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Seventh Annual Survey of North Carolina Case Law

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SEVENTH ANNUAL SURVEY OF NORTH CAROLINA CASE LAW*

The Seventh Annual Survey of North Carolina Case Law is designed to review cases decided by the North Carolina Supreme Court during the period covered and to supplement past and future Surveys in presenting developments in North Carolina case law over a period of 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 discuss only those decisions which are of particular importance—cases regarded as being of significance and interest to those concerned with the work of the Court, and decisions which reflect substantial changes and matters of first impression in North Carolina. Where a case embraced within the period covered by the Survey has been the subject of a note in this *Law Review,* the holding is briefly stated and the note is cited.

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

Student members of the *Law Review* or candidates for membership and the sections for which they are responsible are: Oliver W. Alphin (Business Associations, Insurance, and Negotiable Instruments); Robert B. Blythe (Constitutional Law); Louis J. Fisher III (Domestic Relations); Jack W. Floyd (Criminal Law and Procedure); Raymond A. Jolly, Jr. (Damages and Wills); John H. Kerr III (Agency and Workmen's Compensation, Public Utilities (in part), and Sales); Howard A. Knox, Jr. (Contracts); Robert L. Lindsey, Jr. (Administrative Law, Public Utilities (in part), and Taxation); William H. McNair (Torts); Thomas L. Norris, Jr. (Equitable Remedies, Municipal Corporations, and Trusts); Kenneth L. Penegar (Personal Property and Real Property); James Y. Preston (Labor Law); Robert N. Randall (Credit Transactions); John G. Shaw (Civil Procedure (Pleading and Parties)); Richard von Biberstein, Jr. (Evidence).

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 249 N.C. 490 through 251 N.C. 642.

ADMINISTRATIVE LAW

UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER

In G.S. § 20-16(a)(5) the Department of Motor Vehicles was given purported authority to suspend a driver's license without a preliminary hearing when there was satisfactory evidence that the licensee was "an habitual violator of the traffic laws." In *Harvell v. Scheidt*[1] petitioner's license had been suspended after six traffic convictions. The trial examiner, the Commissioner of Motor Vehicles, and the superior court had found as a fact that petitioner was an habitual violator.

On appeal the Court reversed, holding that G.S. § 20-16(a)(5) contained an unconstitutional delegation of legislative power, and was therefore invalid. The Court said that the legislature had failed to enact a statutory standard to guide the Department in determining when a licensee was an habitual violator.

This holding is in accord with earlier decisions of the Court where substantial rights were involved.[2] In the principal case the Court cited authority to the effect that a license to drive is "a privilege in the nature of a right . . . ."[3]

As a result of the decision in the principal case the 1959 General Assembly amended G.S. § 20-16(a)(5), providing statutory criteria for determining when violation of traffic laws has become habitual.[4]

PLEADING AND EVIDENCE IN ADMINISTRATIVE HEARINGS

In *Branch Banking & Trust Co. v. Wilson County Bd. of Educ.*[5] plaintiff sued the defendant school board under the State Tort Claims Act for the wrongful death of its intestate. The allegations before the Industrial Commission were to the effect that the school board's agent, a school bus driver, was negligent in the way he discharged the intestate from a school bus, causing the child to be struck and killed by a passing automobile. Plaintiff alleged that the bus driver had violated rules promulgated by the defendant designed to protect children alighting from school busses. Defendant moved to dismiss the action on the ground that plaintiff's affidavit and a stipulation between the parties affirmatively showed that the negligence of the driver of the automobile insulated any negligence on the part of the defendant. The motion was

[1] 249 N.C. 699, 107 S.E.2d 549 (1959), also discussed in CONSTITUTIONAL LAW, *Delegation of Authority—Driver's License Revocation, infra.*

[2] See, *e.g.*, State v. Harris, 216 N.C. 746, 6 S.E.2d 854 (1939); Bizzell v. Goldsboro, 192 N.C. 348, 135 S.E. 50 (1926).

[3] 249 N.C. at 706, 107 S.E.2d at 533, citing *In re* Wright, 228 N.C. 584, 46 S.E.2d 696 (1948).

[4] The statute is discussed at length in *Motor Vehicles, Comments on North Carolina 1959 Session Laws*, 38 N.C.L. REV. 200-05 (1960).

[5] 251 N.C. 603, 111 S.E.2d 844 (1959), also discussed in TORTS, *Tort Claims Act, infra.*

granted. The full Commission upheld the dismissal and the superior court affirmed.

On appeal the Court held that plaintiff should have been allowed to put on its evidence. The Court pointed out the informal nature of the proceedings before the Industrial Commission and the fact that G.S. § 143-297 only requires a "brief statement of the facts and circumstances surrounding the injury and giving rise to the claim." The Court implied that if the rules of the school board had been introduced into evidence they might have furnished enough evidence to allow a recovery on the ground that the negligence of the defendant and that of the third party were joint and concurring proximate causes.

The Court finally said that "in an informal proceeding like that provided in our Tort Claims Act, the plaintiff is entitled to have its evidence heard, and the evidence, together with the informal pleadings, considered by the hearing commissioner in making his findings of fact and conclusions of law."[6] *Turner v. Gastonia Bd. of Educ.*[7] was distinguished because in that case there could have been no recovery even if evidence had been heard since the accident allegedly occurred on a date prior to the enactment of the statutory waiver of governmental immunity.

AGENCY AND WORKMEN'S COMPENSATION

AGENCY

"Employee" Under State Tort Claims Act

G.S. § 143-291 permits tort claims to be filed before the Industrial Commission against "the State Board of Education, the State Highway Commission, and all other departments, institutions and agencies of the State." *Turner v. Gastonia City Bd. of Educ.*[1] presented for the first time the issue of whether a janitor, an employee of the city school trustees, was also an employee of the State Board of Education. The Court held that the Tort Claims Act, while applicable to the state departments and agencies, does not include local units such as county and city boards of education. "[T]he city boards [of education] . . . were given general control and supervision of all matters pertaining to the public schools in their respective units, except as to such matters as the law assigned to the State Board of Education or other authorized agency. The duty of selecting janitors was not so assigned and consequently remained with

[6] *Id.* at 608, 111 S.E.2d at 848.
[7] 250 N.C. 456, 109 S.E.2d 211 (1959).

[1] 250 N.C. 456, 109 S.E.2d 211 (1959), also discussed in CIVIL PROCEDURE, *Pleading, Demurrer, infra.*

the local boards."[2] Since lower school boards and officials are primarily responsible for the selection and control of this kind of employee, it would be a strained construction to find an employer-employee relationship between the State Board of Education and the janitor of a local school.

Proof of Ownership and Agency

G.S. § 20-71.1 creates a rule of evidence that proof of ownership or registration of a motor vehicle is regarded as prima facie evidence that it was being operated by and under the control of a person for whose conduct the owner is legally responsible. In *Fox v. Albea*[3] the automobile causing the injury was driven by one of two co-registrants. In an action against the non-driver co-registrant the Court held defendant was entitled to peremptory instructions in his favor since G.S. § 20-71.1 is applicable only when one *other than an owner* is driving the vehicle. This conclusion seems proper, for on several occasions the Court has stated that the purpose of this statute "is to establish a ready means of proving agency in any case where it is charged that the negligence of a non-owner operator causes damage. . . . It does not have, and was not intended to have, any other or further force or effect."[4]

The most interesting case to arise under this statute during the last year was *Rick v. Murphy*.[5] This action arose out of a collision between the plaintiff's automobile and a "hybrid" automobile driven by one Froneberger. Froneberger's original automobile had been demolished. The defendant had rebuilt Froneberger's automobile by using a body that belonged to Murphy and the motor of the original car. The plaintiff attempted to use G.S. § 20-71.1 to hold Murphy vicariously liable for Froneberger's alleged negligence. At the time of the collision the "hybrid" vehicle carried the license plates issued to Froneberger for use on the original automobile and the registration card showing ownership of the original automobile. The Court held that Murphy was not the owner, and his motion for nonsuit should have been granted. "True the body was not the same as the body described on the registration card, but the body is merely part of the motor vehicle referred to in G.S. 20-71.1. . . . [This statute] does not make the merchant who supplies parts or the mechanic who performs work and supplies parts responsible for the operation of a repaired or rebuilt motor vehicle."[6]

[2] *Id.* at 462, 109 S.E.2d at 215, discussing N.C. GEN. STAT. § 115-35 (Supp. 1959).
[3] 250 N.C. 445, 109 S.E.2d 197 (1959).
[4] Hartley v. Smith, 239 N.C. 170, 177, 79 S.E.2d 767, 772 (1954); *accord,* Roberts v. Hill, 240 N.C. 373, 379, 82 S.E.2d 373, 378 (1954).
[5] 251 N.C. 162, 110 S.E.2d 815 (1959), also discussed in CIVIL PROCEDURE, *Pleading—Ultimate Facts, infra.*
[6] *Id.* at 164, 110 S.E.2d at 817.

Family Purpose Doctrine

The person upon whom it is sought to fasten liability under the family purpose doctrine must own or maintain an automobile for the general use, pleasure and convenience of the family.[7] In *Small v. Mallory*[8] the wife initially financed the automobile from her separate earnings. Notwithstanding the evidence that the wife had not worked for some three years prior to the accident and that all the recent installment payments for the financing and refinancing of the vehicle were furnished by the husband, the Court held that there was sufficient evidence to be submitted to the jury under the family purpose doctrine on the question of the wife's liability for the negligent operation of the automobile by the husband. The dissent seems to have taken a more realistic view of the ownership and concludes that, irrespective of technical ownership, the wife here should not be liable under the family purpose doctrine. The instant case is the subject of a Note in this volume.[9]

WORKMEN'S COMPENSATION

Accident on the Employer's Premises

In *Davis v. Devil Dog Mfg. Co.*[10] the claimant had parked in the company parking lot, and while walking from the lot to the part of the employer's premises where she actually worked, she fell and was injured. The Court, adopting the widely accepted "on the premises rule," affirmed the award of compensation. It reasoned that going from the parking lot to claimant's work area was a necessary incident of her employment, and the injury therefore arose out of and in the course and scope of the claimant's employment.[11]

[7] Matthews v. Cheatham, 210 N.C. 592, 188 S.E. 87 (1936).
[8] 250 N.C. 570, 108 S.E.2d 852 (1959).
[9] 38 N.C.L. REV. 249 (1960).
[10] 249 N.C. 543, 107 S.E.2d 102 (1959).
[11] *Accord,* Hughes v. American Brass Co., 141 Conn. 231, 104 A.2d 896 (1952); Federal Ins. Co. v. Coram, 95 Ga. App. 622, 98 S.E.2d 214 (1957); John Roger's Case, 318 Mass. 308, 61 N.E.2d 341 (1945); 58 AM. JUR. *Workmen's Compensation* § 217 (1948); 99 C.J.S. *Workmen's Compensation* § 234f (1958); 1 LARSON, WORKMEN'S COMPENSATION § 15.14 (1952). See also Morgan v. Cleveland Cloth Mills, 207 N.C. 317, 177 S.E. 165 (1934). Compare Hardy v. Small, 246 N.C. 581, 99 S.E.2d 862 (1957), where the employee was killed while crossing a public road which traversed the employer's land and the Court awarded compensation. Travel between two parts of the premises is another well recognized exception to the "going-to-and-from-work rule." See 1 LARSON, WORKMEN'S COMPENSATION § 15.14 (1952).

The "on the premises rule" is applicable to lunch-time travel. The basic rule is that a journey to and from meals, on the premises of the employer, is in the course of the employment. 1 LARSON, WORKMEN'S COMPENSATION § 15.51 (1952). *Contra,* Matthews v. Carolina Standard Corp., 232 N.C. 229, 60 S.E.2d 93 (1950) (employee not paid during his lunch break, but accident occurred while he was leaving the employer's premises). Compare Horn v. Sandhill Furniture Co., 245 N.C. 173, 95 S.E.2d 521 (1956) (no compensation where employee was not paid during his lunch break, and the accident occurred on a public road while the employee was crossing to the company parking lot).

