6-1-1961

Eighth Annual Survey of North Carolina Case Law

North Carolina Law Review

Follow this and additional works at: http://scholarship.law.unc.edu/nclr

Part of the Law Commons

Recommended Citation
Available at: http://scholarship.law.unc.edu/nclr/vol39/iss4/2

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
EIGHTH ANNUAL SURVEY OF
NORTH CAROLINA CASE LAW*

The Eighth Annual Survey of North Carolina Case Law is de-
signed to review cases decided by the North Carolina Supreme Court
during the period covered and to supplement past and future Surveys
in presenting developments in North Carolina case law over a period of
time.

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

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

Student members of the Law Review or candidates for membership
and the sections for which they are responsible are: Oliver W. Alphin
(Evidence); Hiram A. Berry (Criminal Law and Procedure); Robert
B. Blythe (Business Associations and Insurance); Julius L. Chambers
(Torts); Charles E. Dameron, III (Civil Procedure (Pleading and
Parties)); G. Marlin Evans (Contracts and Domestic Relations); Ray-
mond A. Jolly, Jr. (Administrative Law, Damages and Eminent
Domain); John H. Kerr, III (Equity and Trusts); Howard A. Knox,
Jr. (Credit Transactions and Municipal Corporations); Francis N.
Millett (Constitutional Law and Taxation); John D. Warlick, Jr.
(Personal Property, Real Property and Wills and Administration).

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

*The period covered embraces the decisions of the North Carolina Supreme
Court reported in 251 N.C. 646 through 253 N.C. 456.
ADMINISTRATIVE LAW

ADMINISTRATIVE PROCEDURE

In Beaver v. Scheidt\(^1\) petitioner had twice been convicted of speeding, and the courts in each case had so certified to the Department of Motor Vehicles. Acting under statutory authority\(^2\) the Department suspended his license. During the period of suspension he was convicted of driving while his license was suspended, and the Department added a year to his suspension. Before this period expired, petitioner was again convicted of driving while his license was suspended, and the Department gave an additional two-year suspension. Petitioner brought certiorari contending that his first suspension was void\(^3\) and that thus the additional suspensions, founded on his driving while his license was suspended, were invalid. The Court affirmed a sustaining of a demurrer to the petition stating that, if the first suspension was improper, defendant could have applied for an administrative hearing under G.S. §20-16(c)\(^4\) or for a hearing in the superior court under G.S. §20-25. However, he could not “contemptuously ignore” the quasi-judicial determination made by the Department.\(^5\)

EXHAUSTION OF ADMINISTRATIVE REMEDIES

Haynes v. Winston-Salem Southbound Ry.\(^6\) held that where a railroad employee accepts his discharge as final and seeks damages on the ground that it was wrongful the courts have jurisdiction. However, where the employee seeks reinstatement and damages, his sole remedy is before the Railway Adjustment Board.\(^7\) Here the employee did not seek reinstatement and therefore could bring this court action against the railroad without first exhausting his administrative remedies.\(^8\)

INTERPRETATION OF STATUTES

In In the Matter of Vanderbilt University\(^9\) the Court held that, although an interpretation of North Carolina tax statutes by the Commissioner of Revenue would be held prima facie correct, it would not

---

\(^1\) 251 N.C. 671, 111 S.E.2d 881 (1960).
\(^3\) Defendant’s first conviction was for speeding seventy miles per hour in a sixty mile zone. He argued that his license could not be suspended for speeding under seventy-five miles per hour in a sixty mile zone.
\(^4\) See generally Davis, Administrative Law §179 (1951).
\(^5\) 252 N.C. 391, 113 S.E.2d 906 (1960).
\(^8\) See Davis, Administrative Law §179 (1951).
be controlling if the Court deems the interpretation to be in conflict with the clear intent of the statute.\textsuperscript{10}

**Judicial Review**

In *Utilities Comm'n v. Maybelle Transport Co.*\textsuperscript{11} the Commission extended the territory of a motor carrier, and competing carriers appealed the extension to the superior court bringing forward their exceptions to the Commission's order. The superior court remanded to the Commission to ascertain whether there was any necessity for the additional service. The Supreme Court held that there was no basis for remanding the case to the Commission. G.S. § 62-26.10 provides that:

The court may... remand the case for further proceedings... if the substantial rights of the appellants have been prejudiced because the Commission's findings... are: (a) in violation of constitutional provisions, or (b) in excess of statutory authority or jurisdiction of the Commission, or (c) made upon unlawful proceedings, or (d) affected by other errors of law, or (e) unsupported by competent, material and substantial evidence in view of the entire record as submitted, or (f) arbitrary or capricious.

The Court pointed out that the remand of a cause should specify the ground on which it is based, in order to indicate the further proceedings required of the Commission, and noted that the trial court's order required a redetermination of the very question already decided.

*In the Matter of Hastings*\textsuperscript{12} involved a Charlotte zoning ordinance which restricted the use of property within a particular area to "dwellings other than house trailers," but provided that a prohibited use which existed prior to the passing of the zoning ordinance could be continued but not enlarged. Prior to the passage of the ordinance plaintiff constructed house trailer sites on his land. After its passage he applied for a permit to provide additional sites, contending this was part of his original plan for forty-five sites. The permit was denied by the building inspector, and this denial was affirmed by the Board of Adjustment. The superior court and the Supreme Court affirmed on the ground that whether the additional sites were an enlargement of a nonconforming use or the completion of pre-ordinance construction was a question of fact to be determined by the Board. The courts will

\textsuperscript{10} Accord, Campbell v. Currie, 251 N.C. 329, 111 S.E.2d 319 (1959); Dayton Rubber Co. v. Shaw, 244 N.C. 170, 92 S.E.2d 799 (1956).

\textsuperscript{11} 252 N.C. 776, 114 S.E.2d 768 (1960).

\textsuperscript{12} 252 N.C. 327, 113 S.E.2d 433 (1960).
not disturb an administrative agency’s finding of fact when it is supported by sufficient evidence and made in good faith.13

**LICENSES AND STANDARDS**

In *State v. Warren*14 the Court considered the validity of the 1957 statute15 requiring each real estate broker and salesman to take an examination “to determine his qualifications with due regard to the . . . interests of the public as to . . . [his] honesty, truthfulness, integrity and competency . . . .” The Court held that the statute provided a sufficient standard for the North Carolina Real Estate Licensing Board’s use in licensing.16 The Court also held that regulation of real estate brokers and salesmen was a valid exercise of the state police power because of the occupation’s close connection with the public welfare.17

**MISTAKE, APPEAL, AND CERTIORARI**

In *Kellams v. Carolina Metal Prods. Inc.*,18 the Supreme Court held that the superior court should remand a workmen’s compensation award to the Industrial Commission with directions that the weekly award be increased to comply with the higher schedule provided by the statute. *McDowell v. Town of Kure Beach*19 expanded this concept by holding that where an award was inadvertently made for less than the minimum amount provided by statute, the Industrial Commission had authority to increase the award *ex mero motu* to make it comply with the statute.20

*McDowell* held further that where an employer had appealed an award to the full commission, whether he would be allowed to withdraw his appeal is a matter addressed to the discretion of the Commission and is not a matter of right.21

The Court also pointed out that certiorari was not the proper pro-

---

17 Justice Rodman dissented on the ground that he was unable to distinguish this from other licensing statutes which the Court had held had no valid connection with the public welfare. He also stated that statute did not prescribe sufficient standards to guide the board.
procedure here since the statute provides for an appeal. However, certiorari could nevertheless be granted if

(1) the aggrieved party cannot perfect the appeal within the time provided by statute, (2) his inability to perfect the appeal within the time allowed is not due to any fault on his part, and (3) there is merit in his exceptions to the action of the administrative agency.  

BUSINESS ASSOCIATIONS

CORPORATIONS

Proper Accounting Method a Question of Fact

In *Watson v. Watson Seed Farms, Inc.* the Court held that a provision of the Business Corporation Act, G.S. § 55-37, does not make mandatory the use of any one particular accounting method. The plaintiff, owner of one-third of the stock in the defendant corporation, contended that, as the defendant failed to assign a specific value to inventory seed held by the corporation, the balance sheet did not accurately show all of the assets. The defendant asserted that such seed had almost no value until sold and consequently the true financial condition of the corporation was more clearly reflected without an assignment of cash value to the seed. The superior court, sitting without a jury, held that the defendant did not have to assign the seed a specific value.

In sustaining the trial court, the Supreme Court discussed whether the statute required the corporation, in order to "cause a true statement of its assets and liabilities," to replace the cash receipts method of accounting with the accrual method. The Court pointed to the fact that throughout those sections of the act dealing with finance and accounting, the phrase "in accordance with generally accepted principles of sound accounting practice" is often found, indicating that this standard, rather than any prescribed accounting method, is all that is required by the act. The Court also pointed out that the revenue statutes permit the use of both the accrual basis and cash receipts method.

---

1 *Watson v. Watson Seed Farms, Inc.*
2 G.S. § 55-37 (1960).
3 "(a) Each corporation shall: (1) Keep correct and complete books and records of account, and . . . (4) Cause a true statement of its assets and liabilities as of the close of each fiscal year and of the results of its operations and of changes in surplus for such fiscal year, all in reasonable detail . . . ."
5 Without here considering the accounting problems involved, it might be noted that the relevancy of the Court's discussion to the problem presented by the plaintiff would seem questionable.
would be illogical, the Court felt, to assign to the legislature the intention of making the accrual basis mandatory for all corporations. The Court held it to be a question of fact as to whether a particular method is in accord with sound accounting practices. In the principal case the cash receipts method had been approved by one accountant and the "court [below] was justified in concluding that the accounting system used constituted a substantial compliance with statutory requirements." This provision in the Business Corporation Act is the same as that found in the Wisconsin Business Corporation Law, but it appears that the issues decided in Watson have not been presented to that court.

CIVIL PROCEDURE
(PLEADING AND PARTIES)

PLEADING

Burden of Proof

In Muncie v. Travelers Ins. Co. the plaintiff sought recovery against a liability insurer after obtaining a default judgment against the insured. The defendant insurer had denied liability under the policy because of an eight month delay in notification of the accident. The policy contained a provision requiring notice as soon as practicable. The Court stated that the notice requirement was a condition precedent to recovery on the policy and held that the plaintiff had the burden of proving such condition precedent. The Court, in reaching its decision, overruled what it termed dicta in a prior case and followed the weight of authority in holding that notice to the insurer is a condition precedent and not a condition subsequent.

Counterclaims

In Williamson v. Varner plaintiff sued A and B alleging that B
was the agent of A and that B's negligent operation of A's car had caused damage to the plaintiff's automobile. Both defendants denied the negligence and the agency relationship. A counterclaimed for damage to his own automobile. In the trial court plaintiff and A were both nonsuited. A appealed and the Court overruled the nonsuit as to A on the ground that there was a jury issue of negligence. The Court further stated that a reply to the counterclaim of A was unnecessary since the complaint alleged negligence of B imputable to A which, if established, would defeat A's claim.

The North Carolina Court reaffirmed prior decisions in Kersey v. Smith, holding that a demurrer to a counterclaim should be sustained where the plaintiff's cause of action was for assault and battery and the counterclaim for malicious prosecution—the latter resulting from the plaintiff's criminal prosecution of the defendant for the assault and battery. In Kersey the alleged assault occurred on October 10, 1959, and the criminal prosecution in which the defendant was acquitted took place on October 20, 1959. The Court reasoned that the defendant's cause of action arose after the plaintiff's and hence did not arise out of the "transaction set forth in the complaint as the foundation of the plaintiff's claim."

G.S. § 1-137

In Rowland v. Beauchamp a minor, by his next friend, sued to recover for personal injuries received when struck by an automobile. Suit was instituted November 2, 1953, in a county court. On December 1, 1954, a judgment of nonsuit was entered against the plaintiff. An appeal to the superior court was never perfected and the defendant

6 The nonsuit of the plaintiff would not destroy a defendant's counterclaim.

"The granting of a motion by the defendant for judgment of nonsuit as to the plaintiff's cause of action shall not amount to the taking of a voluntary nonsuit on any counterclaim which the defendant was required or permitted to plead pursuant to G.S. § 1-137." N.C. Gen. Stat. § 1-183.1 (Supp. 1959).

7 "If the answer contains a counterclaim against the plaintiff... the plaintiff or plaintiffs shall have twenty (20) days after the service thereof within which to answer or reply." N.C. Gen. Stat. § 1-140 (1953). This provision would appear to be mandatory. In Wells v. Clayton, 236 N.C. 102, 72 S.E.2d 16 (1952), it was stated that allegations of a counterclaim which was duly served on the plaintiff would be taken as true unless controverted by a reply.

8 252 N.C. 468, 114 S.E.2d 117 (1960).

9 Accord, Edward v. Jenkins, 247 N.C. 565, 101 S.E.2d 410 (1957), where in plaintiff's action for assault in which plaintiff had defendant arrested, defendant could not counterclaim for abuse of process; Hancammon v. Carr, 229 N.C. 52, 47 S.E.2d 614 (1948), where in plaintiff's action on a check, after defendant had stopped payment and plaintiff had instigated a prosecution for issuing a worthless check, defendant could not set up counterclaim for abuse of process.


11 "If an action is commenced within the time prescribed therefor, and the plaintiff is nonsuited, or a judgment therein reversed on appeal, or is arrested, the plaintiff... may commence a new action within one year." N.C. Gen. Stat. § 1-25 (1953).

12 253 N.C. 231, 116 S.E.2d 720 (1960), also discussed in Trial Practice, G.S. §§ 1-25 and Claims of Infants, infra.
obtained a dismissal of the appeal on November 15, 1956, in the County Court. On November 13, 1957, another next friend was appointed and another action instituted. A denial of a motion to dismiss was affirmed by the Supreme Court, which held that the statute of limitations began to run against the plaintiff upon the appointment of a next friend and that the one year limitation under G.S. § 1-25 began to run from the date of the dismissal of the appeal to the superior court. The allegations of negligence were substantially similar in both actions and the second was considered a continuation of the first.

G.S. § 1-25 was again involved in Hall v. Carroll wherein plaintiff originally sued A, B, C and D for a death arising out of an automobile collision which occurred November 17, 1956. An action was brought February 12, 1957; it resulted in a judgment of nonsuit which was affirmed by the Supreme Court on December 10, 1958. The present action was instituted February 2, 1959, against D and E. The suit against E was subsequently dismissed as not having been brought within two years. D had C and F joined for purposes of contribution. The principal defendant (D) pleaded the defense of the statute of limitations. The Court reversed the trial court, holding that the action could be maintained against D since the same negligent acts were alleged in both actions and the cause was kept alive by G.S. § 1-25. Since D was jointly and severally liable, it was said, "neither by the elimination of original parties nor the addition of new ones can the liability of the defendant . . . be enlarged." The Court did not discuss the propriety of the joinder of C and F by the principal defendant. Although North Carolina has never decided this problem, when the plaintiff has availed himself of G.S. § 1-25 it would appear that the joinder would be valid even though the statute of limitations had run in favor of C and F as against the plaintiff, since it has been held that a joint tortfeasor could join a party defendant for contribution when the plaintiff's right of action against the latter was barred by lapse of time.

Incorporation by Reference

In Yeager v. Dobbins plaintiff sued to recover for breach of a contract to devise real property. In answer to a motion to make more

---

1 In Webb v. Hicks, 125 N.C. 201, 34 S.E. 395 (1899), the one year period was held to begin upon the final judgment of dismissal in the superior court and not upon the filing of the opinion of the Supreme Court wherein the dismissal was ordered. Rowland follows the holding in Webb.

14 Defendant's attorney could have had the appeal dismissed earlier and thus sooner have started the one year limitation under G.S. § 1-25.


16 Id. at 223, 116 S.E.2d at 462.


18 252 N.C. 824, 114 S.E.2d 820 (1960).
definite and certain plaintiff's attorney amended and attached a letter from the deceased to the plaintiff. A demurrer to the amended complaint was sustained and the Supreme Court affirmed. The Court looked to the wording of the letter itself and held that it did not constitute a contract or an offer to contract. It appears that the plaintiff could still proceed on a theory of quantum meruit.

The contract attached to the complaint in Talman v. Dixon called for the defendants to convey "all of their right, title and interest to the lands..." The plaintiff alleged that the defendants were not the owners of the property and sued to recover his down payment. An order sustaining defendant's demurrer was affirmed, the Court holding that allegations that defendant had agreed to convey good title were conclusions of law. Defendants had demurred for failure to state a cause of action in that it appeared that they had not contracted to convey good or perfect title but only such title or interest as they held.

**Joinder of Causes and Parties**

In Batts v. Gaylord children of deceased by a former marriage brought an action against the widow to have land sold for partition. The widow counterclaimed against the fund arising from the sale for expenses incurred in the children's behalf. The Court overruled the trial court and sustained a demurrer to the counterclaim on the ground

"Where the alleged contract is made a part of the complaint and is relied on as the sole basis of recovery, the court will look to its particular provisions rather than the more broadly stated allegations in the complaint or the conclusions of the pleader as to its character and meaning." Id. at 826, 114 S.E.2d at 822. The Court assumed that the letter was the only possible basis for a contract, i.e., that the letter was an offer or there was no offer. This assumption by the Court would seem to be unwarranted, as the dissent pointed out; see note 20, infra.

There was a dissent. Judges Parker and Higgins would have overruled the demurrer on the ground that the complaint alleged a contract, performance on plaintiff's part, a breach by the defendant, and damages. The dissent pointed out that the attached letter was in answer to plaintiff's letter, which itself would be competent as evidence. 252 N.C. at 829, 114 S.E.2d at 824.

Upon demurrer sustained the plaintiff, within thirty days after receipt of the certificate from the Supreme Court, may move for leave to amend the complaint. N.C. Gen. Stat. § 1-131 (1953).

It seems the plaintiff's attorney amended himself out of court as to a cause of action on contract. There was no obligation on his part to attach the letter to the complaint, and the court could not order the attachment. Hensley v. McDowell Furniture Co., 164 N.C. 148, 80 S.E. 154 (1913). It is arguable that without the letter the Court would have held that the complaint stated a good cause of action based on contract, although the letter would of course have to be used as the basis of the plaintiff's case at trial.

In Moore v. WOOW, Inc., 253 N.C. 1, 116 S.E.2d 186 (1960), as well as in the Yeager and Talman cases the Court allowed without question the attaching and incorporation by reference of contracts. Thus, the fears stemming from Hill v. Hill Spinning Co., 244 N.C. 554, 94 S.E.2d 677 (1956), disallowing attaching and incorporation of pleadings from a prior action, are unfounded.
that there was a misjoinder of causes of action in that the claim against each child was separate and independent from the claims against the other children, and hence all causes did not affect all parties. Also it appears that the Court felt that the entire counterclaim was improper. 26

In King v. Libbey 26 plaintiff sued husband and wife for an amount due on a contract to install a furnace. Defendants counterclaimed for damages to their home resulting from negligent installation of the furnace. The Court, in reversing, held the counterclaim proper. Quoting from Heath v. Kirkman 27 to the effect that a complaint (here a counterclaim) will be assumed to state a cause of action unless the contrary appears, the Court found a single cause based on negligence and found that all causes affected all parties since both defendants had a common interest in the single relief sought 28

In Gaines v. Atlas Plywood Corp. 29 owners of a tract of land sued A and B to remove a cloud upon title alleging that A had conveyed to B who now claimed the land. The plaintiffs also joined a cause of action against A for wrongful cutting and removal of timber from the land. A demurrer for misjoinder of parties and causes of action was sustained by the trial court as to the cause of action for conversion. On appeal the Court held that the action should be dismissed in its entirety because, since B was not interested in the conversion action, all causes did not affect all parties and thus there was a dual misjoinder. The Court here, as in prior cases, 30 refused to allow severance of the causes of action for trial because of the misjoinder of both parties and causes.

Motion To Strike

In Sorrell v. Moore 31 plaintiff alleged the negligent conduct of defendant’s intestate in operating an automobile as the cause of plaintiff’s intestate’s death. The defendant’s answer denied negligence,

26 The Court quoted from Hancammon v. Carr, 229 N.C. 52, 55, 47 S.E.2d 614, 616 (1948), saying that the counterclaim “must be so interwoven in plaintiff’s cause of action that a full and complete story as to the one cannot be told without . . . the other.” In Hancammon the Court interpreted the language of G.S. §1-123(1) (1953) (causes of action which may be joined) and G.S. §1-137(1) (1953) (causes of action which may be pleaded as counterclaims) to be the same and to have the same purpose and intent. For cases involving the proposition “that all causes must affect all parties” under G.S. §1-123, see N.A.A.C.P. v. Eure, 245 N.C. 331, 95 S.E.2d 893 (1957); McKinley v. Hinnant, 242 N.C. 245, 87 S.E.2d 568 (1955).


28 The Court pointed out that a tort claim can be pleaded as a counterclaim against a contract action where the tort arises out of the same transaction or is connected with the same subject of action. N.C. GEN. STAT. §1-137 (1953):


31 251 N.C. 852, 112 S.E.2d 254 (1960); also discussed in Torts, Joint Adventurers—Imputed Negligence, infra.
denied the defendant’s intestate was driving, and pleaded contributory negligence by alleging that if defendant’s intestate was in fact driving the automobile plaintiff’s intestate failed to remonstrate with the operator for the negligent operation and failed to warn the operator of the likely result. Plaintiff’s attorney moved to strike this last defense on the ground that it was a conclusion “totally incapable of proof under the facts as alleged in the complaint.” The Supreme Court reversed the trial court and disallowed the motion to strike, holding that the answer alleged facts, that defendant had a right to prove the allegations by evidence, and that the court had no right to assume that the facts could not be proved.

In defense to a suit on a contract of settlement the defendant, in *Eastern Steel Prods. Corp. v. Chestnutt*, alleged that the contract had been entered into upon an oral agreement that plaintiff submit certain cost figures, which condition had not been met, and that the contract had been entered into on the basis of fraudulent misrepresentations. Also, the defendant set up a counterclaim based upon the original contract from which the settlement contract had arisen. The Court, in reversing the trial court, allowed the plaintiff’s motion to strike the defense and counterclaim. The Court held that the alleged oral agreement was in direct conflict with the written contract and barred from admission in evidence by the parol evidence rule and that hence the allegations were irrelevant and immaterial. The allegations of fraud were stricken because of insufficient facts alleged. Lastly, the Court allowed the motion to strike the counterclaim (based on the original contract) because the allegations would be prejudicial to the plaintiff; these allegations would not be proper "unless and until" the settlement contract had been set aside.

**Prior Action Pending**

In *Demoret v. Lowery* the defendant entered a plea in abatement against a cross action by a party defendant whom he had joined for contribution. The situation arose out of an automobile collision in-

---

1. *Id.* at 854, 112 S.E.2d at 256.
4. *Accord*, *Wade v. Wade*, 252 N.C. 330, 113 S.E.2d 424 (1960), where the Court allowed a motion to strike a portion of the complaint and an attached exhibit when the exhibit was an unexecuted separation agreement which could not be offered in evidence.
volving Lowery, Demoret, and Demoret's wife who was his passenger. Lowery sued Demoret for property damage and Demoret counterclaimed for his own damages. While this action was pending, Mrs. Demoret filed the principal suit against Lowery to recover for personal injuries allegedly sustained in the same accident. Lowery joined Demoret for contribution, and Demoret set up as a cross action the identical matters which were the basis of his original counterclaim. The Supreme Court reversed the trial court and allowed Lowery's plea in abatement. In so doing the Court reiterated the rule laid down in prior cases that such a plea will be good if the party could obtain the same relief by counterclaim in the prior action and a judgment in favor of the plaintiff in the prior action would operate as a bar to the party's prosecution of his claim.

A plea in abatement was involved in Crain & Denbo, Inc. v. Harris & Harris Constr. Co. In this action a contractor sued his subcontractor and the surety on the subcontractor's bond for breach of the subcontract. There was pending in another county a suit by the subcontractor against the contractor and the owner of the property for whom the work was to be performed, in which suit a breach of the same contract was alleged. In the principal case the Court sustained a plea in abatement by the subcontractor, holding that (1) the contractor could obtain the same relief against the subcontractor in the prior action by way of counterclaim, and (2) a judgment in favor of the subcontractor in the prior suit would bar prosecution by the contractor in any later action. However, the plea in abatement by the surety company was overruled on the ground that the prior action did not involve that company. The Court pointed out that while the sub-

---

39 In order to recover for his own damages Demoret had to counterclaim, for he could not institute a separate suit. For cases where a counterclaim has been held compulsory see Cameron v. Cameron, 235 N.C. 82, 68 S.E.2d 796 (1951), where a suit by a wife for divorce a mensa et thoro abated a subsequent action by the husband for absolute divorce on the ground of separation; Johnson v. Smith, 215 N.C. 322, 1 S.E.2d 834 (1939), in which a suit arising out of an auto collision abated a subsequent suit arising out of the same accident wherein the parties were reversed; Garrett v. Kendrick, 201 N.C. 388, 160 S.E. 349 (1931), where a suit for payment of services rendered by a physician barred a later suit for malpractice against the physician; J. A. Jones Constr. Co. v. Hamlet Ice Co., 190 N.C. 580, 130 S.E. 165 (1925), in which a suit for breach of a contract abated a subsequent suit for breach of the same contract wherein the parties were reversed.

38 The Court felt that the attempt to assert the cross action in the second suit made Demoret a party plaintiff in such action, and since a counterclaim was compulsory in this situation the second action would be abated. The fact that the counterclaim had already been entered did not alter the situation. The pendancy of the prior action may be raised by demurrer when such fact appears on the face of the complaint, N.C. Gen. Stat. § 1-127 (1953), or by answer when it does not so appear, N.C. Gen. Stat. § 1-133 (1953).

40 252 N.C. 836, 114 S.E.2d 809 (1960).

41 The case follows earlier ones where both actions involved the same contract. E.g., J. A. Jones Constr. Co. v. Hamlet Ice Co., 190 N.C. 580, 130 S.E. 165 (1925).
NORTH CAROLINA CASE LAW

contractor and surety company were jointly and severally liable, a verdict in favor of the contractor on a counterclaim against the subcontractor would not entitle the contractor to judgment against the surety company.42

**Sufficiency of Allegations**

In *Williams v. Strickland* the plaintiff sued for injuries received while a spectator at a stock car race track, naming as defendants a corporation and four individuals who were stockholders and officers. The complaint stated that the race track was operated by the individuals singly and as a partnership, with the corporation as their *alter ego*; also, the plaintiff alleged that the "defendants" were negligent and then asked for judgment against the individuals and the corporation. The Court, reversing the trial court and overruling a joint demurrer *ore tenus* that specified no grounds of objection, held that the complaint stated a cause of action against the individual defendants. The Court found that the allegations concerning negligence and referring to "defendants" meant the individuals and not the corporation and the individuals jointly. Construing the complaint in this manner, the earlier allegations that the individuals operated the race track as individuals and as a partnership (with the corporation merely an *alter ego*) were not repugnant to the later allegations referring to the negligence of the defendants. The prayer for relief apparently was ignored by the Court.

*Lynn v. Clark* involved the sufficiency of allegations to invoke G.S. § 20-71.1, North Carolina's presumption of agency statute.47 The

42 The Court expressly did not pass on the question of the joinder as a third party defendant of the surety in a counterclaim by the contractor in the prior action. In *Owen v. Salvation Army, Inc.*, 198 N.C. 610, 152 S.E. 800 (1930), such joinder was allowed. See also *Standard Amusement Co. v. Tarkington*, 247 N.C. 444, 101 S.E.2d 398 (1957), where in a suit by assignees of a lease against the lessees for rent, lessees could join the original lessor and the intervening assignees alleging fraud; *Auto Fin. Co. v. Simmons*, 247 N.C. 724, 102 S.E.2d 119 (1958), where in a suit by an assignee of a conditional sales contract defendant could join the assignor of the contract alleging fraud. *But see Overton v. Tarkington*, 249 N.C. 340, 106 S.E.2d 717 (1958), where in a suit by an assignee of a chattel mortgage, defendant was not allowed to join the assignor for recovery of usurious interest; *Standard Amusement Co. v. Tarkington* was distinguished on the ground that in *Overton* the additional defendant was not a necessary, but only a proper party. In *Overton v. Tarkington* it appears the defendant sought the joinder not under G.S. § 1-137 (1953) (counterclaim statute) but under G.S. § 1-73 (1953) (joinder of necessary parties by the court).

43 251 N.C. 767, 112 S.E.2d 533 (1959); also discussed in *Torts, Owners and Occupiers of Land*, infra.

44 Plaintiff alleged that the corporation was under-capitalized when organized and was insolvent at the time of the accident.

45 Unless the complaint fails as to all demurring defendants a joint demurrer will be overruled. *Paul v. Dixon*, 249 N.C. 621, 107 S.E.2d 141 (1959).


