Eminent Domain -- Limited Access Highways

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lina Act passed by the 1955 General Assembly.[27] These amendments, among other things, take away the obligee's privilege of a questionable election of laws[28] and provide that the person having legal custody of a minor may bring suit.[29] In the instant case the court said that the complete answer to the essentially identically worded Arkansas statute was that ". . . this provision is not in the North Carolina Act."[30] The 1955 amendment places the provision in the North Carolina Act and apparently authorizes suit in the name of the legal custodian or guardian.

With the real party in interest question fairly well settled by statute and with the finding of a duty to support clearly the concern of the court in the responding state, the importance of the instant decision lies in the interpretation of the Act as requiring an obligee to be residing in the initiating state during the proceedings in the responding state. To avoid undue complication in the administration of the support funds, to remove a burden on a state no longer interested in the matter, and to aid in the uniformity of application of the Uniform Reciprocal Enforcement of Support Act, it is hoped that other jurisdictions will adopt this interpretation.

JAMES P. CREWS

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". . . I can go no further, Sir; my
old bones ache. Here's a maze trod
indeed through forth-rights and meanders!"
The Tempest, Act III, Sc. III.

Which lament might well be echoed by the puzzled motorist confronted by the clover-leafs, under and overpasses, traffic circles and other highway engineering stunts that seem to have mushroomed since the last war. These and other measures have been required by the great increase of traffic on our highways, which has made necessary a basic reconsideration of our highway systems.

The desire for increased safety plus a need for more efficient com-

[27] N. C. Sess. Laws 1955, c. 699. See Note, 33 N. C. L. REV. 513, 550 (1955). The changes made by this act place North Carolina in the group of states which have adopted the 1952 Uniform Reciprocal Enforcement of Support Act. Since a majority of the states and territories have adopted the 1952 Act, reciprocity will be augmented for North Carolina.

[28] N. C. Sess. Laws 1955, c. 699, § 4. "Duties of support applicable under this Act are those imposed or imposable under the laws of any state where the obligor was present during the period or any part of the period for which support is sought. The obligor is presumed to have been present in the responding state during the period for which support is sought until otherwise shown."

[29] N. C. Sess. Laws 1955, c. 699, § 6(d). "A complaint on behalf of a minor obligee may be brought by a person having legal custody of the minor without appointment as next friend."

[30] Mahan v. Read, 240 N. C. 641, 648, 83 S. E. 2d 706, 712 (1954).

munication between urban areas has given rise to the construction of what are called variously "Limited Access Highways," or "Freeways." Basically these are highways to which abutting property owners do not have their usual "right of egress and ingress,"[1] but rather are permitted to have access to the highway at designated intersections only, or to retain their present access, but only at the pleasure of the highway department. Obviously, such highways are designed primarily for through traffic. It will be the purpose of this note to discuss some of the various problems that have already arisen and promise to reappear to plague our courts.

When the state condemns land for highways under its power of eminent domain, the state obtains only an easement of passage,[2] the owner of the land taken for the public use reserving the fee.[3] Upon vacation of the highway by the state, the land normally reverts to the owner, discharged of the easement.[4]

Landowners whose tracts abut on the highway have a universally recognized common law easement of access to the abutting highway[5]

[1] *E.g.*, Calumet Federal Savings & Loan Ass'n of Chicago et al. v. City of Chicago et al., 306 Ill. App. 524, 29 N. E. 2d 292 (1940); County Park Commission of Camden Co. v. Kimble, 24 N. J. Super. 221, 93 A. 2d 647 (1952); Davis v. Alexander, 202 N. C. 130, 162 S. E. 372 (1932); *In re* Appropriation of Easement for Highway Purposes, — Ohio —, 112 N. E. 2d 411, 415 (1952); City of Norman v. Safeway Stores, 193 Okla. 534, 145 P. 2d 765 (1944); Highway Commission v. Burk et al., 200 Ore. 211, 265 P. 2d 783 (1954); 2 AM. LAW OF PROPERTY 494 (1952); see Notes, 100 A. L. R. 491; 47 A. L. R. 902; 22 A. L. R. 942; 36 IOWA L. REV. 150 (1950).