The "on the premises rule" is a compromise of the usual rule of no employer liability for accidents which occur while going to and from work. "As to employees having fixed hours and places of work, injuries occurring on the premises while they are going to and from work before or after working hours or at lunchtime are compensable, but if the injury occurs off the premises, it is not compensable . . . ."[12] Although justification for this compromise can be found in the close proximity—both in time and place—of the accident and the employee's employment, it would seem that the real explanation can perhaps be found in the general tendency to extend coverage of the act.

The Dual Purpose Doctrine

As a general rule the employer is not liable for injuries to the employee while the latter is going to and from work.[13] When an employee, in the course of his journey off the premises to and from work, performs some concurrent service for his employer, the question whether the trip becomes an exception to the usual rule is determined by the application of the dual purpose doctrine. This doctrine qualifiedly allows a trip serving both business and personal purposes to be classified as within the course of the employment.[14] "The test in brief is this: If the work of the employee creates the necessity for travel, such is in the course of his employment, though he is serving at the same time some purpose of his own . . . . If however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped . . . the travel is then personal, and personal the risk."[15]

In *Humphrey v. Quality Cleaners & Laundry*[16] compensation was sought for the death of a dry cleaning delivery man who was killed while driving his own car to work. The peculiar fact the claimant relied on to justify an award was that his decedent was transporting some items of cleaning as well as cash collections belonging to the employer. Applying the aforementioned test, the Court held this only incidental to the decedent's trip so that it would not warrant the finding that it arose "out of and in the course of the employment."[17]

Injury by Accident

North Carolina has for some time adhered to the view that in order for internal injuries to be classified as "injury by accident"[18] within the

[12] 1 LARSON, WORKMEN'S COMPENSATION § 15 (1952).
[13] Ellis v. American Serv. Co., 240 N.C. 453, 82 S.E.2d 419 (1954); Bryan v. T. A. Loving Co., 222 N.C. 724, 24 S.E.2d 751 (1943); Bray v. Weatherly & Co., 203 N.C. 160, 165 S.E. 332 (1932).
[14] See 1 LARSON, WORKMEN'S COMPENSATION § 18.21 (1952).
[15] Marks' Dependents v. Gray, 251 N.Y. 90, 93, 167 N.E. 181, 183 (1929).
[16] 251 N.C. 47, 110 S.E.2d 467 (1959).
[17] *Accord*, Ridout v. Rose's Stores, 205 N.C. 423, 171 S.E. 642 (1933).
[18] An accident within the meaning of the act is an unlooked-for and untoward

contemplation of the Workmen's Compensation Act they must have arisen from an unusual strain. Reaching the Court this year were two cases which amply illustrate the rigidity of this view. In *Faires v. McDevitt & Street Co.*[19] the claimant and other employees were engaged in the lifting of heavy concrete forms. The other workers momentarily withdrew from this job. However, the claimant attempted to perform the task without assistance, and as a result he strained and ruptured his groin. The Court held that since the injury resulted from an unusual and fortuitious occurrence, and not from part of his normal work, the claimant could recover. In *Turner v. Burke Hosiery Mill*[20] a knitter experienced pain and stinging sensations in his back while leaning over the machine he was operating to make an adjustment. The Court held that since the claimant had been doing this identical task twelve to fifteen times per day for four years he did not suffer an accident as defined by the act.

As illustrated by the instant cases, strains from lifting or moving heavy objects are a common source of injury to the body tissues. The North Carolina Court has adopted a criterion which makes questionable any distinctions based on magnifying slight differences in the weight lifted or the strain experienced or the circumstances which brought about the strain. "Whether a workman has been subjected to a *heavy* lift where his employment requires lifting, or to a *severe* strain, is related to his individual strength and condition and not to any standard of huskiness, which cannot be defined, is impossible of application, and has no real existence in actual experience. Employers take workmen 'as is,' that is, without any warranty as to any state of health known or unknown. . . . Insurance carriers know this fact and we may safely assume that it is reflected in their actuarial tables and in the rates which are ultimately absorbed either by the employee or the consumer."[21]

Neutral Risks

"All risks causing injury to a claimant can be brought within three categories: risks distinctly associated with the employment, risks personal to the claimant, and 'neutral' risks—*i.e.*, risks having no particular employment or personal character. Harms from the first are universally

event which is not expected or designed by the injured employee. Gabriel v. Town of Newton, 227 N.C. 314, 42 S.E.2d 96 (1947); Edwards v. Piedmont Publishing Co., 227 N.C. 184, 41 S.E.2d 592 (1947); Conrad v. Cook-Lewis Foundry Co., 198 N.C. 723, 153 S.E. 266 (1930). *But see* Edwards v. Piedmont Publishing Co., *supra* at 187, 41 S.E.2d at 594 (Seawell, J., concurring in result), where a strong plea was made to include strains and other internal injuries caused by the load of usual employment as "injury by accident" within the meaning of the Workmen's Compensation Act.

[19] 251 N.C. 194, 110 S.E.2d 898 (1959).

[20] 251 N.C. 325, 111 S.E.2d 185 (1959).

[21] Edwards v. Piedmont Publishing Co., 227 N.C. 184, 191, 41 S.E.2d 592, 596 (1947).

compensated, those from the second are universally non-compensable. It is within the third category that most controversy in modern compensation law occurs."[22] In *Pope v. Goodson*[23] lightning caused the death of a carpenter who had taken shelter from a storm in a partially completed house. The carpenter's clothing was wet, and he wore a nail apron. Lightning, after striking the house, entered the carpenter's body at this point. In sustaining the award of compensation the Court reasoned that the circumstances of the carpenter's employment peculiarly exposed him to a risk of injury from lightning greater than that to others in the community in general. The holding in the principal case brings North Carolina in line with the majority view that injury due to lightning and other neutral risks is compensable when within the "increased risk" rule mentioned above.

Occupational Diseases

Hartsell v. Thermoid Co.[24] presented a novel situation in the area of insurer's liability for asbestosis during the period of "last injurious exposure." The claimant was employed by the defendant from 1919 through January 11, 1957 and at all times was exposed to inhalation of asbestos dust. The last thirty days, or parts thereof, within seven consecutive calendar months are deemed to be the last injurious exposure period under the statute,[25] and the insurance carrier covering the risk during this period is made liable. In the instant case, however, different carriers were on the risk during the last period of injurious exposure, one for twenty-five days and the other for the remaining five. The former had been on the risk for some fifteen years. In applying G.S. § 97-57 as then written, the Court held the last carrier solely liable for compensation.

The General Assembly, recognizing the inequity of such a situation had, in 1957, enacted an amendment to G.S. § 97-57 making any carrier which has been on a risk for one or more periods of injurious exposure and any part of the last period of exposure liable for compensation even though it goes off the risk before completion of the last period.[26] This proviso was not in effect when the instant case arose, but it should now correct the hardship evident in *Hartsell.*

An employee is capable of further injury from asbestosis and silicosis as long as there is any sound tissue in the lungs to be scarred by the dust.[27] The final thirty days of exposure being the period of last injurious exposure the Commission may not arbitrarily select any thirty

[22] 1 LARSON, WORKMEN'S COMPENSATION § 7 (1952).
[23] 249 N.C. 690, 107 S.E.2d 524 (1959).
[24] 249 N.C. 527, 107 S.E.2d 115 (1959).
[25] N.C. GEN. STAT. § 97-57 (1958).
[26] *Ibid.*
[27] Haynes v. Feldspar Producing Co., 222 N.C. 163, 22 S.E.2d 275 (1942).

days within the seven month period for the convenience or protection of any one of the litigants.[28] Therefore, because the claimant had worked and was exposed fifty-two full days after the carrier had gone off the risk, the Court in *Fetner v. Rocky Mount Marble & Granite Works*[29] held that the carrier was not on the risk during the period of the employee's last injurious exposure. This result was reached in spite of the facts that the claimant had developed the third stage of silicosis a year before the carrier had gone off the risk and that the claimant's doctor had testified that he was incapacitated from performing any normal stone cutting labor while the carrier was still on the risk.

BUSINESS ASSOCIATIONS

CORPORATIONS

Effect of Dissolution

In *Steadman v. Town of Pinetops*[1] the Court held that for purposes of G.S. § 136-96, providing for the withdrawal of street dedication, a corporation ceased existence when its charter expired by its own limitation. The statute provides:

> [W]here any corporation has dedicated any strip . . . of land . . . and said dedicating corporation is *not now in existence,* it shall be conclusively presumed that the said corporation has no further right, title or interest in said strip . . . the right, title, and interest . . . to be vested in those persons, firms or corporations owning lots or parcels of land adjacent thereto . . . .[2]

The dedication in question was made in 1917 by a corporation chartered on June 21, 1898, which corporation, though it was to exist for thirty years, actually operated until 1934 when it went bankrupt and was placed in the hands of a receiver. The defendant town did not attempt to accept the dedication until 1958 when it attempted to open the streets. The adjoining landowners, relying on G.S. § 136-96, initiated this action to enjoin the defendant from using the property. The trial court held that the receiver of the corporation was entitled to the property. On appeal, the Court reversed the trial court. It held that the corporation ceased to exist as of June 21, 1929, and that the appoint-

[28] Hartsell v. Thermoid Co., 249 N.C. 527, 107 S.E.2d 115 (1959); Mayberry v. Oakboro Granite & Marble Co., 243 N.C. 281, 90 S.E.2d 511 (1955); Haynes v. Feldspar Producing Co., 222 N.C. 163, 22 S.E.2d 275 (1942).

[29] 251 N.C. 296, 111 S.E.2d 324 (1959).

[1] 251 N.C. 509, 112 S.E.2d 102 (1960), also discussed in REAL PROPERTY, *Dedication, infra.*

[2] N.C. GEN. STAT. § 136-96 (1958). (Emphasis added.)

ment of a receiver to wind up its affairs after the corporate existence had expired did not prevent the adjacent landowners from withdrawing the dedication, since the property had vested in them in 1929 under the terms of the statute.

This holding appears to be in direct conflict with the provision of the Business Corporation Act which provides that a corporation, however dissolved, continues to exist for the purpose of winding up its affairs, including disposal of any property interest it might have.[3] This certainly seems to mean any property interest, whether contingent or otherwise, that the corporation might have. The Court did not discuss this point, but it is submitted that the dissolution provision of the corporation statute should have been deemed controlling as to the definition of "existence" in the dedication statute so that the corporation receiver could have gotten the property.

Jurisdiction Over Internal Affairs of Foreign Corporations

A policy against judicial interference in the internal affairs of a foreign corporation is no longer clear grounds for dismissal of an action brought in North Carolina. The legislature and the Court have both approved another rule which appears to be better adapted to modern conditions.

The new corporation code provides:

> No action in the courts of this State shall be dismissed solely on the ground that it involves the internal affairs of a foreign corporation but the court may in its discretion dismiss such an action if it appears that more adequate relief can be granted or that the convenience of the parties would be better served by an action brought in the jurisdiction of its incorporation or in the jurisdiction where the corporation has its executive or managerial headquarters or, because of the circumstances, in some other jurisdiction.[4]

In *Belk v. Belk's Dep't Store*[5] the Court applied the above section. A minority stockholder brought the action against the defendant South Carolina corporation, its directors, and principal executive officers to force payment of dividends. The defendant corporation moved for dismissal on two grounds: first, that the court had no jurisdiction over

[3] N.C. GEN. STAT. § 55-114 (Supp. 1959). "*Dissolution and its effect.*—(a) A corporation may be dissolved in any of the following ways: (1) Automatically by expiration of any period of duration to which the corporation is limited by its charter; . . . . (b) A dissolved corporation, however dissolved, nevertheless continues to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it, and enabling it to collect and discharge obligations, dispose of and convey its property, and collect and distribute its assets, but not for purpose of continuing business except so far as necessary for winding up its affairs . . . ."