47 "In all actions to recover damages for injury ... arising out of an accident or collision involving a motor vehicle, proof of ownership of such motor vehicle
North Carolina Court has consistently held that the plaintiff must allege an agency relationship between owner and operator of the automobile in order to receive the evidentiary benefit of the statute.48 In the principal case plaintiff was nonsuited, and allegations to the effect that the owner was the operator's mother, "that said car was a 'family purpose' car" and was operated "by and with her consent, knowledge, and permission" were held insufficient because not specific allegations of agency. The allegations were also held insufficient to establish agency on the "family purpose" theory—without benefit of G.S. § 20-71.1.49 In the Supreme Court plaintiff's attorney moved to amend his complaint by adding the words "and as her agent and in the furtherance of a family purpose." This motion to make the pleading conform to the proof on the issue of agency under the "family purpose" doctrine was denied.50

Ultimate Facts

Allegations to the effect that an International Harvester loader was inherently dangerous and likely to cause great injury to its operator were held insufficient to state a cause of action against the seller in *Wyatt v. North Carolina Equip. Co.*51 The Court affirmed the sustaining of a demurrer and stated that the complaint should contain factual allegations showing the dangerous character,52 a complaint being insufficient which contained only conclusions of law.

PARTIES

Necessary and Proper Parties

In *Oxendine v. Lewis*53 the plaintiff brought an action for specific

at the time of such accident or collision shall be prima facie evidence that said motor vehicle was being operated and used with the authority, consent, and knowledge of the owner in the very transaction out of which said injury or cause of action arose." N.C. Gen. Stat. § 20-71.1(a) (1953).


50 To state a cause of action based on the family purpose doctrine the North Carolina Court recommends allegations "to the effect that at the time of the accident the operator was a member of his family or household and was living at home with the defendant; that the automobile involved in the accident was a family car and was owned, provided, and maintained for the general use, pleasure, and convenience of the family, and was being so used by a member of the family at the time of the accident with the consent, knowledge, and approval of the owner of the car." Lynn v. Clark, 252 N.C. 289, 292, 113 S.E.2d 427, 430 (1960).

51 Even if allowed it is doubtful that this further allegation would appreciably help the complaint because there would still be insufficient allegations of agency under the Supreme Court recommendations.

52 The Court relied on Lennon v. Buchan Lumber Co., 251 N.C. 675, 111 S.E.2d 868 (1959), discussed in Torts, *Duty of Supplier of Chattels, infra*, wherein allegations which merely stated that lumber was full of knots and holes and was inherently dangerous were held insufficient.

53 251 N.C. 702, 111 S.E.2d 870 (1959).
performance of a land sale contract. It appeared that the deed under which the grantor claimed contained conflicting provisions and that the interests of heirs of the holder of a prior estate were involved. On appeal from a judgment ordering specific performance the Court, in a one paragraph opinion, remanded for joinder of the heirs at law of the holder of the prior estate.  

**Real Party in Interest**

In *Skinner v. Empresa Transformadora De Products Agropecuarios, S. A.*, plaintiff sued for breach of contract alleging that the contract had been entered into by himself as an individual but that it was for the use and benefit of a corporation, that all negotiations were made in the corporation's name, that he had assigned all income from the contract to the corporation, and that though the corporation was the real party in interest the defendant denied this. Defendant's motion to dismiss was overruled in the trial court, but on appeal the Court dismissed the action, holding that the individual plaintiff was not the real party in interest. The Court, raising the question *ex mero motu*, pointed out that if the plaintiff's evidence supported his allegations he would prove himself out of court.  

**CONSTITUTIONAL LAW**

**Due Process**

**Voluntary Confessions**

In *State v. Davis,* the defendant had been arrested as an escapee from a state prison camp. Upon notification of his arrest, the state prison authorities authorized the local police to retain custody of the defendant in order to facilitate an investigation of his activities during

---

54 Cf. Bank of Wadesboro v. Jordan, 252 N.C. 419, 114 S.E.2d 82 (1960), where the Court raised the question of defect of parties on its own motion and held, in a special proceeding to determine the heirs and next of kin of a deceased, that such heirs as were known should be named in the service by publication and not designated as "unknown heirs or next of kin." In both the *Oxendine* and *Jordan* cases the court cited *Town of Morganton v. Hutton & Bourbonnais Co.*, 247 N.C. 666, 101 S.E.2d 679 (1957) (question of defect of parties raised *ex mero motu* in an action under the Declaratory Judgment Act) and *Britt v. Baptist Children's Home*, 249 N.C. 409, 106 S.E.2d 474 (1958) (question of defect of parties raised *ex mero motu* in an action for specific performance).


56 "Every action must be prosecuted by the real party in interest..." N.C. GEN. STAT. § 1-57 (1953).

57 In *Nall v. McConnell*, 211 N.C. 258, 190 S.E. 210 (1937), the Court held that the question of real party in interest could not be taken advantage of by demurrer, but only by affirmative allegations. And in *Asheville Safe Deposit Co. v. Hood*, 204 N.C. 346, 168 S.E. 524 (1933), it was held that the question of real party in interest could not be raised on appeal if not raised in the court below. In *Skinner* the Court treated the case as one where there was a failure to state a cause of action. This was also done in *Thomas v. Gate City Ins. Co.*, 222 N.C. 754, 22 S.E.2d 711 (1943), wherein the defendant's demurrer was sustained.

his absence from the prison camp. After sixteen days in custody the defendant confessed to the rape and murder of an elderly lady. He was tried for this offense and found guilty.

The defendant appealed, contending that his confession was involuntary and was obtained in violation of his rights under the due process clause of the fourteenth amendment. The defendant relied upon McNabb v. United States\(^2\) which held that a confession which was obtained prior to the defendant’s prompt arraignment would be inadmissible, notwithstanding its voluntary character. The Court pointed out that the McNabb rule was adopted as a rule of evidence for the federal courts and was not based upon violation of constitutional rights. The Court thus refused to apply the McNabb doctrine to the facts of the principal case. The Court quoted from United States v. Carignan\(^3\) to the effect that “so long as no coercive methods by threats or inducements to confess are employed, constitutional requirements do not forbid police examination in private of those in lawful custody or the use as evidence of information voluntarily given....”\(^4\)

**Motor Vehicle Safety and Financial Responsibility Act**

In Swain v. Nationwide Mut. Ins. Co.\(^5\) the insurance company attacked the constitutionality of G.S. § 20-279.21(f)(1),\(^6\) alleging that it deprived the company of due process. The defendant had issued an automobile liability policy pursuant to the Motor Vehicle Safety and Financial Responsibility Act. The policy contained a clause requiring the insured to give notice to the company of any suit at which the insured’s liability covered by the policy was to be litigated. The insured failed to give notice and the company had been unable to be heard or defend in the suit by the present plaintiff against the insured. The plaintiff brought this action based upon the liability of the insured determined in the prior suit. The statute in question makes the company liable for the payment of the damages assessed against the insured and provides that no violation of the policy’s terms shall relieve the insurer. The company contended that this provision constituted a violation of due process since the company had not had the required notice

\(^2\) 318 U.S. 322 (1942).

\(^3\) 342 U.S. 36 (1951).

\(^4\) Id. at 39.

\(^5\) 253 N.C. 120, 116 S.E.2d 482 (1960); also discussed under INSURANCE, Effect of Compulsory Liability Insurance on Conditions Precedent, infra.

\(^6\) “(f) every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein: (1) The liability of the insured with respect to the insurance required by this article shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; said policy may not be cancelled or annulled as to such liability by any agreement between the insurance carrier and the insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy.”
or opportunity to be heard as set out in the policy in the action determining the liability of the insured.

The Court answered this contention by saying that the defendant's right to notice of plaintiff's action against the insured and an opportunity to defend that action in the insured's name was based upon a contractual obligation of the insured. When the defendant issued a policy to the insured pursuant to the requirements of the statute, it voluntarily assumed the risk under the statute that the insured might fail to live up to the contract. He knew that the statute became a part of the contract when written and consequently there was no violation of the "law of the land" section of the North Carolina Constitution. To hold otherwise would put a loss upon the plaintiff due to dereliction of the insured which was not the intent of the statute.

The Court pointed out that G.S. § 20-279.21(h) seems to recognize that this situation may arise under the act and allows the insurer to seek reimbursement from the insured for losses suffered which, but for the statute, the insurer would not have suffered, if a clause to this effect is included in the contract.

EMINENT DOMAIN

Redevelopment Law

In Redevelopment Comm'n v. Security Nat'l Bank the Court affirmed the constitutionality of the Urban Redevelopment Law. The respondent alleged that since the Commission was allowed to resell land taken by eminent domain to any redeveloper for residential, recreational, commercial, industrial, or other use or for public use pursuant to the redevelopment plan, that this was a taking for private and not public use. The Court held, however, that this was a taking for public use because the primary purpose of the taking was the reconstruction and rehabilitation of slum areas and their adaption to uses which would prevent a recurrence of the "blighted" condition. The Court noted that the land could not be used by the redeveloper in accordance with his own desires but only in accord with the redevelopment plan.

The respondent also contended that the law was an unlawful delega-

7 N.C. Const. art I, § 17.
8 "(h) Any motor vehicle liability policy may provide that the insured shall reimburse the insurance carrier for any payment the insurance carrier would not have been obligated to make under the terms of the policy except for the provisions of this article."
9 In Aetna Cas. & Sur. Co. v. O'Conner, 207 N.Y.S.2d 679, 170 N.E.2d 681 (1960), the Court of Appeals of New York held that a New York policy written under an "Assigned Risk Plan" was not subject to recession due to fraud or misrepresentation after an accident.
10 252 N.C. 595, 114 S.E.2d 688 (1960); also discussed under Municipal Corporations, Urban Redevelopment, infra.
tion of legislative authority. He alleged the act did not create a standard and left to the municipality the power to determine whether or not it was in the public interest to create a redevelopment commission. The Court rejected this contention noting that the municipality could not create a commission unless the municipality finds: (1) a blighted condition, as defined in the statute, exists and (2) it is necessary to redevelop these areas in the interest of the public health, safety, morals or welfare of the residents of the municipality. The Court pointed out that a finding of (1) was logically a finding of (2) also.

**FULL FAITH AND CREDIT**

*Foreign Divorce Decrees*

In *Lennon v. Lennon* the Court refused to recognize the validity of a Nevada custody decree by which the husband had been granted custody of the children of the marriage. Habeas corpus proceedings to determine the right to custody were begun by the plaintiff-wife while the children were visiting her in North Carolina. The defendant pleaded the Nevada decree as a bar to this action, but the lower court awarded custody to the plaintiff.

On appeal the Court affirmed the lower court. Relying on *May v. Anderson*, the Court held that the courts of North Carolina were not bound to give full faith and credit to the Nevada decree as the plaintiff had not been personally served in that action and had not appeared personally or by attorney. It further held that the superior court had jurisdiction over the children since North Carolina had been the matrimonial home of the parties and continued to be the home of the plaintiff and the defendant had surreptitiously removed the children from this state in order to deprive the courts of jurisdiction over them.

**POLICE POWER**

*Regulation of Solicitors for Private Schools*

In *State v. Williams* the defendant had been convicted for failing to secure an annual license from the State Board of Education as a solicitor of students for a private school. On appeal the Court held that the licensing statute was unconstitutional.

---

14 252 N.C. 659, 114 S.E.2d 571 (1960); also discussed under Domestic Relations, Custody, infra.
15 345 U.S. 528 (1952). "It is now too well settled to be open to further dispute that the full faith and credit clause and the act of Congress passed pursuant to it do not entitle a judgment in personam to extra-territorial effect if it be made to appear that it was rendered without jurisdiction over the person sought to be bound." Id. at 528.
18 N.C. Gen. Stat. § 115-253 (1960). "Any person soliciting students for any such school without first having secured a license from the State Board of Educa-
The Court noted that the State Board of Education under its constitutional authority is confined to the regulation of public schools and that any further extension of its authority must come from a proper delegation of power from the General Assembly in the exercise of the police power of the state. Decisions from other jurisdictions were cited for the proposition that regulation of private schools under the police power would be constitutional as long as the regulation was reasonable and was in response to a manifested present public need or emergency. Also, the Court recognized that the state may exercise its police power over salesmen in the public interest, but these regulations must be necessary for the protection of a substantial public interest and must be reasonable and nondiscriminatory.

The Court found that the showing of need in the present regulation was meager at best. The act purported to protect the public by requiring proper school equipment, quarters, and teaching staff. Further it was designed to force the schools to carry out their advertised promises and contracts. The Court stated that this was merely a statement of purposes and did not show any widespread fraud which would evoke a need for corrective legislation. Moreover, the legislature did not need to enact special legislation to correct any fraud which might exist since the courts of the state are open to redress such wrongs. But the decision did not rest solely upon the failure of showing of need. The legislature had not established any standards for the determination of the fitness of a solicitor or the evaluation of the contract, advertising material and instructional material. All matters were left to the unlimited discretion of the administrative board. The Court stated that such unlimited delegation of authority is beyond the bounds of valid legislation and that the conviction under this statute was a violation of the "law of the land" section of the North Carolina Constitution.

By way of dictum, the Court stated that such statutes, insofar as they attempted to regulate solicitors of nonresident schools, would be a burden upon interstate commerce and therefore unconstitutional.

Although the Court objected to the present regulation of solicitors, it clearly indicated that a constitutional regulatory statute could be formulated. Thus private school solicitors in the future may be added to the growing list of employment regulated by the state.
Regulation of Interstate Carriers

A Utilities Commission regulation prohibiting the sales of bus tickets at any location other than union bus stations was attacked in Utilities Comm'n v. Atlantic Greyhound Corp. The defendant carrier had opened an office to sell interstate tickets without the consent of the Commission in a city maintaining a union bus station. The defendant was ordered by the Commission to cease violating the regulation, but the superior court held the rule was invalid. On appeal the Court held that to limit the right of the defendant to exercise its franchise, as the Commission had done by its ruling, was to burden interstate commerce. The Court stated that it also violated the constitutional right to contract and to utilize one's property to the fullest extent in a lawful manner to earn a living.

CONTRACTS

Guaranty Contracts—Statute of Frauds

In Warren v. White the defendant was the owner of almost all the capital stock of a corporation to which he had loaned $23,000. The corporation got into serious financial difficulty, and the defendant hired the plaintiff as general manager. While plaintiff was general manager, he advanced money to the corporation in reliance upon the oral promise of the defendant that he would "personally pay" any sums which the plaintiff advanced upon the company's behalf. In an action to recover upon the oral promise the Court stated that the defendant was personally, directly and pecuniarily interested in the continuance of the corporation in business and would be the principal beneficiary if this were accomplished and the principal loser if it were forced out of business. Therefore the plaintiff's recovery on the alleged oral agreement was not barred by the Statute of Frauds.

In applying the guaranty section of the statute of frauds our Court makes a distinction between collateral promises and original promises. The former are held to be within the statute while the latter are held not to be. Two earlier North Carolina cases state that a promise is collateral and that the corporation remained bound as original promisor. Record, p. 133.

No action shall be brought . . . to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized.” N.C. Gen. Stat. §22-1 (1953).

Peele v. Powell, 156 N.C. 554, 73 S.E. 234 (1911).

Whitehurst v. Padgett, 157 N.C. 424, 73 S.E. 240 (1911); Peele v. Powell, 156 N.C. 554, 73 S.E. 234 (1911).
original if it is made at the time or before the debt is created and the credit is given solely to the promisor or to both promisors as principals. In the principal case, however, the Court stated,

As applied to the promises by stockholders, officers, or directors, to pay a debt of the corporation, it may be said that the promise is original where the promisor’s primary object was to secure some direct and personal benefit from the performance by the promisee of his contract with the corporation . . . .

It appears that the Court is no longer restricting the term “original promise” to the situation where credit is extended solely to the promisor but is also using it in cases where the so-called “main purpose doctrine” is applicable. This would seem only to add confusion in determining whether or not a promise is within the statute. In applying the main purpose doctrine the question to be answered, it seems, is not whether the promise is original or collateral, but whether the promisors main purpose in making the promise was to secure some direct, personal benefit for himself even though he is at the same time promising to pay the debt of another.

Professor Williston states that today the use of the terms “original” and “collateral” is not decisive in determining if a promise falls within the statute because these terms are not clearly defined. It would seem, therefore, that the better rule would be to restrict the term “original promise” to its former meaning and to refrain from applying it to cases involving the main purpose doctrine.

**Specific Performance**

It is generally held that in an action for specific performance a vendee may waive the performance on the part of the vendor of portions of his contract and elect to take a partial performance, if he himself is willing to fully perform. In *Byrd v. Freeman* the plaintiffs brought an action for specific performance of a land option. The defendants, in consideration of $100, had given plaintiffs an option to purchase a described tract of farm land excepting therefrom a given area to be retained by the defendants. The contract provided for a division of the crop allotments which had been assigned to the entire tract of land. It further provided that, if the option were exercised,

---

*251 N.C. at 732-33, 112 S.E.2d at 525. Here the Court was quoting from Annot., 35 A.L.R.2d 906, 910 (1954).*

*For a discussion of the main purpose doctrine in North Carolina see Note, 13 N.C.L. Rev. 263 (1935).*

*2 Williston, Contracts § 463 at 1337 (rev. ed. 1936).*


*252 N.C. 724, 114 S.E.2d 715 (1960).*
the defendants would execute such leases or other instruments as might be necessary to effectuate the desired division. On trial the defendants stated that they did not know the provision relating to leases was in the contract when they signed it. They also contended that the provisions of the contract providing for the division of crop allotments were in conflict with the regulations under the Agricultural Adjustment Act and were, therefore, impossible of performance. However, the evidence tended to show that these provisions were put into the contract for the benefit of the plaintiffs and that they, rather than the defendants, were adversely affected by the fact that these provisions could not be performed. Plaintiffs waived the contract provisions as to crop allotments and leases and offered to take the land and the allotments that went with it as provided by the Agricultural Adjustment Act. The trial court granted the relief requested.

On appeal the Court affirmed the action of the trial court and stated, "Under these circumstances, it would be inequitable to deny to plaintiffs the remedy of specific performance on the unsubstantial ground that contractual provisions advantageous to plaintiffs rather than to defendants... were 'impossible of performance.'"

This decision not only seems sensible but it also appears to be consistent with prior specific performance cases which hold that a vendee, at his election, may compel the conveyance of such interest as the vendor may have in land he has contracted to sell where it turns out that the vendor does not have the interest he contracted to convey.

CREDIT TRANSACTIONS

Statute of Frauds

In *Warren v. White* the defendant owned nearly all of the stock

1 Since plaintiffs bought only part of the land, they would not get all the allotments assigned to the farm but would get only a proportionate share of them. If they desired an allotment greater than this proportionate share, they would have to lease it from the defendants.

2 In their brief the defendant-appellants stated: "It should be noted that the judgment itself does not undertake to order specific performance of the option contract because of the impossibility thereof but orders a performance different from that agreed upon in the option." Brief for Appellants, p. 7, Byrd v. Freeman, 252 N.C. 724, 114 S.E.2d 715 (1960).

3 See Goldstein v. Wachovia Bank & Trust Co., 241 N.C. 583, 86 S.E.2d 84 (1955); Bryant Timber Co. v. Wilson, 151 N.C. 154, 65 S.E. 932 (1909). The case would also seem to come within the language of Tillery v. Land, 136 N.C. 537, 48 S.E. 824 (1904), wherein the Court stated, "It is true that the Court will not permit the right to have specific performance evaded or denied by a mere technical or immaterial objection. It will rather look to the real, substantial terms of the contract and decree its performance with such variations as will effectuate the intention of the parties." Id. at 547, 48 S.E.2d at 828.

4 251 N.C. 729, 112 S.E.2d 522 (1960). This decision is also discussed under Contracts, Statute of Frauds, supra.
in an Edsel agency. After getting into financial difficulty he engaged the plaintiff, a man of experience in the automobile business, as general manager. At the inception of plaintiff's employment the defendant orally promised that he personally would guarantee payment of any sums the plaintiff might advance to the failing corporation. The agency subsequently went out of business, and the plaintiff sued for the advancements he had made. The Court affirmed a verdict for the plaintiff, holding that the oral promise was not within the Statute of Frauds.

The defendant testified that he had advanced over 23,000 dollars to the corporation during the period in which the plaintiff was general manager and that this was all the money he could borrow. In light of these facts and defendant's stock holdings, the Court stated, "There can be no doubt but that the defendant was personally, directly and pecuniarily interested in the continuance in business of the corporation and would be the principal beneficiary if this were accomplished and the principal loser if it were forced out of business." Thus the case came within an exception to the Statute of Frauds—the main purpose doctrine.

Where the promisor receives an immediate, pecuniary benefit as a result of his promise such promise is held outside the purview of the Statute of Frauds. In North Carolina the consistent recognition of the main purpose doctrine is marred only by the position taken by the Court in Genette v. Lyerly that a person who is president, director, and stockholder of a corporation does not have such an interest in its successful and profitable operation as to take his oral promise to pay its obligation out of the Statute of Frauds. Genette was based upon

2 Id. at 735, 112 S.E.2d at 526.
3 N.C. Gen. Stat. §22-1 (1953) provides: "No action shall be brought . . . to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized." It has been held that the promisor's interest was sufficient to take his oral promise out of the Statute of Frauds in the following instances: oral guaranty of bank deposits by a bank officer, it appearing that the bank was on the verge of insolvency and that the promisor stood to lose heavily in that event, Garren v. Youngblood, 207 N.C. 86, 176 S.E. 252 (1934), and Dillard v. Walker, 204 N.C. 16, 167 S.E. 636 (1933); agreement to pay his grantor's purchase money mortgage, Coxe v. Dillard, 197 N.C. 344, 148 S.E. 545 (1929); agreement to pay the creditor who furnished a boiler to a contractor, the boiler to be used in the promisor's business, Kelly-Handle Co. v. Crawford Plumbing & Mill Supply Co., 171 N.C. 495, 88 S.E. 514 (1916); promise by lumber company to pay a subcontractor for hauling logs to a mill, Dale v. Gaither Lumber Co., 152 N.C. 651, 68 S.E. 134 (1910).
4 207 N.C. 201, 176 S.E. 275 (1934). The same day that opinion was filed the Court seems to have held the opposite of the position taken in Genette without distinguishing the two cases. See Garren v. Youngblood, 207 N.C. 86, 176 S.E. 252 (1934).
the holding in *Peele v. Powell*, but this holding was reversed on rehearing. In the principal case the Court stated that the result in *Genette* was supportable on other grounds; thus it seems that the Court clearly intends to maintain its present position.

Whether the mere ownership of stock in a corporation is a sufficient interest to take a promisor's agreement to answer for the debt of the corporation out of the Statute of Frauds is a question remaining unanswered in North Carolina.

**SURETYSHIP**

In *Pickett v. Rigsbee* the defendants' father was indebted to the plaintiff on six promissory notes, five of which were executed in 1931 and one in 1928. One note was partially secured by certain bank stock. On September 24, 1954, the stock was sold and the proceeds credited to the note. The sale of the stock was handled by the debtors' son, the defendant A.M. Rigsbee. The last payment on the other five notes was made April 16, 1943.

In 1937 the defendants A.M. Rigsbee and Lelia R. Rezner had written the plaintiff as follows: "In recognition of the fact that our father . . . is indebted to you . . . and it being out desire to secure you for said loans . . . we the undersigned do hereby recognize this indebtedness as if it were our own and do assume full responsibility and liability for same." A seal appeared after the signature of each of the defendants.

The Court held that the instrument executed in 1937 made the defendants sureties and not guarantors and that the seal did not make the ten years statute of limitations applicable, as by express provision the statute covered only principals on an obligation.

---

6 156 N.C. 553, 73 S.E. 234 (1911). It was held that the interest of a landlord in a profitable crop grown by a tenant was insufficient to take out of the statute the landlord's promise to be responsible for payment of supplies furnished the tenant.

7 In *Jannsen v. Curtis*, 182 Wash. 499, 47 P.2d 662 (1935), mere ownership of one half the corporation's stock was held an insufficient interest to take an oral guaranty of the corporation's debt out of the Statute.

8 252 N.C. 200, 113 S.E.2d 323 (1960).

9 Id. at 201, 113 S.E.2d at 324.


11 N.C. GEN. STAT. § 1-47 (1953).

12 The presence of a seal is immaterial in determining for the purpose of the statute of limitation whether the signer be a principal or not. *Davis v. Alexander*, 207 N.C. 417, 177 S.E. 417 (1934); *Barnes v. Crawford*, 201 N.C. 434, 160 S.E. 464 (1931).
Prior to July 1, 1953, however, payment by a joint obligor started the statute of limitations running anew as to all persons primarily liable, including sureties.\textsuperscript{13} By virtue of the 1953 amendment to G.S. § 1-27, the statute does not run anew against any party not making a payment or ratifying the same.

The Court found clear evidence that the payment on September 24, 1954, by sale of the stock and application of the proceeds on one of the notes, had been ratified by the debtor's son, defendant Rigsbee; thus he would still be within the three year statute of limitations\textsuperscript{14} when the suit was begun on September 18, 1957. The Court remanded the issue of whether Lelia R. Rezner had also ratified the September 24, 1954, payment. If she had not ratified, she would be within the protection of the statute.

As for the other five notes, the last payment was made on April 16, 1943; thus the appropriate three year statute of limitations clearly had run as to them.

**Conditional Sales**

In *Franklin Nat'l Bank v. Ramsey*\textsuperscript{15} a resident of New York bought an automobile in that state on June 11, 1957, by a conditional sales contract which was recorded in New York on June 14, 1957, at 12:01 P.M. This same day around 8:00 A.M. the purchaser, having meanwhile brought the car to North Carolina, sold it to defendant Rocky Mount Motors, which defendant had no knowledge of the conditional sales contract. On July 15, 1957, defendant Ramsey bought the automobile from Rocky Mount Motors and executed a chattel mortgage thereon to defendant Planters National Bank. The plaintiff bank, holder of the conditional sales contract, did not record it in North Carolina until April 30, 1959.

The Court, in affirming the verdict in favor of the defendants, held that whether or not the car acquired a situs in this state, the result would be the same. If it did acquire a situs, G.S. § 44-38.1(b)\textsuperscript{16} is applicable, and it requires that the encumbrance be registered in the state from whence removed prior to removal, which was not true here.

\textsuperscript{13} Saied v. Abeyounis, 217 N.C. 644, 9 S.E.2d 399 (1940).

\textsuperscript{14} N.C. GEN. STAT. § 1-52 (1953).

\textsuperscript{15} 252 N.C. 339, 113 S.E.2d 723 (1960).

\textsuperscript{16} If property acquires a situs in North Carolina the out of state holder of a conditional sales contract takes as against the North Carolina purchaser for value who acquires his interest before the out-of-state holder records "only upon fulfilling all of the following conditions: (1) That such encumbrance was properly registered in the state where such property was located prior to its being brought into this State; and (2) That such encumbrance is properly registered in this State within ten days after the mortgagee, grantee in a deed of trust, or conditional sale vendor has knowledge that the encumbered property has been brought into this State; and (3) That such registration in this State in any event takes place within four months after encumbered property has been brought into this State." N.C. GEN. STAT. § 44-38.1(b) (Supp. 1959).
If no situs was acquired, G.S. § 44-38.1(c) applies, and it makes the encumbrance valid against subsequent purchasers only from registration in the state from whence removed, which occurred after the North Carolina sale (by several hours).

Though New York gives the vendor ten days to record his conditional sales contract and makes it valid against subsequent purchasers for value if recorded in ten days, that statute is not controlling because in conflict with G.S. § 44-38.1. Comity is not permitted to override express statutes.

DEED OF TRUST

In Adams v. Taylor the plaintiff had real estate on which she gave a deed of trust to secure a note payable in 300 monthly installments. Part of the land was taken in a condemnation proceeding, in which the judgment provided by consent of the parties that the compensation awarded be paid the secured creditor and applied on the note. The Court held that since the payment was not voluntary neither the creditor nor the debtor had the right to direct how it be applied; rather this was to be done by the court so as to accord with "intrinsic justice or the equity of the case." Accordingly, the money received should be applied ratably to each of the remaining installments on the note. In North Carolina an identical result would follow in the case of a foreclosure under a deed of trust or mortgage which secured several notes.

"When personal property covered by a deed of trust, mortgage or conditional sale contract is brought into this State and no situs is acquired in this State, the encumbrance is valid as against lien creditors of, or purchasers for valuable consideration from, the grantor, mortgagor or conditional sale vendee only from the date of due registration of such encumbrance in the proper office in the state from which the property was brought." N.C. Gen. Stat. § 44-38.1(c) (Supp. 1959).

G.S. § 44-38.1 was enacted to protect residents of North Carolina who purchase personal property which is subject to a chattel mortgage or conditional sale created in another state, when the property subsequently has been brought into North Carolina.

For illustration of this principle, see General Fin. & Thrift Corp. v. Guthrie, 227 N.C. 431, 42 S.E.2d 601 (1947); Mack Int'l Truck Corp. v. Wilkins, 219 N.C. 327, 13 S.E.2d 529 (1941).