[2] Absent an express statutory sanction the state may acquire land for highways by two methods: (1) by voluntary act of owner, and (2) by condemnation. By the former method the state *may* obtain the fee. By the latter, only an easement. Barclay v. Howell, 6 Pet. 498 (U. S. 1832); Lindel Realty Co. v. Miller, 2 N. J. Super. 204, 62 A. 2d 817 (1948).

[3] Purvis v. Busey, 260 Ala. 373, 71 So. 2d 18 (1954); People v. Thompson, 43 Cal. 2d 13, 271 P. 2d 507 (1954); Hildebrand v. Telegraph Co., 219 N. C. 402, 14 S. E. 2d 252 (1941) (Telephone Co. not allowed to use highway easement without compensating owner of fee.); Davis v. Alexander, 202 N. C. 130, 162 S. E. 372 (1932); Brown v. Electric Co., 138 N. C. 533, 51 S. E. 62 (1905); State v. Jesse Hewell, 90 N. C. 705, 706 (1884) (Jesse was released from an indictment for carrying a concealed weapon in public when it was shown he was carrying it on a public highway passing over his father's land. Ashe, J., found him to be on his own property since the fact that a public road is over the land does not deprive a man of his freehold in the soil: "his title continues in the soil, and the public acquires only an easement, that is, a right of passing and repassing."); Raleigh and Gaston Ry. v. Richard Davis, 19 N. C. 451 (1837); Breinig et ux. v. County of Allegheny et al., 332 Pa. 474, 2 A. 2d 842 (1938) (Owner of fee may control use of highway inconsistent with the easement of passage, i.e. continuous parking.); Bond v. Green et al., 189 Va. 23, 52 S. E. 2d 169 (1949); Dovaston v. Payne, 2 H. Bl. 526, 126 E. R. 684 (1795); 2 AM. LAW OF PROPERTY 482 (1952).

[4] Bond v. Green et al, *supra* note 3.

[5] Cases cited note 1 *supra*. *But cf.* Calumet Federal Savings & Loan Ass'n of Chicago et al. v. City of Chicago et al., 306 Ill. App. 524, 29 N. E. 2d 292 (1940). (Where abutting landowner attempted to *enjoin* construction of a curb by the city which would necessitate the abutter's customers traveling a circuitous route to obtain access. The abutter was thrown on his remedy at law, the court holding the abutter's rights are subservient to reasonable use of police power in the interest of public safety.)

at any and all points. And when the state deprives the owner of abutting land of his access to the highway, extinguishing the easement,[6] he is entitled to compensation[7] even if the state has acquired the land in fee.[8] This is explained on the basis that the right of access to a public highway is an *incident of ownership* of abutting property,[9] and the taking thereof is, consequently, a "taking of property."[10] Thus, where a municipality vacated a street and conveyed it in fee to a private individual, and "the street . . . [was] necessary to free and convenient access to the premises of a particular owner, his right to such use is appurtenant to his premises and cannot be taken without payment of damages."[11] The courts, while they require damages when the abutting owner's right of access is harmed by a re-routing or vacation of the highway,[12] recognize no vested right in any particular flow of traffic over the highway, leaving regulation of traffic to the proper authorities in the exercise of their police power.[13] Even when the

[6] *E.g., In re* Appropriation of Easement for Highway Purposes, — Ohio —, 112 N. E. 2d 411, 415 (1952) and cases cited therein.

[7] Schiefelbein v. U. S., 124 F. 2d 945 (1942); Ridgway v. City of Osceola, 139 Iowa 590, 117 N. W. 974 (1908); Petition of Burnquist, 220 Minn. 48, 19 N. W. 2d 394 (1945); Davis v. Alexander, 202 N. C. 130, 162 S. E. 372 (1932); Thomas v. Farrier, 179 Okla. 263, 65 P. 2d 526 (1937); Note 36 IOWA L. REV. 150 (1950).

[8] County Park Comm. of Camden Co. v. Kimble, 24 N. J. Super. 221, 93 A. 2d 647 (1952); Highway Commission v. Burk, 200 Ore. 211, 265 P. 2d 783 (1954).

[9] Lindel Realty Co. v. Miller, 2 N. J. Super. 204, 62 A. 2d 817 (1948) (And exist whether the fee is in the public or in private owner subject to public easement); 39 C. J. S., *Highways* § 141.