[4] N.C. GEN. STAT. § 55-133 (Supp. 1959).

[5] 250 N.C. 99, 108 S.E.2d 131 (1959).

the corporation because it was not doing business in North Carolina; and second, that the court had no jurisdiction, or should not exercise jurisdiction, over the cause of action since the internal affairs of a foreign corporation were involved. The trial court found that all stockholders meetings, except one each year as required by South Carolina law, were held in Charlotte, North Carolina; that the individual defendant corporate executives had their offices in Charlotte and normally transacted much of the corporate business there; that the directors meetings were regularly held there; that all the books were kept there; that the decisions to declare dividends were made there; and that most of the purchases for the corporation were made from Charlotte. Accordingly, the trial court held that it had jurisdiction over the corporation and the cause of action and refused the motion to dismiss.

The Supreme Court affirmed, holding that the judgment in personam could be rendered against the corporation since it was doing business in North Carolina and since there was local jurisdiction over the cause of action.

The statute and the decision are contrary to the general rule[6] which normally leaves the internal affairs of a corporation exclusively to the domiciliary jurisdiction. An old North Carolina decision approves this rule.[7] It has been said that local courts have no visitorial jurisdiction over foreign corporations.[8] Some courts do not deny the existence of the jurisdiction but decline to exercise it because it would involve the interpretation of foreign statutes or because of the possible difficulty of enforcing a decree.[9]

In considering the problem our Court quoted the statutory section set out above, and quoted also the following comment submitted to the legislature by the drafters of the code in explanation of the theory behind this section:

> While the doctrine of nonintervention in the internal affairs of a foreign corporation is still frequently asserted, the courts have increasingly taken jurisdiction in cases which that doctrine would seem to deny. At this date it is believed that a test more nearly approaching "forum non-conveniens" should govern the court's decision and that a statute making that apparent would represent a sound innovation.[10]

The statute refers to adequacy of relief and convenience of the parties as criteria to be considered. This means that important factors in

[6] Rogers v. Guaranty Trust Co., 288 U.S. 123 (1933); 20 C.J.S. *Corporations* § 1879 (1940).

[7] Howard v. Mutual Reserve Fund Life Ass'n, 125 N.C. 49, 34 S.E. 199 (1899).

[8] Fuller v. Ostruske, 48 Wash. 2d 802, 296 P.2d 996 (1956).

[9] Healey v. R. J. Reynolds Tobacco Co., 48 F. Supp. 207 (M.D.N.C. 1942); State *ex rel.* Weede v. Iowa So. Util. Co., 231 Iowa 784, 2 N.W.2d 372 (1942); Sternfield v. Toxaway Tanning Co., 290 N.Y. 294, 49 N.E.2d 145 (1943).

[10] 250 N.C. at 105, 108 S.E.2d at 136.

deciding whether to exercise such jurisdiction would normally be accessibility in the local jurisdiction of that evidence which should be used in determining the facts, and enforcibility of a final judgment against the corporation by the local court. In the *Belk* case the corporate records were in North Carolina, the executive officers lived and supervised corporate business from North Carolina, and the decision-making by directors was normally carried on in this state. There can be little doubt that the exercise of jurisdiction by the court was a reasonable application of the new statute.

Separate Entity

In the case of *Troy Lumber Co. v. Hunt*[11] the separate legal entity of a closely held family corporation was upheld. One Taylor, while operating a vehicle owned by the plaintiff corporation in the scope of his employment, collided with the defendant's vehicle. The facts showed that Taylor was the controlling stockholder, chairman of the board of directors, and president, and that he was in complete charge of the plaintiff corporation.

Taylor brought an action against the defendant to recover damages for his personal injuries arising out of the collision. The issue of negligence was answered against Taylor and judgment was entered for the defendant. Plaintiff corporation then brought this action to recover for property damage to its vehicle arising out of the said collision. Defendant entered a plea of res judicata and estoppel by judgment in bar of this action by the corporation. Plaintiff demurred to these pleas and moved to dismiss them. *Held:* Demurrer sustained. There was no identity of parties or privity among the parties in this suit and the individual suit of Taylor against the defendant. The Court stated that a corporation is a separate legal entity, distinct from its shareholders, even though all of its stock is owned by a single individual or corporation. This decision is adequately justified under the North Carolina corporation statute.[12]

The case of *Lester Bros., Inc. v. Pope Realty & Ins. Co.*,[13] holding that G.S. § 55-3.1 cannot apply retroactively to validate a one or two man corporation where vested rights would be impaired thereby, is the subject of a Note in this volume.[14]

[11] 251 N.C. 624, 112 S.E.2d 132 (1960).

[12] N.C. GEN. STAT. § 55-3.1 (Supp. 1959): "Effect of acquisition of all shares by less than three persons.—(a) No provision in this chapter . . . shall be construed as an indication of any legislative intention that the existence of a corporation . . . is in any respect impaired by the acquisition of all of the shares by one person . . . . (b) The acquisition, heretofore or hereafter, of all of the shares of a corporation by one person or by two persons is hereby declared to violate no policy or provision of the laws of this State."

[13] 250 N.C. 565, 109 S.E.2d 263 (1959).

[14] 38 N.C.L. REV. 270 (1960).

Ultra Vires Act

The ultra vires provision[15] of the North Carolina Business Corporation Act was in question in *Everette v. D. O. Briggs Lumber Co.*[16] The defendant was a South Carolina corporation whose president, who owned ninety per cent of the outstanding stock, contracted with the plaintiff in the name of the defendant corporation for the transportation of lumber for an independent lumber company in North Carolina. The plaintiff performed the services and when the defendant corporation refused to compensate the plaintiff suit was brought. The defendant raised the defense of ultra vires on the grounds that it had not authorized such a contract with the plaintiff and had no interest in the transaction, that it did not benefit from it, and that in reality it was for the benefit of its president as an individual since he was a stockholder of the North Carolina firm. The Court applied the provisions of the statute literally and held that the defense of ultra vires was not available to the corporation in a suit between it and a third party contractor. *Quaere* as to what the Court would have done to avoid injustice to other stockholders had the president been only a minor stockholder in the instant case. It is submitted that the proper procedure would be to construe the statute as the Court did and allow the shareholders to bring a derivative suit against its president taking advantage of G.S. § 55-18(a)(2).

CIVIL PROCEDURE (PLEADING AND PARTIES)

PLEADING

Amendment

In *Mica Indust., Inc. v. Penland*[1] plaintiff sought damages and the return of personal property taken under an execution. The defendant had obtained a judgment in a previous suit, but the plaintiff alleged

[15] N.C. GEN. STAT. § 55-18 (Supp. 1959): "Defense of ultra vires.—(a) No act of a corporation . . . shall be invalid by reason of the fact that the corporation was without capacity or power to do such act . . . but such lack of capacity or power may be asserted:
(1) In an action by a shareholder against the corporation . . . .
(2) In an action by the corporation or by its receiver, trustee or other legal representative, or by its shareholders in a derivative suit, against the incumbent or former officers or directors of the corporation.
(3) In an action by the Attorney General . . . to dissolve the corporation . . . .
(b) This section applies to acts . . . done or made by a foreign corporation in this state."

[16] 250 N.C. 688, 110 S.E.2d 288 (1959), also discussed in EVIDENCE, *Identification of Antiphonal Party, infra.*

[1] 249 N.C. 602, 107 S.E.2d 120 (1959), also discussed in PERSONAL PROPERTY, *Wrongful Execution, infra.*

that the execution was wrongfully levied upon his property and not upon that of the true judgment debtor. The allegation of damages was inserted by amendment; defendant demurred, claiming that a new, separate, and distinct cause of action was alleged by the amendment, which cause of action substantially changed the plaintiff's claim. The Court, in reversing the trial court, overruled the demurrer. The opinion stated that whether or not the amendment constituted a new cause of action was immaterial, for absent the bar of the statute of limitations such an amendment would be permissible,[2] provided the facts constituting this new cause arose out of or were connected with the transaction upon which the original complaint was based.[3]

In *Dudley v. Dudley*[4] the trial court sustained a demurrer to the complaint but retained the cause on the docket. The plaintiff did not except or appeal, but a week later filed an amendment without notice and without leave of court. The defendant moved to dismiss the amendment for failure to comply with G.S. § 1-131,[5] and the trial court granted the motion. The Court affirmed and also suggested that the defendant could move to have the action dismissed for failure to meet the statutory requirement.[6]

Stathopoulos v. Shook[7] involved a car wreck at an intersection. The plaintiff failed to plead a city ordinance authorizing a stop light. Plaintiff offered the ordinance in evidence at trial; defendant objected and was overruled. There was no amendment or motion for amendment. The plaintiff moved in the Supreme Court for leave to amend his complaint and the motion was granted, the Court allowing amendment under G.S. § 7-13 and Rule 20(4), Rules of Practice in the Supreme Court. The Court stated that there was no surprise and plaintiff's claim would not be substantially changed. Although amendment in the Supreme

[2] The statute allowing such amendment is G.S. § 1-163.

[3] The Court cited the leading case of Perkins v. Langdon, 233 N.C. 240, 63 S.E.2d 565 (1951), which set out these rules: (1) "A litigant may not set up by amendment a wholly different cause of action, i.e., one which does not arise out of or connect itself in a material aspect with the transaction set out in the original complaint." (2) "Inconsistent causes of action may not be joined in the same complaint." (3) "Where a related 'new cause of action may be introduced by way of amendment . . . if the amendment introduce a new matter . . . such defense [statute of limitations] or plea will have the same force and effect as if the amendment were a new and independent suit.'" *Id.* at 245, 63 S.E.2d at 570.

[4] 250 N.C. 95, 107 S.E.2d 918 (1959).

[5] This statute states that: "Within thirty days after the return of the judgment upon the demurrer, if there is no appeal, or within thirty days after the receipt of the certificate from the Supreme Court, if there is an appeal, if the demurrer is sustained the plaintiff may move, upon three days' notice, for leave to amend the complaint. . . ."

[6] It is doubtful that the mere filing without notice and without leave would have caused a dismissal had the plaintiff subsequently followed the correct procedure within the thirty-day time limit. As the case stood on appeal the plaintiff not only chose the wrong method originally but was confronted by his failure to meet the thirty-day limitation.

[7] 251 N.C. 33, 110 S.E.2d 452 (1959).

Court is a practice not much used, this case demonstrates that the Court will allow the amendment when justice so requires.

Burden of Proof

In *Slaughter v. State Capital Life Ins. Co.*[8] the plaintiff sought recovery on an insurance contract whereby, as beneficiary thereunder, she would receive 2,500 dollars for the loss of life of insured when sustained through external, violent and accidental means. The contract had an exclusion clause which exempted the insurer from liability if the insured were killed by his own intentional act or that of any other person. The evidence showed that deceased, a taxi operator, was found dead from bullet wounds in a deserted location and that his money, pistol and car were taken. In sustaining defendant's motion for nonsuit the Court held that the plaintiff, in order to recover, must establish that the insured's death was within the coverage provisions of the policy; if this were established, the defendant could relieve itself of liability by showing that the particular injury was excluded from the coverage.[9] The Court found that the plaintiff had not shown coverage in that she had failed to show death by accidental means; in fact, the plaintiff's evidence showed an intentional killing which placed the case within the exclusion clause.[10]

Counterclaim

In *Durham Lumber Co. v. Wrenn-Wilson Constr. Co.*[11] plaintiff subcontractor sought to recover from defendant contractor the unpaid balance due on a contract. The defendant filed a counterclaim which exceeded in amount the claim of the plaintiff, the defendant alleging plaintiff's failure to perform six items of the contract and defendant's resulting damage. The Court, stating that clearly the burden would not lie on the plaintiff until the amount of his claim was reached and then shift to the defendant for any excess, held the defendant had the burden of proof for the full counterclaim. Earlier in the opinion the court had stated in a dictum that the defendant could deny plaintiff's performance and then show under the denial any defects or omissions which would lessen plaintiff's claim.[12] Thus the same matter might be used by a defendant

[8] 250 N.C. 265, 108 S.E.2d 438 (1959).

