

State v. Jackson reasserts the right of the trial judge, in his discretion, to reopen the case for the admission of further evidence after the attorneys have made their summations to the jury. On such reopening, the scope of subsequent arguments to the jury by counsel is also in the court's discretion. This same problem was considered in State v. Harding where the court noted that if the trial judge permits one counsel to introduce further evidence after argument to the jury has begun, "the opposing party should be given opportunity to introduce evidence in rebuttal."

ARGUMENT OF COUNSEL—PROPRIETY OF PER DIEM, OR OTHER UNIT-OF-TIME ARGUMENT RELATIVE TO DAMAGES FOR PAIN AND SUFFERING

In recent years certain counsel for plaintiffs have been successful in obtaining large damage awards in personal injury cases by

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22 Lane v. Paschall, 199 N.C. 364, 367, 154 S.E. 626, 627 (1930).
23 266 N.C. at 72, 145 S.E.2d at 321.
24 265 N.C. 558, 144 S.E.2d 584 (1965).
25 263 N.C. 799, 140 S.E.2d 244 (1965).
26 Id. at 799, 140 S.E.2d at 243.
using the suggestion, in final argument, that a modest allowance be made for every minute, hour, or day plaintiff has and will suffer pain. Then having perhaps suggested the sum of five dollars per day, counsel multiplies on the blackboard the number of days plaintiff has already suffered by the five dollars and then does the same with the number of days in the life expectancy of the plaintiff during which testimony has established he will suffer pain. The resultant figure is the answer to a plaintiff attorney's prayer and has its desired effect on the jury.

Until 1965, the propriety of such argument had not been passed upon by the North Carolina Supreme Court, although it has been the subject of court decisions in other states. A clear-cut conflict is present in the out-of-state decisions. Some jurisdictions permit the argument, others do not. The leading authority disapproving such argument is *Botta v. Brunner*, a decision of the New Jersey Supreme Court. Typical of decisions permitting the argument is *Newbury v. Vogel*, a decision of the Colorado Supreme Court. The Court of Appeals for the Fifth Circuit has just recently divided two-to-one on the propriety of the unit-of-time argument, the majority holding it improper and calling for reversal. Much has been written for and against what has become known as the per diem argument.

In *Jenkins v. Hines* the North Carolina Supreme Court had occasion to consider the matter. The argument had been permitted at the trial, plaintiff's counsel suggesting that an allowance of one cent per minute for the duration of plaintiff's expectancy would total 86,100 dollars. On appeal, the Supreme Court referred to the conflict of authorities and in particular to the *Botta* case. Although it reversed the trial court for allowing the argument, it did so without finding it necessary to accept *Botta* without qualification. Rather, it found that the evidence did not establish that plaintiff would


27 Johnson v. Colglazier, 348 F.2d 420 (5th Cir. 1965).

28 38 N.C.L. Rev. 289 (1960). See list of notes and monographs cited in *Newbury v. Vogel* and set out in the quotation from that opinion in note 33 infra. For a still more exhaustive list of case law and law review articles and comments see the dissenting opinion of Judge Brown in Johnson v. Colglazier, 348 F.2d 420, 428-29 (5th Cir. 1965).

suffer pain as had been assumed in plaintiff's argument. Thus the Court said,

Disposition of this appeal in defendant's favor does not require that we accept without qualification the decision and reasoning in Botta. Plaintiff testified: "Answering the question whether at the present time my hand or finger pains me, it feels like it is drawn up, or being drawn; it feels almost like it looks, tight. It doesn't interfere with my rest at night now. It doesn't give me any pain other than the feeling of being drawn. That is a discomfort." In the light of plaintiff's testimony, it is our opinion, and we so decide, that the argument of plaintiff's counsel to which defendant objected was without factual or legal justification and was prejudicial to defendant. Hence, for error in overruling its objection to said argument, defendant is entitled to a new trial.32