[10] Schiefelbein v. U. S., 124 F. 2d 945 (1942) (*P* owned triangle of 700 acres, bounded on two sides by a river. The government straightened the river, thus completely isolating *P's* tract, although not trespassing on the tract itself. *P's* theory of recovery is in the destruction of the highway *leading to* his land. Held: The owner of land has a private property right in a public highway if the only access to his land is over that highway. A vacation of the highway is a taking of his property for which he is entitled to compensation. N. B.; The property taken here is not the land, but the private property of condemnee *in the highway.*); Petition of Burnquist, 220 Minn. 48, 19 N. W. 2d 394 (1945).

[11] Ridgway v. City of Osceola, 139 Iowa 590, 593, 117 N. W. 974, 975 (1908) ("Where [a] street or alley is necessary to free and convenient access to the premises of a particular owner, his right to such use is appurtenant to his premises and cannot be taken away without payment of damages.").

[12] People v. Ricciardi, 23 Cal. 2d 390, 144 P. 2d 799 (1943) (Poor Mr. Ricciardi was happy enough until the state chose his locale to create a veritable nightmare of cloverleafs, under and overpasses, and express, local, and service lanes. Even his abutter's right to visibility was affected, one state's witness admitting, "it is my opinion that the view will be sufficiently interfered with so that anyone desiring to reach Mr. Ricciardi's property will be inclined to lose his way on account of the circuitous route and fail to reach the property for that reason." *Held:* Here there is more than a mere diversion of traffic. There is a diversion of the highway itself, taking, in effect, his property rights in the highway.)

[13] People v. Sayig, 101 Cal. App. 2d 890, 226 P. 2d 702 (1951) (Construction of strip dividing highway on which *P* abuts not compensable although inconvenient.); Jones Beach Boulevard Estate v. Robert Moses, 268 N. Y. 362, 197 N. E. 313 (1935) (Reductio ad absurdum: *P* was abutter on a parkway where no one was allowed to make a left turn on entering except around "plazas" pro-

state, having abandoned or vacated a public highway *deeds* it to a private owner, there is authority holding that such owner may not obstruct the road if to do so will substantially hinder other owners' access to their property.[14] And the same proposition seems to apply when the state's highway easement is vacated and the land reverts to the abutting owners. Even when the state, under its powers of eminent domain, takes an abutter's *right of access,* the abutter has a cause of action for compensation for the loss of this vested right whether the state actually takes his *land* or not.[15]

Suppose, however, a highway is *newly* located as a *Limited Access* highway. Do abutters have any vested rights of access such as would entitle them to compensation? The few cases that have involved this question seem to answer it in the negative,[16] reasoning that there can be no detriment to a right of easement which never existed and no compensation for a loss never sustained.

A recent Ohio case[17] involves the more intricate problem of the designation of an *existing* highway[18] as a limited access highway under the fairly typical Ohio statute.[19]

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vided for that purpose. Nearest "plaza" to *P* is five miles away, therefore, in order to go to town *P* had to drive five miles on one side of road to the plaza, then turn around and come back. *Held:* Proper and uniform application of police powers. Once access is given, and abutter is on the highway, he is treated just as other traveler thereon.)

[14] Long et al v. Melton, 218 N. C. 94, 10 S. E. 2d 699 (1940); Davis v. Alexander, 202 N. C. 130, 162 S. E. 472 (1932). While the North Carolina court speaks of a maxim, "Once a highway always a highway," in all-inclusive terms, the decided cases all deal with hardship situations. In Long v. Melton, *supra,* however, three justices dissented, feeling that the majority's view should be restricted to cases where access is cut off completely. Lindauer v. Hill, — Okla. —, 262 P. 2d 697 (1953).

[15] Department of Public Works v. Lanter, 413 Ill. 581, 110 N. E. 2d 179 (1953); Nichols v. Commonwealth, 331 Mass. 581, 121 N. E. 2d 56 (1954); City of Norman v. Safeway Stores, 193 Okla. 534, 145 P. 2d 765 (1944); Shapera v. Allegheny County, 344 Pa. 473, 25 A. 2d 566 (1942).