[9] The Court stated that the insurer would have the burden of proving that the death came within the exclusion clause.

[10] The Court stated it would make no attempt to reconcile divergent views and opinions with respect to coverage provisions in accident policies. The holding was merely to apply to the evidence and policy provisions involved. For discussion of related aspects of this problem see Note, 37 N.C.L. REV. 92 (1958); *Insurance, Fifth Annual Survey of North Carolina Case Law*, 36 N.C.L. REV. 429-30 (1958).

[11] 249 N.C. 680, 107 S.E.2d 538 (1959).

[12] The Court did not say where the burden of proof would then lie, and later in the opinion specifically declined to state the applicable rule. We may nonetheless take for granted that plaintiff would have the burden, as the plaintiff must allege and prove the contract and his performance or tender of performance.

to counterclaim or to deny the performance of the contract, and the use would determine who carried the burden of proof on the issue.[13]

In *Southern Box & Lumber Co. v. Home Chair Co.*[14] plaintiff sued to collect for plywood sold to the defendant. The wood was to be used by the defendant to manufacture chair seats. The defendant filed a counterclaim alleging damages for breach of express and implied warranties. The Court held that the defendant had the burden of proof to show, by the greater weight of evidence, the warranties, the breach thereof, and the resulting damages. Where the person relying on the warranty is the defendant, placing the burden of proof on him seems inconsistent with the principle that a plaintiff must allege and prove the contract and his performance or excuse for nonperformance.[15]

In *General Tire & Rubber Co. v. Distributors, Inc.*[16] plaintiff sought recovery of personal property defendant allegedly held wrongfully. In July 1956 plaintiff and defendant entered into a warehouse agreement whereby defendant agreed to hold goods of the plaintiff on a consignment basis. It was provided that either party could cancel the agreement upon three days notice, and in such event the defendant was to deliver immediately to the plaintiff all consigned goods. The plaintiff alleged that notwithstanding its demand for the goods on March 6, 1958, the defendant refused to deliver them. The defendant admitted plaintiff's ownership but in a counterclaim denied that plaintiff was entitled to immediate possession, alleging that plaintiff had agreed in July 1957 that the warehouse agreement would continue in effect until July 31, 1960. The plaintiff's demurrer to the counterclaim was sustained. The Supreme Court in reversing held that a valid counterclaim existed under both subsections of G.S. § 1-137.[17] There was a valid counterclaim in contract, as the defendant alleged that an integral part of the agreement was its extension until July 31, 1960. The Court felt that such allegation by the defendant alleged a breach of contract which occurred prior to the commencement of the action. The fact that plaintiff relied solely upon the contract of July 30, 1956, was immaterial. Also, the allegation of

[13] This situation might present the defendant with a dilemma in the event that he desired to bring a counterclaim but not to carry the burden of proof. The problem would probably be of practical significance only where there was but little evidence for either party, or, more especially, where there was not enough evidence to go to the jury.

[14] 250 N.C. 71, 108 S.E.2d 70 (1959), also discussed in SALES, *Implied Warranties, infra.*

[15] *Accord,* Furst v. Taylor, 204 N.C. 603, 169 S.E. 185 (1933).

[16] 251 N.C. 406, 111 S.E.2d 614 (1959).

[17] G.S. § 1-137 reads: "The counterclaim . . . must be one existing in favor of a defendant . . . and arising out of one of the following causes of action:

1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action."

an agreement to extend the contract until July 31, 1960, related directly to the subject of the plaintiff's action—his right to immediate possession of the consigned goods.[18]

Demurrer

The plaintiffs in *Elliott v. Goss*[19] claimed, as heirs of William Elliott, certain lands recorded in the name of Sam McCall and claimed by defendants, McCall's heirs. Plaintiffs alleged that a deed had been executed with Elliott as grantee, that the grantor was to keep the deed until full payment, and that before full payment was made Elliott died. The complaint went on to allege that Elliott's widow married McCall, that they paid the remaining twenty-three dollars owed, and that upon delivery of the deed to Elliott's widow, McCall substituted his name for that of Elliott and recorded the instrument. The plaintiffs sought to have Elliott's name put back in the instrument and themselves put in possession; they also prayed for any other relief available in law or equity. The Court held that no cause of action for reformation was stated and affirmed defendants' demurrer, but left open the possibility of amendment. The deed never having been delivered to the deceased, no title could have passed to him and the reformation would have been futile. The Court gave citations which indicated relief might be obtained on the basis of a resulting or a constructive trust.[20] This being true, it would seem that by changing the prayer for relief the plaintiff would originally have stated a cause of action.[21]

In *McLaughlin v. Beasley*[22] plaintiffs as taxpayers sought to enjoin the purchase of a lot and the erection of a school thereon. The trial court sustained a demurrer *ore tenus* on the ground that insufficient facts were alleged to constitute a cause of action. The Court upheld the demurrer, but on another basis, stating that the summons and complaint showed that plaintiffs were suing the individual members of the Board of Education instead of the Board itself, a corporate entity and the proper defendant. There was, however, an answer filed by the Board. The Court said this had no "bearing on the sufficiency of the

[18] The Court further stated that if plaintiff were given recovery of the property in this action, such a finding would probably preclude the defendant from asserting in an independant action what was here asserted as a counterclaim. Thus we see North Carolina, in a dictum, finding this counterclaim compulsory; this follows the holding in Savage v. McGlawhorn, 199 N.C. 427, 154 S.E. 673 (1930).

[19] 250 N.C. 185, 108 S.E.2d 475 (1959), also discussed in REAL PROPERTY, *Delivery, infra.*

[20] Although the citations cover both types of trusts, it would seem that in order to prevent unjust enrichment the constructive trust would be the proper form of relief in this case.

[21] The trial court or the Supreme Court might have noticed *ex mero motu* that the facts pleaded alleged a valid cause of action for a constructive (or resulting) trust, and the demurrer could have been overruled.

[22] 250 N.C. 221, 108 S.E.2d 226 (1959).

complaint" and thereby designated this situation as one where aider by answer was inapplicable.[23]

The case of *Turner v. Gastonia City Bd. of Educ.*[24] apparently raised a question of first impression in North Carolina.[25] Plaintiff sued the Gastonia and the State Boards of Education for an injury his daughter received while attending school. The action was brought before the North Carolina Industrial Commission. Both defendants demurred to the claim. The Industrial Commission and the superior court sustained the demurrers. When the case reached the Supreme Court, the first issue decided was whether the defendants in a proceeding before the Industrial Commission could challenge the claim by demurrer. The Supreme Court held that such procedure was a proper method to take advantage of a defect in a plaintiff's claim.

Joinder of Causes and Parties

In *Darroch v. Johnson*[26] the situation again arose where the plaintiff was struck in close succession by two moving vehicles.[27] The plaintiff rounded a curve and was sideswiped by the first car and then hit head on by the second. Plaintiff alleged joint and concurrent negligence and this issue was submitted. One of the defendants claimed error in the failure to submit an issue on his individual liability. The Court found no error, stating that the pleadings presented the issue of concurrent negligence and that to return a verdict for the plaintiff the individual defendant would first have to be found negligent.

Judgment on the Pleadings

In *Good Will Distribs. (Northern), Inc. v. Currie*[28] plaintiff sought a refund of taxes paid under protest. There had been a merger of two other corporations with and into the plaintiff corporation, and plaintiff sought to deduct from its taxable income the loss sustained by one of these during its previous fiscal year. When the case originally was heard plaintiff obtained at trial a judgment on the pleadings. The defendant appealed, and the Supreme Court reversed the lower court but

[23] For a case where aider by answer was used in such a situation see Cox v. Hennis Freight Lines, Inc., 236 N.C. 72, 79, 72 S.E.2d 25, 30 (1952).

[24] 250 N.C. 456, 109 S.E.2d 211 (1959), also discussed in AGENCY AND WORKMEN'S COMPENSATION, *"Employee" Under State Tort Claims Act, supra.*

[25] The Court cited authority for its position, but none of it was from North Carolina.

[26] 250 N.C. 307, 108 S.E.2d 589 (1959). There were actually three actions, consolidated for trial. All three plaintiffs were passengers in the same car.

[27] There are prior North Carolina cases very similar to the present one. For treatment of prior cases in this area see Brandis, *Permissive Joinder of Parties and Causes in North Carolina,* 25 N.C.L. REV, 1, 41 (1946); Brandis & Graham, *Recent Developments in the Field of Permissive Joinder of Parties and Causes in North Carolina,* 34 N.C.L. REV. 405, 416 (1956).

[28] 251 N.C. 120, 110 S.E.2d 880 (1959), also discussed in TAXATION, *Loss Carry-over, infra.*

did not dismiss the action. The case went back to the trial court and there was no amendment or motion to amend; when the case was next called the defendant moved to dismiss on the ground that under the previous opinion of the Court the plaintiff was not entitled to relief on his complaint. The plaintiff claimed that the former opinion left the case open for him to present evidence. The trial court overruled defendant's motion; the Supreme Court held this was error, as the former opinion had considered the motion for judgment on the pleadings as a demurrer *ore tenus* and found the complaint insufficient to state a cause of action.[29] Nonetheless, the Court said that it would accept the plaintiff's interpretation and look at facts stipulated by defendant *dehors* the complaint. Having done this the Court reached the same conclusion, *i.e.*, that the plaintiff could not recover.

Prior Action Pending

The plaintiffs in *Wallace v. Johnson*[30] sought to recover proceeds from timber defendant had sold under a power of attorney. Plaintiffs claimed ownership of part of the timber and alleged that they had not received their distributive share of the proceeds of the sale. Defendant answered that three prior actions were pending, and the trial court dismissed the case on defendant's motion.[31] In reversing, the Court stated that as to two of the alleged prior actions there had been nonsuits, and this invalidated defendant's plea. As for the third alleged action pending, the plaintiffs were the same but the defendants were different, as were the basic facts upon which relief was sought; thus the two cases were distinguishable and there could be no abatement.[32]

Reply

In *Smith v. Smith*[33] plaintiff sought a partition sale of land allegedly owned by herself and the defendants, her divorced husband and his mother. In a prior alimony suit the husband had admitted by his answer that he and the plaintiff held the property as tenants by the entirety, and this part of his answer was offered in evidence by the plaintiff. The

[29] No matter how defective the answer of the defendant, the plaintiff could not obtain a judgment on the pleadings unless he had alleged a valid cause of action.

[30] 251 N.C. 11, 110 S.E.2d 488 (1959). Tillis v. Calvine Cotton Mills, 251 N.C. 359, 111 S.E.2d 606 (1959), which contains a plea of prior action pending will be found under CIVIL PROCEDURE, *Variance, infra.*

[31] The use of a plea of prior action pending followed by a motion to dismiss is discussed and compared with the defense of res judicata in *Civil Procedure, Third Annual Survey of North Carolina Case Law,* 34 N.C.L. REV. 21-22 (1955).

[32] This "third action" also went up on appeal in Wallace v. Johnson, 251 N.C. 18, 110 S.E.2d 493 (1959); the defendant wished to use one of the nonsuited cases as the basis for his prior action pending claim, but the Court dismissed for the reasons already given. In both these actions (the "third action" and the main case discussed above) plaintiff alleged in his brief and defendant admitted the two nonsuits, so the issue was clearly drawn.

[33] 249 N.C. 669, 107 S.E.2d 530 (1959), also discussed in EQUITABLE REMEDIES, *Mistake, infra,* and REAL PROPERTY, *Deeds—Exchange of Deeds by Tenants in Common, infra.*

plaintiff "did not file a reply and did not plead as an estoppel" the former admission by the defendant. The Court held that the estoppel was new matter which generally had to be pleaded as a defense. Since the plaintiff failed to plead it, the admission lost its conclusive effect and was merely evidence to be considered with other evidence.[34] This holding is in direct conflict with G.S. § 1-159, which provides that new matter in the answer, not relating to a counterclaim, is to be deemed controverted by denial or avoidance, as the case requires. The defendant had a "further answer," but no counterclaim. The only other place the estoppel could have been pleaded was the complaint, but this clearly would have been anticipatory pleading. A prudent attorney, in the light of this case, should reply and allege the estoppel.