Just what we are to draw from this decision is not clear. Would our Supreme Court adopt Botta and rule out the per diem argument if proof established pain for a specific period, past or present? Or would the Court in such a situation adopt the rule of those jurisdictions that permit the per diem argument? Time will tell. Meanwhile decisions in other jurisdiction may establish a clear-cut majority either in support of or against the per diem argument.33

**CHARGE**

During the course of his charge a judge may instruct a jury that if they find certain facts by the greater weight of the evidence (spelling out the precise facts), they shall answer the issue of

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32 Id. at 91, 141 S.E.2d at 7.
33 In Newbury v. Vogel, 379 P.2d 811, 813-14 (Colo. 1963), the court commented on what it found to be the then (1963) state of authorities as follows,

The question is not a novel one, however, and in recent years has been the subject of decision in at least 27 jurisdictions. See 60 A.L.R. 2d 1347 (Supp. 1960, 1962, 1963), and of discussion in numerous law review articles, for example, 23 Ohio St. L.J. 573; 62 W. Va. L. Rev. 402; 43 Minn. L. Rev. 832; 28 U. Cinc. L. Rev. 138; 36 Dicta 373; 12 Rutgers L. Rev. 522; 1962 Duke L.J. 344; and has been the subject of monographs prepared by both sides of the Negligence Bar. See Damages: Pain and Suffering in Dollars on a Unit of Time Basis, The Defense Research Institute, Inc., Nov. 1962; and 23 NACCA L.J. 255 and 24 NACCA L.J. 252.

The authorities appear to be rather evenly divided among (1) those who hold the argument is proper; (2) those who refuse to allow it; and (3) those who declare it to be a matter in the discretion of the trial court.
plaintiff's contributory negligence "yes." Assuming the evidence supports such charge, he will not be reversed. But if the trial judge continues in his charge and says, "If you fail so to find, you should answer the issue of plaintiff’s contributory negligence 'no,'" he will be reversed if the jury, on the evidence, could find the plaintiff was guilty of contributory negligence even though they did not find the precise facts set out by the judge in his charge.

This was well illustrated in Barber v. Heeden\(^{34}\) where the trial judge in his instruction referred to precise facts as to speed when excessive speed was only one of the factors of negligence with which the party was charged. Further, the trial judge, in referring to speed as a factor of contributory negligence, had told the jury that if they found the speed to be from seventy to eighty miles per hour, they could find contributory negligence, but if the speed were not that, they could not. Since even as to the factor of speed it was not essential to a finding of contributory negligence that the speed be from seventy to eighty miles per hour, the trial judge clearly erred.

**Expression of Opinion by Trial Judge**

Many a judge has been reversed in this state because the Supreme Court found he had expressed an opinion in violation of G.S. § 1-180. Galloway v. Lawrence\(^{35}\) presents an interesting situation in which the trial judge is reversed because the Court found he had twice expressed an opinion in violation of the statute.

The action was against a physician and surgeon for malpractice in the treatment of a child's legs which had suffered injury in an automobile accident. It appeared that, while the child was under the doctor's care and confined to a hospital, a nurse telephoned the defendant at night telling him that the child's leg was discolored and swollen. The defendant by phone told the nurse to pursue certain treatment. The defendant testified that after receiving the phone call he went to the hospital, entered by an emergency entrance, went to the child's room, observed what had been done pursuant to his instructions, and determined there was nothing further to do at that time. He left the hospital with no one seeing him and did not see the hall nurse or night supervisor.

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\(^{34}\) 265 N.C. 682, 144 S.E.2d 886 (1965).

\(^{35}\) 266 N.C. 245, 145 S.E.2d 861 (1966).
In response to a hypothetical question, which incorporated the fact that the defendant had gone to see the child after getting the call from the nurse, a doctor called as an expert by the defendant testified that the child had received the standard treatment. On cross-examination he testified, "My opinion certainly would not have been the same if that visit [defendant's visit after being called by the nurse] had not been made." 

Defendant then called another doctor to testify as an expert in his behalf. The same hypothetical question was put to him. On cross-examination plaintiff's counsel asked, "And, if no visit at all had been made to the hospital by the doctor in response to this call, that would very definitely have affected your opinion, wouldn't it?"