[16] Thus where *P* was originally separated from a certain street by an intervening lot, and that lot was condemned by highway commission for use as "freeway," *P* was held to have acquired no compensable right of access by virtue of construction of the freeway. Since he had no right of access *before* the conversion of the street into a freeway, nothing was taken from him by the failure to give him access when the conversion took place. Compensation in such a case, said Gibson, C. J., would be a gift rather than damages. Schnider v. State, 38 Cal. 2d 439, 241 (1952). The *Schnider* case, *supra,* was cited by the California court when a limited access highway was constructed where no road had before existed. Brand, J., stated that the California and United States constitutions require compensation for the taking of easements only if there are easements to take. Highway Comm. v. Burk, 200 Ore. 211, 265 P. 2d 783 (1954). *See* Rothwell v. Linzell, 163 Ohio St. 517, 127 N. E. 2d 524 (1955).

[17] Rothwell v. Linzell, 163 Ohio St. 517, 127 N. E. 2d 524 (1955).

[18] The case involved a 13.58 mile section of Route 40, also known as the National Road, which was originally constructed by the War Department with funds appropriated by Congress. Construction was begun in 1825 and completed in 1837. [Record, p. 12.]

[19] OHIO GENERAL CODE § 1178-21 (Page, 1946): Which authorizes the director of highways to "lay out, establish . . . regulate . . . 'Limited Access High-

Petitioners were abutting property owners and brought action to enjoin the state highway director from designating a 13.58 mile portion of route 40 as a limited access highway. Petitioners urged that the state and federal constitutional guarantees of equal protection[20] would be violated in that the state highway director had treated abutters along this one stretch of highway in six different manners.[21] They contended also that the words of § 1178-21 Ohio Gen. Code (1946), "access to which [limited access highway] may be allowed only at highway intersections designated by the director," mean "access is allowable *only* at highway intersections designated by the director." And, finally, that the highway in question was not "especially designed for through traffic" and therefore did not come within the statutory definition of "Limited Access Highway."[22]

The court of common pleas and the court of appeals held the director had exceeded his authority in that the 13.58 mile portion was not "especially designed for through traffic" as the statute required, but rather "was designed to serve all comers"[23] when it was rebuilt in 1949. The lower courts also held that the equal protection clauses of the Ohio and federal constitutions were violated in that "persons similarly situated [were not] . . . accorded equal treatment."[24] These courts found that while the constitution permits classification,[25] such classification

ways' . . . within this state" in the same manner as he might lay out etc. ordinary highways, and authorizes him to extinguish by purchase, gift, agreement or condemnation existing easements of access thereto. The director was further "authorized" to lay out and construct "service highways" to provide access from areas adjacent to the Limited Access highways. A Limited Access Highway is defined by the Ohio statute as "a highway especially designed for through traffic and over which abutting property owners have no easement or right of access by reason of the fact that their property abuts upon such highway, and access to which may be allowed only at highway intersections designated by the director."

[20] U. S. CONST. Art. XIV, § 1; OHIO CONST. Art. I, § 2.

[21] The court of common pleas found that in two cases no restriction of access was sought by the Highway Department; in four cases access was restricted only from part of abutter's property; in five cases all access was excluded, but eight driveways were constructed onto the highway from these parcels; in five cases all access was excluded except for one driveway directly onto the highway in each deed; in four cases all right of access was excluded and no access provided; and in four cases no restriction of access was imposed. Brief for Appellant, app. II, p. 3, Rothwell v. Linzell, *supra* note 17.

[22] See note 19 *supra.*

[23] Brief for Appellant, app. II, p. 5, Rothwell v. Linzell, note 17, *supra.*

[24] Brief for Appellant, app. II, p. 6, Rothwell v. Linzell, note 17 *supra;* see note 21 *supra.*

[25] Thus, an ordinance forbidding trucks from displaying other than their own advertising because of an alleged tendency to distract other drivers, was held not violative of equal protection clause because the classification had reference to the purpose of the regulation. Railway Express Co. v. New York, 336 U. S. 106 (1949). Where the statute permitted retention of already established access, but forbade new access. Held, not an unjust discrimination; "classification by which unsuitable conditions are restrained within their existing extent is not unreasonable." Opinion of the Justices, — N. H. —, 105 A. 2d 924, 926 (1954); cited in Wiseman v. Merrill, — N. H. —, 109 A. 2d 42 (1954) (established

must have some reasonable basis.[26] Nor did they concur with the director's contention that he was given the authority to restrict access in this case under the police power.[27]