In *Nowell v. Great Atl. & Pac. Tea Co.*[35] the plaintiff-owner of a building and surrounding parking lot sought recovery against the Tea Company and West Construction Company for certain alleged defects in the building and lot. The Tea Company rented the premises and had furnished the plans and specifications and supervised the construction done by West Company. The defendants pleaded the statute of limitations and upon this basis the Tea Company obtained a nonsuit. The trial court held, however, that West Company was estopped from using this defense because of its representations in promising that the defects would be corrected and its refusal to act after the statute had run. On appeal the Court found no error. Two aspects of this decision are worth noting. The Court stated that the plaintiff had pleaded facts in his complaint showing the estoppel and having once so pleaded no reply was necessary. This would leave us to infer that anticipatory pleading is not undesirable and, secondly, that plaintiff might need to reply to the affirmative defense of the statute of limitations.[36]

Res Judicata

In *Pack v. McCoy*[37] plaintiff sued Queen City Coach Company and McCoy, one of its drivers, for personal injuries and damage resulting

[34] The Court gave three citations to uphold its ruling. The first was 1 McINTOSH, NORTH CAROLINA PRACTICE & PROCEDURE § 1236 (2d ed. 1956). This citation seems inappropriate as § 1236 is concerned with defendant's answer and affirmative defenses. The other two citations were Miller v. New Amsterdam Cas. Co., 245 N.C. 526, 96 S.E.2d 860 (1957) and Wilkins v. Suttles, 114 N.C. 550, 19 S.E. 606 (1894). The *Miller* case held that no question of estoppel was presented as the plaintiff had not specifically pleaded it and no facts appeared in the pleadings on which to base such a claim. The Court stated that there was no supporting evidence had estoppel been pleaded, so the exact situation in the main case was not presented. The *Wilkins* case does not uphold the viewpoint of the Court, as there defendant had pleaded a counterclaim.

[35] 250 N.C. 575, 108 S.E.2d 889 (1959).

[36] This is directly contrary to G.S. § 1-159. This case should be compared with *Smith*; the two would lead one to believe that the safest procedure for a plaintiff is to reply and allege an estoppel whether or not this should be necessary according to the statutory rules of pleading.

[37] 251 N.C. 590, 112 S.E.2d 118 (1960).

from a collision with defendant's bus. Defendants pleaded res judicata as an affirmative defense. The plea alleged as a bar a consent judgment in a former action which arose out of the same collision and in which all three of the present parties were defendants, the plaintiff in the former suit alleging joint and concurrent negligence on the part of the three defendants. The Supreme Court reversed an order striking the plea. The Court said that a judgment against defendants jointly charged with negligence necessarily establishes the negligence of all. Yet had there been a settlement after the complaint was filed but before answer, and had the plaintiff executed a release and taken a nonsuit, there would have been no validity in a plea of res judicata.[38]

Hayes v. Richard[39] was an action in the nature of ejectment in which a plaintiff, formerly nonsuited on the merits, sought to plead over, under G.S. § 1-25.[40] The lower court heard the defendant's plea in bar before trial on the merits and held the plaintiff estopped by judgment. The pleadings of the plaintiff and the parties plaintiff and defendant were substantially the same as in the former action.[41] However, the plaintiff stated that he wished to present evidence not offered in the former suit. The Court did not permit this, holding that a plea of res judicata covered all matter pleaded in the former action, whether actually litigated or not.[42]

Ultimate Facts

In *Rick v. Murphy*[43] the complaint alleged violation of G.S § 20-140, which prohibits the reckless operation of a vehicle; the complaint did not allege a violation of G.S. § 20-138, which pertains to drunken driving. The trial court allowed the plaintiff to present evidence of intoxication

[38] See Mercer v. Hilliard, 249 N.C. 725, 107 S.E.2d 554 (1959). It follows a fortiori from the above that where there is a trial and judgment on the merits the plea of res judicata will apply, and where there is an outside settlement before complaint is filed the plea will not stand. In the *Pack* case Judge Bobbitt dissented, stating that it was a misapprehension to consider a consent judgment a judicial determination of negligence and that North Carolina is not supported in this stand by the weight of authority.

[39] 251 N.C. 485, 112 S.E.2d 123 (1960).

[40] This statute provides, *inter alia,* that a nonsuited plaintiff may begin a new action within one year.

[41] The only change in the parties plaintiff was a child born subsequent to the first action; his sister was represented in the prior suit and he was held in privity with her. As for defendants, there had been a grant of some of the disputed land, but these grantees were privies in estate with the former defendant because of the grantor-grantee relationship. The pleadings were nearly the same, the differences being inconsequential.

[42] Previous North Carolina decisions have been conflicting as to the scope of an estoppel by judgment. See Note, 34 N.C.L. REV. 458, 461-64 (1956). This Note sets out three possibilities: (1) the estoppel will cover only matter pleaded and tried, (2) the estoppel will cover all matters raised by the pleadings, and (3) the estoppel will cover all matters determined or which might properly have been determined. The present case is in the second category.

[43] 251 N.C. 162, 110 S.E.2d 815 (1959), also discussed in AGENCY AND WORKMEN'S COMPENSATION, *Proof of Ownership and Agency, supra.*

and the Supreme Court held this correct. The Court stated that a party need not allege evidential facts which cause a person to act in a particular manner, as an allegation of the ultimate facts suffices, and the ultimate fact here was the reckless driving.[44]

Variance

In *Tillis v. Calvine Cotton Mills*[45] plaintiff Tillis sought recovery against the Cotton Mills and their president for an alleged breach of contract. The evidence showed only a contract with the Cotton Mills and defendant Cotton Mills claimed this was a fatal variance. The Court disagreed, stating that there were no grounds for nonsuit as against the Cotton Mills as the variance was not material. This was a consolidated action, the other suit being *Calvine Cotton Mills v. Tillis* in which the Cotton Mills sought possession of a truck allegedly wrongfully taken by Tillis. Before answering the Cotton Mills, Tillis filed the independent action discussed above. In the answer of Tillis was a counterclaim; Cotton Mills replied with a plea of prior action pending. The Court stated that the counterclaim should have been nonsuited, as it was the same action alleged in the separate suit.

PARTIES

Necessary Parties

In *Baker v. Murphrey*[46] the plaintiffs sought to have themselves declared owners of a one-sixth interest in land formerly sold under a mortgage foreclosure. The mortgagor had died before the commissioner's sale and the decree of confirmation. The plaintiffs were heirs of the mortgagor but were not made parties to the action. The Court stated that since they had succeeded to his rights they were necessary parties and were entitled to be heard as to whether the sale should be confirmed. The decree of confirmation was held void as to the plaintiffs and the Court declared them owners of a one-sixth interest in the land.

Real Party in Interest

In *Southeastern Fire Ins. Co. v. Moore*[47] the Court held that payment to insured by an insurance company under a fifty dollar deductible policy did not allow the company to sue the tort-feasor in its own name. This case is the subject of a Note in this volume.[48]

[44] The Court did not consider this a case of variance, but rather one where the issue was within the pleadings. No North Carolina case was cited as precedent for the ruling, the decision apparently being one of first impression in this jurisdiction.

[45] 251 N.C. 359, 111 S.E.2d 606 (1959).

[46] 250 N.C. 346, 108 S.E.2d 644 (1959), also discussed in CREDIT TRANSACTIONS, *Substituted Parties in Confirmation Proceedings, infra.*

[47] 250 N.C. 351, 108 S.E.2d 618 (1959).

[48] 38 N.C.L. REV. 99 (1959).

In *Glover v. Brotherhood of Ry. & S.S. Clerks*[49] plaintiff charged defendant with failing in its contract obligation to bring suit in the district court to compel his (plaintiff's) reinstatement by the Atlantic Coast Line Railroad. The Railroad Adjustment Board had found that plaintiff had been wrongfully discharged and ordered the railroad to reëmploy him, which the railroad did not do. Plaintiff sought damages from the Brotherhood, alleging that the action for reinstatement was now barred by the statute of limitations. Defendant demurred, one ground being that under the Railway Labor Act the plaintiff *or* defendant could bring the action and defendant was under no obligation to start the suit. The Court overruled the demurrer, stating that the cause of action was grounded upon failure of the Brotherhood to carry out its contract. This does not change the real parties in interest under the Railway Labor Act, but holds that breach of a contract between the parties as to who will bring suit will subject to an action for damages the party who breached the contract.

In *Godwin v. Vinson*[50] an action was brought in the name of the plaintiff to recover on a claim actually belonging to a partnership in which the plaintiff was a member. During the trial the evidence brought out the true situation and the defendant moved to dismiss on the ground that plaintiff was not the real party in interest. The plaintiff moved to amend, but the trial court in its discretion denied plaintiff's motion and dismissed the action. The Supreme Court affirmed in a per curiam opinion.

In *White v. Osborne*[51] the plaintiff father had previously represented his son as next friend in a personal injury action in which damages were recovered. The former judgment had allowed the father to recover his medical expenses out of the damages paid to the son and had given the father priority in recovery; this was important as it was contemplated that the whole judgment might not be collected. Part of the judgment was paid to the clerk, Osborne, and the father then sought his allotted share. The clerk refused to obey the lower court's order to give the father the money and appealed this order to the Supreme Court. The Court held that the father individually and the son were the real parties in interest in the present controversy and that the son must be represented by a disinterested guardian before the issue could be decided.[52] In view of the father's conflicting interests, the failure of the son to appeal from the judgment in which the father was given priority in recovery could not be held binding.

[49] 250 N.C. 35, 108 S.E.2d 78 (1959), also discussed in LABOR LAW, *Union's Liability to Member, infra.*

[50] 251 N.C. 326, 111 S.E.2d 180 (1959).

[51] 251 N.C. 56, 110 S.E.2d 449 (1959).

[52] The Court stated that because of conflicting interests when the original judgment was entered, a question arose as to the jurisdiction of the judge in giving the father priority, the son not being represented in the "conflict" for priority.

Third Party Practice

Jordan v. Blackwelder[53] involved an automobile accident in which the plaintiff, a passenger in one car, sued the driver and the owner of another vehicle for injuries sustained when the two cars collided. The driver of the car in which plaintiff rode was made an additional defendant. The plaintiff recovered damages, the jury finding joint and concurrent negligence. The additional defendant's insurance carrier had paid nearly 700 dollars on hospital bills of the plaintiff; the Court deducted this from the total amount given as damages[54] and divided the remaining amount, making the additional defendant liable for half of what remained. The Supreme Court held this error, holding that the recovery should have been halved and the additional defendant then given the full deduction from his half.[55]

CONSTITUTIONAL LAW

Delegation of Authority

Right of Milk Commission to Set Rates

The power of the North Carolina Milk Commission to fix the rates for the hauling of milk was held to be a constitutional delegation of authority in *State ex rel. North Carolina Milk Comm'n v. Galloway*.[1] In upholding the validity of the Milk Commission Act,[2] the Court pointed to the similarity of this statute to that of Virginia[3] and to those cases upholding the constitutionality of the Virginia statute.[4] Since *Nebbia v. New York*[5] it has been firmly established that a state legislature, in the exercise of its police power, may regulate the price of milk through an administrative agency. The powers given to the Commission under G.S. § 106-266.8 are quite broad,[6] and the Court found that

[53] 250 N.C. 189, 108 S.E.2d 429 (1959).

[54] There had been an agreement at trial that evidence of medical bills would be admitted, but the amount already paid might "in the court's discretion" be deducted from plaintiff's recovery.