The trial court held that the plaintiff was entitled to have the condemnation monies discharge the monthly installments thereafter accruing until the sum was exhausted.

Where funds are distributed in judicial proceedings, and thus the payments are involuntarily made by debtor to creditor, the rule is that neither party may direct the manner of application to the debt. See F. D. Cline Paving Co. v. Southland Speedways, Inc., 250 N.C. 358, 108 S.E.2d 641 (1959), 38 N.C.L. Rev. 544; accord, Ohio Elec. Car Co v. Le Sage, 198 Cal. 705, 247 Pac. 190 (1926); Citizens' & So. Bank v. Armstrong, 22 Ga. App. 138, 95 S.E. 729 (1918). A creditor can apply proceeds of a voluntary payment to any debt owed by the debtor where the debtor has not otherwise specified. Security Trust & Sav. Bank v. June, 38 Ariz. 513, 1 P.2d 970 (1931); Sanders v. Hamilton, 233 N.C. 175, 63 S.E.2d 187 (1951).

notes secured by a mortgage, the proceeds would have been so applied. Here there was one note payable in 300 installments, but the Court felt such was tantamount to 300 notes, one due each month.

**CRIMINAL LAW AND PROCEDURE**

**Criminal Law**

**Abortion**

North Carolina has two punitive abortion statutes. The first, G.S. §14-44, is designed to protect the child *en ventre sa mere*, the other, G.S. §14-45, to protect the pregnant woman. In *State v. Hoover* the defendants were indicted for violating both statutes and upon a verdict of "guilty as charged" sentenced to not less than one year's imprisonment. The prosecuting witness testified she knew she was pregnant because of the absence of a month's menstruation. Medical evidence showed that she was about two months pregnant at the time of the illegal operation. On appeal the Court held that the prosecuting witness was properly allowed to testify she was pregnant. The evidence was held sufficient to establish that fact beyond a reasonable doubt and the Court affirmed the conviction under G.S. §14-45. But since there was no evidence that the woman was "quick with child" the conviction under G.S. §14-44 could not be sustained. The judgment was upheld.

1 *State v. Jordan*, 227 N.C. 579, 42 S.E.2d 674 (1947). G.S. §14-44 provides that if any person shall willfully administer to, prescribe or procure for, or advise any woman either pregnant or quick with child to take drugs or other substances, or use any instruments or other means with intent thereby to destroy such child, unless it is necessary to save the life of the mother, he shall be guilty of a felony and shall be imprisoned for not less than one year nor more than ten.

2 *State v. Green*, 230 N.C. 381, 53 S.E.2d 285 (1949); *State v. Forte*, 222 N.C. 537, 23 S.E.2d 842 (1943). G.S. §14-45 provides that if any person shall administer to any pregnant woman, or prescribe for any such woman, or advise and procure such woman to take any medicine, drug or anything whatsoever, with intent thereby to procure the miscarriage of such woman, or to injure or destroy such woman, or shall use any instrument or application for any of the above purposes, he shall be guilty of a felony, and shall be imprisoned for not less than one year nor more than five.

3 *252 N.C. 133, 113 S.E.2d 281 (1960).*

4 The Court cited with approval the following: *State v. Horwitz*, 108 Conn. 53, 142 Atl. 470 (1928), where it was held that the victim's belief that she was pregnant was a relevant circumstance; *Commonwealth v. Leger*, 264 Mass. 217, 162 N.E. 337 (1928), where it was held competent for the woman to testify "she thought she was pregnant.


6 *Accord*, *State v. Forte*, 222 N.C. 537, 23 S.E.2d 842 (1943), where the indictment charged the operation was performed upon a woman "quick with child" and the evidence proved pregnancy only; the variance was held to be fatal. "Either pregnant or quick with child" as used in G.S. §14-44 means the woman must be quick with child, not just pregnant. *State v. Jordan*, 227 N.C. 579, 42 S.E.2d 647 (1947).
because the count laid under G.S. § 14-45 alone was sufficient to support the verdict and the sentence as to each defendant.7

Assault and Battery—Self-Defense

In State v. Francis8 the defendant store owner shot an unruly patron who had attacked him. The defendant was convicted of assault with a deadly weapon, over a plea of self-defense. The trial court charged that generally a person cannot use a pistol to repel an attack by an unarmed assailant and that, while the law permits a person to use such force as is reasonably necessary to protect himself, he is answerable to law if he uses more force than is reasonably necessary. On appeal the Court held the charge erroneous in that the instruction virtually eliminated the defendant's right of self-defense. In support of this conclusion the Court stated the general rule that one who is free from fault, when attacked on his own premises, does not have "to retreat before he can justify his fighting in self-defense regardless of the character of the assault."9 It would seem that the questions as to the duty to retreat and the degree of force necessary to protect himself from harm, once the attacked person resists are entirely different. Granted the defendant here had no duty to retreat before resisting;10 but once he resisted, the law allowed him to use only such force as he believed to be necessary and for which belief he had reasonable grounds.11 The right to resist was not questioned in the instant case.

The trial court's charge was held to be erroneous in another aspect in that it failed to charge that the defendant may use such force as was necessary or apparently necessary to protect himself. The jury, not the party charged, is to determine the reasonableness of the belief of the apparent necessity.12

Bad Check

It is a misdemeanor for any person, firm or corporation to draw and deliver to another any check knowing at the time that the maker does not have sufficient funds on deposit to afford collection.13 One

7 State v. Snipes, 185 N.C. 743, 117 S.E. 500 (1923). Here the Court held that where there are two or more counts in the indictment, a general verdict of guilty as charged will be presumed to have been returned on the count or counts to which the evidence relates if it does not relate to all the counts.
8 252 N.C. 57, 112 S.E.2d 756 (1960).
9 Id. at 59, 112 S.E.2d at 758.
10 See State v. Sally, 233 N.C. 225, 63 S.E.2d 151 (1951), where the Court held that one in his own home or place of business acting in defense of himself and his premises is not required to retreat in the face of an assault but may repel force with force, not only to resist but to overcome the assault.
12 State v. Rawley, supra note 11; State v. Terrell, 212 N.C. 145, 193 S.E. 161 (1937); State v. Nash, 88 N.C. 618 (1883).
13 N.C. GEN. STAT. § 14-107 (1953).
who solicits, aids or abets in this issuance is also guilty of a misdeemeanor.\textsuperscript{14} In \textit{State v. Cruse}\textsuperscript{15} a firm’s secretary was indicted for drawing and delivering checks knowing at the time \textit{she} did not have sufficient funds on deposit. The firm’s owners were indicted for soliciting, aiding and abetting. The evidence showed that the secretary, upon authorization by the owners, signed the checks under the printed name of the firm. All of the defendants were found guilty as charged. On appeal the Court reversed as to the secretary. It was held that one who merely performs a clerical task of filling in the printed forms and signing the same to authenticate the instrument as a check of the firm does not violate the provisions of the statute. The Court pointed out that there was no evidence she intended the check to be a personal one and therefore there was a fatal variance between allegation and proof.\textsuperscript{16} As to the owners of the firm, judgment was affirmed.\textsuperscript{17}

\textit{Corpus Delicti}

In every criminal case the prosecution must prove (1) that the crime charged has been committed by someone and (2) that the defendant is the perpetrator of the crime.\textsuperscript{18} The proof of the former, the \textit{corpus delicti}, is just as essential as identification of the person charged, and both are prerequisites to a conviction.\textsuperscript{19} In \textit{State v. Bass}\textsuperscript{20} the State relied upon circumstantial evidence to convict the defendant of peeping into a woman’s room at night. A single witness saw a man near the house and upon investigation tracks were found near the window, leading to a point where the man had been seen. Blood hounds picked up a scent at this latter point and led officers to the defendant’s house. The State introduced a confession but the defendant denied that it was voluntarily made. The Court reversed the conviction, holding that the State failed to prove a crime had been committed or, if it had, that the defendant was the culprit.\textsuperscript{21} The Court said it is well

\footnotesize{\textsuperscript{14} Ibid.\textsuperscript{15} 253 N.C. 456, 117 S.E.2d 49 (1960).\textsuperscript{16} The Court cited \textit{State v. Dowless}, 217 N.C. 589, 9 S.E.2d 18 (1940), where the indictment charged that the defendant issued a worthless check knowing \textit{he} did not have sufficient funds. The proof was that it was the check of the corporation, defendant being an executive officer thereof, and that the corporate funds were the ones lacking. The Court held there was a fatal variance between allegation and proof.\textsuperscript{25} One who solicits another to commit a crime may be convicted even though the principal never acts or is never convicted of the counseled crime. \textit{State v. Hampton}, 210 N.C. 283, 186 S.E. 251 (1936); \textit{State v. Whitt}, 113 N.C. 716, 18 S.E. 715 (1893).\textsuperscript{17} \textit{State v. Edwards}, 224 N.C. 577, 31 S.E.2d 762 (1944).\textsuperscript{18} \textit{State v. Norggins}, 215 N.C. 226, 1 S.E.2d 533 (1939).\textsuperscript{19} 253 N.C. 318, 116 S.E.2d 772 (1960).\textsuperscript{20} See \textit{State v. Harvey}, 228 N.C. 62, 44 S.E.2d 472 (1947), wherein the Court states the rule that when circumstantial evidence is relied upon for a conviction, the facts established on the hearing must point unerringly to the defendant’s guilt to the exclusion of any other reasonable hypothesis.}
settled that the *corpus delicti* cannot be proved by an extra-judicial confession standing alone. There must be evidence *aliunde* the confession of sufficient probative value to establish commission of the crime. As far as can be determined, this is the first time the North Carolina court has applied this rule in a misdeameanor case. The Court did not consider whether a distinction exists between felony cases and misdeameanor cases when establishing the *corpus delicti*.

Aside from the confession the State's only evidence was the tracks. It was pointed out that there was no evidence that the tracks were made at the time in question and that they were not sufficiently proved to be the defendant's footprints.

### Illegal Possession of Liquor

The possession of any quantity of nontaxpaid liquor by a person is unlawful without exception in this state. The possession may be actual or constructive, but in either case the State must prove the defendant was the possessor in order to convict. In *State v. Guffey* the officer was permitted to enter a house owned by the defendant and used by her as a residence. She was not at home when the officer arrived. He found five adult persons there and a jar of nontaxpaid liquor on the kitchen shelf. At this point the defendant returned home and was arrested. On trial the defendant was convicted of the possession of nontaxpaid liquor for the purposes of sale. The Court reversed the conviction, holding the evidence insufficient to be submitted to the

---


23 *Ibid.* Both of these cases involved a felony.

24 The majority of the jurisdictions in this country make no distinction, holding that a naked extrajudicial confession is insufficient to support a conviction in a felony or misdeameanor case. *Smith v. United States*, 348 U.S. 147 (1954). The view has been taken, however, that the rule applies only to felony cases or serious or high crimes and that in cases of mere misdeameanors convictions may be had upon uncorroborated confessions. See, e.g., *Commonwealth v. Quick*, 15 Pa. Dist. 260, 31 Pa. Co. 541 (1905); *State v. Gilbert*, 36 Vt. 145 (1863). See generally Annot., 45 A.L.R.2d 1316, 1322 (1956).

25 The officer testified that in his opinion the tracks found were the footprints of the defendant. However in *State v. Reitz*, 83 N.C. 634 (1880), the Court said the bare opinion of a witness on this issue of identification by footprints is without probative force as to the identity of the person who made the tracks.


27 *State v. Glenn*, 251 N.C. 156, 110 S.E.2d 791 (1959). As to what constitutes constructive possession there is no definite rule but the jury must decide on all the facts. In *State v. Gibbs*, 238 N.C. 258, 77 S.E.2d 779 (1953), the Court held that where the liquor was found in the curtilage of the defendant's home the evidence was sufficient to go to the jury. In *State v. Brown*, 238 N.C. 260, 77 S.E.2d 627 (1953), the liquor was found beneath the defendant's house. The evidence was held sufficient to go to the jury. But where the liquor is on the defendant's premises with his knowledge and consent, it is as a matter of law within his constructive possession. *State v. Taylor*, 250 N.C. 363, 108 S.E.2d 629 (1959).

jury on the question of the defendant's possession of the liquor, either
constructive or actual. It was pointed out that there was no evidence
that the liquor was on the shelf when the defendant left her home and
that she was not present when the officer arrived. Thus the evidence
was so slight as to leave to mere conjecture whether the defendant or
one of the five adults was the possessor of the nontaxpaid liquor. Ap-
parently the mere fact that the liquor was found on the defendant's
premises did not place it in her constructive possession without a show-
ing that it was there by her consent or that she had knowledge of its
presence.

In State v. Rogers and State v. Foster, the two cases being tried
together, the defendants were convicted of unlawful possession of more
than two and one-half gallons of taxpaid liquor for the purposes of
sale. Our G.S. § 18-32 declares that the possession of more than a
gallon of such liquor whether at one or more places is prima facie evi-
dence of possession for the purpose of sale. Two gallons were found
in an automobile being used by the defendants and five more pints in
an apartment for which they shared expenses. Defendant Rogers
claimed these five pints were her personal possession and did not be-
long to defendant Foster. Defendant Foster claimed only eight pints
of that found in the car, the remaining eight were said by Rogers to
have been purchased by herself for a friend. A motion for nonsuit
was denied. The Court sustained convictions of both defendants, hold-
ing the evidence sufficient to be submitted to the jury. Apparently the
Court concluded also that the jury was warranted in finding that both
defendants had possession of the five pints found in the apartment. If
the Court had not so concluded, then only one party could be said to
have been in possession of over a gallon of liquor.

In State v. Gibbis, 238 N.C. 258, 77 S.E.2d 779 (1953), the defendant was
not at home when the officers arrived but was present when the liquor was found.
The Court held the evidence sufficient to be submitted to the jury on the issue
of constructive possession, although there was no showing that the liquor was
there when the defendant left home.

Accord, State v. Glenn, 251 N.C. 156, 110 S.E.2d 791 (1959). Here several
paths led from nearby houses, defendant's being one of them, to the hiding place
where nontaxpaid liquor was found. Conviction was reversed.

See State v. Taylor, 250 N.C. 363, 108 S.E.2d 629 (1959), where the Court
held that, while mere knowledge of the defendant that intoxicating liquor is on
his land does not establish as a matter of law that the whiskey is in defendant's
constructive possession, if the whiskey is on defendant's premises with his knowl-
edge and consent, he has constructive possession thereof while it remains on the
premises under his exclusive control.

State v. Buchanan, 233 N.C. 477, 64 S.E.2d 549 (1951). The possession
may be actual or constructive in this offense also.

But see State v. Watts, 224 N.C. 771, 32 S.E.2d 348 (1944), where more
than a gallon was found on the defendant's premises but the Court held the
evidence insufficient to make out a prima facie case since another adult claimed
part of the liquor.
Argument of the Solicitor

The North Carolina Court has often repeated the general rule that wide latitude is given counsel in the argument of his case to the jury but that counsel must refrain from remarking on facts not in evidence. This rule is illustrated in the recent case of State v. Graves. The solicitor in his summation to the jury argued:

[Rape is] the type of crime . . . that tempts people to take the law into their own hands. . . . That could easily have happened in this case but they didn't, the people were relying upon you, that is the jurors . . . to uphold the laws of this State in which rape is a capital crime . . ..

He continued to the effect that though the jury had unbridled discretion to recommend life imprisonment, such discretion should not be exercised in this case. "[I]f this defendant is given life imprisonment rather than death I don't know what might happen . . ." The defendant was convicted and given the death sentence. The Court granted a new trial, stating that it was error to allow the solicitor to go outside the record and argue facts not included in the evidence.

Although the solicitor referred to facts outside the record, it would seem that the argument was also objectionable for the reason stated in State v. Manning. There it was held error to allow the solicitor to remark to prospective jurors that the State was demanding the death penalty. The Court relied upon the provison in North Carolina's murder statute that the jury may recommend life imprisonment. This has been construed to mean the jury has unbridled discretion and that it is error for the solicitor to attempt to influence it. The identical provision is contained in the rape statute under which the defendant was indicted in the Graves case. The Court in the instant case did not cite the Manning case or refer to the argument as impinging on the

---

36 252 N.C. 779, 114 S.E.2d 770 (1960); also discussed under Trial Practice, Improper Argument of Solicitor, infra.
37 Id. at 780, 114 S.E.2d at 771.
38 Ibid.
39 Accord, State v. Little, 228 N.C. 417, 45 S.E.2d 542 (1947).
41 G.S. § 14-17, after defining murder in the first degree, provides that "If at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. . . ."
Charges to the Jury—Peremptory Instructions

Only in rare instances may a verdict be directed for the State in a criminal prosecution. When the trial court's instructions are peremptory in nature, the Court will closely examine the facts of the case to determine if they warranted the peremptory instruction and often will hold the charge to be error. State v. Lackey illustrates the Court's close scrutiny of such charges. The defendant pleaded not guilty to a charge of driving while intoxicated. The State's evidence was that defendant's automobile had been weaving along the highway and that when arrested the defendant smelled of alcohol and was unsteady. The defendant testified that he had two drinks prior to his arrest and had taken a prescription of unknown content which had made him dizzy. His doctor testified the medicine was narcotic in nature, that the defendant was not told this and that the medicine alone would produce the drunken condition.

The trial court charged the jury that if they

---

44 Cases were cited by the Court in which it was held error for counsel to argue as follows: that he could get a hundred people to testify to the defendant's bad reputation, State v. Roach, 248 N.C. 63, 102 S.E.2d 413 (1958); that the defendants could not prove where they were at the time of the offense and that their mothers and fathers were not in court to show where they were the night in question, State v. Roberts, 243 N.C. 619, 91 S.E.2d 589 (1956); that if the defendant were convicted of first degree murder there would be appeals all the way to the Governor to commute the death sentence; that not more than sixty percent of prisoners of capital offenses are ever executed, State v. Little, 228 N.C. 417, 45 S.E.2d 542 (1947). In all these cases the solicitor or counsel was said to have argued facts outside the record. See generally Note, 38 N.C.L. Rev. 281 (1960); 32 N.C.L. Rev. 423, 438 (1954); Note, 4 N.C.L. Rev. 132 (1926).

45 E.g., State v. Godwin, 227 N.C. 449, 42 S.E.2d 617 (1947); State v. Langley, 209 N.C. 178, 183 S.E. 526 (1936). In this latter case the Court stated that it is error for the trial judge to direct a verdict in a criminal action “when there is no admission or presumption calling for an explanation or reply from the defendant.” Id. at 181, 183 S.E. at 527. In this case there was a presumption that the defendant had the liquor in his possession for purposes of sale and there was no evidence tending to show the contrary. The trial court instructed the jury that “if you believe beyond a reasonable doubt the facts to be as the evidence . . . tends to show, you will find the defendant guilty.” (Emphasis added.) The charge was approved on appeal, the Court stating that in such a case only the credibility of the evidence should be submitted to the jury. But cf., State v. Ellis, 210 N.C. 166, 185 S.E. 663 (1936), where the Court stated that it is only when the prima facie case of the State is corroborated by circumstances which point unerringly to the defendant's guilt that a peremptory instruction is permissible. The Court in the Ellis case stated that it was on this theory that the instructions in the Langley case were upheld.


47 251 N.C. 686, 111 S.E.2d 891 (1960).

48 G.S. § 20-138 makes it unlawful to drive an automobile under the influence of liquor or narcotics. This is a penal statute and to constitute a violation the
found the facts to be as all of this evidence tended to show and found those facts beyond a reasonable doubt, then it would be their duty to return a verdict of guilty as charged. On appeal the Court reversed the conviction, holding the charge erroneous. The Court stated that in the absence of an admission or presumption calling for an explanation by the defendant, the peremptory character of the instruction would seem to be in excess of the "approved practice." Moreover, as was pointed out by the Court, the plea of "not guilty" disputes the credibility of the evidence even when uncontradicted since one is presumed innocent until a jury finds the contrary.

Charge to the Jury—Elements of the Offense

It is the duty of the trial judge to charge the jury as to the nature of the offense and the general principles of law essential to a conviction. In State v. Jacobs a conviction for larceny was reversed because the trial judge failed to charge, inter alia, that the taking must be done with animus furandi, a felonious intent to appropriate the goods taken to the defendant's own use. The charge did not refer to intent at all.

When two or more defendants are being tried together, the trial judge must make clear in his instruction that the requisite criminal intent be found in each of the several defendants. Two defendants were indicted for breaking and entering and larceny in State v. Miller. The trial judge charged that if the jury found beyond a reasonable doubt that the defendants, or either one of them, entered the building with the felonious intent to take away goods and deprive the owner of them act must we willful. Had the defendant's evidence been believed, it would seem that he was not guilty. Further, the warrant charged him with driving while intoxicated. Quaere: Would this warrant have been sufficient to support a conviction of driving under the influence of narcotics which produced a drunk effect?

Just what is the "approved practice" is not entirely clear. The final determination will depend upon the facts of the case. In State v. Estes, 185 N.C. 752, 117 S.E. 581 (1923), the Court said where as an inference of law the uncontradicted evidence, if true, establishes guilt then the trial court may instruct the jury to return a verdict of guilty if they find the evidence to be true beyond a reasonable doubt. In State v. Riley, 113 N.C. 648, 18 S.E. 168 (1893), the evidence was uncontradicted. The trial court charged the jury that if they believed the evidence beyond a reasonable doubt, the defendant was guilty. On appeal the Court held the charge was correct but reversed the conviction when the judge entered the verdict for the jury without permitting it to retire. In Everett v. Williams, 152 N.C., 117, 67 S.E. 265 (1910), the Court said while the trial judge cannot direct a verdict for the State it may, in a plain case, instruct the jury that if they believe the evidence, they will find the defendant guilty. The Court said this is not directing a verdict.

This is true even though guilt may be inferred from the testimony of the defendant. State v. Green, 134 N.C. 658, 46 S.E. 761 (1904).

N.C. GEN. STAT. § 1-180 (1953); State v. Fulford, 124 N.C. 798, 32 S.E. 377 (1899).

permanently, it would be the duty of the jury to find both guilty of breaking and entering. On appeal the Court held the charge erroneous. The State admitted that the defendants were not indicted for conspiracy to commit the offenses charged so as to imply that there was a mutual intent. Under the instructions given the jury could find both defendants guilty although only one had the necessary felonious intent, while it was necessary to find that each had such an intent in order to convict them both.  

**Charge to the Jury—Contentions of the Parties**

The trial judge is required by G.S. § 1-180 to explain the law and give equal stress to the contentions of the State and the defendant. Thus in *State v. Revis* it was held error when the trial judge stated to the jury when reviewing the testimony that certain evidence brought out by the State on its cross examination of the defendant was offered as evidence by him. The testimony elicited on the cross examination was for impeachment purposes only and not offered in defense by the defendant. The Court stated that the trial court's charge tended to confuse the defendant's position.

**Circumstantial Evidence as a Basis for Conviction**

The correct rule for instructions to the jury when the State relies upon circumstantial evidence as a basis for conviction was pronounced by the Court in *State v. Potter*. The defendants were convicted of a conspiracy to commit arson. The trial court charged that, while the State relies on circumstantial evidence for a conviction, it is the duty of the jury to accept the hypothesis that points to the defendants' innocence as much so as the hypothesis that points to their guilt. The Court held the charge erroneous stating the correct rule in such cases to be as follows: "when the circumstances taken together are as compatible with innocence as with guilt, there arises a reasonable doubt and it is the duty of the jury to adopt the hypothesis of innocence even though that of guilt is more probable." Under the instructions of the trial court, if the jury found the circumstances compatible with innocence and guilt, they could have adopted either hypothesis, thus destroying the "beyond a reasonable doubt" requirement. The rule

---

65 See *State v. Massengill*, 228 N.C. 612, 46 S.E.2d 713 (1918), where the trial judge referred to three defendants together in charging as to larceny and the evidence was not identical as to all three. The Court stated that the defendants were entitled to have the evidence as to each and the question of guilt or innocence of each submitted to the jury separately.


as laid down by the Court is clearly the one followed by the majority of jurisdictions.\(^6^9\)

In *State v. Rhodes*\(^6^0\) the Court applied substantially the same rule when considering the legal sufficiency of circumstantial evidence to support a conviction. The Court stated that when the State relies upon such evidence for a conviction the facts established or advanced on hearing must be of such a nature and so connected or related as to point unerringly to the defendant's guilt, excluding any other reasonable hypothesis.\(^6^1\) A comparison will reveal that this rule and the rule stated in the *Potter* case embody the same principle—that there must be a finding of guilt to the exclusion of any reasonable hypothesis which would point to the defendant's innocence.

**Evidence**

The common law rule that the courts look to the competency of the evidence and not to the manner in which it is acquired was applied in *State v. Rhodes*.\(^6^2\) The trial court permitted a physician to testify as to his findings upon performing an autopsy of the deceased and to give his opinion as to the cause of death. The State made no showing that the physician had been authorized to perform the autopsy. In affirming the manslaughter conviction the Court said that evidence otherwise competent is admissible irrespective of the manner in which it was obtained by the witness.

North Carolina has by recent statutory enactments\(^8^3\) restricted this rule in cases where the evidence is obtained by an officer in conducting a search without a valid warrant, evidence so obtained no longer being competent. There are statutes which require that an autopsy be authorized by the prosecuting officer in homicide cases,\(^6^4\) or by the coroner or coroner's jury, or by the next of kin.\(^6^5\) North Carolina has recognized the principle that a dead body is quasi property belonging to the next of kin of the deceased and such kin may maintain an action for the mutilation of the dead body.\(^6^6\) Apparently the Court did not consider the unauthorized autopsy a search so that the evidence thereby procured would be inadmissible.


\(^{6^0}\) 252 N.C. 438, 113 S.E.2d 917 (1960).


\(^{6^2}\) 252 N.C. 438, 113 S.E.2d 917 (1960).


\(^{6^5}\) N.C. Gen. Stat. § 90-217 (1958). The coroner or a majority of the coroner's jury may direct performance of an autopsy when they deem it necessary upon inquest. In all other cases, such as autopsies by medical schools, public institutions, etc., the consent of the next of kin must be obtained.

\(^{6^6}\) *Floyd v. Atlantic Coast Line Ry.*, 167 N.C. 55, 83 S.E. 12 (1914).
In *State v. Case* 67 the appellant's co-defendant, Shedd, made certain statements to an officer in the presence of the appellant which implicated him in the offense. The appellant, Case, made no reply to the statements. The Court held the statements competent evidence as implied admissions; therefore the officer was properly allowed to testify as to them.68 Other statements made by Shedd when the appellant was not present were admitted in the trial court without objection or request by Case that they be limited as admissions against Shedd only. In referring to these *ex parte* statements, the Court said that, had such an objection or request been made, it would have been error to admit the statements against the appellant. The Court stated that it would not have been prejudicial error in this case, however, since there was other competent evidence sufficient to support a finding of the facts contained in these latter statements.

**Plea of Nolo Contendere**

The effect of the plea of *nolo contendere* was restated by the Court in *State v. Stevens.*69 The defendant entered the plea to a bill indicting him for larceny. The trial court proceeded to hear the State's evidence at the close of which the defendant moved for a nonsuit. The motion was denied and defendant sentenced. The Court affirmed the trial court's ruling on the motion, stating that the effect of the plea when accepted by the State is to give the court the same authority to impose judgment as if the defendant had pleaded guilty or the jury had returned such a verdict. The evidence is taken not to determine the guilt or innocence of the pleader but for the purpose of determining the proper judgment.70 The Court emphasized that the law does not sanction a conditional plea of *nolo contendere.*

**Sentencing Problems**

Activation of suspended sentences was the subject of controversy in two recent cases. In the first, *State v. Morton,*71 the defendant upon a conviction for criminal non-support received a six months' sentence which was suspended upon the payment of twenty-five dollars per week for his family's support. Defendant complied with this condition until about a year later when, pursuant to a modification provision

68 *Accord,* State v. Bryant, 235 N.C. 420, 70 S.E.2d 186 (1952). Here the Court said statements made by others within the defendant's hearing which implicate him in the offense, and to which defendant makes no reply at the time, may be admitted in evidence as implied admissions.
69 252 N.C. 331, 113 S.E.2d 577 (1960).
70 *Accord,* State v. Ayers, 226 N.C. 579, 39 S.E.2d 607 (1946). The effect of the plea of *nolo contendere* has been the subject of much controversy in North Carolina. See generally Lane-Reticker, *Nolo Contendere in North Carolina,* 34 N.C.L. Rev. 280 (1956); Notes, 30 N.C.L. Rev. 407 (1952) and 12 N.C. L. Rev. 369 (1934).
71 252 N.C. 482, 114 S.E.2d 115 (1960).
contained in the judgment, a hearing was held and the payments increased to forty-five dollars per week. After the increase the defendant failed to pay anything and the suspended sentence was activated.\textsuperscript{72} On appeal the Court refused to discuss the effect of the modification as a condition of the suspended sentence but pointed out that the original condition of twenty-five dollar payments had been violated. Activation of the sentence was affirmed.