On appeal the Ohio Supreme Court, Taft, J., reversed. Taking as his text the words of the statute, he held the words in the definition of a limited access highway, "access to which may be allowed only at highway intersections designated by the director," to be permissive,[28] simply showing "the extent to which rights of access to a limited access highway might be curtailed or eliminated." Continuing, Justice Taft paused to observe "considerable weight" should be given an administrative determination by the highway director that a highway was "especially designed"[29] as a limited access highway, and clinched his rationale for holding the director to be within his statutory authority by noting, "It is obviously not necessary that a highway be designed 'exclusively' for through traffic in order to be 'especially' designed for through traffic."

Nor did the supreme court find that the director was required to construct "service highways" to provide access at the designated intersections for abutters whose access to the highway had been acquired or condemned. They left these decisions, as well as the deciding of whose access rights are to be acquired, to the discretion of the director.

The question of equal protection received short shrift: the court stated that such a question can obviously be raised only where the extinguishment of access is by condemnation. For such a loss, the owner is entitled to compensation for decrease in value of his property.[30]

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businesses allowed to retain access.); Jones Beach Blvd. Estate v. Moses, 268 N. Y. 362, 197 N. E. 313 (1935); Suddreth v. Charlotte, 223 N. C. 630, 633, 27 S. E. 2d 650, 653 (1943) (Barnhill, J.: "The discriminations which invalidate an ordinance are those where persons [in the same class] are subjected to different restrictions or are held entitled to different privileges under the same conditions.").

[26] And here there was nothing *on the record* indicating a reasonable basis for discrimination. Brief of Appellant, app. II, p. 7.

[27] Breinig v. County of Allegheny, 32 Pa. 474, 2 A. 2d 842 (1938) (Use of police power by public authority must be reasonable and not capricious or arbitrary.); *but see* Department of Public Works v. Lanter, 413 Ill. 581, 110 N. E. 2d 179, 183 (1953); Note 60 HARV. L. REV. 464 (1947).

[28] Compare this construction with that in Supervisors v. U. S. ex relatione, 71 U. S. 435, 446, 18 L. Ed. 419, 423 (1866); where Swayne, J., states, "Where power is given to public officers, in the language of the act before us ["may"] or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory." Which view seems rather general; BLACK'S LAW DICTIONARY, p. 1131 (4th ed. 1951). Compare also ORE. LAWS 1947, c. 226 § 14 ("the commission *shall* provide access . . ." [Emphasis supplied.]).

[29] See note 19 *supra*.

[30] U. S. v. Miller, 317 U. S. 329 (1942). (In ascertaining damages it is not proper to take into account an enhancement in value.); Department of Public Works v. Thompson, 43 Cal. 2d 13, 271 P. 2d 507 (1954) (compensation for severance.); In Re Appropriation of Easement for Highway Purposes, 93 Ohio App. 179, 112 N. E. 2d 411 (1952) (Court here lists elements of establishing

Thus, in such cases, petitioners are not in the position of parties whose property rights have been interfered with under the exercise of the power of taxation or the police power, in which cases there would be no compensation. Finally, to the petitioners' contentions that the director did not treat similarly abutters similarly located, the Ohio court laconically announced that "the mere fact, if it is a fact, that the director has failed to perform some duties, is no reason for enjoining him from performing other duties that he is undertaking to perform."

This writer submits that the Ohio court by permitting this public officer to decide for himself what duties to perform and what duties not to perform, when coupled with his discretion in selecting sites and otherwise, may well allow him, subject only to expensive and tedious litigation, to designate by a simple entry in his journal long-established highways as limited access highways, and then by a majestic stroke of his pen to strike off the access of the abutting landowners at will; perhaps because the color of their hair is not pleasing to him, perhaps because their politics are not pleasing to him. Such is not yet the prevailing view of "equal protection."

If North Carolina ever sees fit to enact a limited access highway statute, we would be well advised to avoid such a wholesale grant of power to the highway department. Peterson, J., dissenting in the *Burnquist* case[31] stated the danger succinctly: "the . . . object of the trunk highway system . . . was to get the farmers out of the mud. To the extent that the commissioner can exercise the power here asserted he not only can keep them in the mud, but off the highways altogether."