[55] The Court stated that G.S. § 1-240 did not contemplate an additional defendant paying more than his pro rata share of a judgment against the original defendant. This interpretation appears to be both logical and just.

[1] 249 N.C. 658, 107 S.E.2d 631 (1959).

[2] N.C. Gen. Stat. §§ 106-266.6 to -266.21 (Supp. 1959).

[3] Va. Code Ann. §§ 3-346 to -383 (1950).

[4] Highland Farms Dairy, Inc. v. Agnew, 16 F. Supp. 575 (E.D. Va. 1936), *aff'd*, 300 U.S. 608 (1936); Reynolds v. Milk Comm'n, 163 Va. 957, 179 S.E. 507 (1936).

[5] 291 U.S. 502 (1933).

[6] G.S. § 106-266.8(c) states in part that it is vested with the power "to supervise and regulate the transportation, processing, storage, distribution, delivery and sale of milk for consumption." By the terms of G.S. § 106-266.8(j) "the Commission, after public hearing and investigation, may fix prices to be paid producers and/or associations of producers by distributors in any market or markets, and may also fix different prices for different grades or classes of milk."

it was within the Commission's power "fairly implied from the language of the Act and essential to putting into effect its declared purposes and objects, to regulate and to fix transportation rates . . . ."[7]

This case also involves the possible delegation of non-judicial power to the North Carolina Superior Court under the de novo appeal provision of the Milk Commission Act. This problem is discussed in a Note in this volume.[8]

Driver's License Revocation

In *Harvell v. Scheidt*[9] G.S. § 20-16(a)(5) was declared to be an unconstitutional grant of legislative authority to an administrative body. This section of the statute provided for the suspension of driver's licenses by the Motor Vehicles Commission upon a satisfactory showing that the licensee was an habitual violator of the traffic laws. Pursuant to this section the Director of the Driver's License Division had established a set of criteria, weighting principal traffic offenses, to be used in determining those classified as habitual violators. The Director further provided that other standards such as age, experience and attitude were to be considered in determining whether the license should be revoked.

It is a well-established rule that the legislature may not delegate the power to make laws to a governmental agency.[10] Certain regulations may be promulgated by these agencies, however, to carry out the enforcement and operation of a statute. As these regulations can exist only by reason of the statute, they must be confined within statutory limits; and there must be an adequate guide in the language of the statute so that these limits are thoroughly defined. Legislation which grants an official the power to revoke a license is invalid unless it prescribes rules to guide the official in exercising his discretion.[11] The Court in the principal case found that the Driver's License Examiner was not guided by any statutory set of standards. Rather, the agency had provided its own independent criteria to determine whether a license was to be suspended, and the Court quite properly held this section of the statute to be invalid.

Following this decision G.S. § 20-16 was amended[12] to provide a fixed schedule of points to be assigned for convictions of violating the

[7] 249 N.C. at 667, 107 S.E.2d at 638.
[8] 38 N.C.L. REV. 380 (1960).
[9] 249 N.C. 699, 107 S.E.2d 549 (1959), also discussed in ADMINISTRATIVE LAW, *Unconstitutional Delegation of Legislative Power, supra.*
[10] United States v. Shreveport Grain Elevator Co., 287 U.S. 77 (1932).
[11] State v. Harris, 216 N.C. 746, 6 S.E.2d 854 (1939); Thompson v. Smith, 155 Va. 367, 154 S.E. 579 (1930).
[12] This amendment is discussed at length in *Motor Vehicles, Comments on North Carolina 1959 Session Laws,* 38 N.C.L. REV. 200-05 (1960).

Motor Vehicle Laws, and further providing the criteria to which the Department must adhere.

Separation of Powers

Issuing of Warrants by Recorder's Court Solicitor

The power of the prosecuting attorney of a recorder's court to issue warrants was upheld in *State v. Furmage*.[13] In a trial before the recorder's court the defendant moved to quash two warrants issued by the solicitor of that court charging the defendant with certain misdemeanors; the motion was overruled. On a trial de novo in the Superior Court, however, this motion was granted, the court holding that the laws[14] conferring authority on the solicitor to issue warrants were invalid and violated the separation of powers provision of the State Constitution.[15] On appeal the Supreme Court reversed and held that the legislature did have the power to delegate this authority to a solicitor of the recorder's court. The Court recognized that there is a division of opinion as to whether the issuance of a warrant is a judicial or ministerial act, but it did not rule on this question. Neither did the Court give approval to the contention of the State that article I, section 8 of the North Carolina Constitution provides only for the separation of the Supreme Court and not of the entire judicial system. It held, rather, that the issuance of a warrant does not involve the "exercise of the *supreme judicial power* within the meaning of that term as used in Article I, Section 8."[16] Thus the applicable laws conferring the authority upon the solicitor were held not to violate that constitutional provision, and it was declared error to quash the warrants.

The Court did not discuss the problem of whether a determination of probable cause upon which a warrant is to be issued should be made only by a judicial officer. The Court had declared in a previous case[17] that the issuance of an arrest warrant is a "judicial act" without commenting on whether determining probable cause is exclusively a judicial function. In *Ocampo v. United States*,[18] where the information upon which the defendants were arrested had been signed by the prosecuting

[13] 250 N.C. 616, 109 S.E.2d 563 (1959), also discussed in Criminal Law and Procedure, *Criminal Procedure—Warrants and Indictments, infra.*

[14] The court was established by N.C. Public-Local Laws 1915, ch. 634, and amended by N.C. Public-Local Laws 1927, ch. 333 and N.C. Public-Local Laws 1937, ch. 22, the pertinent part of the latter two providing "that the prosecuting attorneys of the recorder's courts . . . shall have full power and authority to issue warrants, summons, subpoenas, commitments, and administer oaths, and all other papers incident to the dispatch of business in said courts . . . ."

[15] N.C. Const. art. I, § 8. "The legislative, executive, and supreme judicial powers of the government ought to be forever separate and distinct from each other."

[16] 250 N.C. at 627, 109 S.E.2d at 571.

[17] State v. McGowan, 243 N.C. 431, 90 S.E.2d 703 (1956).

[18] 234 U.S. 91 (1913).

attorney, the United States Supreme Court stated that "the function of determining that probable cause exists for the arrest of a person accused is only quasi judicial and not such that, because of its nature, it must necessarily be confided to a strictly judicial officer or tribunal."[19] In the *Ocampo* case, reliance was placed on the proposition that the finding of probable cause and the issuance of an arrest warrant are not a final determination of the case. This view tends to overlook the fact that a person arrested and subsequently found innocent has nevertheless been deprived of some measure of his liberty during the interim.

While other courts have stated that a prosecuting attorney is a judicial[20] or quasi-judicial officer,[21] the North Carolina Court has declared him not to be a judicial officer.[22] As the Court in the principal case points out, however, these North Carolina cases concerned the performance by the prosecuting attorney of a truly judicial function, *i.e.*, that of instructing a grand jury and examining witnesses before such jury.

There appears to have been sufficient precedent from which the Court could have found in the *Furmage* case that a non-judicial officer was delegated the power to perform a judicial act. It is submitted that any adjudication of probable cause for arrest should come only from the judicial branch of the government, that branch traditionally entrusted with the determination of an individual's rights.

Due Process

Right of Confrontation

After weeks of strife during a labor dispute the superior court had issued an order restraining defendants from interfering with the operation of a textile plant and from impeding other persons seeking to enter and leave the premises. The plaintiff subsequently filed a petition with the court alleging that the defendants had violated the restraining order. To support the contempt of court charges affidavits of witnesses concerning the occurrence were offered into evidence, and at the contempt hearing no objection was made to their introduction. In *Harriet Cotton Mills v. Local 578, Textile Workers of America*,[23] the Court held that the defendants had waived the right to object to these affidavits by failing to make a timely assertion of their privilege to confront the witnesses against them.

[19] *Id.* at 100.
[20] Cawley v. Warren, 216 F.2d 74 (7th Cir. 1954).
[21] Commonwealth v. Ragone, 317 Pa. 113, 176 A. 454 (1935).
[22] State v. Crowder, 193 N.C. 130, 136 S.E. 337 (1927); Lewis v. Board of Comm'rs, 74 N.C. 194 (1875).
[23] 251 N.C. 218, 111 S.E.2d 457 (1959). The other cases arising from this restraining order and the contempt thereof will not be dealt with separately. The same problem is dealt with in all of these cases, and the same result was reached.

There is a conflict of authority on whether such affidavits may be introduced into evidence,[24] but they apparently have been used in North Carolina to establish the commission of alleged acts.[25] Nevertheless the Court in the *Harriet* case stated that in cases of indirect contempt the defendant is entitled under "the law of the land" provision[26] of the North Carolina Constitution to confront and cross-examine the witnesses against him. This appears to be the first instance in which our Court has stated specifically that the right of confrontation and cross-examination extends to hearings on contempt alleged to have been committed out of the presence of the court.[27] It is settled, however, that the right of confrontation may be waived, and waiver may be effected by the failure to make a timely assertion of that right.[28] Since the defendants failed to make a request to the court that the witnesses against them be produced for cross-examination, the court properly held that there had been a valid waiver.

Right To Prepare for Trial

In an action brought under the Post Conviction Hearing Act[29] the Court in *State v. Graves*[30] held that the petitioners had been deprived of their opportunity to prepare for trial. It was found that the petitioners had been arrested on a charge of robbery with firearms and placed on trial within a period of only two days. At the time of the arrest no warrant was issued, and no bail had been set for the prisoners. No evidence was presented that anyone had told the petitioners or the members of their families when the trial was to be held, nor were the petitioners represented by counsel. The petitioners claimed that they were thereby deprived of the constitutional right to confront their accusers and to have counsel in all criminal prosecutions.[31]

The Court reversed the decision of the superior court denying a new trial and found that failure to observe the provisions of G.S. § 15-46 and G.S. § 15-47[32] deprived defendants of constitutional rights when the

[24] Allowing introduction: Bowden v. Bowden, 198 Tenn. 143, 278 S.W.2d 670 (1955). *Contra,* NLRB v. Rath Packing Co., 123 F.2d 684 (8th Cir. 1941).

[25] See *In re* Deaton, 105 N.C. 59, 11 S.E. 244 (1890).

[26] N.C. CONST. art. I, § 17 provides "No person ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land."

[27] For a case which is *contra* see State v. Harris, 14 N.D. 501, 105 N.W. 621 (1905), where the court said in a case of indirect contempt: "The defendant has no constitutional right to be confronted by witnesses against him."

[28] State v. Mitchell, 119 N.C. 784, 786, 25 S.E. 783, 784 (1896). "The right [of cross-examination] may be waived either by express consent, by failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it."

[29] N.C. GEN. STAT. §§ 15-217 to -222 (1953).

[30] 251 N.C. 550, 112 S.E.2d 85 (1960).

[31] N.C. CONST. art. I, § 11.

[32] G.S. § 15-46 specifies that on an arrest without a warrant the prisoner must be taken before a magistrate either straightway or as soon as possible after being taken to jail, and have that magistrate issue a warrant. G.S. § 15-47 requires that

offense charged was of such a serious nature. It is a fundamental rule that due process includes the right of the defendant to prepare his defenses adequately and to confront those who accuse him. The Court held that failure to complain of these abuses at the time of the arraignment did not constitute a waiver of these rights. Here there had been no indication that the case was more than a matter of investigation up until the very moment of trial. The evidence shows that the families of the prisoners had reason to believe that bail would be arranged for them, and that they would be allowed to employ counsel to prepare fully for the trial. The Court stated that the mere fact that the trial occurred only two days after arrest does not of itself show a deprivation of rights, yet "the more speedily a case is brought to trial . . . the greater the duty of the courts to determine whether or not the accused has had a fair opportunity to prepare for trial."[33]

Systematic Exclusion of Negroes From Grand Jury

In *State v. Perry*[34] the Court found that there had been no evidence of systematic exclusion of Negroes from the grand jury of Union County. The defendant, a Negro on trial for performing an abortion, had made a motion to quash the indictment on the ground that there had been such exclusion in violation of his rights to due process of law. The evidence showed that Negroes constituted approximately twelve and one-half per cent of the total adult population of Union County; that for at least eight years prior to 1958 one or two Negroes had been on every jury panel; and that the grand jury had been selected by having a child under ten years of age draw the names from this jury panel. Although there had been during that eight year period before this indictment only one Negro on the grand jury, the Court reiterated that the fourteenth amendment does not guarantee to a defendant a proportional representation of his race on the jury.[35] The Court distinguished *Eubanks v. Louisiana*,[36] where only one Negro (from a total population almost one-third Negro) had ever served on a jury, and the jury members were selected by interviewing those on the panel.