Had the defendant continued to pay the twenty-five dollar per week payments after the modification the result should have been the same. The defendant consented to the terms of the suspension, as he must,\textsuperscript{78} and possible modification of the payments was one of the terms of the condition of suspension.

The nature of a proceeding to determine violation of a condition of a suspended sentence was demonstrated in the case of \textit{State v. Guffey}.\textsuperscript{74} Here the defendant, convicted of a liquor violation in a county recorder's court, received a suspended sentence upon condition (1) that she pay a fine, (2) that she not have any liquor in her possession for two years and (3) that she not violate any of the liquor laws of the State for two years. Later the defendant was convicted in the same court for possession of nontaxpaid liquor and, upon motion of the solicitor, the judge entered an order activating the suspended sentence of the first conviction. Defendant appealed both the second conviction and the activation order to the superior court. The superior court judge, in his discretion, found that the defendant had violated the condition of the suspended sentence and entered the activation decree accordingly. Subsequently the jury in the superior court, hearing the charge of possession of nontaxpaid liquor \textit{de novo}, convicted the defendant again. This conviction was reversed by the Supreme Court for insufficient evidence.\textsuperscript{76} In view of this decision another judge, at the following term of the superior court, entered an order striking the activation decree. The State appealed. The Court held that upon certification of the decision reversing a conviction, a judge may properly strike from the record an order activating a suspended sentence when the order of activation is based upon that conviction.\textsuperscript{78}

\textsuperscript{72} G.S. § 15-200.1 gives the defendant the right to appeal from the recorder's court to the superior court, the matter to be heard de novo, but only upon the question of whether there has been a violation of the condition. This issue is determined in the sound discretion of the court. \textit{State v. Marsh}, 225 N.C. 648, 36 S.E.2d 244 (1945).

\textsuperscript{73} \textit{State v. Barnhardt}, 230 N.C. 223, 52 S.E.2d 904 (1949). Here the Court held that the trial court may not suspend the sentence upon prescribed conditions without the consent of the defendant, express or implied.

\textsuperscript{74} \textit{State v. Guffey}, 252 N.C. 60, 112 S.E.2d 734 (1960). This case is noted under \textit{Criminal Law, Illegal Possession of Liquor, supra.}

The Court stated the general rule to be that, when judgment in a criminal action is suspended upon condition, the proceedings to ascertain a violation of the condition are addressed to the sound discretion of the judge or court and not to the jury. The finding of the judge, if supported by competent evidence, is not reviewable except for abuse of discretion. The Court stated as an exception, however, that when the defendant is acquitted of the offense which constitutes the violation of the suspended sentence and is the sole basis of the activation "as to that fact and to that extent, the court or judge hearing the matter of the suspended sentence should be concluded." The Court also stated that as a matter of procedure the superior court judge should have tried the appeal from the second conviction de novo before making a finding upon the matter of activation. In this case, however, it would appear the judge would have made the same finding of violation had he waited since the superior court jury convicted the defendant of possession of nontaxpaid liquor.

Warrants and Indictments

The North Carolina Constitution declares that every person charged with a crime has the right to be informed of the accusation against him. The warrant or indictment is the method used to inform the defendant, and if they do not give sufficient information the Court may find them fatally defective. In *State v. Thornton* the defendant was convicted and sentenced upon a plea of guilty to an indictment charging him with the embezzlement of money from "The Chuck Wagon." On appeal the judgment was arrested, the Court holding the indictment defective on its face since there was no allegation that "The Chuck Wagon" was a corporation capable of owning property and the name did not import that it was a corporation or any other legal entity. The Court stated the general rule to be as follows: (1) where the goods belong to a natural person, he must be named; (2) where the goods
belong to a partnership or other quasi artificial person, the names of the persons composing the partnership or quasi artificial person should be given; (3) where the goods belong to a corporation, the name of the corporation should be given and the fact that it is a corporation stated, unless the name itself imports a corporation. This rule has been followed in other jurisdictions as well as in North Carolina.

Where the defendant was convicted of larceny on a warrant which averred that the property belonged to the “U-Wash-It,” the Court arrested the judgment for the same reasons set out in the Thornton case.

In State v. Rorie the Court was presented the novel question of whether a conviction for assault with a deadly weapon can be upheld under an indictment for manslaughter, framed in the abbreviated words of the statute, which failed to allege that the homicide was committed by means of assault and battery or assault with a deadly weapon. The Court held that the conviction could not be sustained and arrested the judgment. The Court stated that the lesser offense is not necessarily included in the charge of manslaughter. The defendant, a store owner, struck the fatal blow with a tire tool when the deceased persistently took meat from the store. Neither the weapon nor any of the circumstances of the homicide were alleged in the indictment. It would seem that the decision is in harmony with those of the majority

E.g., Burrow v. State, 147 Ala. 114, 41 So. 987 (1906). Here the indictment laid the ownership of the property in the Southern Railway Company without averring it was a corporation, partnership, or natural person. It was held sufficient. See generally Annot., 88 A.L.R. 485 (1934), where it is pointed out that absent a statute the greater number of jurisdictions follow the rule that an allegation of incorporation is not necessary where the name imports incorporation.

State v. Grant, 104 N.C. 908, 10 S.E. 554 (1889). Here an indictment for larceny alleged that the property belonged to the Richmond and Danville Railway Company. It was held sufficient, the Court saying that the fact of incorporation need not be alleged where the corporate name is correctly set out in the indictment.


G.S. § 15-144 provides that in indictments for manslaughter it is not necessary to allege matter not required to be proved on trial; but in the body of the indictment, after naming the person accused, his residence, and the date of the offense, it is sufficient to allege that the accused feloniously and willfully did kill and slay (naming the victim). The abbreviated statutory form has been held sufficient in State v. Gilchrist, 113 N.C. 673, 18 S.E. 319 (1893); State v. Matthews, 142 N.C. 621, 55 S.E. 342 (1906).

As an example of a case where manslaughter may be committed without the deceased’s being assaulted, the Court cited a case where a homicide occurs as a result of some negligent or culpable omission of duty. In State v. Watkins, 200 N.C. 692, 158 S.E. 393 (1931), the defendant was found guilty of assault with a deadly weapon upon an indictment for manslaughter using the statutory language. The Court granted a new trial holding that whether a pair of handcuffs will be considered a deadly weapon is a question for the jury. The majority opinion did not discuss the sufficiency of the indictment but the question was raised by the concurring opinion of Chief Justice Stacy.
of jurisdictions which have decided the precise question. It is also in accord with previous decisions of the Court to the effect that where the defendant is indicted for assault with a deadly weapon, the character of the weapon must be alleged in the bill.

North Carolina’s G.S. § 14-394 makes it an offense to write and transmit communications containing threats or vulgar and obscene language without signing the sender’s true name. No decision of the Court prior to State v. Robbins had fixed the averments necessary for a bill laid under this statute. The indictment in the Robbins case did not contain any of the language of the letters in question or the name of the intended recipient. On appeal the judgment was reversed. The Court said that in order to convict under this statute it must be alleged and established that the defendant wrote and transmitted to a named person an anonymous letter containing threats to person or property or vulgar and obscene language which if published would bring such person into public contempt and disgrace. The indictment should also include the kind and character of vulgar or obscene language used. The Court cited with approval an English case which held that, to bring the offense within their statute (similar to G.S. § 14-394), the letter must be sent to the person threatened and this fact must be alleged. In the Robbins case it was not clear from the indictment what language the defendant used or whether the letters were ever actually transmitted.

DAMAGES

EMINENT DOMAIN

In In re Land of Alley the Court held a charge by the trial judge that the jury should take into consideration any special value of the property to the owner to be reversible error. The Court pointed out that the jury was to award the owner the fair market value of his

---

99 State v. Porter, 101 N.C. 713, 7 S.E. 902 (1888); State v. Cunningham, 94 N.C. 824 (1886).
100 253 N.C. 47, 116 S.E.2d 192 (1960).
101 "Such person" apparently means the recipient. The type or character of the language which if published would bring public contempt or disgrace is not defined by the statute nor has it been defined by the Court in this situation. It would seem that language which if published would constitute criminal libel was intended by the legislature.
103 1754, 27 Geo. 2, c. 15.
104 For cases following this same rule see Kessler v. State, 50 Ind. 229 (1875); Goulding v. State, 126 Tex. Grim. App. 73, 70 S.W.2d 200 (1934).
105 The defendant claimed he threw the letters in question from his car not intending that anyone find them, but a young girl actually did find the letters. Record, pp. 7, 22, State v. Robbins, 253 N.C. 47, 116 S.E.2d 192 (1960).
property but was not to consider the property's value to the owner for his particular purposes. The Court reiterated the North Carolina rules that (1) when the entire tract is taken, the measure of damages is the fair market value of the entire tract; (2) when only a portion of the tract is taken, the measure of damages is the difference between the fair market value of the entire tract before and after the taking.

In a case of first impression, the Court held that where the State Highway Commission condemned the building in which the plaintiff-tenant was doing business, the tenant could not recover expenditures incurred in moving merchandise, furniture and fixtures to another location. The Court also held that there could be no recovery for losses due to interruption of business or good will. The rule is that where there is an entire taking of the property of the condemnee, whether a leasehold or the fee, there is no recovery for consequential losses. The reason behind the rule is that these consequential losses are not interests in the realty condemned. The present case appears to be in harmony with the weight of authority.

**Present Worth**

A recent case again held that the trial court commits reversible error by not charging that recovery in a personal injury action is limited to the present worth of fair compensation for future pain and suffering and permanent injury.

**Wrongful Death**

In *Bryant v. Woodlie* the Court dealt with a point of first impression. The Court held that in a wrongful death action the jury can

---

6 The Williams case is also discussed under EMINENT DOMAIN, Limited Access Highways, infra.
11 See generally Annots., 3 A.L.R.2d 312 (1949); 90 A.L.R. 166 (1934); 41 A.L.R. 1026 (1926); 34 A.L.R. 1523 (1925).
14 See generally 23 N.C.L. Rev. 46 (1944).
consider the fact that the deceased was receiving retirement income in arriving at the present pecuniary loss suffered by his family. This holding is in line with the policy of North Carolina to award damages for wrongful death on the basis of the net pecuniary worth of the deceased.

DOMESTIC RELATIONS

ALIMONY AND COUNSEL FEES PENDENTE LITE

North Carolina has two statutes providing for the allowance of alimony and counsel fees pendente lite.\(^1\) Under G.S. § 50-15 an allowance is to be made, in suits for absolute divorce or divorce from bed and board, if it appears to the judge that the wife “has not sufficient means whereon to subsist during the prosecution of the suit, and to defray the necessary and proper expenses thereof.” G.S. § 50-16 provides that the judge may, in suits for alimony without divorce, award such subsistence and counsel fees pendente lite as may be proper according to the condition and circumstances of the husband, “having regard also to the separate estate of the wife.”

Two recent cases, Mercer v. Mercer\(^2\) and Rowland v. Rowland,\(^3\) indicate that the language in G.S. § 50-16 is not to be interpreted to mean the wife must not have “sufficient means whereon to subsist during the prosecution of the suit” as is required by G.S. § 50-15. In Mercer an award of $1,000 plus $500 a month and $3,500 attorney’s fees to a wife who had a separate estate of $47,500 and an income of $6,400 per year was sustained. The husband’s estate was valued at several hundred thousand dollars. The Court quoted Bowling v. Bowling\(^4\) to the effect that the husband has a legal duty to support his wife and his duty does not depend on the ability or inability of the wife to support herself by her own labor or out of her own separate property.\(^5\) Finding that under G.S. § 50-16 the fact that the wife has a separate estate of her own does not defeat her right to subsistence and counsel fees pendente lite, the Court concluded that the wife’s estate

---

\(^3\) 253 N.C. 328, 116 S.E.2d 795 (1960). In this case the defendant contended that it was error to allow the wife subsistence and counsel fees pendente lite because she had filed a cost bond wherein she stated that she was worth $400 above all her debts and personal property exemptions and thereby showed she had sufficient means to cope with her husband in presenting her case to the court. The defendant had a monthly income of $410 while his wife had no income. The Court cited its decision in Mercer in answer to the defendant’s contention. See also Note, 39 N.C.L. Rev. 189 (1961).
\(^4\) 252 N.C. 527, 114 S.E.2d 228 (1960).
\(^5\) The defendant sought to distinguish Bowling on the ground that the order was entered after trial of the case upon its merits and did not relate to alimony pending the trial of the case. See Brief for Appellant, p. 9, Bowling v. Bowling, 252 N.C. 527, 114 S.E.2d 228 (1960).
and income were too small "to cope successfully with her husband, a man of considerable means and a large income, in presenting her case to the court."  

The test followed by the Court to determine the wife's right to subsistence and counsel fees pendente lite—whether she has sufficient means to cope with her husband in presenting her case—has been applied in two earlier cases. Although such test is clearly contrary to the literal language of G.S. § 50-15, in both Mercer and Rowland the awards were made under G.S. § 50-16.

It seems doubtful that the General Assembly intended to create a different test for determining eligibility for alimony and counsel fees pendente lite in alimony without divorce cases from that to be applied in suits for divorce.

In two other cases dealing with alimony pendente lite, Sguros v. Sguros and Conrad v. Conrad, the trial court based an award of alimony pendente lite upon the earning capacity of the husband rather than his actual earnings at the time the alimony was awarded. The trial court was reversed in both cases. The Court stated that the award should be based on the actual earnings of the husband at the time the alimony is sought and awarded unless it appears that the husband is failing to exercise his capacity to earn because of disregard of his marital obligation to provide reasonable support for his wife. These two cases are the subject of a note in this volume of the Law Review.

CUSTODY

In Lennon v. Lennon a father took the two children of the marriage to Nevada without the knowledge or consent of the mother where he obtained a divorce and a decree awarding him custody of the children. The mother was not personally served in Nevada and made no

---

6. 253 N.C. at 170-71, 116 S.E.2d at 448.
7. Fogartie v. Fogartie, 236 N.C. 188, 72 S.E.2d 226 (1952); Oliver v. Oliver, 219 N.C. 299, 13 S.E.2d 549 (1941). In Fogartie it appeared that the wife had property worth $5,900 and a monthly income of $131. The husband's property was worth $5,700, and he had a yearly income of $3,923. An award of $50 per month subsistence and $200 attorney's fees was upheld by the Court which stated, "The remedy thus established [under G.S. § 50-16] for the subsistence of the wife pending the trial ... and for her counsel fees is intended to enable her to maintain herself according to her station in life and to have sufficient funds to employ adequate counsel to meet her husband at the trial upon substantially equal terms." 236 N.C. at 189, 72 S.E.2d at 227.
8. In Oliver the Court said, "Whether proceeding under the provisions of C.S., 1666 [now G.S. § 50-15], or at common law, the right to an allowance either for support pending the action or for expenses of the action, is predicated upon a finding that the wife is without sufficient means to cope with her husband in presenting their case before the court." 219 N.C. at 303, 13 S.E.2d at 551-52.
11. 252 N.C. 659, 114 S.E.2d 571 (1960), also discussed under Constitutional Law, Full Faith and Credit, supra.
appearance in the Nevada court. When the father later brought the children to North Carolina to visit their mother, she refused to return them and instituted proceedings under G.S. § 17-39.1 to determine their custody. The father contended that the Nevada custody decree must be given full faith and credit and, therefore, that the North Carolina court did not have jurisdiction to determine custody. The Court, relying upon *May v. Anderson*, held that a parent's right to custody of a minor child is a personal right which cannot be taken away by a court not having personal jurisdiction over such parent. The courts of North Carolina, therefore, were not bound by the Nevada custody decree, and the trial court had jurisdiction to determine the custody of the children. The Court further stated that since the father surreptitiously removed the children from the state to deprive the courts of North Carolina of jurisdiction over them, the courts did not lose jurisdiction.

This is the first time the Court has applied the "personal right" theory to find that the courts of North Carolina had jurisdiction to determine custody. The Court stated that this decision did not conflict with its prior decisions regarding custody jurisdiction in *Allman v. Register* and *Richter v. Harmon* except for a dictum in the latter case.

In this case the parties were domiciled in Wisconsin until the wife took the children to Ohio after marital trouble developed. The husband obtained in Wisconsin a divorce and a decree awarding him custody. The wife was not personally served and made no appearance. When the wife refused to turn the children over, the husband brought *habeas corpus* proceedings in Ohio. The Ohio court held that it was compelled to give full faith and credit to the Wisconsin decree and ordered the mother to discharge the children. On appeal, the United States Supreme Court held that a mother's right to custody is a personal right entitled to at least as much protection as her right to alimony, which *Estin v. Estin*, 334 U.S. 541 (1948), had held could not be terminated without personal jurisdiction over the wife.

The petition alleged and the trial court found that the conditions and circumstances with reference to the custody and welfare of the children had changed radically since the entry of the Nevada decree. Therefore, the jurisdiction of the trial court could have been upheld on this basis under the authority of *Kovacs v. Brewer*, 355 U.S. 604 (1958), which held that a change of conditions will support a custody decree of the forum notwithstanding a valid prior decree of a sister state.

In this case the Court held that although the children in question were residing in North Carolina, they were domiciled in Virginia. Therefore, the North Carolina court was without jurisdiction to make a custody award except in conformity with a prior Virginia decree which awarded custody to the mother. This case differs from *Lennon* in that both husband and wife were before the court when the original custody decree was entered and, therefore, would seem not to be in conflict with the present decision.

Here the wife and child were residents of Florida and the husband, a resident of North Carolina. The Florida court awarded custody to the wife. The husband was not personally served and did not appear in the Florida court. The wife left the child with the husband while she was moving to the Washington-Baltimore area. When he refused to return the child, the wife brought special proceedings under G.S. § 50-13 to regain custody. The Court held that, since the wife was no longer domiciled in Florida and since the child was present in North Carolina, the trial court had jurisdiction to determine if conditions had so changed as to warrant awarding custody to the
In *Fearrington v. Fearrington*, another recent custody case, it appeared that in 1955 custody had been awarded to the mother who then left the child with one Sprinkle and his wife. In 1959 the father moved to have custody awarded to himself because of changed conditions. The mother asserted that, if there was to be a modification of the original order, custody should be awarded to the Sprinkles. The trial court found that the mother had been guilty of misconduct but that such misconduct did not affect the child since she was being reared and supervised by the Sprinkles in their home. The trial court further found it in the best interest of the child to leave it with the Sprinkles and, therefore, refused to modify the original order.

Although this was in form an action between the mother and father for custody, it was in substance an action between the father and a non-parent. As such it is in accord with recent North Carolina decisions that the welfare of the child is the paramount consideration in a custody proceeding and that it is not necessary to make a finding that the parent is unfit before custody can be awarded to a non-parent.

**Divorce**

A new problem was before the Court in *Sears v. Sears*. The husband brought an action for absolute divorce on the ground of two years' separation. The wife filed a counterclaim for alimony without divorce under G.S. § 50-16, alleging that eight years previously she had secured in New York a judgment for divorce *a mensa et thoro* and an award of permanent support and maintenance on the grounds of cruel and inhuman treatment. The wife also entered a plea of recrimination as a bar to the right of the husband to a divorce, setting forth abandonment and the cruel and inhuman treatment by the husband which had been found as a fact by the New York court. The Court held that the New York judgment was a complete bar to the wife's counterclaim for alimony without divorce under the doctrine of *res judicata* and that her plea of recrimination was not a bar to the husband's action because the effect of the New York judgment was to legalize the separation of the parties.

The decision that the prior bed and board divorce decree is a bar to an action for alimony without divorce appears to be consistent with the husband. The Court also said, "If the petitioner were still a citizen and resident of the State of Florida the decree in that state awarding the custody of the minor child... to her would be binding on our courts under the full faith and credit clause of the Constitution of the United States." It is this statement which the Court in *Lennon* now disapproves as being dictum in conflict with its present decision.

16 251 N.C. 694, 111 S.E.2d 850 (1960).
prior North Carolina decisions that an order for payment of alimony is *res judicata* between the parties even though the court granting the order has power to modify it upon application of either party for changed conditions.\(^2\) It is also in line with the cases holding that under the full faith and credit clause of the United States Constitution a judgment rendered by a court of one state is, in the courts of another state, binding and conclusive as to all matters adjudicated.\(^2\)

*Sears* is also significant on another point. It reaffirms earlier cases in holding that the effect of a judgment granting a divorce *a mensa et thoro* is to legalize the separation of the parties, which began by abandonment on the part of the husband. After two years from the date of such judgment, the husband is entitled to bring an action for absolute divorce on ground of two years' separation.\(^2\)

### EMINENT DOMAIN

**Appeal from Appraiser's Award**

By statute\(^1\) either party to a condemnation proceeding may appeal an appraiser's award and obtain a jury trial de novo on the question of damages. *Ramsey v. Southern Ry.*\(^2\) held that where the clerk enters an order of the appraiser's award and only the respondent appeals, the superior court can, in its discretion, allow the respondent to withdraw his appeal. Withdrawal makes the clerk's order final and deprives both parties of a jury trial. The petitioner must have appealed the award to be entitled to a jury trial. Although no other North Carolina case has been found on this point and the Court cited no authority in its per curiam opinion, the respondent cited two out of states cases\(^3\) which have given this construction to similar condemnation statutes.


\(^{21}\)Howland v. Stitzer, 231 N.C. 528, 58 S.E.2d 104 (1950); Arrington v. Arrington, 127 N.C. 190, 37 S.E. 212 (1900). In *Arrington* it was held that when the wife brought action in North Carolina to enforce an Illinois judgment awarding her alimony, such judgment was *res judicata* and binding on the parties, and therefore the defendant husband could not plead the merits of the original cause of action. *Accord*, Bates v. Bodie, 245 U.S. 520 (1918), where it was said: "[W]hat is once adjudged cannot be tried again. And this court had established a test of the thing adjudged and the extent of its estoppel. It is: If the second action is upon the same claim or demand as that in which the judgment pleaded was rendered, the judgment is an absolute bar not only of what was decided but of what might have been decided." *Id.* at 526.

It seems, at least in the situation here presented, that a claim for alimony without divorce could be termed the "same claim or demand" as a claim for alimony in an action for divorce *a mensa et thoro*.

\(^{22}\)Pruett v. Pruett, 247 N.C. 13, 100 S.E.2d 296 (1957); Lockhart v. Lockhart, 223 N.C. 559, 27 S.E.2d 444 (1943).

\(^{1}\)N.C. GEN. STAT. § 40-20 (Supp. 1959).


LIMITED ACCESS HIGHWAYS

In *Williams v. State Highway Comm'n* the Highway Commission purchased a right of way over plaintiff's land. Although under the purchase contract he was given a right of access to the highway at a designated point, the Commission refused to allow plaintiff to enter the highway at the point agreed upon. Plaintiff sued for breach of contract. The Commission's demurrer for failure to state a cause of action was sustained by the trial court and affirmed on appeal. The Court held that the right of access was an easement, thus an interest in property, and that the Commission's refusal to allow plaintiff access was a condemnation thereof. Further, the Commission, as a state agency, was not subject to suit for breach of contract, for the plaintiff's sole remedy was in a special proceeding pursuant to the condemnation statute.

*Ferrell v. State Highway Comm'n* involved a consent judgment by which the Highway Commission obtained a right of way over plaintiff's land. The consent judgment provided that plaintiff's "right of access . . . would be limited to service roads constructed and to be constructed." The Court held that this provision did not obligate the Commission to build roads, but only gave the landowner a right of access on any service roads already constructed or constructed in the future. Therefore, there had been no breach of a contract provision which the court could require to be specifically enforced or for which damages could be awarded.

EQUITABLE REMEDIES

INJUNCTIONS

Two recent cases indicate an apparent inconsistency as to the extent to which the constitutionality of an ordinance or a statute can be considered in an interlocutory injunction proceeding. In *Union Carbide Corp. v. Davis* the manufacturer attempted to get injunctive relief against the "cut-rate" selling of its anti-freeze in violation of an agreement operating under the North Carolina Fair Trade Act. At the preliminary hearing the trial judge dissolved a temporary restraining order against such sales solely on the ground that the North Carolina

---

4 252 N.C. 772, 114 S.E.2d 782 (1960); also discussed under DAMAGES, Eminent Domain, supra.
7 252 N.C. 830, 115 S.E.2d 34 (1960).
8 Id. at 834, 115 S.E.2d at 38.
Fair Trade Act was unconstitutional. Held, reversed, for it was error to render a final decision on the constitutionality of an act at the interlocutory stage. The Court concluded that the constitutional question was not before the court at that stage of the proceeding and could be concluded only at a final hearing on the merits allowing or denying a permanent injunction.

In Little Pep Delmonico Restaurant, Inc. v. City of Charlotte, the judge granted interlocutory injunctive relief pending a final determination of the validity of a municipal ordinance prohibiting the maintenance of business signs over sidewalks in a designated area of the city. This result was affirmed on appeal. The trial court found the ordinance was apparently invalid because it was arbitrary and discriminatory, based as it was on purely aesthetic considerations. The Supreme Court held that the findings were "sufficient to establish apparent invalidity and hence sufficient to warrant temporary injunctive relief."

From a cursory consideration of the holding in the Restaurant case it might seem that the Court approved a determination of the constitutionality of an ordinance at the interlocutory stage. Such a decision would appear to be inconsistent with the "anti-freeze" decision. But these two holdings can be reconciled. There is of course a factual distinction, but the key lies in the factors considered by the respective judges at the interlocutory stage in each case. In the "anti-freeze" case the judge apparently considered only the constitutionality of the Fair Trade Act, while in the Restaurant case the judge considered not only the constitutional issue but also on equitable grounds the irreparable harm likely to be caused the plaintiff. There is a well recognized exception to the general rule that equity will not restrain the enforcement of a municipal ordinance. This exception operates where injunctive relief is necessary for the prevention of irreparable injury to property. The holding in the Restaurant case would appear to fall within this exception.

**Quasi-Contract—Measure of Recovery**

In Gales v. Smith the plaintiffs alleged an oral agreement under

---

1.252 N.C. 324, 113 S.E.2d 422 (1960).
2. Id. at 326, 113 S.E.2d at 424.
3. The Restaurant case was an attempt to get injunctive relief against an order of a governmental agency. The "anti-freeze" case was an attempt to get injunctive relief against a purported violation of an agreement operating under the North Carolina Fair Trade Act which had been held constitutional. Lilly & Co. v. Saunders, 216 N.C. 163, 4 S.E.2d 528 (1939).
4. Lanier v. Town of Warsaw, 226 N.C. 637, 39 S.E.2d 817 (1946), and cases therein cited.
which the defendant promised either to convey or to devise a farm to the plaintiffs in consideration for their moving onto his farm and rendering certain personal services to the defendant. The defendant subsequently repudiated this agreement and forced the plaintiffs off the farm. This action was to recover a sum alleged to be the reasonable value of the services performed by the plaintiffs, and the jury rendered an award to the plaintiffs. On appeal the defendant contended that there was error in the judge’s charge as to the computation of recovery. Held, it was error for the court not to charge that the amount found to be the reasonable value of the services the plaintiffs rendered should be diminished by the reasonable value of the benefits they received from the defendant, including the use of the defendant’s home and farm. The Court said that there was no North Carolina case directly on point but cited cases from six other jurisdictions to substantiate its position.

It would appear that the rule as to the computation of recovery in a quantum meruit situation established in the principal case is just. Moreover, it should be noted that there is prior North Carolina authority that would sustain the “off set” rule. Whenever the North Carolina Court has been confronted with the problem of the enforcement of an oral contract for the conveyance of land it has held: (1) that such an oral contract to convey land is unenforceable under the statute of frauds and (2) that the doctrine of part performance will not be recognized so as to take an oral contract out of the statute of frauds. In such a situation a promisee who enters upon the land and makes valuable improvements is, however, entitled to some relief, for he has conferred appreciable benefit upon the vendor. Our Court has on many occasions held that while the promisee is entitled to relief, the promisor is entitled to a reasonable rent for the use of the land while the promisee was in possession. This would appear to be an application of the “off set” rule in a situation comparable to that in the principal case.

A question might arise in a case like the principal one as to the

9 The complaint was held to state a good cause of action for recovery on quantum meruit in Gales v. Smith, 249 N.C. 263, 106 S.E.2d 164 (1958).

10 E.g., Hendrickson v. Meredith, 161 Va. 193, 170 S.E. 602 (1933).


12 Ballard v. Boyette, 171 N.C. 24, 86 S.E. 175 (1915); Plummer v. Administrator of Owens, 45 N.C. 254 (1852); Allen v. Chambers, 39 N.C. 125 (1845).

13 Stewart v. Wyrick, 228 N.C. 429, 45 S.E.2d 764 (1947); Daughtry v. Daughtry, 223 N.C. 528, 27 S.E.2d 446 (1943); Price v. Askins, 212 N.C. 583, 194 S.E. 284 (1937).

14 In this situation the measure of the vendee’s recovery is the vendor’s gain and not the vendee’s loss. See Note, 15 N.C.L. Rev. 203, 205 (1937).