Objection was interposed and the court, in the presence of the jury, entered into a discussion with counsel and in the course of it said, "Well, of course, now, the evidence with reference to the doctor going to the hospital is that he went. * * * There is no evidence that he did not go there, and the burden of proof is on you."

On the question of whether the doctor went to the hospital in response to the nurse's call, the Supreme Court points out that, other than defendant's testimony that he went, the only evidence on the point is that neither the nurse nor night supervisor saw the defendant at the hospital and he did not communicate to them that he was there. Whether the doctor did go was a question of fact for the jury, and the Court held that the above quoted statement of the trial judge was an expression of opinion prohibited by G.S. § 1-180.

The second occasion in which the Court found the trial judge expressed an opinion arose in the following manner. Defense counsel called the defendant as a medical expert witness. Defense counsel then stated he did not wish to ask the defendant questions as to his qualifications to express an opinion as a medical expert. The trial judge then said, "Let the record show that the Court finds as a fact that Dr. Lawrence [the defendant] is a medical expert, to wit: an expert physician in surgery." This statement was made in the presence and hearing of the jury.

The Supreme Court held that the court's ruling that defendant was an expert should have been placed in the record in the absence

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8 Id. at 249, 145 S.E.2d at 865.
87 Ibid.
88 266 N.C. at 250, 145 S.E.2d at 866.
of the jury because it was an expression of opinion by the court as to the professional qualifications of the defendant. While the Court states there was no error in letting the defendant testify as an expert, the statement of the trial judge declaring he finds as a fact that defendant is a medical expert "might well have affected the jury in reaching its decision that the child was not injured by the negligence of the defendant."^{39}

Obviously, a cause of action against defendant would have been established if the defendant, although a medical expert, had not used that degree of care which his calling and relationship required to be used under the circumstances. Nevertheless, the instant case shows the care that must be taken by the trial judge if he is not to be charged with having expressed an opinion. Plaintiff's counsel in effect admitted the defendant's qualifications to testify as an expert witness. The court found he was a medical expert, "an expert physician in surgery."^{40} Perhaps if the trial judge had asked, "Does plaintiff admit defendant's qualifications to testify as an expert witness?", and counsel had replied, "Yes," there would not have been a reversal, for then the trial court would not have made the finding; it would have been conceded by counsel.

In *State v. Hopson*^{41} defendant was convicted of larceny. Reversal was sought on the ground that the trial judge by comment had violated G.S. § 1-180 and disparaged the credibility of defendant.

It appeared that on cross-examination defendant admitted he had been in prison in Florida but that he had not been guilty of anything, did not plead guilty and was not convicted. Thereupon the cross-examiner proceeded by asking defendant, "How long did you stay in prison for not doing anything?" Objection to this question was overruled. Witness answered he did not know how to explain it, but he had a retrial and was turned loose. The cross-examiner proceeded, "I'll ask you if you didn't have guns and rings and watches that you'd stolen up here in Buncombe County when you were arrested down there in Florida?" Defense counsel then intervened and said, "I think it's unreasonable, the man wasn't found guilty and I think it's unreasonable." The court then said, "Well, Mr. Reagan [defense counsel], I think it's just as unreasonable for

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^{39} Ibid.
^{40} Ibid.
^{41} 265 N.C. 341, 144 S.E.2d 32 (1965).
a man to be sent to jail or prison in Florida for nothing. And I am going to permit the witness to answer questions that are asked of him."\(^4\)

Despite the court's ruling counsel did not repeat the question relating to guns, etc., and proceeded to other matters. In reversing the trial judge because of his comment, the Court said, "While not so intended, we think it probable the jury understood the court's comment as an expression of opinion that defendant's testimony concerning his Florida imprisonment was incredible and therefore defendant should not be considered a credible witness. So considered, the court's inadvertent comment was a violation of G.S. § 1-180 and numerous decisions of this Court."\(^5\)