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bail be fixed in non-capital cases, and that the prisoner be allowed to communicate with family and friends.

[33] 251 N.C. at 559, 112 S.E.2d at 92.

[34] 250 N.C. 119, 108 S.E.2d 447 (1959). The prior case of State v. Perry, 248 N.C. 334, 103 S.E.2d 404 (1958), resulted in a reversal of the superior court's refusal to hear evidence of systematic exclusion of Negroes from the grand jury.

[35] Atkins v. Texas, 325 U.S. 398 (1945); Miller v. State, 237 N.C. 29, 74 S.E.2d 513 (1953).

[36] 356 U.S. 584 (1957). From a jury panel of seventy-five, the lower court judges held interviews to determine which of the seventy-five would serve on a jury of twelve. It is apparent that there is a vast difference, on the surface, between this method and that of allowing a small child to draw the names of the jurors.

The charge of denial of equal protection through a systematic exclusion from jury duty has been a fertile source of litigation in the United States Supreme Court.[37] The present case would seem to be analogous to *Brown v. Allen*,[38] another case arising in this state in which the United States Supreme Court held that the petitioner had not shown that he had been denied equal protection by establishing only that there had been proportionately fewer Negroes than whites on the jury. Yet, the United States Supreme Court in other cases[39] has been careful to insure that there is no systematic exclusion, and these other decisions have indicated a willingness to find such exclusion on the basis of a disproportionate representation of the accused's race on the grand jury which indicted him. An examination of these latter cases, however, reveal the presence of other factors[40] besides a gross disproportion in numbers which indicated that the jurors had been selected on a partial basis. No such additional factors were shown to be present in *Brown v. Allen*, and none appear present in the *Perry* case.

EMINENT DOMAIN

Diversion of Waters

In *Braswell v. State Highway Pub. Works Comm'n*[41] there was an allegation that in the construction of a highway the Commission had caused a diversion of waters causing a creek to overflow and flood plaintiff's property. The Commission contended that no liability existed unless there had been negligence on its part, and the petition did not allege negligence. The Court held that this was a taking of private property[42] within the meaning of the North Carolina Constitution,[43] which must be compensated regardless of whether or not there had been

[37] Although the vast majority of the cases deal with the exclusion of Negroes from the jury, the charge has been brought by members of other races as well. Hernandez v. Texas, 347 U.S. 475 (1954).

[38] 344 U.S. 443 (1953). Only one Negro had served on the grand jury of a county whose population was one-third Negro. The method for selection was to have a child draw the names gathered from the tax list. The case was decided by a divided court.

[39] Eubanks v. Louisiana, 356 U.S. 584 (1957); Cassell v. Texas, 339 U.S. 282 (1949).

[40] In Cassell v. Texas, *supra* note 39, the jury commissioners, charged with the responsibility of selecting the individual jurors, indicated that they selected only those citizens with whom they were acquainted. The use of the personal interview in Eubanks v. Louisiana, *supra* note 39, was an added factor allowing individual discretion in choosing the jurors.

[41] 250 N.C. 508, 108 S.E.2d 912 (1959).

[42] The Court said that prior decisions indicated the benefit accruing to property through having water continue its natural course is a property right. *E.g.*, Pernell v. City of Henderson, 220 N.C. 79, 16 S.E.2d 449 (1941), where the Court stated that the right to have a natural water course continue its existence on one's land is property.

[43] N.C. CONST. art. I, § 17. Further, it is a principle so "grounded in natural equity that it has never been denied to be a part of the law of North Carolina." Yancey v. Highway Comm'n, 222 N.C. 106, 22 S.E.2d 256 (1942).

negligence. "If the right to have water flow in the direction provided by nature is a property right, it follows that the owner of the property is protected by the constitutional guarantee and must be compensated when he has been damaged by the destruction of that right."[44] Although an earlier North Carolina case[45] had held that where the obstruction causes surface water to damage the plaintiff's property there is taking, the *Braswell* case is in line with United States Supreme Court decisions on this point.[46]

POLICE POWER

Regulation for Aesthetic Purposes

In *State v. Brown*[47] the Court held that G.S. § 14-399, regulating the storage of junk, constituted a deprivation of property in violation of "the law of the land" provision of the North Carolina Constitution.[48] This statute forbade the placing of junk and other trash within 150 yards of a hard surfaced highway where the highway was outside the corporate limits of a town, unless the trash was concealed from the view of persons on the highway. The Court pointed out that the police power of the General Assembly may be exercised only as it relates to health, safety, morals or general welfare—the traditionally recognized police power considerations. In the *Brown* case the Court found that the statute was enacted purely for aesthetic considerations.

A long established principle has been that the uses to which a person may put his property may not be limited by the exercise of the police power of the state for reasons solely aesthetic.[49] It has been stated, however, that aesthetic factors may be weighed in connection with the recognized police power considerations,[50] and some courts ostensibly have relied on traditional purposes to uphold ordinances obviously designed to promote aesthetic betterment.[51] A New York court[52] has

[44] 250 N.C. at 511, 108 S.E.2d at 915.

[45] Bell v. Norfolk So. R.R., 101 N.C. 21, 7 S.E. 467 (1888).

[46] United States v. Lynah, 188 U.S. 445, 470 (1903) states: "It is clear . . . that where the government by construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment." See also Jacobs v. United States, 290 U.S. 13 (1933).

[47] 250 N.C. 54, 108 S.E.2d 74 (1959), also commented on in *Criminal Law, Comments on North Carolina 1959 Session Laws,* 38 N.C.L. REV. 173 (1960).

[48] N.C. CONST. art. I, § 17.

[49] Welch v. Swasey, 214 U.S. 91 (1909); Murphy v. Town of Westport, 131 Conn. 292, 40 A.2d 177 (1944).

[50] New Orleans v. Southern Auto Wreckers, 193 La. 895, 192 So. 523 (1939); Vestal v. Bennet, 199 Misc. 41, 104 N.Y.S.2d 830 (Sup. Ct. 1950); Criterion Services, Inc. v. East Cleveland, 55 Ohio L. Abs. 90, 88 N.E.2d 300 (1940).

[51] *E.g.,* Simpson v. Los Angeles, 38 P.2d 174, *rev'd* 4 Cal. 2d 60, 47 P.2d 474 (1935), where a city-granted license provided for the closing of a street so that a "Mexican Village" could be opened as a tourist attraction. The court held it valid, finding that its purpose was to improve traffic conditions.

[52] Preferred Tires v. Hempstead, 173 Misc. 1017, 19 N.Y.S.2d 374 (Sup. Ct. 1940).

sustained the validity of an ordinance prohibiting overhanging signs on the basis on both aesthetic and recognized considerations; this court stated that it would not hesitate to sustain it on solely aesthetic grounds if necessary. The United States Supreme Court in *Berman v. Parker*[53] held that in redeveloping the District of Columbia there could be a taking of private property for aesthetic purposes, even though the particular property was not substandard, if it did not fit into the overall plan. The Court in the *Berman* case stated that "the concept of public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary."[54] This statement represented a far-reaching extension of the exercise of the police power; nevertheless at least some elements of the traditional welfare considerations were present in the overall redevelopment program. There appears to be a growing trend, which North Carolina has not followed, toward allowing aesthetic motives to be a primary consideration in the exercise of the police power. There can be no doubt that the primary consideration of the statute in the *Brown* case was aesthetic, as is evidenced by the fact that the statute was not to apply to junk yards "which are properly screened or fenced from the view of persons on the highway."[55]

Freedom of Speech and Assembly

Conflict With State's Interest in Preserving Order

A conviction on a charge of inciting to riot was upheld in *State v. Cole*.[56] The defendant, a leader of the Ku Klux Klan, had publicized an outdoor meeting to be held by the Klan. As a result the Indians in the area against whom Klan activity had been directed arrived at the gathering and broke up the meeting with gun fire. The inciting to riot aspect of this case is discussed in a Note in this volume.[57]

The *Cole* case presented the problem of determining where a person's constitutional rights of freedom of assembly and speech yield to the interest of the state in preserving order. It was not denied that the defendant had the right to espouse his cause and that, at least initially, the assembly of the Klan may have been a lawful one. A person's freedom to speak is not dependent on the will of his audience, and the fact that his words and actions may invoke emotions will not deprive him of it. In *Cantwell v. Connecticut*[58] the defendant had played a record advocating his own religion and degrading the religion of those who listened. There was no violent reaction, although the audience was incensed and

[53] 348 U.S. 26 (1954).
[54] *Id.* at 33.
[55] G.S. § 14-399 was amended in 1959 to delete the offending portions.
[56] 249 N.C. 733, 107 S.E.2d 732 (1959).
[57] 38 N.C.L. Rev. 274 (1960).
[58] 310 U.S. 296 (1939).

was tempted to strike the defendant. A conviction of inciting others to a breach of the peace was reversed by the United States Supreme Court on the ground that the defendant had been deprived of his freedom of speech and religion.

An anti-Semitic speech which attracted an openly hostile throng was protected by the United States Supreme Court in *Terminiello v. City of Chicago*.[59] In a five-to-four decision the Court stated that a city ordinance which, as construed by the trial court, permitted conviction if the defendant's speech "stirred people to anger, invited public dispute, or brought about a condition of unrest" was unconstitutional.

There is some point beyond which free speech is not permitted. As the Court stated in the *Cantwell* case, "No one would have the hardihood to suggest that the principles of freedom of speech sanctions incitement to riot . . . . When clear and present danger of riot, disorder, interference with traffic on public streets, or other immediate threat to public safety, peace, or order appears, the power of the state to prevent or punish is obvious."[60] On these grounds, a conviction of breach of the peace was upheld in *Feiner v. New York*,[61] where the defendant was in a public park advertising a meeting of the Young Progressives. There were mutterings of disapproval and one threat of action if the haranguing did not cease. The defendant failed to heed several requests of a policeman that he stop, and was thereupon arrested. In sustaining the conviction the Court stated that "it is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bound of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace."[62] Justice Douglas, dissenting in the *Feiner* case, agreed that "a speaker may not, of course, incite a riot any more than he may incite a breach of the peace by use of fighting words."[63] Douglas argued, however, that there had been no showing of such an extreme occurrence, and indeed, the evidence only showed a threat made by one person. Another vigorous dissent by Justice Black reiterated the holding of prior cases[64] that if the authorities are to interfere with a lawful public speech, all reasonable efforts must first be made to protect the speaker.

It is apparent that the defendant's rights of freedom of speech and assembly do not allow him to incite others to riot. If in the *Cole* case the only way for the state to preserve order and prevent a riot was to

[59] 337 U.S. 1 (1948).
[60] 310 U.S. at 308.
[61] 340 U.S. 315 (1950).
[62] *Id.* at 321.
[63] *Id.* at 331.
[64] Terminiello v. Chicago, 337 U.S. 1 (1948); Hague v. CIO, 307 U.S. 496 (1938).

arrest the defendant, it had the right to do so. The question which remained unanswered in the North Carolina Court's decision was whether the authorities there had first taken all reasonable measures to protect the defendant's right to speak.