15 See cases cited note 11, supra.
time when the promisee's liability for rent first attaches. The earlier case of *Hedgepeth v. Rose* touches this point. In this case the Court makes a distinction between (1) permissive or gratuitous possession of the promissor's land where the rent liability begins to accrue only upon a demand for restoration and (2) illegal possession of the promissor's land as under an unenforceable contract in which case rent liability begins to accrue from the date of entry. The principal case would seem to fall into the first category. Therefore under the *Hedgepeth* rule the promisee should be liable for rents only from the date possession was demanded. The principal case does not recognize the distinction made in the *Hedgepeth* case and only states that the reasonable value of the benefits received should be set off. An examination of the record of the *Gales* case suggests that the whole time of possession by the promisees was the period to be used in measuring benefit to the promisor. It is regrettable that the Court did not consider the *Hedgepeth* rule, for it would seem that this area of the law can not be settled until the validity of that decision is definitely established or rejected.

**EVIDENCE**

**Dead Man's Statute**

G.S. § 8-51, commonly referred to as the “dead man's statute,” provides that “a party... shall not be examined as a witness in his own behalf... against the... administrator... of a deceased person... concerning a personal transaction or communication between the witness and the deceased person.” In *Carswell v. Greene* the defendant was charged with negligence arising out of an automobile collision between his automobile and that of the plaintiff's intestate. The Court held that the “dead man's statute” did not preclude the defendant's testifying as to the deceased's speed, position, and manner of operation of his automobile at the time of the collision.

The Court noted two grounds for its decision, and apparently either would have been sufficient. The first was that since the defendant was not a passenger in the deceased's automobile he had merely testified to facts about which he had “independent knowledge not acquired in a communication from nor a transaction with the deceased.” Secondly, the Court noted that a witness for a plaintiff, who was a passenger in the deceased's automobile, had testified as to the position and operation of the defendant's automobile. Thus the plaintiff had opened the

1695 N.C. 42 (1886).

1Considering the date of the *Hedgepeth* case and the fact that it has never been cited as authority, a question might be raised as to its current importance.


2 *Id.* at 270, 116 S.E.2d at 804.
door to testimony by his adversary concerning his version of the transaction.

Although the second ground for the decision is well established in North Carolina, this appears to be the first instance in which the Court has held that such testimony was not "concerning a personal transaction" with the deceased. The principal case should be distinguished from one in which a passenger in the deceased's automobile attempts to testify against the representative, as to the manner of the operation by the deceased, for such testimony is inadmissible.

**Waiver of Privilege of Confidential Communication Between Physician and Patient**

In *Capps v. Lynch*, a case of first impression in North Carolina, the Court held that where a patient voluntarily testifies in detail regarding the nature of his injuries or relates what the physician did or said to him while in attendance, he thereby waives the physician-patient privilege established by G.S. § 8-53. Thus the adversary may compel the physician to testify as to the plaintiff's injury.

The Court pointed out that a contrary result would close the mouth of the only witness who could contradict the patient's testimony. The rule is followed by the majority of courts which have ruled on the question, and it is approved by Dean Wigmore.

---

3 See, e.g., Highfill v. Parrish, 247 N.C. 389, 100 S.E.2d 840 (1957); Batten v. Aycock, 224 N.C. 225, 29 S.E.2d 739 (1944); Herring v. Ipock, 187 N.C. 459, 121 S.E. 758 (1924).

4 There is no authority directly in point supporting the holding that a party-passer in another car may testify as to the actions by the deceased. See Rankin v. Morgan, 193 Ark. 751, 102 S.W.2d 552 (1937). *Contra:* Chapman v. Bruton, Inc., 325 Ill. App. 334, 60 N.E.2d 125 (1945). See also Kilmer v. Gustason, 211 F.2d 781 (5th Cir. 1954), where the plaintiff driver was permitted to testify only as to his own actions and movements. It seems that by being permitted to do this, however, the witness can by inference testify as to the actions of the deceased driver, i.e., testimony as to his own careful conduct leaves an inference that the deceased driver was negligent.


6 But see Lamm v. Gardner, 250 N.C. 540, 108 S.E.2d 847 (1959). In that case the plaintiff was riding as a passenger with A. There was a collision with a car driven by B. B was killed. Plaintiff sued A and B. Her testimony that B zigzagged across the highway in approaching A's car was held incompetent by the trial court because of the dead man's statute. The Supreme Court reversed on the theory that it was competent as to one party and should not be excluded because it was not competent against another party to the suit. Rather, it should be admitted under proper instructions. Thus the Court assumed that the evidence was incompetent as to B and this is contrary to the rule subsequently declared in the principal case.


8 Wigmore, Evidence § 2380 (3d ed. 1940).
Testimony of a Husband in a Divorce Action by Him on Grounds of Adultery

In *Biggs v. Biggs*\(^1\) the plaintiff-husband brought an action for divorce on the grounds of adultery. The wife pleaded condonation by the husband, alleging that she became pregnant by an act of intercourse with her husband during a visit with him in Florida. The husband was permitted, over objection, to testify that he had not had relations with her on this occasion and that he was in her room only one and one-half minutes. On appeal it was held that this testimony was properly admitted.

The Court held that the rule enunciated by Lord Mansfield in *Goodright v. Moss*\(^2\) prohibiting either spouse from testifying as to non-access did not apply where the legitimacy of a child was neither directly in issue nor a necessary inquiry in determining a material issue. The Court stated that paternity was not in issue since the challenged evidence was merely a denial of the defendant's affirmative defense of condonation.\(^3\)

The defendant had also contended that the testimony was incompetent under G.S. § 8-56 which provides that neither spouse is "competent or compellable to give evidence for or against the other in any... proceeding for divorce on account of adultery." The Court noted\(^4\) that the statute was designed to prevent collusion in divorce actions and that in this case the testimony objected to was not collusive but was purely a defense to the charge of condonation. Thus it would appear that the statute does not apply unless the testimony is elicited to establish a ground for the divorce.

A further objection was raised by the defendant to the testimony

---

\(^1\) 253 N.C. 10, 116 S.E.2d 178 (1960).
\(^2\) 2 Cowp. 591, 594, 98 Eng. Rep. 1257, 1258 (K.B. 1777). "[I]t is a rule founded on decency, morality, and policy that they (husband and wife) shall not be permitted to say after marriage, that they had no connection, and therefore the offspring is spurious."
\(^3\) Examples of situations where legitimacy or paternity was directly in issue are where the husband was trying to prove the adultery itself by the conception of a child when he did not have access, *Harward v. Harward*, 173 Md. 339, 196 Atl. 318 (1938), and where the husband was trying to evade liability for support payments on the ground that he was not the father, *State v. Campo*, 233 N.C. 79, 62 S.E.2d 500 (1950). In the principal case the Court also noted that the testimony would have no tendency to bastardize the child at law because G.S. § 50-11 provides that "no judgment of divorce shall render illegitimate any child in esse, or begotten of the body of the wife during coverture."

\(^4\) G.S. § 8-56 also provides that neither spouse "shall be compellable to disclose any confidential communication made by one to the other during their marriage." The defendant in the principal case also objected to the testimony as a violation of this statutory provision. The Court held, however, that since the testimony of the husband was voluntary it was not within the prohibition. Thus the Court affirmed the rule in *Hagedorn v. Hagedorn*, 211 N.C. 175, 189 S.E. 507 (1937), which held that the privilege is that of a witness only, and if one spouse chooses to testify to a confidential communication the other may not object. See STANSBURY, EVIDENCE § 60 (1946).
under G.S. § 50-10 which provides that neither spouse "shall be com-
petent witness to prove the adultery of the other." The Court disposed
of this objection on the theory that the plaintiff gave no testimony as
to adultery, but merely stated that he had not had intercourse with his
wife while she was in Florida. The fact that the testimony showed
adultery by inference was due to the defendant's own testimony that
she was pregnant, and she could not complain.

It is apparent, as the Court noted, that to prevent a husband from
testifying would make a plea of condonation an absolute defense in
adultery divorce cases where the wife alleges that she became pregnant
by the condoning act. Thus it seems that the Court reached the only
proper decision in the principal case.15

INSURANCE

INSURER'S RIGHT OF CONTRIBUTION

In Squires v. Sorahan1 the Court once again considered whether
under G.S. § 1-2402 the insurer of a joint tort-feasor has the right of
contribution from the other joint tort-feasors. After the insurer of
defendant A had paid five-sixths of a judgment, the plaintiff's attorney
assigned the judgment to a trustee for the benefit of defendant A.2 The
defendant and the insurer then moved to have the court "enter judg-
ment declaring the proportionate part each judgment debtor shall pay
in this action."3 The denial of this motion was affirmed on appeal to
the Supreme Court.

The Court pointed out that enforcement of contribution must be
strictly in accord with the statute, as it is in derogation of the common
law.4 The insurer was deemed not to be a joint tort-feasor as contem-
plated by the statute and consequently was held not to be a proper
party to maintain this action. Although the insured was joined as a
party to the motion, the Court apparently held that it was not the
real party in interest and likewise not a proper party.5 Even though

3 N.C. GEN. STAT. § 1-240 (1953). "[A]nd in the event the judgment was
obtained in an action arising out of a joint tort, and only one, or not all of the
joint tort-feasors, were made parties defendant, those tort-feasors made parties
defendant, and against whom judgment was obtained, may, in an action therefor,
enforce contribution from the other joint tort-feasors; or at any time before
judgment is obtained, the joint tort-feasors made parties defendant may, upon
motion, have the other joint tort-feasors made parties defendant."
4 In the statement of facts the Court states that the amount paid was assigned
to the trustee, but this is apparently incorrect.
5 252 N.C. at 589, 114 S.E.2d at 278.
a new right, provides an exclusive remedy, and substantial compliance with its
terms is necessary to make it available." Id. at 399, 25 S.E.2d at 25.
7 "If contribution is made, obviously the payment goes to Textile Insurance
Company. It was not a party to the tort. Its rights after payment are entirely
the policy provided for the subrogation of the insurer to the rights of
the insured, the statute cannot be extended to allow the insurer to
recover contribution from a joint tort-feasor of the insured.

A similar question already had been considered in Lumberman's
Mut. Cas. Co. v. United States Fid. & Guar. Co.,\(^7\) in which the in-
surer of one joint tort-feasor was not permitted to maintain an action
for contribution against the insurer of another joint tort-feasor. In
North Carolina in order for a party to receive contribution the facts
must be such that the original plaintiff could have joined such third
party as a defendant in the original action,\(^8\) although other courts have
not considered this necessary.\(^9\) It would appear, however, that any
change allowing an indemnitor to maintain an action for contribution
should only be the result of appropriate legislation.

## Effect of Compulsory Liability Insurance on Conditions

**Precedent**

In two opinions handed down on the same day the Court considered
the effect of G.S. § 20-279.21(f),\(^10\) a provision of the Vehicle Financial
Responsibility Act of 1957. In the first of these cases, Muncie v.
Travelers Ins. Co.,\(^11\) the accident giving rise to the action occurred be-
fore the effective date of the 1957 act. When the insured failed to
give notice of the collision "as soon as practicable,"\(^12\) a condition pre-
cedent to recovery under the liability policy, the insurer refused to
grant coverage. This refusal of coverage was upheld by the Court.

In Swain v. Nationwide Mut. Ins. Co.,\(^13\) the liability coverage pro-
contractual." 252 N.C. at 590, 114 S.E.2d at 279. This statement apparently
would have to be based upon the theory that the subrogation of the insurer made
it the real party in interest. Thus where the insurer has paid, as in the principal
case, no one can sue for contribution. This would seem to nullify the applicability
of G.S. § 1-240 in a large number of cases.

---

\(^7\) 211 N.C. 13, 188 S.E. 634 (1935). See also Gaffney v. Lumberman's Mut.

\(^8\) Hobbs v. Goodman, 240 N.C. 192, 81 S.E.2d 413 (1954); Wilson v. Massagee,
224 N.C. 705, 32 S.E.2d 335 (1944).

1942), where the court said that "the indemnitor having discharged the liability
of his principal succeeds to whatever rights and remedies his principal had to
enforce contribution, whether derived from statute or from common law." Id.
at 460.

policy shall be subject to the following provisions which need not be contained
therein: 1. The liability of the insurance carrier with respect to the insurance
required by this article shall become absolute whenever injury or damage covered
by said motor vehicle liability policy occurs; said policy may not be cancelled
or annulled as to such liability by any agreement between the insurance carrier
and the insured after the occurrence of the injury or damage...."

\(^11\) 253 N.C. 74, 116 S.E.2d 474 (1960). This case is also discussed under
Civil Procedure, Pleading—Burden of Proof, supra.

\(^12\) Id. at 76, 116 S.E.2d at 475.

\(^13\) 253 N.C. 120, 116 S.E.2d 482 (1960); also discussed under Constitutional
vided that as a condition precedent to recovery notice must be given as soon as practicable of any accident or suit against the insured. The insured was involved in an automobile accident in September, 1958, and suit was instituted against him in March, 1959. The insurer was not notified of this suit and default judgment was entered in favor of the plaintiff. The failure of the insured to notify his indemnitor was deemed not to bar the present action by the plaintiff against the insurer. Under the 1957 act, which makes proof of financial responsibility obligatory on all car owners, the liability of the carrier with respect to the compulsory amounts is absolute. A violation of the policy provisions by the insured after the occurrence of the injury or damage does not constitute a valid defense for the insurer. This holding is in accord with the result reached under a similar statute pertaining only to assigned risks covered by that act.

The Court in Swain pointed out that the rule of the Muncie case, giving the insurer a complete defense where the insured fails to meet the conditions precedent set forth in the policy, still prevails as to that coverage in excess of the amount required by the statute. It is obvious, however, that the Court reached the correct result with respect to the compulsory coverage, else the act would often fail in its avowed purpose of protecting the public from the financially irresponsible motorist.

**Standard Mortgage Clause in Fire Insurance Contract**

A standard or union mortgage clause in a fire insurance contract was the subject of an action in Shores v. Rabon. The plaintiffs, husband and wife, conveyed real property to a third party in 1953. The purchaser at that time gave the plaintiffs a promissory note and executed in their favor a deed of trust on the property. In 1957 there was a default and public sale, at which time the feme plaintiff purchased the real estate "for herself and as agent for her husband." The foreclosure deed was executed on December 31, 1957, and recorded on January 4, 1958; a house situated on the land burned on January 5, 1958.

Prior to the foreclosure the defendant issued the purchaser a fire insurance policy on the house, which policy contained a standard mort-

14 See note 10, supra.
15 Sanders v. Travelers Indem. Co., 144 F. Supp. 742 (M.D.N.C. 1956); Sanders v. Chavis, 243 N.C. 380, 90 S.E.2d 749 (1956). It should be noted that although the Court in the principal case relies heavily on the voluntary nature of the insurance contract in upholding the constitutionality of the statutory section, it bases its interpretation of the statute on Sanders v. Chavis, which involved an assigned risk policy. This would appear to be somewhat inconsistent.
16 231 N.C. 790, 112 S.E.2d 556 (1960).
17 Id. at 791, 112 S.E.2d at 558.
gage clause designating the male plaintiff as beneficiary. Although the policy provided that it would not be invalidated by any act or neglect of the mortgagor or by foreclosure or change of title, the contract stipulated that it should be null and void if the mortgagee failed to notify the company in the event of any known change of ownership of the covered premises. It was admitted that prior to the fire loss the plaintiffs had not given notice of the foreclosure and purchase; consequently the defendant-insurer denied any liability.

In holding that the male plaintiff was covered by the insurance and the feme plaintiff was not covered the Court considered four propositions:

1. The contention of the defendant that the feme plaintiff was not covered by the standard mortgage clause was sustained by the Court. Although the plaintiffs admitted that the policy named only F. F. Shores as the beneficiary, they proposed to extend the effect of G.S. § 58-180.1 to cover the wife's interest. The Court found that while the husband and wife were tenants in common as to the ownership of the note and security, they were not the owners of buildings within the purview of the statute and the act did not apply. The judgment below was therefore modified so that no recovery would be allowed the wife. This same result would obtain even though sufficient notice of any change of ownership were given to the insured.

2. F. F. Shores, being the beneficiary of a deed of trust, claimed an interest which was insurable and the Court sustained him. The Court pointed out that in order to protect all beneficiaries, the trustee in a deed of trust is generally designated as the insured in a standard mortgage clause. However, "where a holder of a note secured by a deed of trust is named insured, he has an insurable interest that will be recognized by the court under the terms of the standard mortgage clause." This is in accord with other holdings that a mortgagee has

18 Green v. Fidelity-Phenix Fire Ins. Co., 233 N.C. 321, 64 S.E.2d 162 (1951): "Clauses are frequently inserted in property insurance policies to protect a mortgagee's interest against loss from the causes insured against. These clauses are mainly of two kinds, to wit: (1) The standard or union mortgage clause, which stipulates, in substance, that the interest of the mortgagee in the proceeds of the policy shall not be invalidated by any act or neglect of the mortgagor; and (2) the open or simple loss-payable clause, which merely provides that the loss, if any, shall be payable to the mortgagee, as his interest may appear." Id. at 325, 64 S.E.2d at 165.

19 N.C. GEN. STAT. § 58-180.1 (1960): "Any policy of fire insurance issued to husband or wife, on buildings and household furniture owned by the husband and wife, either by entirety, in common, or jointly, either name of one of the parties in interest named as the insured or beneficiary therein, shall be sufficient and the policy shall not be void for failure to disclose the interest of the other, unless it appears that in the procuring of the issuance of such policy, fraudulent means or methods were used by the insured or owner thereof."

20 251 N.C. at 794, 112 S.E.2d at 559.
an insurable interest in the mortgaged property. Further, the standard mortgage clause is recognized as being a separate and distinct contract between the insurer and the beneficiary of a deed of trust. Consequently, the insured's liability to the beneficiary is not dependent upon or determined by its liability to the grantor of the deed of trust.

(3) The Court denied the contention of the insurer that as the beneficiary had failed to notify the insurer of any change of ownership when the feme plaintiff acquired title to the property under foreclosure, the insurer was therefore not liable under the policy. As the defendant admitted that Mrs. Shores had purchased "for herself and as agent for her husband," it could not deny that the male plaintiff had acquired an estate in the land under the foreclosure proceedings. Thus the beneficiaries of the deed of trust acquired title and the Court pointed out that this is generally regarded as an increase in interest of the mortgagee or beneficiary, rather than being a change of ownership. There was consequently no necessity for giving any notice.

(4) Even if the acquisition of title at foreclosure did constitute a change of ownership, the Court upheld the contention that the delay in notifying the insurer was not unreasonable. The provision in the insurance contract was held not a condition precedent but merely a covenant requiring notice within a reasonable time. It was admitted that a jury should generally decide what constitutes a reasonable time, but the Court held as a matter of law that a delay of five days after the transfer of title was not unreasonable.


23 251 N.C. at 794, 112 S.E.2d at 560.


25 The Court cited cases holding that a "change of ownership" provision applies only to strangers to the insurance contract, as the provision was inserted to protect the insurer from those with whom it did not wish to contract. The feme plaintiff in the principal case was concededly a stranger to the contract, so that it is arguable that there was a change of ownership when she became a purchaser at foreclosure. In the absence of adequate notice this would render the insurance contract null and void. However, as pointed out under discussion (4), the Court held that an unreasonable time had not elapsed without the requisite notice.

In *Whiteville City Administrative Unit v. Columbus County Bd. of County Comm'rs*\(^1\) a school administrative unit disagreed with the county commissioners as to the necessity for purchasing a new school site, the commissioners opposing the purchase. The commissioners appealed to the superior court from a decision rendered in favor of the administrative unit by the clerk of superior court,\(^2\) and the superior court reversed. The Supreme Court affirmed the verdict for the commissioners, stating that in North Carolina county commissioners have discretion to determine what expenditures of county funds shall be made for the erection, repair and equipping of school buildings in their administrative units.\(^3\) The Court noted that even without the approval of the board of county commissioners school authorities are free to acquire any site desired for the erection of a school building, provided they do not acquire it with county tax money.\(^4\)

**GOVERNMENTAL IMMUNITY**

In *McDonald v. Carper*\(^5\) the city manager of Raleigh allegedly had publicly accused the plaintiff, an employee of the city’s tax department, of embezzlement. A suit for malicious prosecution was brought against the manager individually and against the city of Raleigh. In sustaining the lower court the Supreme Court affirmed the city’s demurrer and held that the tortious conduct, if any, was committed in the exercise of a governmental function. It is well established in North Carolina that, in the absence of statute, a city is not liable for torts committed by its officers when engaged in the performance of governmental duties.\(^6\)

\(^1\) 251 N.C. 826, 112 S.E.2d 539 (1960).
\(^2\) G.S. §115-87 provides a procedure for adjudication of cases in which the tax authorities refuse to levy taxes requested by the administrative unit.
\(^3\) *Accord*, Board of Educ. v. Board of County Comm'rs, 240 N.C. 118, 81 S.E.2d 256 (1954); Mears v. Board of Educ., 214 N.C. 89, 197 S.E. 752 (1938); Rollins v. Rogers, 204 N.C. 308, 168 S.E. 205 (1933); Board of Educ. v. Board of Comm'rs, 150 N.C. 116, 63 S.E. 724 (1909).
\(^4\) See Edwards v. Board of Educ., 235 N.C. 345, 70 S.E.2d 170 (1952), where a school board was permitted to erect a school with funds made available by allocation of state money, notwithstanding the refusal of the county commissioners to provide the funds for this purpose.
\(^5\) 252 N.C. 29, 112 S.E.2d 741 (1960).
\(^6\) For numerous cases so holding, see Rhine v. Mount Holly, 251 N.C. 521, 526-27, 112 S.E.2d 40, 44-45 (1960). The *Rhine* case itself constitutes an exception to the general rule of governmental immunity. 38 N.C.L. Rev. 576 (1960).
INCORPORATION OF MUNICIPALITY

In Starbuck v. Town of Havelock the corporate existence of the municipality and the right of defendants to serve as mayor and commissioners were challenged on the basis of certain election irregularities and the alleged unconstitutionality of the special act under which the election was authorized. The defendant demurred _ore tenus_ in the Supreme Court to the plaintiff's prayer for injunction, basing the demurrer on the ground that a challenge to corporate existence must be made by quo warranto. The Court held that quo warranto is required to challenge the _de facto_ existence of a municipal corporation, but that a _de facto_ corporation may never be produced by an election; rather, an election may only present an opportunity for such to arise. _De facto_ status requires not only colorable compliance with a law authorizing its creation but also some exercise of corporate power. Therefore, the Court stated, the plaintiff could proceed by injunction rather than quo warranto.

However, the order of injunction issued below was reversed upon the ground that the plaintiffs failed to allege they had suffered damage.

POWER OF CITY TO CONTRACT—WATERLINES OUTSIDE THE CITY

In Styers v. City of Gastonia the utilities commissioner of Gastonia agreed that the city would reimburse the plaintiffs for the cost of constructing a water line outside the corporate limits if and when the limits were extended to include the property upon which the line was to be constructed. Relying thereon the plaintiffs constructed the line as a business investment. Several years later the corporate limits were enlarged so as to include this area. The city repudiated the contract and took possession of the water lines. The Court held the contract a nullity since G.S. § 143-129 (which outlines the procedure to be followed when a political subdivision of the state wishes to contract) had not been complied with, but the Court also held that when the city

---

7 252 N.C. 176, 113 S.E.2d 278 (1960).
8 The election notice failed to give any information with respect to the election officials and failed to designate any polling place in the described area; also, the place provided for electors was outside the area to be incorporated.
9 Section six of the special act, N.C. Sess. Laws 1959, ch. 952, provided that the officials to be selected must be qualified electors who had resided in the area to be incorporated for not less than one year preceding the election and that nomination must be made by petition of five electors of the area. Art. 7, § 2 of the North Carolina Constitution requires merely that the nominee be a qualified voter of the state. Therefore, the Court held that the legislature had no power to limit the class which could qualify for office. Although this section was held invalid, the Court stated that the qualifications provision was severable from the remainder of the special act providing for an incorporating election.
10 The right to hold public office must be challenged by quo warranto. Apparently the Court felt that the question of whether the defendants held public offices depended upon whether a municipal corporation existed.
appropriated the water lines to its use a duty was imposed to pay just compensation.

Mere annexation of property having private water line thereon is not a “taking” in violation of due process;\(^{12}\) however, there is a “taking” when a municipality actually assumes control of the lines. An exception to this latter proposition is where by ordinance or specific contract the city, as a condition to selling a developer city water, provides that the developer must dedicate the water lines to the city when the area is annexed.\(^{33}\) In the principal case no such ordinance or contract provision existed as a part of the city’s agreement to provide water.

**Elections**

In *Strickland v. Hill*\(^{14}\) an unsuccessful candidate for the democratic nomination for judge of recorder’s court requested a recount by the county board of elections. The board granted the request and reversed the result shown by the first count of the ballots. The petitioner, the candidate receiving the highest number of votes in the first count, contended that the board had acted entirely without authority. Petitioner, relying on G.S. § 163-143, contended that the county board only had authority to recount in the case of errors in tabulating returns or filling out blanks.\(^{15}\) Here there were only allegations that the tabulators were not electors of the respective precincts, that they were not properly instructed in the manner of counting differently marked ballots and that in one precinct the election officials were absent at the counting.

The Court affirmed the action taken by the county board, holding that G.S. § 163-86\(^{16}\) conferred authority upon the board to determine the result of the election and that insofar as any conflict existed between that statute and G.S. § 163-143 the conflict should be resolved in favor of G.S. § 163-86.

**Utilities**

In *Utilities Comm’n v. City of Wilson*\(^{17}\) the Court held that under

\(^{12}\) *Farr v. City of Asheville*, 205 N.C. 82, 170 S.E. 125 (1933).

\(^{13}\) Spaugh v. City of Winston-Salem, 234 N.C. 708, 68 S.E.2d 838 (1952). See generally, 36 N.C.L. Rev. 435-37 (1958). In Honey Properties, Inc. v. City of Gastonia, 252 N.C. 567, 114 S.E.2d 344 (1960), the Court held that the connection to the city's line of a privately constructed water main outside the corporate limits of a municipality is entirely a matter of contract between the parties. Also a city has no power to require an individual outside the corporate limits to construct a water line; conversely, the individual cannot compel the city to extend its line outside the limits to enable the individual to connect his line. Atlantic Constr. Co. v. City of Raleigh, 230 N.C. 365, 53 S.E.2d 165 (1949).


\(^{15}\) See *Brown v. Costen*, 176 N.C. 63, 96 S.E. 659 (1918).

\(^{16}\) "The .... county board of elections shall have the power and authority to judicially pass upon all facts relative to the election, and judicially determine and declare the result of the same." N.C. Gen. Stat. § 163-86 (1952).

\(^{17}\) 252 N.C. 640, 114 S.E.2d 786 (1960).
the North Carolina franchise tax law a public utility may not furnish a municipality with free telephone service or service at a reduced rate in exchange for the privilege of using the municipal streets, alleys and roads.

**Urban Redevelopment**

In *Redevelopment Comm'n v. Security Nat'l Bank*\(^{18}\) a frontal attack was made on the Urban Redevelopment Law\(^{39}\) by the trustees of a certain parcel of land which the Redevelopment Commission of Greensboro sought to condemn. The superior court approved the condemnation and the Supreme Court affirmed. The respondent argued that the Urban Redevelopment Law was unconstitutional upon three grounds: (1) the taking by the commission was for a private purpose and therefore prohibited by article 1, § 17 of the North Carolina Constitution; (2) there was an unlawful delegation of legislative authority in violation of article 2, § 1 of the North Carolina Constitution; (3) the act allowed special emoluments in violation of article 1, § 7 of the North Carolina Constitution.

As to (1) the Court stated that although G.S. § 160-464(a) empowers the commission to “sell...or otherwise transfer real property...in a redevelopment project area to any redeveloper for residential, recreational, commercial, industrial or other uses or for public use....”\(^{20}\) such is only incidental to the primary purposes of the Urban Redevelopment Law. Quoting from the Supreme Court of New Hampshire the Court stated, “‘If the public use which justifies the exercise of eminent domain in the first instance is the use of the property for purposes other than slums, that same public use continues after the property is transferred to private person.’”\(^{21}\)

As to (2) the Court stated that if adequate standards are set forth by the legislature to guide an agency, that agency is merely carrying into effect the will of the legislature and is not exercising a legislative function. Under the Urban Redevelopment Law a specific condition must be found to exist in a community in order for it to be classed as a “blighted area,” including a finding that two-thirds of the buildings in the area are of that character.

As to (3) the respondent argued that since G.S. § 160-464(b) provides that a sale of property by the commission shall be made to the highest responsible bidder a particular individual may ultimately receive special emoluments. The Court pointed out that this provision

\(^{18}\) 252 N.C. 595, 114 S.E.2d 688 (1960); also discussed under **Constitutional Law, Eminent Domain, supra.**


\(^{21}\) 252 N.C. at 607, 114 S.E.2d at 696-97.
means only that there shall be no discrimination in the selection of the purchasers; under the statutes all bids may be rejected.