G.S. § 18-11 provides that the possession of liquor by any person not legally permitted under the statute to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, etc., in violation of the statute. In *State v. Tessnear\(^6\)* defendant was charged with the possession of nontaxpaid liquor for the purpose of sale in violation of the statute. In his charge the judge told the jury that possession of any quantity of nontaxpaid liquor is unlawful and "raises a deep presumption that it was had for the purpose of sale."\(^7\)

Conviction of defendant was reversed because of this language in the court's charge. Referring to the statute the Supreme Court said:

> From the mere possession of nontaxpaid whiskey G.S. 18-11 authorizes, but does not compel, the jury to infer that the possessor intended to sell the whiskey. The statute raises a permissible inference. . . . In characterizing it "a deep presumption" the trial judge expressed an opinion as to the strength of the evidence. Such an expression is prohibited by G.S. 1-180.\(^8\)

**JURORS—MISCONDUCT**

In *O' Berry v. Perry\(^9\)* the jury returned a verdict for the plaintiff in an automobile accident case. Upon the coming in of the verdict, defendant moved to set it aside because, during the noon recess that day, a juror had walked with the plaintiff and one of

\(^{42}\) *Id.* at 342, 144 S.E.2d at 33.

\(^{43}\) *Ibid.*

\(^{44}\) 265 N.C. 319, 144 S.E.2d 43 (1965).

\(^{45}\) *Id.* at 320, 144 S.E.2d at 45.

\(^{46}\) *Id.* at 321, 144 S.E.2d at 45.

\(^{47}\) 266 N.C. 77, 145 S.E.2d 321 (1965).
his witnesses from the courtroom to a luncheon establishment. On this motion having been made, the trial judge conducted an immediate inquiry, and from this it appeared that the plaintiff, his witness and the juror had not discussed the case but talked about fishing and corned herring. Several other jurors and the sheriff had eaten at the same luncheon place. The sheriff testified the juror in question was a truthful person and had a good reputation. The juror himself said that if he had not seen the plaintiff at the lunch hour, his verdict would have been the same. On this evidence the trial judge found the encounter had been a casual one and that it had not affected the verdict. Motion of defendant was accordingly denied.

In affirming the action of the trial judge, Justice Sharp, for the Court, declared that the granting or denial of defendant's motion for a mistrial was in the discretion of the trial judge and under the facts of this case there was no evidence indicating any abuse of discretion.

WORKMEN'S COMPENSATION

Philip C. Thorpe*

INDUSTRIAL COMMISSION'S FINDINGS OF JURISDICTIONAL FACTS

The Court decided two cases that make clear the proper procedures respecting findings of jurisdictional facts by superior court judges. In Askew v. Leonard Tire Co. the superior court judge overruled the exceptions filed to the Industrial Commission's findings of jurisdictional facts, but without making independent findings of such facts. On appeal the defendant argued that prior decisions in Beach v. McLean and Aylor v. Barnes necessitated

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2 See note 1 supra. Burns was based upon the decision in Askew. See Hanft, Administrative Law, North Carolina Case Law, 44 N.C.L. Rev. 889 (1966), for further discussion of this case.

3 The jurisdictional question was whether an employment relationship existed.

4 219 N.C. 521, 14 S.E.2d 515 (1941).

The Court refused to so hold and established guidelines for findings of jurisdictional facts. At present, the following rules apply. The Court still holds that the Industrial Commission's findings of jurisdictional facts are not conclusive even though they are supported by competent evidence; thus the superior court judge may examine the record independently. The judge may refer to and affirm the Commission's findings without making separate findings, at least as long as it is clear that he examined the record independently and decided that the jurisdictional facts were as found by the Commission. The Court intimated in Askew that if counsel had requested independent findings, the superior court would have been under an obligation to file them.

STATUTORY EMPLOYER IN "LOANED SERVANT" CASES

In Leggette v. J. D. McCotter, Inc. the Court held that an employee was employed by each of two employers. It affirmed a finding of the Industrial Commission, which had been reversed by the superior court, requiring the employers to split the payment of compensation benefits between them. Leggette represents a departure from prior decisions in "loaned servant" cases. It rests upon the proposition that, in close cases, fairness requires both the general and the special employer to be liable for compensation. It is clear from the opinion that the Court does not mean to overrule earlier cases in which the employee was clearly performing work solely for the special employer. Only where the employee's duties benefit both employers, or arguably do so, will the Leggette rule apply.