But if the statutory discretion which the Ohio court seems to have vested in their highway director appears to be overly broad, the North Carolina situation is even more unwarranted. This writer can find no authority whatever for the North Carolina highway commissioner to designate public highways as limited access ways. In fact, the highway department received a negative mandate in 1951 when that legislature expressly refused to pass legislation[32] authorizing limited access highways. Yet, offering no explanation,[33] the North Carolina highway

severance damages as; 1. The fair market value of the property taken, 2. The reduced value of the residue, to be determined after severance and without deduction for benefits.); Highway Commission v. Burk, 200 Ore. 211, 265 P. 2d 783 (1954) (Methods of apportionment of award for loss of access between lessor and lessee.); WIS L. REV. 458 (1953); See note 7 and 8 *supra*.

[31] Petition of Burnquist, 220 Minn. 48, 19 N. W. 2d 394, 413 (1945).

[32] H. B. 569, "...an act to provide for the...establishment...of limited-access facilities...," was introduced in the 1951 North Carolina Legislature, but reported unfavorably in the Senate.

[33] Or, at least, has offered no explanation to this reviewer, who sent to their General Counsel by registered mail (September 26, 1955; registered no 729,

department is busily putting limited access signs on many of our newer highways.[34] Either the highway department is proceeding under a conviction that power to designate limited access highways is implied in the general grant of powers to that department, a conviction which hardly seems tenable, when we consider our court's traditional solicitude for individual rights,[35] or the North Carolina highway department is making an attempt to bluff abutters into a belief that they have lost rights which have, in fact, always been theirs. Let us hope that if these acts are tested in the courts, as they should be, the commission will be able to offer convincing evidence of its authority to designate Limited Access Highways in North Carolina.

HAMILTON C. HORTON, JR.

Torts—Contributory Negligence as a Matter of Law—A Threat to Stare Decisis

In broad daylight the plaintiff-pedestrian, who had looked both ways and had seen no vehicle approaching, started across the open highway and was struck by defendant-motorist eighteen inches from the other side; the motorist was traveling only twenty to twenty-five miles per hour and the plaintiff had clear visibility for 700 feet. The Supreme Court reversed the judgment for the plaintiff on the ground that he was contributorily negligent as a matter of law.[1] Judge Bobbitt, dissenting,[2] thought that there was more reason for submitting this case to the jury than there was in the similar case of *Williams v. Henderson*,[3] because more evidence of due care was shown here. The principal case attempted to distinguish the *Williams* case,[4] but did not seem to

Chapel Hill.) an inquiry as to the authority under which the Commission was constructing Limited Access Highways.

[34] Typical are those erected on the Durham-Chapel Hill highway: "Limited Access Highway. Entrance by permit only. S. H. & P. W. C."

[35] The Minnesota Court, in Petition of Burnquist, 220 Minn. 48, 19 N. W. 2d 394 (1945), reviews the question of whether statutory authority is necessary and tabulates those states which are with and those without statutes. That court found a statute unnecessary, construing the general grant of power to determine what "land" to acquire, to include all interests growing out of land, including easements of access. The great majority of states, however, obviously felt a specific statute necessary: *e.g.*, ILLINOIS ANNO. STAT. c. 121 § 334 *et seq.* (Supp. 1954); ANNO. LAWS OF MASS. c. 81 § 7c (1953); N. Y. CODE ANNO. c. 248 § 30.4 (1937); OHIO GEN. CODE § 1178-21 (Page 1946); ORE. LAWS c. 226 § 14 (1947).

[1] Garmon v. Thomas, 241 N. C. 412, 85 S. E. 2d 589 (1954).

[2] *Id.* at 418, 85 S. E. 2d at 593.

[3] 230 N. C. 707, 55 S. E. 2d 462 (1949). Plaintiff's intestate crossed the open highway to go to her mail box. As she was standing at the box with her back to the road two trucks were approaching, the second following the first at a short distance. The first truck passed and she turned suddenly and walked in front of the second truck. The court held that intestate was not contributorily negligent as a matter of law.

[4] Garmon v. Thomas, 241 N. C. 412, 416, 85 S. E. 2d 589, 592: "'Here the