An additional point is quite significant. The Court stated that the constitutionality of G.S. § 160-470, insofar as it authorizes the appropriation of tax funds to a redevelopment commission, must be decided another day, when the question was squarely presented. A concurring opinion by Justice Bobbitt and a dissenting opinion by Justice Higgins both questioned whether the real issue in the case was not the possible conflict of G.S. § 160-470 and article 7, § 7 of the North Carolina Constitution. This section provides that no municipal corporation shall incur a debt or levy a tax except for necessary expenses unless approved by a majority of those voting in an election held to approve the debt or tax.

ANNEXATION

In a recent case of first impression the North Carolina Court was called upon to interpret the Municipal Finance Act.

In Upchurch v. City of Raleigh taxpayers of Raleigh sought to have two bond issues declared invalid and to restrain the city from expending the proceeds to construct water and sewer lines in an area which the city proposed to annex.

The precise question on appeal was whether bond proceeds could be expended within areas annexed to the city after the date of a bond election when neither the bond ordinances nor election ballots disclosed the intent of the city so to use the proceeds. The Court held that, so long as the ordinance contained a statement of the general purpose of the bond issue, this was sufficient and the exact location of the improvements need not be disclosed. The Court distinguished Thomasson v. Smith wherein the city of Charlotte had incorporated in the bond ordinance its intent to expend the proceeds in an area to be annexed. In that case the city had simply done more than was required.

This case is significant in that the Court has recognized that as a

22 G.S. § 160-470 provides that a municipality may appropriate funds to a commission to aid it in carrying out any of its power under the Urban Redevelopment Law. The Court noted that the question of what constitutes a "necessary expense" is to be decided by the courts.


25 G.S. § 160-379(b) (1) provides: "The ordinance shall state: (1) In brief and general terms the purpose for which the bonds are to be issued...." G.S. § 160-379(d) provides: "In stating the purpose of a bond issue, a bond ordinance need not specify the location of any improvement or property...."


27 G.S. § 160-453.17(e) (3) requires only that "if authority to issue such bonds must be secured from the electorate of the municipality prior to the effective date of annexation, then the effective date of annexation shall be no earlier than the day following the statement of the successful result of the bond election."
practical matter a city cannot tie down the exact location of a future sewer or water line and also that a city must be free to use its revenue for all areas within the corporate limits—whether they be within the limits before or after the time of a bond issue.\(^2\)

**PERSONAL PROPERTY**

**JOINT BANK ACCOUNTS**

In *Wilson County v. Wooten,\(^1\)* apparently a case of first impression,\(^2\) decedent and defendant (not husband and wife) established a joint savings account in which all deposits were made by the decedent. The parties provided by contract that the funds would be owned by them as joint tenants with rights of survivorship. The Court held that the rights of the survivor-defendant were superior to those of a creditor of the decedent. The Court pointed out that though in joint tenancies survivorship by operation of law has been abolished in this jurisdiction,\(^3\) persons may still create this right by contract.\(^4\) Since our legislature has not enacted any statute with respect to the rights of creditors\(^5\) against property obtained by survivorship, except as to bank deposits created by husband and wife,\(^6\) the Court applied the rules of common law with regard to such rights. At common law the survivor takes the entire property free and clear of the claims of creditors of the deceased tenant.\(^7\) The earlier cases involving rights of survivorship in joint bank accounts are ably discussed by previous articles in this *Law Review*.\(^8\)

\(^{28}\) Compare Eakley v. City of Raleigh, 252 N.C. 683, 114 S.E.2d 777 (1960), where the facts were essentially the same as in *Upchurch*, and on the basis of *Upchurch* the Court held that the electorate of Raleigh was not deceived by the city council which contemplated annexation at the time of the bond election.

\(^{1}\) 251 N.C. 667, 111 S.E.2d 875 (1960).

\(^{2}\) "This is a case of first impression in North Carolina . . . The decision in Bowling v. Bowling, 243 N.C. 515 (1956), resolved the confusion and clarified the rights of the parties to such transactions, inter se, but without reference to the rights of creditors. . . . The question presented upon this appeal, however, remains unanswered." Brief for Plaintiff, p. 3, Wilson County v. Wooten, 251 N.C. 667, 111 S.E.2d 875 (1960).

\(^{3}\) N.C. GEN. STAT. § 41-2 (1950).


\(^{5}\) In 1953 and again in 1955 bills were introduced in the legislature providing for a standard form of contract which would be recognized in North Carolina as validly creating the right of survivorship in bank accounts. Each time the bill failed for the reason that it might result in defeating creditor's rights. Note, 35 N.C.L. Rev. 75 (1956). The present case appears to accomplish exactly what the legislature intended to avoid.

\(^{6}\) N.C. GEN. STAT. § 41-2.1 (Supp. 1959). This section provides in part, "Upon the death of either husband or wife, the survivor becomes the sole owner of the entire unwITHdrawn deposit subject to the claims of the creditors of the deceased and to governmental rights."


\(^{8}\) McCall, *Some Problems in Administration of Estates*, 35 N.C.L. Rev. 341, 352 (1957); Note, 35 N.C.L. Rev. 75 (1957).
REAL PROPERTY

IMPLIED EASEMENTS

In Potter v. Potter, a case of first impression, plaintiffs sought to establish an easement by implication to a cartway that passed over their lands and that of the defendant. The Court held that ownership of land by tenants in common constitutes sufficient unity of title and that partition between them is sufficient severance so that upon such partition, under appropriate circumstances of use, an implied easement will arise in favor of the dominant tract. Although the Court affirmed a nonsuit because plaintiffs seeking to establish this particular easement failed to prove actual physical appurtenance of the cartway to their respective properties, the holding on the point noted is clear and is in accord with the established majority view.

MORTGAGES

In Gallos v. Lucas land was sold by a trustee under foreclosure of a deed of trust. Contrary to G.S. § 45-21.26 the sale was not reported to the clerk within five days. Within ten days of the sale an
advance bid was filed, and a resale later was held. The Court in a per curiam opinion held that the resale was valid, despite the failure of the trustee to file the report within the time limit set by the statute.9

RESTRICTIVE COVENANTS

Scott v. Board of Missions10 again demonstrates the prevailing view of the Court that in order to be binding a restriction on property use must be created in express terms11 or by plain and unmistakable implication.12 In this case land in a subdivision was conveyed by deeds which provided: "SUBJECT TO THE FOLLOWING RESTRICTIONS AND COVENANTS . . . namely: '1. There shall not be constructed on said lot more than one (1) dwelling house . . . . '2. No building shall be constructed nearer than fifteen (15') feet from the side lines of said lot . . . . '"13 The defendant bought three lots and wished to build a church which would cover a portion of each. The Court, in refusing to enjoin this construction, held that the restriction placed upon the property did not strictly limit the lots to residential purposes but only limited to one the number of dwellings which an owner could build on each lot. The Court also stated, "Furthermore, we hold that the restriction, 'no building shall be constructed nearer than fifteen (15') feet from the side lines of said lot . . . .' is applicable only to the outside lines of the lots involved."14 There is no doubt that the lots in question could have been limited to residential purposes,15 but this decision indicates the strictness with which such intended restrictions will be construed.

The Court also has held16 recently that, where a subdivision contains one hundred and seventeen lots, the mere fact that twenty of these are sold subject to residential restrictions does not impose such limits on the other property. The Court distinguished that situation from one where a deed to a lot contains a restrictive covenant which purports to place similar restrictions on adjoining lots, the deeds to

8 The Court pointed out that under G.S. § 45-21.14 the clerk could have compelled the report when the trustee failed to file it within five days. The Court also relied upon G.S. § 45-21.29 which gives the clerk authority to make all such orders as may be just and necessary to safeguard the interests of all parties and to fix all necessary procedural details with respect to resales in all instances in which the statute fails to make definite provision as to such procedure.
10 252 N.C. 443, 114 S.E.2d 74 (1960).
13 252 N.C. at 443-44, 114 S.E.2d at 74-75.
14 Id. at 445-46, 114 S.E.2d at 74.
15 Callahan v. Arenson, 239 N.C. 619, 80 S.E.2d 619 (1954); Edney v. Powers, 224 N.C. 441, 31 S.E.2d 372 (1944). In fact these appear to be the "standard" F.H.A. restrictions, but with the critical omission of the key restriction that all lots shall be used solely for residential purposes.
which do not mention the restriction. In the latter instance, where the same original owner sold all of the property involved, the Court has held that subsequent purchasers of such adjoining lots are on constructive notice of the restrictions imposed in the first deed.¹⁷

**Rule Against Perpetuities**

In *Parker v. Parker*¹⁸ testator left a will in which he gave some of his land and personal property in trust to a named son. The net proceeds from the property were to be used to defray the college expenses of the trustee's children in such amounts for each child as the trustee in his absolute discretion should determine. The trustee was to convey the land and personal property to the children "when" the youngest child reached the age of twenty eight. Stating that the "when" applied both to the time of vesting and the time of enjoyment, the Court held this provision violated the rule against perpetuities and the property passed by intestate succession. This case will be the subject of a note in a later issue of this *Law Review*.

**Subterranean Waters**

In *Jones v. Home Bldg. & Loan Ass'n*¹⁹ defendant, in constructing a building on its lot, erected a foundation wall adjacent to plaintiff's land. This wall obstructed the flow of underground water, causing it to back up on plaintiff's lot and into his cellar. The Court, in ordering a new trial, held that defendant's demurrer was properly overruled, as the complaint stated a cause of action both for the obstruction of a subterranean stream and for the obstruction of percolating water. The Court also held that the evidence would not support the award of damages for obstruction of a subterranean stream but that on retrial there should be an issue submitted to the jury as to the negligent obstruction of percolating waters.

The Court classified subterranean waters into (1) subterranean streams which are bodies of water flowing in fixed channels, the location of which are known or ascertainable from surface indications, and (2) percolating waters, which ooze, seep, filter or flow through the soil beneath the surface in a course that is unknown and not discoverable from surface indications.

Rights and liabilities in regard to subterranean streams, as defined in (1) above, are generally governed by the rules of law applicable to surface streams.²⁰ There is a division of authority as to rules for deter-

¹⁷ Reed v. Elmore, 246 N.C. 221, 98 S.E.2d 360 (1957). The problems for the title examiner which this earlier decision has created are discussed in Note, 36 N.C.L. Rev. 233 (1958).
¹⁸ 252 N.C. 399, 113 S.E.2d 899 (1960).
¹⁹ 252 N.C. 626, 114 S.E.2d 638 (1960).
²⁰ A landowner through whose property a subterranean stream flows may make a reasonable use of the stream. But a landowner having riparian rights
mining liability for harm caused by the use or obstruction of percolating waters. The common law rule holds that any use or obstruction of percolating water to the injury of an adjoining landowner, in the absence of negligence or malice, does not give rise to an action for damages.21 This rule was followed by most of the earlier cases and is still followed by some jurisdictions.22 The general trend of recent decisions23 and the view of the North Carolina Court is, however, in favor of the American or "reasonable use" rule,24 which holds that a landowner's rights to percolating waters on his land are limited to a reasonable and beneficial use thereof.25 The North Carolina Court in Rouse v. City of Kinston26 stated that they were of the opinion that the reasonable user doctrine is supported by the greater weight of authorities in the United States and is the just and equitable rule to follow. The Court did not think the English rule consistent with the ideals of our government.

TAXATION

INCOME TAX

Deduction for Income Taxed in Another State


21 Percolating water is regarded as being as much a part of the freehold as the clay, sand, rocks and gravel found therein, and the owner, in the absence of malice and of any contractual or statutory restrictions, has the absolute right to intercept and make whatever use he desires of the water before it leaves his premises, regardless of the effect that such use may have on an adjoining proprietor through whose land the water would filtrate or flow in its natural course. Bloodgood v. Ayers, 108 N.Y. 400, 15 N.E. 433 (1888); Logan Gas Co. v. Glasgo, 122 Ohio St. 126, 170 N.E. 874 (1930). See generally 56 Am. Jur. Waters § 113 (1947).


24 The right of a landowner to subterranean waters percolating through his own and his neighbor's lands, and which are a common source of supply for the lands of two or more of them, is limited to a reasonable and beneficial use of the waters upon the land or to some useful purpose connected with its occupation and enjoyment, where the rights of others are affected. Snake Creek Mining & Tunnel Co. v. Midway Irr. Co., 260 U.S. 596 (1923).

26 It is interesting to note that in addition to the common law and American rules, the American Law Institute has developed another theory; liability for interference with subterranean waters is determined by the rules generally governing liability for non-trespassory invasions of interests in the private use and enjoyment of land. Thus such liability depends upon whether the causative activity or conduct, if unintentional, was negligent, reckless, or ultrahazardous. Annot., 29 A.L.R.2d 1354 (1953).

1 188 N.C. 1, 123 S.E. 482 (1924); Note, 3 N.C.L. Rev. 31 (1925).

come taxes paid under protest to the state. The dispute arose over the Commissioner’s disallowance of a deduction of income from two trusts under the provisions of G.S. § 105-147(10)(b) prior to its repeal. This section allowed a deduction for net income received by a resident taxpayer from an established business located in another state to the extent that the income from such business was reported and taxed in the other state. The trusts involved were (1) an inter vivos trust created by the plaintiff, for her benefit, of her interest in a partnership with herself and a bank as co-trustees, and (2) a testamentary trust created by her father for the benefit of plaintiff, her mother, and her two sisters of the father’s interest in the same partnership naming the plaintiff and the same bank as co-trustees. The superior court allowed the deduction of the income from the first trust but affirmed the Commissioner’s disallowance as to the second trust.

On appeal the Court affirmed. The Court held that as to the inter vivos trust, the plaintiff continued to be the equitable owner of the partnership interest and thus was entitled to the deduction. But as to the testamentary trust, the plaintiff could not qualify for a deduction because she did not have an interest sufficient to come within the contemplation of the statute.

The plaintiff on appeal sought to distinguish Sabine v. Gill where the Court stated that if a beneficiary did not have either legal or equitable title in the business, but was merely entitled to the income, then the business belonged to the trust. In the principal case, the plaintiff contended that as co-trustee of her father’s trust she would have the legal title and thus meet the requirements of the Court in the Sabine case. But the Court held that the plaintiff’s interest, as trustee of a testamentary trust, was only fiduciary and did not give her a “business” in another state within the contemplation of the statute.

The principal case does not seem to coincide with either the intent of the statute nor with the plaintiff’s actual situation. Under both trusts, the plaintiff was a beneficiary and a co-trustee. Yet in the case of the inter vivos trust, where she was the settlor, the Court held that she had an interest sufficient to allow a deduction. If she had a sufficient interest in one case, it is difficult to see why she did not in the other case. The only distinguishing factor would seem to be that in one case she had legal title prior to the establishment of her inter vivos trust while in the other case the legal title passed from her father to her as co-trustee. It would appear from the granting of a deduction for income from a business reported and taxed in another jurisdiction that the intent of the Legislature was to prevent double taxation. It

does not seem that a result based apparently upon a distinction as to the way title passed to the trusts effectuates this intent.

This problem can no longer arise. The present law allows a tax credit to any resident beneficiary of an estate or trust who is taxed on income received from such estate or trust where the fiduciary has paid a tax on the income in another state or country.¹

**TORTS**

**NEGLIGENCE**

**Joint Adventurers—Imputed Negligence**

In *Shoe v. Hood*¹ a wife was the owner-occupant of an automobile which her husband was driving to work. She had accompanied her husband in order to return the automobile to their home. The plaintiff brought suit against both the husband and wife for injuries sustained when the husband collided with the plaintiff’s automobile. On appeal the Court held that the trial judge was correct in instructing the jury as a matter of law that the defendants were joint adventurers and that any negligence of the husband was to be imputed to the wife.²

The Court recognized that the husband did not become the agent of the wife merely by reason of the marital relation. The wife’s liability arose from the fact that presumptively she had the right to control the vehicle and direct its operation.³ The presumption placed upon the wife the burden of showing a bailment or some other condition by which she had relinquished the incidents of ownership and control of the vehicle to her husband.⁴ The Court noted that her purpose in accompanying

---

¹ N.C. GEN. STAT. § 105-151(c) (1958).
³ The doctrine of joint-adventurers is used here in its restricted sense as contrasted with the usual case of parties on a venture of common interest, each exercising power of control over the operation of the vehicle and sharing expenses. See, e.g., Williams v. Barton, 81 So. 2d 22 (La. App. 1955); James v. Atlantic & E. Carolina R.R., 233 N.C. 591, 65 S.E.2d 214 (1951); Bonney v. San Antonio Transit Co., 317 S.W.2d 69 (Tex. Civ. App. 1958); Howard v. Riley, 257 Wis. 594, 44 N.W.2d 552 (1950).
⁴ This is the general rule applied where a person is both the owner and a passenger. E.g., Litaker v. Bost, 247 N.C. 298, 101 S.E.2d 31 (1957), discussed in 36 N.C.L. REV. 284 (1958). It should be noted that this rule is not based on G.S. § 20-71.1 which makes a showing of ownership prima facie evidence of agency.

⁵ There was evidence that the husband purchased the vehicle and took title in the wife’s name. The wife was apparently attempting to show a resulting trust in favor of her husband to rebut the presumption that she had control of the vehicle on the occasion in question. It is well established that where a party purchases real property and takes title in the name of a stranger there is a resulting trust in favor of the purchaser. Nissen v. Baker, 198 N.C. 433, 152 S.E. 34 (1930). But where the husband purchases real property and takes title in the wife’s name it is presumed that he intended a gift. Bowling v. Bowling, 252 N.C. 527, 114 S.E.2d 228 (1960). This presumption is rebuttable,
her husband showed an intent to maintain control and possession over the vehicle.

It is arguable that the wife's purpose in accompanying the husband is completely consistent with the husband's control of the vehicle during the trip (i.e., she was riding in the car in order to secure control later). Moreover, the Court is here dealing with a fiction—the presumption of control by the owner-occupant. The Court should not carry this fiction to the extreme. It seems unrealistic to presume that the wife has the power to control the husband in the operation of the vehicle on the mere ground that the wife is owner and an occupant of the vehicle. Especially is this so when considering the case from the standpoint of the husband as head of the household. Some jurisdictions take a more realistic approach to the problem and refuse to apply the doctrine of imputed negligence to the wife-owner-occupant in the absence of a clear showing that she had the right to control the operation of the vehicle.\(^5\)

While the negligence of a driver is imputed to the owner-occupant in an action by a third person to recover damages sustained as a result of the negligence of the driver, the rule was held inapposite in Sorrell\(^6\) v. Moore\(^6\) where the action was brought by the owner against the driver.\(^7\)

It should be noted, however, that the owner-occupant may still be contributorily negligent. The Court stated in Sorrell:

While an owner-occupant is not chargeable with the negligence of the driver so as to prevent the owner from recovering from the driver for the driver's negligence, the owner-occupant, however, by showing a contrary intent. Bass v. Bass, 229 N.C. 171, 48 S.E.2d 48 (1948). See generally Edwards & Van Heck, Purchase Money Resulting Trust in North Carolina, 9 N.C.L. Rev. 177 (1930). The same principles should be applicable to purchases of personal property. Compare with the instant case Painter v. Lingon, 193 Va. 840, 71 S.E.2d 355 (1952), where it was held that evidence showing that the husband purchased the automobile for family use, that he had title placed in the wife's name, that the husband had used the car at will, and that the expenses of operation and maintenance of the vehicle were paid by the husband was sufficient to support the verdict that the husband had absolute control over the operation of the vehicle, even though the wife was in the vehicle with him.\(^8\)

\(^*\) See, e.g., Roach v. Parker, 48 Del. 519, 107 A.2d 798 (1954), where the court stated, "It is fully in accord with common experience to presume that an owner-passenger retains the right of control when he asks or permits a friend or even a child to drive.... But to say that this is true of a wife whose husband takes the wheel is to ignore realities." Id. at 522, 107 A.2d at 799; Painter v. Lingon, supra note 4; Porter v. Wilson, 357 P.2d 309 (Wyo. 1960).

\(^5\) 251 N.C. 852, 112 S.E.2d 254 (1960); also discussed under CIVIL PROCEDURE, Pleading—Motion To Strike, supra.

\(^6\) Sorrell should clear up the confusion caused by Harper v. Harper, 225 N.C. 260, 34 S.E.2d 185 (1945), which held that the negligence of the husband-driver would be imputed to the wife-owner-occupant and would bar her recovery against the husband, unless the jury found that there had been a bailment. The Harper decision applied South Carolina law but was cited with apparent approval in Tew v. Runnels, 249 N.C. 1, 105 S.E.2d 108 (1958). See 37 N.C.L. Rev. 455, 458 (1959).
like any other person, must take reasonable precautions to protect himself from injury. What is reasonable care depends on the existing conditions.\(^8\)

Sorrell further pointed out that the owner has the duty and the ability to control the operation of the vehicle. "He cannot sit placidly by and, when injured by the negligent operation, escape the consequences of his lack of due care."\(^9\)

**Entrusting an Automobile to an Incompetent Driver**

In *Dinkins v. Booe*,\(^{10}\) evidence that the owner of the vehicle had known the person to whom he entrusted his automobile all his life and knew that he had had a "very serious" automobile accident in 1956, another accident in 1958, and had been convicted of driving without operator's license in 1953, was held sufficient to carry the case to the jury on the issue of the negligence of the owner in entrusting his vehicle to an incompetent driver.\(^{11}\)

**Rear-end Collisions**

The recurring problem of rear-end collisions was presented in three recent cases.\(^{12}\) In one of these cases\(^{13}\) the defendant ran into the back of the plaintiff who had stopped on the highway to avoid hitting another vehicle which had stopped just ahead. In reversing a nonsuit, the Court noted that G.S. § 20-151 makes it a criminal offense for a motorist to follow another more closely than is reasonable under the circumstances and that violation of this statute is negligence per se.\(^{14}\)

---


\(^9\) Ibid. It seems that the Court is saying, perhaps properly, that the fact that the party whose contributory negligence is in question is an owner-occupant is a circumstance to be considered in determining whether the party exercised due care. Compare with the instant case Watters v. Parrish, 252 N.C. 787, 115 S.E.2d 1 (1960), wherein the Court stated that, although a guest passenger cannot be totally oblivious to danger, he is not expected to exercise the same vigilance as the driver or to be annoyingly active in protesting the method of operation of the vehicle.

\(^10\) 252 N.C. 731, 114 S.E.2d 672 (1960).

\(^11\) "[T]he owner of a motor vehicle who entrusts its operation to a person whom he knows, or by the exercise of due care should have known, to be an incompetent or reckless driver, thereby becomes liable for such person's negligence in the operation thereof; and in such case the liability of the owner is predicated upon his own negligence in entrusting the operation of the motor vehicle to such person..." Heath v. Kirkman, 240 N.C. 303, 307, 82 S.E.2d 104, 107 (1954).


\(^14\) The Court has held that violation of certain criminal statutes regulating the operation of motor vehicles on the highway is negligence per se. *E.g.*, G.S. § 20-163 (leaving automobile unattended on the side of a highway without setting the brakes and stopping the engine), Arnett v. Yeago, 247 N.C. 356, 100 S.E.2d 855 (1957); G.S. § 20-154 (failing to give signal when stopping or turning), Queen City Coach Co. v. Fultz, 246 N.C. 523, 98 S.E.2d 860 (1957). The General
The Court, apparently for the first time, implied that the mere fact that a following motorist runs into a vehicle ahead was some evidence that the following motorist was negligent.15

**Proximate Cause**

The Court frequently states that foreseeability as a test of proximate cause does not require that the tort-feasor should have been able to foresee the injury in the precise form in which it actually occurred. It is sufficient if, in the exercise of reasonable care, some injury might have been foreseen.16 The rule was applied in *Bondurant v. Mastin*17 where defendant A, driving at an excessive rate of speed and four or five feet over the center line, forced the approaching plaintiff's intestate off the highway. The intestate lost control of his automobile, swerved back across the highway, and collided with the oncoming truck of defendant B, who was following closely behind defendant A. The Court sustained the finding of the jury that the negligence of defendant A was the sole proximate cause of the intestate's death. The Court stated that defendant A should have foreseen that some injury was likely to result from his negligent acts.

While the result of the principal case seems sound, the Court has not always been consistent. In some cases the Court apparently was thinking of foreseeability as requiring the tort-feasor to foresee the injury in the precise form in which it actually occurred.18 Assembly has negated this presumption in certain instances and has provided that the violation may be considered with other circumstances by the jury in determining whether the violator was negligent. E.g., G.S. § 20-143 (stopping vehicle at railway crossings). See for a discussion of such statutes, 38 N.C.L. Rev. 205 (1960). However, the Court has held even in the absence of statutory negation that violation of G.S. § 20-174, regulating pedestrians walking on the highway, is not negligence per se. Moore v. Bezalla, 241 N.C. 190, 84 S.E.2d 817 (1954).

Query whether the statement would be valid as a general rule. In the previous cases considering the problem in which the following motorist was found negligent there were circumstances in addition to the mere fact of the collision. E.g., Crotts v. Overnite Transp. Co., 246 N.C. 420, 98 S.E.2d 502 (1957), where the plaintiff was following the defendant at a speed of thirty or thirty-five miles per hour and only seventy-five feet behind, after apprehending that the defendant had decreased his speed. Compare with the instant case Thomas v. Thurston Motor Lines, Inc., 230 N.C. 122, 52 S.E.2d 377 (1949), where the automobile in which the plaintiff was riding collided with the defendant's tractor-trailer which had stopped diagonally across the highway without lights on the trailer. The Court held that the evidence was sufficient to support a finding that the driver of the automobile acted reasonably under the circumstances. Although this was not a rear-end collision, the same result should have been reached if the driver of the automobile had run into the back of the trailer rather than the side.


16 252 N.C. 190, 113 S.E.2d 292 (1960).

17 In *Davis v. Carolina Power & Light Co.*, 238 N.C. 106, 76 S.E.2d 378 (1953), defendant maintained uninsulated wires in a settled community only seventeen or eighteen feet high. *Held*: The defendant could not foresee that someone might throw a housemover's measuring tape over its transmission line. In Boone
Insulating Negligence

The Court considered the problem of insulating negligence in *Gwyn v. Lucky City Motors, Inc.*\(^1\) and *Shepard v. Rheem Mfg. Co.*\(^2\). In *Gwyn* the defendant-manufacturing company placed a one-piece check valve in the master cylinder of the plaintiff's intestate's truck in lieu of the two-piece check valve normally used. The defendant-retailer, attempting to correct the faulty brakes, either failed to discover or neglected to remedy the defective condition. The intestate was fatally injured when the brakes failed to hold. A nonsuit entered for the manufacturer was reversed on appeal. The Court stated that if the wrong valve was installed in the cylinder by the manufacturer and was permitted to remain there by the retailer, "there was no break in the chain of causation set in motion by the negligence"\(^2\) of the manufacturer.\(^2\)

In *Shepard* the plaintiff was injured when a spark caused an explosion as a result of the accumulation of gas escaping from a defective heater. The heater was purchased from a construction company and contained a defective check valve which would not cut off the gas supply when the pilot light on the heater stopped burning. The plaintiff alleged that the construction company represented that the heater was safe and placed the heater in a room which the construction company built for the plaintiff without providing proper ventilation. It was further alleged that a gas company which furnished gas to the heater had on several occasions inspected the heater and had seen the dangerous condition existing because of the escaping gas and the improper ventilation but had continued to furnish gas to the heater. In an action against the manufacturer, the construction company, and the gas company, each defendant demurred separately. The demurrer of the defendant's train, travelling at an excessive rate of speed, struck a pedestrian and hurled him into the plaintiff's intestate. Held: The engineer was not required to anticipate the negligence of the pedestrian in remaining on the track. In *Adams v. State Bd. of Educ.*, 248 N.C. 506, 103 S.E.2d 854 (1958), discussed in 37 N.C.L. Rev. at 459-60 (1959), the plaintiff, an eleven year old child, was injured when he slipped while playing on wet grass and slid into the defendant's power mower. On the issue of contributory negligence, it was held that the plaintiff was not required to anticipate from the noise of the power mower that he might slip on the wet grass into the unguarded blades of the mower.

\(^{10}\) 252 N.C. 123, 113 S.E.2d 302 (1960).


\(^{21}\) *Gwyn v. Lucky City Motors, Inc.*, 252 N.C. 123, 131, 113 S.E.2d 302, 308 (1960).

\(^{22}\) The manufacturer also argued that the defect was not concealed but was apparent since the purchaser had knowledge of the malfunctioning of the brakes. The Court noted, however, that there was no evidence that the purchaser knew that "the malfunctioning was caused by the presence, within the brake assembly, of a 'one-piece' check valve." *Ibid.* Compare *Hoover v. Odom*, 252 N.C. 459, 113 S.E.2d 926 (1960), where it was held that the fact that the defendant knew that "something" was wrong with the car door was no evidence that she knew that one of the four notches on the door latch was defective.
manufacturer was overruled. The Supreme Court affirmed, stating that it could not say as a matter of law that the negligence of the manufacturer was insulated by that of the construction company.