"INJURY BY ACCIDENT"

In Lawrence v. Hatch Mill, the Court reaffirmed its recent (since 1957) definition of the statutory term "injury by accident."

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6 In Pearson v. Peerless Flooring Co., 247 N.C. 434, 101 S.E.2d 301 (1958), the superior court specifically adopted the Industrial Commission's findings as its own. This practice was approved, but was not followed in Askew.

7 Thus the Court has not moved away from the largely discredited jurisdictional facts theory. See 2 Larson, Workmen's Compensation Law § 80.41, at 324 (1952) [hereinafter cited as Larson]. For criticism of the rule on the ground that almost all findings of fact are "jurisdictional" in the sense that an absence of such facts places the matter outside the range of those cases to which the compensation act applies.

8 265 N.C. 617, 144 S.E.2d 849 (1965).

9 This is not an overruling of Citizens & Southern National Bank v. Runyan, 259 N.C. 646, 130 S.E.2d 78 (1965).

10 265 N.C. 329, 144 S.E.2d 3 (1965).

In Lawrence plaintiff was removing a heavy object from a tool box when he felt pain in his back. There was no evidence of unusual twisting, lifting, or any other unusual or fortuitous occurrence. Relying on several recent cases, the Court applied a rule requiring proof of an external fortuitous incident before an injury may be characterized as accidental.

The "injury by accident" question has proved troublesome, particularly in cases involving hernias, heart attacks, and back injuries. North Carolina decisions reflect the problems in deciding what is a compensable accidental injury. Prior to 1940, the statute was construed to require an external, fortuitous occurrence. In 1940, the Court apparently reversed itself in Smith v. Cabarrus Creamery Co., holding that an injury was accidental (1) if caused by an external, fortuitous event, or (2) if the result itself was unexpected. This rule was altered in 1957, and since then the Court has required a fortuitous external occurrence in order for the injury to be compensable. Although Hensley v. Farmers Fed'n Co-op. distinguished rather than overruled Smith, a review of the cases decided after Smith and prior to Hensley shows that the Court did not require that the injury be induced by an unusual external event. In several cases, the testimony indicated that the claimant was doing his usual work in his usual way.

Hensley represented a return to a rule now in the minority in

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24 The test requires more than that the usual work was being done in the usual way. Lawrence v. Hatch Mill, 265 N.C. 329, 330, 144 S.E.2d 3, 4 (1965).


26 217 N.C. 468, 8 S.E.2d 231 (1940).


the United States. However, since the statute does not require an external occurrence, the Court has alternative interpretations available. The problem is one of distinguishing between sudden failures of the body (accidental injuries) and those requiring time to develop (disease). By requiring proof of an external occurrence, the Court has needlessly limited compensation coverage, overlooking its own authorities to the contrary in the process.

MISCELLANEOUS

In Gibbs v. Carolina Power & Light Co., plaintiff-employee brought a third-party action against the defendant, pursuant to G.S. § 97-10.2. Defendant asserted a claim for indemnity or contribution against plaintiff’s employer. The Court held that such a claim could not be joined in the employee’s action. In Jones v. Myrtle Desk Co. the employee was injured while doing personal work on company time. Although company rules permitted employees to do personal work, the employee had not obtained permission from his foreman as required. The Court affirmed the Industrial Commission’s findings that plaintiff was not injured in the course of his employment. This holding is clearly a proper result. It would seem that the only situation in which compensation would be payable when the employee’s injury occurred while doing personal work is where the personal work benefits the employer. At times a benefit can be found in the educational value of personal work when the employer benefits from the employee’s attempts at self-improvement. No such showing was made in Jones.

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22 See 1 Larson § 38.00.  
23 265 N.C. 459, 144 S.E.2d 393 (1965).  
26 See 1 Larson § 27.31(b).