It is settled that the negligence of a manufacturer in placing a defective instrumentality on the market is not insulated even though there is negligence by an intermediate vendor in failing to discover the defect or in creating some independent condition which contributes to the injury, provided the negligence of the second party is reasonably foreseeable by the manufacturer. However, where the intervening actor discovers the dangerous condition created by the negligence of the original tort-feasor and thereafter by an independent act of negligence brings about an accident, the negligence of the original tort-feasor is insulated. In the principal case, there was no allegation that the construction company was aware of the defective check valve. Its negligence might reasonably have been foreseen by the manufacturer. Therefore, the decision as to the manufacturer seems sound, i.e., that the negligence of the manufacturer was not insulated by that of the construction company. However, it was expressly alleged that the gas company had actual knowledge of the defective condition and continued to furnish gas to the heater. Although the manufacturer argued this point in its brief, the Court failed to mention it in the decision.

Duty of Supplier of Chattels

In Lemon v. Buchan Lumber Co., the plaintiff alleged that the defendant sold lumber to a construction company to be used as joists and framing in a building. The defendant supplied knotty white pine instead of the “number 2” grade yellow pine which was ordered. The distinguishing characteristics of the two grades of lumber were readily discernible. Plaintiff’s intestate, an employee of the construction company, was standing on a joist constructed of the knotty white pine when it suddenly collapsed, causing the intestate to fall to his death.
Murrer was sustained by the trial court and affirmed on appeal. It is settled that a manufacturer may be held liable for supplying an article which is likely to cause injury in its ordinary use because of some latent defect or because it is inherently dangerous in the use to which he knows it will be put. However, the Court stated that the duty of a manufacturer to remote users does not require that it guard against hazards which are apparent to the casual observer.

The Court further stated that to hold the defendant liable on the theory that it negligently supplied a product which would be inherently dangerous in the use to which the defendant knew the product would be put would require that the defendant know "how each board would be placed, the distance to be spanned, the weight to be supported, and many other factors which the defendant could not know but which would be known to the carpenters and others working on the building." This, the Court stated, "would require a vendor to stretch foresight into omniscience."

The result reached seems sound in view of the fact that the intestate obviously saw or should have seen the defective condition of the knotty lumber. The language of the Court implies, however, that even if the defect were latent, the defendant would not be held liable since he could not have foreseen the precise use of the lumber. This seems questionable. It should not require omniscient foresight to foresee that some of the lumber purchased for "joist and framing" would be spanned the length of the lumber across two beams and used to support employees and material in the construction of the building. Especially is this so if the "number 2" yellow pine ordered would have been sufficient for this purpose.

In Shepard v. Rheem Mfg. Co. it was held that, by representing that a heater was safe, the vendor incurred a more positive duty of care. While this language is difficult to understand, perhaps the Court means that when a vendor makes a representation that the article which he is selling is safe, he has a duty to inspect it in order to ascertain whether it is, in fact, safe. If he then fails to inspect, and the article is defective, he is liable.

---

22 Ibid.
24 The language of the Court indicates another instance in which the Court is thinking of foreseeability as requiring the tort-feasor to foresee the injury in the precise form in which it actually occurs. See discussion in Proximate Cause, supra.
Similar Instance Doctrine—Soft Drinks

In *Elledge v. Pepsi Cola Bottling Co.*, the plaintiff sought to recover for injuries caused by a deleterious substance found in a bottled soft drink. The Supreme Court affirmed the nonsuit entered by the trial court, stating that evidence showing that the soft drink was purchased from a Pepsi Cola agent was insufficient to show that it was manufactured by the defendant Pepsi Cola Bottling Company of Winston-Salem.

The language of the Court also implied that evidence of only one other instance of deleterious substance was insufficient to carry the case to the jury on the issue of the negligence of the manufacturer in bottling the soft drink in question. The Court has not expressly ruled on the number of "other instances" that would be necessary to carry a case to the jury. The question was presented in *Tickle v. Hobgood*, but the Court refused to rule on the issue and reversed the case on the ground that the plaintiff failed to prove any similar instance. In *Caudle v. F. M. Bohannon Tobacco Co.*, which involved chewing tobacco rather than bottled soft drinks, evidence of one other instance and of complaints made by the defendant's foreman that other foreign substance had been left in the manufactured product was held sufficient.

Owners and Occupiers of Land

The owner or operator of an automobile race track is charged with the duty of exercising reasonable care, or that care commensurate with the known or reasonably foreseeable danger, for the safety of patrons. The rule was applied in *Williams v. Strickland*, where the plaintiff was injured while watching a race at the defendants' race track. The Court held that the complaint sufficiently stated a cause of action against the defendants for failing to provide seats and a reasonably adequate barricade for the safety of the patrons.

The decision is consistent with the view taken by the Court of the duty owed by the owner or operator of a baseball park to the patrons and by a merchant to its customers.

An invitee has been defined as one who visits the premises of another

---

38 252 N.C. 337, 113 S.E.2d 435 (1960).
39 216 N.C. 221, 4 S.E.2d 444 (1939).
38 220 N.C. 105, 16 S.E.2d 680 (1941).
40 251 N.C. 767, 112 S.E.2d 533 (1960); also discussed under Civil Procedure, Pleading—Sufficiency of Allegations, supra.
pursuant to an invitation of the owner or occupier for a purpose of mutual interest or pecuniary benefit. But mutuality of interest or pecuniary benefit has not been a controlling factor. Thus where A accompanies a customer to a store or a patient to a clinic, or goes to a train or bus station to see a friend off or to meet a friend who is arriving, or visits a friend who is a patient at a hospital, A is an invitee although he purchases nothing at the store or transacts no business at the clinic, station, or hospital. In these instances, it is arguable that the operators of the businesses indirectly derive some pecuniary benefit from A's visit. The controlling factor in determining whether one is an invitee, however, is whether he has been invited by the owner or occupier of the premises.

In Walker v. County of Randolph, the plaintiff was injured while examining a bulletin board in the courthouse for a notice of the sale of land. It was held that the plaintiff was an invitee. The Court stated that, since the posting of public notices in the county courthouse for the sale of land was required by statute, a person visiting the premises for the purpose of seeing such notices was not a mere licensee but an invitee, to whom the defendant owed the duty of making the premises and approaches safe. The Court made no mention of pecuniary benefit or of mutuality of interest. Plaintiff's status as an invitee was found in the implied invitation of the defendant to the plaintiff and the public.

It is encouraging to the customers and patrons to have their friends or children accompanying them while shopping, to meet them or to see them off on trips, or to visit them while a patient in a hospital. Moreover, there is advertising benefit to the owners or operators of the businesses by permitting such visits. See, e.g., Campbell v. Weathers, 153 Kan. 316, 111 P.2d 72 (1941). But one visiting a station merely to deliver a message to a passenger is not an invitee but a licensee. Sims v. Warren, 248 Ala. 391, 27 So. 2d 803 (1946). See generally Annot., 92 A.L.R. 614 (1934).

As applied by the courts, "invitation" is distinguished from a mere private invitation or mere acquiescence by the owner in trespasses. Murrell v. Handley, 245 N.C. 559, 96 S.E.2d 717 (1957); Adams v. American Enka Corp., 202 N.C. 767, 164 S.E. 367 (1932). In its legal sense "invitation" is an express or implied request to visit the premises which leads the visitor to believe that the owner or occupier will take reasonable precautions to make the premises and approaches safe. Guilford v. Yale Univ., 128 Conn. 449, 23 A.2d 917 (1942). This has been ably pointed out by a noted author as the early common law rule and as the rule actually applied by the American courts although the courts have continuously used language implying that there must also be some mutual pecuniary benefit. Prosser, Business Visitors and Invitees, 26 Minn. L. Rev. 573 (1942).

As applied by the courts, "invitation" is distinguished from a mere private invitation or mere acquiescence by the owner in trespasses. Murrell v. Handley, 245 N.C. 559, 96 S.E.2d 717 (1957); Adams v. American Enka Corp., 202 N.C. 767, 164 S.E. 367 (1932). In its legal sense "invitation" is an express or implied request to visit the premises which leads the visitor to believe that the owner or occupier will take reasonable precautions to make the premises and approaches safe. Guilford v. Yale Univ., 128 Conn. 449, 23 A.2d 917 (1942). This has been ably pointed out by a noted author as the early common law rule and as the rule actually applied by the American courts although the courts have continuously used language implying that there must also be some mutual pecuniary benefit. Prosser, Business Visitors and Invitees, 26 Minn. L. Rev. 573 (1942).

45 See Prosser, Business Visitors and Invitees, 26 Minn. L. Rev. 573 (1942).
49 Hamlet v. Troxler, 235 F.2d 335 (4th Cir. 1956).
50 It is encouraging to the customers and patrons to have their friends or children accompanying them while shopping, to meet them or to see them off on trips, or to visit them while a patient in a hospital. Moreover, there is advertising benefit to the owners or operators of the businesses by permitting such visits. See, e.g., Campbell v. Weathers, 153 Kan. 316, 111 P.2d 72 (1941).
52 As applied by the courts, "invitation" is distinguished from a mere private invitation or mere acquiescence by the owner in trespasses. Murrell v. Handley, 245 N.C. 559, 96 S.E.2d 717 (1957); Adams v. American Enka Corp., 202 N.C. 767, 164 S.E. 367 (1932). In its legal sense "invitation" is an express or implied request to visit the premises which leads the visitor to believe that the owner or occupier will take reasonable precautions to make the premises and approaches safe. Guilford v. Yale Univ., 128 Conn. 449, 23 A.2d 917 (1942). This has been ably pointed out by a noted author as the early common law rule and as the rule actually applied by the American courts although the courts have continuously used language implying that there must also be some mutual pecuniary benefit. Prosser, Business Visitors and Invitees, 26 Minn. L. Rev. 573 (1942).
53 See generally Annot., 92 A.L.R. 614 (1934).
55 Hamlet v. Troxler, 235 F.2d 335 (4th Cir. 1956).
56 As applied by the courts, "invitation" is distinguished from a mere private invitation or mere acquiescence by the owner in trespasses. Murrell v. Handley, 245 N.C. 559, 96 S.E.2d 717 (1957); Adams v. American Enka Corp., 202 N.C. 767, 164 S.E. 367 (1932). In its legal sense "invitation" is an express or implied request to visit the premises which leads the visitor to believe that the owner or occupier will take reasonable precautions to make the premises and approaches safe. Guilford v. Yale Univ., 128 Conn. 449, 23 A.2d 917 (1942). This has been ably pointed out by a noted author as the early common law rule and as the rule actually applied by the American courts although the courts have continuously used language implying that there must also be some mutual pecuniary benefit. Prosser, Business Visitors and Invitees, 26 Minn. L. Rev. 573 (1942).
57 It is encouraging to the customers and patrons to have their friends or children accompanying them while shopping, to meet them or to see them off on trips, or to visit them while a patient in a hospital. Moreover, there is advertising benefit to the owners or operators of the businesses by permitting such visits. See, e.g., Campbell v. Weathers, 153 Kan. 316, 111 P.2d 72 (1941).
58 Guilford v. Yale Univ., 128 Conn. 449, 23 A.2d 917 (1942). This has been ably pointed out by a noted author as the early common law rule and as the rule actually applied by the American courts although the courts have continuously used language implying that there must also be some mutual pecuniary benefit. Prosser, Business Visitors and Invitees, 26 Minn. L. Rev. 573 (1942).
in general to visit the premises for a purpose required by statute. It is submitted that this—the invitation—was the proper test and that the definition requiring mutuality of interest should be modified by the Court to conform to its actual decisions.53

CONTRACT AND COMMON CARRIERS

In Jackson v. Stancil,54 the plaintiffs sought to recover for injuries sustained in an airplane crash. The defendant maintained an established place of business and carried on regular flying services—making chartered flights, spraying and dusting crops, and banner towing—at fixed prices. A and B contracted with the defendant for a chartered flight as they had done on several previous occasions. The airplane crashed during a landing attempt. The trial court charged the jury that the defendant was a common carrier and, as such, owed his passengers the highest degree of care. The defendant appealed from a judgment for the plaintiffs, and the Supreme Court reversed.

The Court stated that the evidence was insufficient to establish the defendant as a common carrier as a matter of law. Thus it was prejudicial error to instruct the jury that the defendant owed his passengers the highest degree of care.

The Court, citing G.S. § 63-15,55 pointed out that the liabilities of the defendant, if any, were determined by the rules of law applicable to torts on land. A distinction is made between the duties owed passengers for hire by a common carrier and the duties owed by a private or contract carrier.56 The former owes its passengers the highest degree of care,57 while the latter owes its passengers only ordinary care commensurate with the circumstances.58

The Court also noted the essential distinction between the two types of carriers.59 The common carrier holds himself out to the public as

53 The advisors for the Restatement of Torts (Second) have suggested the following: "(1) An invitee is either a public invitee or a business visitor. (2) A public invitee is a person who is invited to enter or remain on land as a member of the public for the purpose for which the land is held open to the public. (3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." RESTATEMENT (SECOND), TORTS § 332 (Tent. Draft No. 5, 1960).
55 "The liability of the owner of one aircraft to the owner of another aircraft, or aeronauts or passenger on either aircraft, for damages caused by collision on land or in the air shall be determined by the rules of law applicable to torts on land." N.C. GEN. STAT. § 63-15 (1960).
56 Some jurisdictions make no distinction between contract and common carriers in respect to aircraft and impose the highest degree of care on both. See Annot., 73 A.L.R.2d 346, 349 (1960).
57 Arrow Aviation, Inc. v. Moore, 266 F.2d 488 (8th Cir. 1959); Atcheson v. Barniff Int'l Airways, 327 S.W.2d 112 (Mo. 1959). The connotations of the Court's statement regarding the highest degree of care are the subject of Note, 39 N.C.L. Rev. 294 (1961).
engaged in the business of transporting persons for compensation, offering his service indifferently to those of the general public who choose to employ him. The private or contract carrier makes an individual contract in a particular instance for transportation to a certain destination. The Court stated that three important factors indicating operation as a common carrier were (a) an established place of business, (b) engaging in the operation as a regular business and not merely as a casual or occasional undertaking and (c) a regular schedule of charges.

Recognizing that the defendant had an established place of business and set prices for his trips, the Court nevertheless stated that evidence was wanting that the defendant held himself out as a common carrier, offering his services generally to those of the public who chose to employ him.59

**Fraud**

In *Brooks v. Ervin Constr. Co.*,60 the defendant sold a house and lot to the plaintiffs. The house was constructed over a hole which had been filled in by the defendant, but no disclosure of this fact was made by the defendant during the negotiations. The plaintiffs had inspected the lot but had seen nothing to indicate a fill. Because of the fill, the foundation of plaintiff's house receded, causing extensive damage to the home. The Supreme Court, in reversing a nonsuit entered by the trial court in plaintiffs' action for damages for fraud and deceit, stated,

> Where material facts are accessible to the vendor only, and he knows them, not to be within the reach of the diligent attention, observation and judgment of the purchaser, the vendor is bound to disclose such facts, and make them known to the purchaser.61

The decision is in harmony with prior North Carolina decisions62 and with the majority rule.63 It justifies the comment that "the law appears to be working toward the ultimate conclusion that full dis-

---

59 Justice Bobbit concurred with the majority in holding that the evidence was insufficient to show that defendant was a common carrier, but stated that ordinary care commensurate with the circumstances in respect to airlift is no less than the highest degree of care consistent with the practical operation and conduct of the business. He also pointed out that G.S. § 6315 relates only to collision between aircraft and should have no bearing upon the question of whether common and contract carriers owe different legal duties to fare paying passengers.

61 Id. at 217, 116 S.E.2d at 457.
62 E.g., Brooks Equip. & Mfg. Co. v. Taylor, 230 N.C. 680, 55 S.E.2d 311 (1949). In the absence of a fiduciary relationship, however, the Court has held that the vendee has no duty to disclose facts within his knowledge to the vendor, unless the vendor specifically questions the vendee in reference thereto. Harrell v. Powell, 249 N.C. 244, 106 S.E.2d 160 (1958).
closure of all material facts must be made whenever elementary fair conduct demands it.”

MALICIOUS PROSECUTION

In an action for malicious prosecution, it is essential that the plaintiff show a favorable termination of the action upon which his action is based, a want of probable cause, and malice. A judgment of acquittal may be introduced to establish a favorable termination of the prior action, but in *Abbitt v. Bartlett* it was held that the acquittal has no bearing on the issue of probable cause. The decision is in harmony with the prior North Carolina decisions and with the majority view.

A logical justification for the rule is that the plaintiff in the prior action might have been acquitted on some technicality not involving the merits of the case. It has been further stated that the existence of probable cause must be viewed from the standpoint of the accuser and not that of the accused. Moreover, probable cause may be established in the criminal action and the evidence fail to show the guilt of the accused beyond a reasonable doubt.

It should be noted, however, that the dismissal of the accused by a committing magistrate is prima facie evidence of want of probable cause, for the committing magistrate has thereby determined the absence of probable cause. The same rule and reasoning apply where the

---

64 *Prosser, Torts* § 87 (2d ed. 1955).
67 *252 N.C. 40, 112 S.E.2d 751 (1960).*
73 *Roughton v. Jackson*, 185 Ala. 284, 64 So. 112 (1912); *Downing v. Stone*, 152 N.C. 525, 68 S.E. 9 (1910); *Smith v. Eastern Bldg. & Loan Ass’n*, 116 N.C. 73, 20 S.E. 293 (1895). *Contra*, *Brandt v. Brandy*, 286 Ill. App. 151, 3 N.E.2d 96 (1936). Some jurisdictions make a distinction between a magistrate who has jurisdiction to try and determine the cause as well as to commit the accused and one who has jurisdiction only to commit the accused. In the former case dismissal by the magistrate is not prima facie evidence of want of probable cause. *E.g., Fox v. Smith*, 26 R.I. 1, 57 Atl. 932 (1904).
74 Commitment by the magistrate, however, or waiver of the preliminary examination by the accused is prima facie evidence of probable cause. *Bryant v. Murray*, 239 N.C. 18, 79 S.E.2d 243 (1933); *Taylor v. Hodge*, 229 N.C. 558, 50 S.E.2d 307 (1948).
grand jury fails to return a true bill. But an abandonment of the prosecution by the prosecuting witness, a discontinuance at the instance of the prosecuting attorney, or a dismissal by the committing magistrate before hearing all the evidence, is no evidence of want of probable cause.

In an action for malicious prosecution the courts are faced with two competing social policies—prevention of harassment through the use of legal process and justifiable encouragement of bringing those who violate the law to justice. It is submitted that where the scales are evenly balanced, as in Abit—the force of the committal being neutralized by the force of the acquittal—the preferable rule is that applied by the courts, tipping the scales in favor of the person seeking to enforce the law.

**TRIAL PRACTICE**

**Process**

**Service on Non-Resident Motor Vehicle Owner**

In *Howard v. Sasso* the Court held that G.S. § 20-71.12 could be relied upon in order to uphold service on a non-resident automobile owner who sought to set aside service made under G.S. § 1-105 on the ground that his automobile was not being operated by or for him or under his direction or control at the time of the happening of an accident involving his automobile in North Carolina. The Supreme Court stated that G.S. § 20-71.1 established a rule of evidence and was a ready means of proving agency in any situation where the fact of agency was in dispute and that consequently the trial court could, on

---

74 Shelton v. Southern Ry., 255 Fed. 182 (E.D. Tenn. 1918), appeal dismissed, 256 Fed. 991 (6th Cir. 1919). Return of a true bill is prima facie evidence of probable cause. Kelly v. Newark Shoe Store Co., 190 N.C. 406, 130 S.E. 32 (1925). An interesting situation was presented in Mitchen v. National Weaving Co., 210 N.C. 732, 189 S.E. 389 (1936). In this case the accused was bound over for trial by the committing magistrate, but the grand jury failed to return a true bill. It was held that the action of the committing magistrate in binding the accused over for trial was prima facie evidence of probable cause and that the action of the grand jury in failing to find a true bill, perhaps, neutralized the action of the committing magistrate. In any event, the Court stated, "the matter was for the twelve."


---

1 253 N.C. 185, 116 S.E.2d 341 (1960).

2 This is the statute which provides that proof of ownership of a motor vehicle is prima facie evidence that at the time of the accident in question it was being driven with the authority of the owner; that proof of registration is both prima facie evidence of ownership and that the motor vehicle was then operated by a person for whose conduct the registered owner was legally responsible.
the authority of that statute, uphold service on a non-resident pursuant to G.S. §1-105. The Court held further that the trial court’s finding of agency made for the purpose of determining the validity of service under G.S. §1-105 and predicated on G.S. §20-71.1 did not prevent the jury at the trial from finding that there was in fact no agency.

**Service on Foreign Corporation for Out-of-State Tort**

The influence of *International Shoe Co. v. Washington* in expanding the concept of the jurisdictional power of a state over foreign corporation is again evidenced in *Dumas v. Chesapeake & O. Ry.* In the latter case the Court held that a foreign railroad corporation which maintains no trackage and operates no trains in North Carolina but maintains three offices in North Carolina and employs agents to operate from those offices to solicit freight and passenger business for its out-of-state lines is engaged in the doing of business in North Carolina within the meaning of G.S. §1-97. It, therefore, held that service in a cause of action arising out of an accident in West Virginia could be made on one of those soliciting agents in North Carolina. The Court found that the activities of the defendant consisted in more than the solicitation of business as contemplated by G.S. §55-131(B)(5).

It is interesting to note that the Court endeavors, with what would appear to be dubious success, to distinguish the case of *Lambert v. Schell*, decided in 1952. In *Lambert* the Union Pacific Railroad, like the Chesapeake and Ohio in *Dumas*, maintained no trackage and operated no trains in North Carolina but maintained an office in this state out of which its agent operated for the purpose of soliciting business in North Carolina. The Court there held that it could not be served by serving the agent for a cause of action arising out of an automobile accident occurring in North Carolina involving the agent’s car, which was being operated in the entertainment of a prospective customer. No mention was made by the court in *Lambert* of the *International Shoe* case decided seven years before. Now in *Dumas*, where the cause of action arose outside of North Carolina, repeated mention is made of *International Shoe*.

A careful analysis of the *Lambert* and *Dumas* cases reveals that what the court is actually now doing is classifying as “doing business” the act of solicitation of business by foreign railroads who maintain soliciting agents in this state operating from offices in North Carolina.

---

3 326 U.S. 310 (1945). See the extensive note on this and related cases in 35 N.C.L. Rev. 546 (1957).
6 Why *International Shoe* was not mentioned is not clear since six years before *Lambert* the Court cited that landmark case four times in *Harrison v. Corley*, 226 N.C. 184, 37 S.E.2d 489 (1946).
Once the foreign corporation is found to be "doing business" the way is open for service on the manager of any office maintained by the corporation in this state or on its local managing agent even though the cause of action may have arisen outside of North Carolina.\(^7\)

The *Dumas* case is most significant because it not only subjects the foreign railroad to the service of process in causes of action arising out of its activities in North Carolina (a jurisdiction denied in *Lambert v. Schell*) but subjects it to the jurisdiction of our courts as to causes of action arising outside of North Carolina and having no relation to the activities of its soliciting agents in this state.\(^8\)

G.S. § 1-25 AND CLAIMS OF INFANTS

By virtue of G.S. § 1-25, within one year after a nonsuit, reversal, or arrest of judgment, the plaintiff may institute another action based on the same cause of action even though the statute of limitations has expired since the commencement of the prior action.

In *Rowland v. Beauchamp*\(^9\) a four year old child was injured on February 18, 1953. On November 2, 1953, his mother, who had been appointed next friend, instituted suit in behalf of the infant in the General County Court of Buncombe County. On December 1, 1954, that court dismissed the action by a judgment of involuntary nonsuit. The plaintiff appealed to the superior court. On November 15, 1956, the county court dismissed the appeal because of the failure of the appellant to perfect the appeal. On November 13, 1957, the grandfather of the infant was appointed next friend and instituted a second action in the same county court against the defendant who was served November 14, 1957. The allegations in both of the complaints were substantially the same.

Defendant moved to dismiss the second action on the ground that it was barred by the statute of limitations and that G.S. § 1-25 could not aid the plaintiff. The county court denied defendant's motion to dismiss and this denial was affirmed by the superior court. In upholding the action of the two lower courts the Supreme Court held:

(1) In North Carolina, contrary to the general rule in most jurisdictions, the statute of limitations begins to run against an infant upon the appointment of a guardian or next friend who is qualified to bring suit in behalf of the infant.\(^10\) Therefore, unless the infant is to be helped

\(^7\) Steele v. Telegraph Co., 206 N.C. 220, 173 S.E. 583 (1934).

\(^8\) We have been informed by counsel for the defendant in *Dumas* that no appeal to the United States Supreme Court is contemplated. We, accordingly, will not have the opinion of that court advising whether or not the taking of jurisdiction in *Dumas* satisfied the "fair play" and "substantial justice" concepts spelled out in *International Shoe*.

\(^9\) 253 N.C. 231, 116 S.E.2d 720 (1960). This case is also discussed under Civil Procedure, Pleading—G.S. § 1-25, supra.

\(^10\) For the rule in other jurisdictions holding that the statute of limitation is
by G.S. § 1-25 the second action brought by his grandfather as next friend would be barred because instituted more than three years after the cause of action arose.

(2) The one year additional period of time given by G.S. § 1-25 did not begin to run in the instant case on December 1, 1954, the date of the dismissal and nonsuit, but began to run from November 15, 1956, the date the county court dismissed the appeal to the superior court. Hence, since the second action was started on November 13, 1957, it had been brought within the year contemplated by G.S. § 1-25.

(3) The second action brought within the provisions of G.S. § 1-25 must be between the same parties for the same cause of action. While in the first action the mother was the child’s next friend and in the second the grandfather is his next friend, the defendant and the child in whose behalf the actions were brought are the same in each case. Consequently, the Court upholds the refusal of the defendant’s motion to dismiss.

**Friendly Suits—Attorney and Client—Vacation of Judgment**

A most unusual situation involving an infant’s friendly suit in which one of two defendants was also an infant arose in *Smith v. Price.*

A collision had occurred between cars owned by Gordon Price and May M. Rouse. The Rouse car was driven by the owner’s agent Darlene Hill and the Price car, a family purpose car, was driven by the owner’s infant son, Caroll Clark, with his father’s consent.

One Harold Maxton Smith was a guest in the Price car and both he and Carroll, the driver, were injured. Claim was made by Harold against the owners and drivers of both cars and settlement was agreed upon with the insurance companies covering the cars. Since Harold was an infant, a friendly suit was necessary and accordingly such an action was started in the Superior Court of Wayne County. The complaint alleged the joint negligence of both drivers. The insurance companies employed the same counsel to file answers for them and in the answer filed for each defendant his own negligence was denied and the accident was alleged to have been caused by the negligence of the other driver. No reference was made in any of the answers to the injuries sustained by the infant driver Carroll who appeared by guardian ad litem.

By consent the matter was heard before Judge Paul and based on the evidence presented he concluded that a settlement of $2,500 as suspended even though a next friend or guardian has been appointed who could sue for the infant see Annot., 6 A.L.R. 1689 (1920) and Annot., 128 A.L.R. 1379 (1940).

agreed upon for the plaintiff Harold was fair and approved the same. Judgment was entered accordingly against all the defendants. Judge Paul was not then informed that the infant defendant Carroll had been injured or that he asserted a claim against the owner and driver of the Rouse car.

In due course Carroll instituted suit against both Rouse and Hill. As a bar to recovery the defendants pleaded the judgment in the friendly suit entered by Judge Paul. Carroll then made a motion in the friendly suit action to vacate the judgment rendered by Judge Paul in so far as it affected him. The motion was granted. On appeal the Court, in a per curiam opinion, held that the lack of knowledge on the part of Judge Paul of the defendant Carroll's injuries and the representation of both defendants who had conflicting interests by the same attorney resulted in the judgment's being "irregular." Consequently, a motion in the cause to vacate the judgment was held to be proper procedure and the action of the court was affirmed.

Except for the fact that our Court had held, contrary to the majority view, that the judgment for the infant plaintiff in a friendly suit brought against two defendants was res adjudicata as to the rights of the defendants between themselves, there would appear to have been no crying need to vacate the judgment in the instant case merely because the same counsel represented the respective insurance companies filing the pro forma answers in the friendly action.

Although it is beyond the time period covered by this case survey, it is most important to note that since the decision in the Smith case, just discussed, our Court has overruled Lumberton Coach Co. v. Stone upon which Pack v. McCoy was based and has now adopted the majority view to the effect that a judgment in favor of a passenger in one vehicle against the drivers of both vehicles involved in the accident is not res adjudicata as to the rights of the two drivers between themselves.

For a criticism of the then policy of the North Carolina Supreme Court which declared that a judgment in an infant's friendly suit brought against two defendants was res adjudicata as to the rights of the defendants between themselves see the note on Pack v. McCoy, 251 N.C. 590, 112 S.E.2d 118 (1960), in 39 N.C.L. Rev. 90 (1960).

Our Court has repeatedly held that an irregular judgment cannot be attacked collaterally but only by motion in the cause in which the judgment was entered. Simms v. Sampson, 221 N.C. 379, 20 S.E.2d 554 (1942); Clark v. Carolina Homes, Inc., 189 N.C. 703, 128 S.E. 20 (1925).


251 N.C. 590, 112 S.E.2d 118 (1960). See the dissent of Justice Bobbitt, 251 N.C. at 595, 112 S.E.2d at 122.

The overruling decision is Gunter v. Winders, 253 N.C. 782, 117 S.E.2d 787 (1961).
NORTH CAROLINA CASE LAW

IMPROPER ARGUMENT OF SOLICITOR

All too often convictions in capital cases have been reversed because of improper comment of the solicitor in his argument to the jury. In State v. Graves, a conviction for rape which carried with it a death sentence was reversed because, over objection of the defendant, the solicitor was permitted to urge the jury not to make a recommendation for life imprisonment. The solicitor's argument was to the effect that the crime of rape tempts an aroused public to take the law into their own hands. Although he didn't use the express word, the innuendo of the solicitor's argument was that if the jury permitted the defendant to escape with his life, lynching might be resorted to by the people in rape cases.

It is of interest to note that in his brief on appeal the attorney general, after quoting the remarks of the solicitor, said that similar arguments had been held for error by the Supreme Court in other cases. Much expense incurred as a result of second trials could be saved if solicitors and trial judges would bear in mind that they merely invite reversal by making or permitting arguments to the jury urging, in effect, that the verdict carry the death penalty.

COURT'S CHARGE MENTIONING INSURANCE AND INSURANCE PREMIUMS

In Hoover v. Gregory the trial court charged the jury that by virtue of the action of the North Carolina legislature in 1958 every person owning and operating an automobile was required to provide some kind of liability insurance or post a bond. He further charged, "Premiums are determined upon the losses and liabilities suffered by insurance companies which we all must bear..." He specifically cautioned the jury that the matter of insurance or the matter of premiums had nothing to do with the case and should not enter into their verdict. The jury found for the defendant, concluding that both plaintiff and defendant were guilty of negligence.

Judgment was entered on the verdict and on appeal the plaintiff urged that the comments of the trial judge relative to the matter of premiums called for a reversal. The Court divided five to two, the majority finding that if the jury followed the admonition of the court to disregard insurance and insurance premiums there was no miscarriage of justice. The majority also concluded, "The effect of one accident on any juror's future insurance premium would be too insig-

18 252 N.C. 779, 114 S.E.2d 770 (1960); also discussed under CRIMINAL LAW, Argument of the Solicitor, supra.
21 Id. at 453, 117 S.E.2d at 396.
significant, it seems to us, to overcome the judge’s positive instructions as to the rule of damages and that insurance had nothing to do with the case.”

Justice Parker wrote the dissenting opinion and commented that he was unable to find comparable action by a trial judge in any of the thousands of reported cases. He concluded, however, that what the judge said as to insurance premiums “was prejudicial to the plaintiffs... and nothing he said before and after... could undo the damage done them.”

Whether or not plaintiff’s attorney brought up the question of insurance on his voir dire examination of jurors, or whether the defendant’s attorney in his argument urged that judgments for plaintiffs will increase the premiums we all pay did not appear. In any event, the admonition by the trial judge to disregard both the existence of insurance and the matter of the determination of the size of insurance premiums would seem to adequately protect both parties to the litigation. It is common knowledge that insurance premiums in the final analysis are determined by the losses insurance companies must pay, and it would seem to the writer that the trial judge in making reference to this fact did not tell the jurors something they did not already know.

**VERDICTS—IMPEACHMENT BY JURORS**

It has been repeatedly held that jurors in North Carolina will not be allowed to impeach their verdicts and that evidence will not be received from them for that purpose. This rule was restated by the majority of a divided court in *In re Will of Hall*. However, two dissenting justices were of the opinion that the trial judge had refused to consider impeaching affidavits of jurors as a matter of law when in their view he should have considered the affidavits and then in his dis-

---

22 Id. at 454, 117 S.E.2d at 397.
23 Id. at 455, 117 S.E.2d at 398. Compare those cases arising prior to compulsory insurance in which the plaintiff improperly introduced the matter of defendant’s insurance and our court has held that a trial judge’s charge to “dismiss it (the insurance) from your mind and erase it from your memory. That is your duty and I so instruct you,” adequately protected the defendant. See Lane v. Paschall, 199 N.C. 364, 154 S.E. 626 (1930), and the comments and citations in 31 N.C.L Rev. 55-57 (1952).
24 One of the earliest reported cases in which our Court upheld the action of a trial judge who refused to hear affidavits of jurors as to their misconduct is State v. McLeod, 8 N.C. 344 (1821), where the Court said, “As to the misconduct of the jury, it has been long settled, and very properly, that evidence impeaching their verdict must not come from the jury; but must be shown by other testimony.” Id. at 346. (Italics supplied.) For a collection of cases in point see 6 N.C.L. Rev. 315 (1928). It is because affidavits of jurors as to how they reached their verdict may not be considered that attempts to set aside a verdict on the ground that it was a quotient verdict have met with failure. See Baker v. Winslow, 184 N.C. 1, 113 S.E. 570 (1922).
cretion determined whether or not the verdict should be set aside. Were we to consider solely the view of the dissenting justices we might dismiss the case with the mere caveat that apparently certain members of the Supreme Court do not approve of the established North Carolina rule. However, it is because of language in the majority opinion that the Court's action on this point is significant.

The litigation was a will contest in which the caveators alleged undue influence. Appropriate issues had been submitted to the jury and in due course the jury answered that no undue influence had been exerted on the testator. In seeking to set aside the verdict for the propounders, the caveators presented to the trial judge affidavits of eight jurors. These affidavits stated that one of the jurors had brought into the jury room volume twenty-seven of the *Encyclopedia Americana* which contained a definition of "undue influence," that the definition was read to the jury and studied by some of them individually, and that the jury was influenced thereby. In fact one or more of the jurors stated that the jury felt the testator had been influenced but decided in favor of the propounders because there was no evidence of force and violence.

In denying the motion to set aside the verdict, the trial judge held that even if there were a variance between the court's instructions and the definition of undue influence in the encyclopedia, the court was confronted with the established rule that jurors cannot impeach their own verdict. That rule, the trial judge said, "is the stone wall."

If it is true that evidence cannot be taken from jurors to impeach their own verdicts, it would seem that not only may the jurors not be examined orally but that neither may the court consider affidavits of jurors offered for that purpose. Yet, in the instant case, although the majority solemnly declares, "It is firmly established in this state that jurors will not be allowed to attack or overthrow their verdicts, nor will evidence from them be received for such purpose,"26 it proceeds to set out in detail the exact wording of the definition of undue influence contained in the encyclopedia aforesaid and then says, "it is difficult to perceive how the definition in question could have prejudiced caveators, despite the affidavits of some of the jurors."27 Perhaps of further significance is the statement of the majority that, "In our opinion, the patient, painstaking, impartial and learned judge who presided at the trial below would have set the verdict aside in his discretion, notwithstanding the foregoing rule of law, had he considered that the incident worked an injustice to appellants."28

26 *Id.* at 87-88, 113 S.E.2d at 13.
27 *Id.* at 88, 113 S.E.2d at 13.
28 *Ibid.* (Italics supplied.)
Does this language of the majority, plus their own careful analysis of the definition contained in the encyclopedia, mean that affidavits or oral testimony of jurors may be received to impeach their verdict and that the trial judge in the exercise of his discretion may set aside a verdict if satisfied by the facts thus revealed that the losing party has been prejudiced? Is the Court paying lip service to the rule that evidence of jurors will not be allowed to impeach their verdicts when it actually considers such evidence and concludes no prejudice resulted from the misconduct revealed?

If evidence of jurors may not be considered to impeach their verdict, there seems no sound reason for carefully considering the evidence revealed in the affidavits in this case and then concluding that there was no prejudice or for asserting that had the evidence revealed prejudice the Court was satisfied the painstaking trial judge would have set aside the verdict in the exercise of his discretion. It is clear that the majority in this case either pierced or went over the "stone wall" which the trial judge found blocked his path and then, being satisfied with what it saw on the other side, confirmed the refusal of the lower court to set aside the verdict. Without in the least implying disapproval of the rule which prohibits jurors from impeaching their own verdicts, one is compelled to ask, if it is proper on appeal for the Supreme Court to consider the effect of juror's misconduct as revealed by their affidavits, is it also proper for the trial judge to do the same?

Case on Appeal

Under G.S. § 1-282(3) when an appellee serves exceptions to a case on appeal the appellant must request the trial judge to settle the case on appeal. If the appellant does not bring the matter of settling the case on appeal to the trial judge within the time permitted the exceptions of the appellee shall be allowed.

The mere fact, however, that an appellant has not requested the trial judge to settle the case within the permitted time, and that consequently appellee's exceptions are to be allowed, does not relieve the appellant from the duty of redrafting the case on appeal as modified by the exceptions of the appellee and submitting the same to the trial judge for his signature.29

In Wiggins v. Tripp30 the Supreme Court entered an order which granted time within which to serve statement of case on appeal and exceptions or countercase. The order also provided that if the case on appeal should not be settled by agreement the same should be settled by Judge Bundy within a given time. The case on appeal was duly

29 Western North Carolina Conference v. Tally, 229 N.C. 1, 47 S.E.2d 467 (1948); Waller v. Dudley, 193 N.C. 749, 138 S.E. 128 (1927).
served and exceptions to the same likewise served. Both the case on
appeal and the exceptions were filed with the clerk of the trial court.
No application was made to Judge Bundy to settle the case on appeal
or to sign a duly modified case on appeal incorporating appellee’s
exceptions. The Supreme Court dismissed the appeal holding that its
own order requiring Judge Bundy to settle the case on appeal did not
relieve the appellant from requesting the judge either to settle the case
on appeal or to sign a redrafted case on appeal incorporating appellee’s
exceptions.

TRUSTS

STATUTORY REVOCATION

City of Washington v. Ellsworth1 limits the revocability of certain
trusts, under G.S. § 39-6 to future contingent interests of a person not
in esse. The case involved a voluntary irrevocable trust in which the
settlor made a conveyance in trust for her father for life, then for the
settlor for life or widowhood, remainder in trust for the children of the
settlor’s father and mother. Some years later, the settlor and her
father (first life beneficiary) attempted to modify the original trust
instrument—by a new document under which a son2 of the first life
beneficiary—a beneficiary in remainder under the provisions of the
original instrument—would be excluded. The son was in esse at the
time each of the trust instruments was executed, but had subsequently
died. Held, reversing the lower court, that this son had taken a vested
interest under the original trust instrument and that “G.S. 39-6 gives
the trustor no right to withdraw a vested interest in property held by
one who was in esse when the trust was created, but only to withdraw
a future contingent interest to some person or persons not in esse or
not determinable until the happening of a future event.”3

The result reached by the Court adheres to the clear language of
G.S. § 39-6. This statute was enacted to change the common law rule
that even a voluntary settlement in trust, fully executed, with no power
of revocation reserved, is irrevocable in the absence of mistake, undue
influence, or fraud.4 The constitutionality of this statute was upheld
on the ground that there would be no abrogation of a vested property

2 From the report of the principal case there appears to be a conflict as to
whether the person who was to be excluded by the revocation was the son or the
grandson of the first life beneficiary—W. H. Ellsworth. The instrument of rev-
ocation referred to him as the grandson of W. H. Ellsworth, but the court
includes him in a list of the children of W. H. Ellsworth.
3 253 N.C. at 28, 116 S.E.2d at 170 (1960).
Note, 8 N.C.L. Rev. 92 (1929), for a discussion of the statute.
interest, but only of the possibility of a mere future interest limited to persons not in esse.\(^5\)

The outcome of the principal case was foreshadowed by \textit{Mackie v. Mackie}\(^6\) which was cited by the Court in the instant decision but not discussed or relied upon. That case arose under an earlier version of G.S. § 39-6. There the grantor executed a deed to his son for life and then to his son's children in fee. Thereafter the grantor and the grantee undertook to revoke the restrictive provision in the deed and joined in conveying the title to a third person. A child was born of the marriage of the grantee in the original deed less than 280 days after the attempted revocation. \textit{Held}, that since the child was in esse at the time, though \textit{en ventre sa mere}, the attempted revocation was ineffective.

\section*{WILLS AND ADMINISTRATION}

\subsection*{CODICILS}

In \textit{Young v. Williams}\(^1\) testator, who then had one child, executed his will naming his wife as sole beneficiary. Subsequently another child was born to them. Thereafter testator and his wife executed a joint codicil re-affirming each of their previous wills and naming an executor and guardian of their two children in the event that the parents died in a common disaster. At testator's death his will was probated and his widow was adjudged sole beneficiary. The guardians for the minor children appealed, contending that the birth of the child after the original execution of the will had partially revoked it.\(^2\) The Court held, in line with our accepted view\(^3\) and the overwhelming majority of other jurisdictions,\(^4\) that a duly executed codicil operates as a republication of the original will and makes it speak from the new date; thus the child would not be after born. Also, even if the child were considered after born, under G.S. § 31-5.5 the will would not be partially revoked;
here the testator referred to the child and this was sufficient to show an intentional exclusion and thus prevent revocation.

Construction

In Clarke v. Clarke the testator bequeathed property to the "heirs" of his living sons, the property to be used for college education only. A series of problems arose out of this bequest and the Court, in construing this will, held:

1. That in a bequest to the "heirs" of a living person "heirs" is to be construed as "children" of that person.

2. When such a bequest is to vest immediately, without an intervening estate, only those children living at the testator's death take under the devise; the gift is not subject to open up for after-born children. The Court carefully distinguished the situation where the gift is not immediate, but after an intervening life estate, and pointed out that in that instance all children born before the termination of the life estate are entitled to take.

3. A bequest to the "heirs" of testatrix's son, the money to be used only for college education, does not violate the Rule Against Perpetuities. The beneficiaries were designated and in being at the testatrix's death (since the class automatically closed at that time) and their rights must vest if at all during their lives. The case was distinguished from Parker v. Parker. In Parker property was willed to testator's son in trust, to use the net proceeds to defray his children's college expenses and to convey the property to the children "when" the youngest child reached twenty eight. The Court held this to be a violation of the Rule Against Perpetuities.

The will in Clarke also contained a provision that if any of the money was left after paying for the college education of the "heirs," it was to be divided among named beneficiaries. Under this provision the share of one beneficiary was limited to specified uses. It was held that the restriction did not to render the gift to him less than absolute

---


"No devise or grant of a future interest in property is valid unless the title thereto must vest, if at all, not later than twenty-one years, plus the period of gestation, after some life or lives in being at the time of the creation of the interest." Parker v. Parker, 252 N.C. 399, 402-03, 113 S.E.2d 899, 902 (1960). GRAY, The Rule Against Perpetuities § 201 (4th ed. 1942).

252 N.C. 399, 113 S.E.2d 899 (1960), also discussed under Real Property, Rules Against Perpetuities, supra. This case will be the subject of a note in a future issue of this Law Review.
and that the gift was bequeathable by him. However, if distributed to
him during his lifetime, it was the duty of the executor to supervise the
expenditure of his share in accordance with the directions in the will.
This is apparently the first time our Court has ruled upon this specific
problem, and the decision seems to be in accord with other jurisdictions
which have previously decided the question.\textsuperscript{11}

In \textit{Andrews v. Andrews},\textsuperscript{12} another case involving construction prob-
lems, the will provided, "'All the remainder of my real and personal
properties goes to my daughter Annie May—at her death all property
be divided equally among the grand children.'"\textsuperscript{13} The Court stated that
under our statute\textsuperscript{14} and by the majority rule an unrestricted devise of
real estate carries the fee to the land. A subsequent clause expressing
a wish or direction for what remains at the death of the devisee usually
is not allowed to defeat the devise nor limit it to a life estate.\textsuperscript{15} However,
the Court pointed out that this rule of construction must yield
to the paramount intent of the testator as gathered from the four cor-
ners of the will.\textsuperscript{16} Therefore, the Court held that Annie May took only
a life estate with remainder to the grandchildren in fee. \textit{Taylor v. Taylor}\textsuperscript{17} was distinguished from the present case. There a devise was
made to named brothers and sisters of the testator, giving them an ex-
press power of disposition, followed by a provision that whatever was
left at their death was to go to testator's niece.\textsuperscript{18} This was held to
give a fee to the brothers and sisters.\textsuperscript{19}

\textbf{Executors and Administrators}

In \textit{In re Will of Covington}\textsuperscript{20} the executor under the purported last

\textsuperscript{11} Louderbough v. Weart, 25 N.J. Eq. 399 (1874); Kinnier v. Rogers, 42
N.Y. 531 (1870); Schwab's Estate, 22 Pa. County Ct. 218 (1899).

\textsuperscript{12} 253 N.C. 139, 116 S.E.2d 435 (1960).

\textsuperscript{13} Id. at 141, 116 S.E.2d at 439.

\textsuperscript{14} N.C. GEN. STAT. § 31-38 (1950). While the statute speaks only of real estate,
this rule has frequently been applied to real and personal property. See, e.g.,
Roane v. Robinson, 189 N.C. 628, 127 S.E. 626 (1925); Fellowes v. Duffey, 163
N.C. 305, 79 S.E. 621 (1913).

\textsuperscript{15} E.g., Walters v. Children's Home, 251 N.C. 369, 111 S.E.2d 707 (1959);
Heeóner v. Thornton, 216 N.C. 702, 6 S.E.2d 505 (1939); Barco v. Owens, 212
N.C. 30, 192 S.E. 862 (1937). For cases in other jurisdictions following this
rule see Annot., 17 A.L.R.2d 7, at 36 (1951).

\textsuperscript{16} Hampton v. West, 212 N.C. 315, 193 S.E. 290 (1937); Jolley v. Humphries,
204 N.C. 672, 169 S.E. 417 (1933); Shuford v. Brady, 169 N.C. 224, 85 S.E. 303
(1915).

\textsuperscript{17} 228 N.C. 275, 45 S.E.2d 368 (1947).

\textsuperscript{18} There are at least four distinguishing features: (1) Here the first taker is
not given the absolute power of disposition, expressly or by implication; (2) there
is no provision that the remainderman take only what is undisposed of; (3) the
gift over serves to define the estate of the first taker as a life estate; and (4) it
seems plain that the will intends that the daughter take only a life estate." \textit{Andrews v. Andrews, 253 N.C. 139, 144, 116 S.E.2d 436, 440 (1960).}

\textsuperscript{19} In reaching that decision the Court distinguished \textit{Hampton v. West, 212
N.C. 315, 193 S.E. 290 (1937)}, relied upon in the principal case.

\textsuperscript{20} 252 N.C. 546, 114 S.E.2d 257 (1960), and 252 N.C. 551, 114 S.E.2d 261
(1960).
will and testament of decedent discovered a later writing also purporting to be decedent’s last will. This latter instrument named him as executor and sole beneficiary. He delivered the latter writing to the clerk for probate, caveated the former will, and asked that the Court remove him as executor of the prior instrument. The Court held that the caveator should be removed and stated that he was under a duty to deliver the latter writing to the Court and that a failure to do so would have been a violation of our criminal laws. The Court, in seeking authority for his removal as executor of the earlier will, undertook for the first time to define the words “legally incompetent” which appear in G.S. § 28-32. This statute authorizes the Court to revoke letters testamentary when cause exists. The case is in harmony with those of other jurisdictions which have interpreted similar statutory provisions by holding these words to mean “not fit, qualified, or prepared to impartially discharge the duties of the office in the manner directed by the oath taken.” Under this construction of the statute the caveator was held to have disqualified himself as executor of the original “will,” and his removal by the clerk was held proper.

In Robertson v. Robertson the administratrix of decedent’s estate instituted proceedings against decedent’s heirs to sell certain described property to raise assets for the payment of debts. The heirs answered the petition, admitting that the house and lot in question were a part of the decedent’s estate. The sale was held, and the purchaser then sought a writ of possession against the heirs. In defense to the writ the heirs contended that the property claimed was not a part of decedent’s estate and offered as proof a deed from decedent to his brother. The Court granted the writ, holding that the heirs were estopped by their earlier admission from asserting that the property was not a part of the estate.

23 N.C. Gen. Stat. § 28-32 (Supp. 1959). “If, after any letters have been issued, it appears to the clerk that any person to whom they were issued is legally incompetent to have such letters... the clerk shall issue an order requiring such person to show cause why the letters should not be revoked. On return of such order... if the objections are found valid, the letters issued to such person must be revoked and superseded, and his authority shall thereupon cease.” (Emphasis added.)
24 Under a statute providing that where an executor shall become evidently unsuitable for discharging his trust, the judge of probate may remove him, an executor has been deemed unsuitable when he has any conflicting personal interest which prevents him from doing his official duty. In re McGowan’s Estate, 118 Vt. 170, 102 A.2d 856 (1954). For other similar holdings see Karsner’s Ex’r v. Monterey Christian Church, 304 Ky. 269, 200 S.W.2d 474 (1947); Putney v. Fletcher, 148 Mass. 247, 19 N.E. 370 (1889); In re Blochowitz’ Estate, 124 Neb. 110, 245 N.W. 440 (1932).
25 252 N.C. at 554, 114 S.E.2d at 264.
Decedent's heirs entered into a consent judgment by which they agreed that decedent was an incompetent, that no will made by her should be offered for probate and that if a will were offered for probate the consent judgment would be res judicata as to her mental capacity. The Court held this to be a family settlement which was binding on all the parties thereto. family settlements providing for the distribution of a testator's estate in a manner other than as provided for in his will are almost universally approved. However, a problem was raised by the agreement that the consent judgment would be res judicata as to the mental capacity of the testatrix. The Court avoided the problem by stating that the consent judgment estopped all parties thereto from taking under the will even if probated. Therefore, since the will could have no effect and its probate would be a nullity, all of the beneficiaries thereunder being parties to the consent judgment, the lower court's finding that the will was invalid was not reversed.

Mental Capacity

In In re Will of Shute the petitioner alleged that decedent executed a valid holographic will which she thereafter mutilated by tearing. It was alleged that she lacked mental capacity to revoke the will at the time she tore it and that the will should have been probated. The caveators alleged that the testator had capacity to revoke and did re-

\[\text{In re Will of Pendergrass, 251 N.C. 737, 112 S.E.2d 562 (1960).}\]

\[\text{According to the weight of authority, in the absence of fraud, a valid contract to dispose of the property in a testate estate in a manner different from the will is binding, even though the contract contemplates the rejection of the will when offered for probate or the will's being set aside when admitted to probate. In re Noble's Estate, 141 Kan. 432, 41 P.2d 1021 (1935); Brakefield v. Baldwin, 249 Ky. 106, 60 S.W.2d 376 (1933). The reason for this rule is that the property belongs to the beneficiaries under the will, and if the creditors are paid no one else is interested in its disposition. Since the beneficiaries may, by transfers made immediately after the distribution, divide the property as they see fit, there is no reason why they should not be allowed to divide it by agreement before they receive it in the regular course of judicial administration of the estate. Fore v. McFadden, 276 S.W. 327 (Tex. Civ. App. 1925). However, at least one jurisdiction holds that the beneficiaries under a will cannot validly agree to distribute the testator's estate otherwise than as provided in his will, particularly where the agreement is to suppress the probate of the will. Graef v. Kanouse, 205 Wis. 597, 238 N.W. 377 (1931); In re Dardi's Will, 135 Wis. 457, 115 N.W. 332 (1908). It should also be noted that a contract for the suppression of a will, to be valid, must be between all of the interested parties. Hunter v. Jordan, 158 Wash. 539, 291 Pac. 471 (1930).}

\[\text{Certainly a person adjudged sane in a lunacy proceeding is no more conclusively so than he might be under natural conditions, and such an adjudication of a court is no more than evidence. Between those who are not parties to the proceeding, a court order adjudging a person of unsound mind is not res judicata and is not conclusive of the mental condition of the person. It may serve as evidence of the condition it purports to find, but such presumptions as arise from it are rebuttable. Medical College v. Maynard, 236 N.C. 506, 73 S.E.2d 315 (1952); Johnson v. Pilot Life Ins. Co., 217 N.C. 139, 7 S.E.2d 475 (1940).}\]

\[\text{Certainly a person adjudged sane in a lunacy proceeding is no more conclusively so than he might be under natural conditions, and such an adjudication of a court is no more than evidence. Between those who are not parties to the proceeding, a court order adjudging a person of unsound mind is not res judicata and is not conclusive of the mental condition of the person. It may serve as evidence of the condition it purports to find, but such presumptions as arise from it are rebuttable. Medical College v. Maynard, 236 N.C. 506, 73 S.E.2d 315 (1952); Johnson v. Pilot Life Ins. Co., 217 N.C. 139, 7 S.E.2d 475 (1940).}\]
voke the purported will. The judge charged that in order to find the mutilation an invalid revocation the jury must find that testatrix did not possess mind enough to understand without prompting what she was engaged in, and the kind and extent of her property, and the natural objects of her bounty, and the manner in which she desired the disposition of her property to take effect, and the effect which the disposition would have upon her estate. The Court held this to be an erroneous charge. The Court stated that the same degree of mental capacity is necessary to revoke a will as to make one\textsuperscript{32} and that to prove sufficient intelligence to make a will all of the essential elements\textsuperscript{33} of capacity must be shown. The Court then held that to find lack of mental capacity to revoke the jury need only conclude that the testatrix was lacking one of these elements. The judge had committed error by the use of “and” instead of “or,” for this had placed the burden on the propounders to show that the testatrix was lacking all of the requirements.\textsuperscript{34}

The Court in \textit{In re Will of Harrington}\textsuperscript{35} held that the fact that a testator attempted to devise land which he and his wife held by the entireties was not a sufficient ground to sustain a finding that he lacked mental capacity to make a will.\textsuperscript{36} The Court also held, apparently for

\textsuperscript{32}\textit{In re Goldsticker’s Will}, 192 N.Y. 35, 84 N.E. 581 (1908); \textit{In re Dougan’s Estate}, 152 Ore. 235, 53 P.2d 511 (1936).
\textsuperscript{33}A person has sufficient mental capacity to make a will or to revoke a prior will if he (1) comprehends the natural objects of his bounty, (2) understands the kind, nature and extent of his property, (3) knows the manner in which he desires his act to take effect, and (4) realizes the effect his act will have upon his estate. \textit{In re Rawlings’ Will}, 170 N.C. 58, 86 S.E. 794 (1915).
\textsuperscript{34}In \textit{In re Will of Kempt}, 234 N.C. 495, 67 S.E.2d 672 (1951), the judge charged that “in connection with the second issue, [mental capacity] the burden of proof thereon rests upon the caveators to satisfy the jury by the greater weight of the evidence that at the time the said Annis S. Kemp signed and executed said paper writing that she was incapable by reason of her mental incapacity to know and comprehend the nature, character and extent of her property, who were the natural objects of her bounty, how she was disposing of her property, and the effect of such disposition upon her estate.” In holding this to be an erroneous instruction the Court stated: “It thus appears that the court placed upon the caveators the burden of showing that the testatrix was lacking in all of the essential elements of testamentary capacity; whereas, to establish testamentary incapacity, it suffices to negative only one of the essential elements of testamentary capacity.” \textit{Id.} at 499, 67 S.E.2d at 675.
\textsuperscript{35}\textit{In re Emma C. Buckman’s Will}, 64 Vt. 313, 315, 24 Atl. 252, 253 (1892), where the court stated: “The testimony was relevant to the issue of want of testamentary capacity. . . . for if the testatrix undertook to devise property not her own, it tended to show mental weakness, as not knowing what property she had nor understanding the true relation she sustained to her husband in respect to their property rights.”
the first time,87 that the widow's election to dissent, made three years after the will was executed, was of no probative value on the issue of the testator's mental capacity at the time of execution.88 This seems to be a logical application of the accepted rule that the competency of a person to make a will is to be determined as of the date of its execution, or of its republication where there is a codicil.89

87 It is conceded in the briefs of both parties that no case on this point can be found either in North Carolina or elsewhere.
88 "That the caveators were not in fact relying upon the widow's dissent from her husband's will as evidence of his lack of testamentary capacity is clearly shown by the fact that the caveat was filed prior to the filing of the widow's dissent." Brief for Appelle, p. 5, In re Will of Harrington, 252 N.C. 105, 113 S.E.2d 21 (1960).
89 In re Will of Hall, 252 N.C. 70, 113 S.E.2d 1 (1960); In re Will of Hargrove, 206 N.C. 307, 173 S.E. 577 (1934). Illustrative of cases in other jurisdiction reaching the same result are: In re Perkins Estate, 195 Cal. 699, 235 Pac. 45 (1925); Barnhill v. Miller, 114 Kan. 73, 217 Pac. 274 (1923).