CONTRACTS

Accord and Satisfaction

In *Fidelity & Cas. Co. v. Nello L. Teer Co.*[1] the defendant and its insurer were in disagreement over the amount of unpaid premiums due the insurer. Following some inconclusive negotiations as to whether defendant was entitled to a 12,500 dollar credit for overpayment of premiums, the defendant mailed a letter and a check to the insurance company. Both the letter and the check indicated that 12,500 dollars had been deducted from the amount of unpaid premiums due and that the check was intended to be in full payment and satisfaction of all amounts owing the insurer. The insurance company endorsed and deposited the check but then sued to collect the 12,500 dollars previously in dispute. Jury trial was waived and the court rendered judgment for the defendant. The important issue on appeal was whether there was a bona fide dispute between the parties as to the credit when the check was sent. The Supreme Court affirmed the trial court, finding that there was such a dispute in that since the beginning of their negotiations in 1953 the defendant had insisted he was entitled to such a credit while the insurer denied this.

The language of G.S. § 1-540[2] would appear to discharge completely the alleged obligation where part payment was accepted in satisfaction of the whole debt, even though the amount was *not* in dispute; however, the North Carolina Court in 1915, having had the earlier common law rule in mind rather than this statute, held that the element of dispute was necessary.[3] Thus the Court in the principal case was in accord with precedent in requiring that the amount be in dispute.

In holding the endorsement and deposit to be acceptance of the amount tendered the Court said that not only did the language in the letter clearly state that the check was offered in full satisfaction of all debts owing the insurance company, but the check specifically showed the 12,500 dollars as a credit. The Court added that the intent with which

[1] 250 N.C. 547, 109 S.E.2d 171 (1959).

[2] G.S. § 1-540 provides that where an agreement is made to accept a less amount than that claimed to be due, the payment of the less amount in compromise of the whole is a complete discharge of the obligation whether the sum was liquidated or in dispute.

[3] Rosser v. Bynum, 168 N.C. 340, 84 S.E. 393 (1915).

the plaintiff accepted the check was immaterial. This decision is in accord with a number of North Carolina cases[4] as to the effect of acceptance of a check plainly labeled "payment in full" as accord and satisfaction.

CONTRACTS OF EMPLOYMENT

In *Briggs v. American & Efird Mills, Inc.*[5] the plaintiff had procured a three year employment contract with American & Efird as Vice-President and Director of Manufacturing. His contract contained the following language: "Briggs shall be in *exclusive* charge of manufacturing operations of American and Efird." (Emphasis added.) Another part of the contract read: "If for any other reason, whether because of disagreement with his policies and methods or sale of its properties or other cause, American and Efird *terminates* Briggs' services during the term of the contract, then American and Efird shall be liable to Briggs for compensation of a minimum of two years base pay." (Emphasis added.) Six months before the contract was to expire, the corporation relieved Briggs of his duties with respect to manufacturing in the Spun Fibers Division. Briggs brought an action for the damages stipulated in the contract contending that the action of the corporation was "termination" within the meaning of the contract.

The trial court sustained defendant's demurrer for failure to state a cause of action, and the Supreme Court affirmed. The Court stated that "termination" as used here means a complete discontinuance of services and that the plaintiff did not allege that he had been removed from all supervision and control of manufacturing.

It is submitted that the Court regarded the act of the defendant simply as an exercise of the inherent right of a corporate employer to decrease the duties of an executive and vary his responsibility within the corporation without terminating his services, notwithstanding language in his contract that he shall have exclusive charge of certain operations.

PAROL EVIDENCE RULE

Bank of Varina v. Slaughter[6] was an action by the payee to collect the unpaid balance on a note signed by Tri-County Farm Center, Inc. and the defendants, stockholders in the corporate maker. According to defendants' evidence, part of the 25,000 dollar loan secured by the note was for the use of the corporation, and the balance was to be used by

[4] Jordan Motor Lines v. McIntyre, 157 F. Supp. 475 (M.D.N.C. 1957); Moore v. Greene, 237 N.C. 614, 75 S.E.2d 649 (1953); DeLoache v. DeLoache, 189 N.C. 394, 127 S.E. 419 (1925); Blanchard v. Edenton Peanut Co., 182 N.C. 20, 108 S.E. 332 (1921); Mercer v. Frank Hitch Lumber Co., 173 N.C. 49, 91 S.E. 588 (1917).

[5] 251 N.C. 642, 111 S.E.2d 841 (1960).

[6] 250 N.C. 355, 108 S.E.2d 594 (1959), also discussed in CREDIT TRANSACTIONS, *Inadmissibility of Contemporaneous Parol Agreement, infra.*

the individual makers, the defendants. They offered parol evidence of an agreement with the bank, prior to the execution of the note, that the liability of the defendants should be limited to that portion of the note proceeds which was loaned to the defendants individually and that the corporation alone would be liable for the share which was loaned to Farm Center, Inc. This evidence was excluded by the trial court, and the Supreme Court affirmed. The Court held that the written promise "could not be contradicted or destroyed by parol testimony that the makers would not be called upon to pay monies loaned pursuant to the contract. The very purpose of reducing it to writing was to avoid any controversy as to the terms of the contract."[7] The decision cites a group of North Carolina cases which clearly support this holding and follow the parol evidence rule.[8] The rule stated by the Court, however, has not been consistently applied in North Carolina; in another group of cases (which were cited by the defendant) the makers of promissory notes have been allowed, on the basis of parol evidence, to escape the obligation clearly stated in the signed instrument.[9] If there is a distinction between these two groups of cases, the Court has not pointed it out. The fact that the parol agreement was made prior to the written instrument may possibly distinguish the principal case from the latter group, but otherwise no reason appears why the result should be different from that reached in the long line of cases relied on by the defendant. The Court here, as usual, cited one group of cases only, and made no reference to the cases relied on by the unsuccessful litigant.

[7] 250 N.C. at 357-58, 108 S.E.2d at 596-97.

[8] Bost v. Bost, 234 N.C. 554, 67 S.E.2d 745 (1951); Williams v. McLean, 220 N.C. 504, 17 S.E.2d 644 (1941); Home Owners' Loan Corp. v. Ford, 212 N.C. 324, 193 S.E. 279 (1937).

[9] Jefferson Standard Life Ins. Co. v. Morehead, 209 N.C. 174, 183 S.E. 606 (1936) (parol evidence admitted to establish an agreement that a note was not to be delivered until twenty-five members of a fraternity also signed as makers, and this in spite of language in the note that endorsers should be bound regardless of who did or who did not sign the note.); Hunter v. Sherron, 176 N.C. 226, 97 S.E. 5 (1918) (parol evidence admissible to show an agreement that each maker was to be liable only to the extent of his individual charges where, for the convenience of a carrier, two shippers signed one note for the sum of freight charges owed by both); Martin v. Mask, 158 N.C. 436, 74 S.E. 343 (1912) (parol evidence admitted to show agreement that a note given for rent was to be paid only if the maker continued to reside at the payee's premises.); Evans v. Freeman, 142 N.C. 61, 54 S.E. 847 (1906) (parol evidence admitted to show that note was to be paid only to the extent of proceeds received from the sale of patent rights in the maker's stockfeeder); Quin v. Sexton, 125 N.C. 447, 34 S.E. 542 (1899) (parol evidence admitted to show that maker's liability was contingent upon his collection of another note); Carrington & Co. v. E. F. Waff, 112 N.C. 115, 16 S.E. 1008 (1893) (parol evidence admitted to show that payment of note was contingent upon the maker's selling the payee's products).

CREDIT TRANSACTIONS

SERVICE ON REMAINDERMEN IN FORECLOSURE ACTION

In *Bolton v. Harrison*[1] the Court said that it was debatable whether in a foreclosure action service of process upon the life tenant also constituted service upon remaindermen who would take at the termination of the life estate. Since the case is not a holding on the question, the issue alluded to remains open. As to remaindermen who were *in esse* at the commencement of the foreclosure action, the Court held that the return of the sheriff showing service upon them raised a presumption in law that they were properly served. This presumption could be, but was not here, rebutted by proper evidence. As to the one remainderman who was not *in esse* at the time the foreclosure action was begun, the Court held that he was, under the doctrine of virtual representation,[2] represented and bound by the living persons of his own class who had been parties to the action.

There is some support for the proposition that service on the life tenant is service on the remaindermen where the remaindermen are not *in esse* at the time of the action.[3] However, no case has been found which holds that such service is sufficient to cut off the interests of the remaindermen who are in being at the commencement of the action. A negative answer was implied by dictum in a New York case[4] where the issue of the children of the testator-mortgagor were said to be necessary parties to a foreclosure action if, under the will, they received an interest or future estate in testator's real property which could not be divested by a decree against their ancestors.

SUBSTITUTED PARTIES IN CONFIRMATION PROCEEDINGS

In *Baker v. Murphrey*[5] the Court held that in a foreclosure action where the mortgagor had died after judgment, but before sale and confirmation of the sale by the Court, the sale could not be valid without making the heirs of the mortgagor parties to the confirmation proceeding

[1] 250 N.C. 290, 108 S.E.2d 666 (1959).

[2] The doctrine of virtual representation is an exception to the general rule that no person can be bound by a judgment without having been before the court. Under this doctrine, the unborn remaindermen, or the member of any class who is *in posse* but not *in esse*, is represented by those members of his class who are before the court, and a judgment against those who are properly before the court is binding upon a later-born member of the class. 33 AM. JUR. *Life Estates, Remainders & Reversions* § 180 (1941).

[3] Carraway v. Lassiter, 139 N.C. 145, 51 S.E. 968 (1905), holding that remaindermen who were not *in esse* at the time of the action were bound by a judgment against their mother who was life tenant. There, the Court theorized that the life tenant represented the entire title for purposes of the proceedings.

[4] Dunkel v. Homindustries, Inc., 275 N.Y. 327, 9 N.E.2d 949 (1937).

[5] 250 N.C. 346, 108 S.E.2d 644 (1959), also discussed in CIVIL PROCEDURE, *Parties—Necessary Parties, supra.*

and thereby allowing them a chance to be heard as to whether or not the sale should be confirmed.

As a general rule, the heirs of a deceased mortgagor of real property should be made parties in an action to foreclose the mortgage.[6] Similarly, it has been held that where the mortgagor dies during the pendency of the action, his heirs are indispensable parties.[7] Under a 1929 Florida decision,[8] which involved the same question as that presented in the principal case, it was held that the sale was valid, even though no one had been substituted as party defendant. In that case the court bolstered an otherwise unsupported holding by saying that no attempt was made to show that the confirmation was unjust, irregular, illegal, or that it deprived appellant of any legal right. The Florida decision is directly contra to the *Murphrey* decision, and is the only other case found which directly presented this problem. In view of the general rule that upon the death of an intestate his real property descends directly to his heirs at law,[9] the North Carolina Court seems to have reached a justifiable result by preserving to the heirs a chance to have their day in court as to the merits of the sale.[10]

Inadmissibility of Contemporaneous Parol Agreement To Vary Terms of Loan

In *Bank of Varina v. Slaughter*[11] the Court refused to admit parol evidence to show that defendants had agreed with the bank president at the time the loan in question was made that the defendants would be liable for money loaned to them personally and that Tri-County Farm Center, Inc., a corporation solely owned and controlled by the defendants, would alone be liable for credits extended to it. The same note, secured by deed of trust, evidenced the debts of defendants and of Farm Center. The rule of law applied in this case seems irreconcilable with the rule laid down by the Court in previous cases. In *Bank of Chapel Hill v. Rosenstein*[12] there was an action by payee against makers and endorsers of a note secured by a deed of trust on lands. One maker defended on the ground that he had agreed with payee, contemporaneously to the making of the note, that his liability on the note should be limited to the value of the lands covered by the deed of trust. In that case the Court said that a contemporaneous parol agreement as to mode of payment is

[6] Phillips v. Parker, 148 Kan. 474, 83 P.2d 709 (1938); Chadbourn v. Johnston, 119 N.C. 282, 25 S.E. 705 (1896); 37 Am. Jur. *Mortgages* § 1129 (1941); Annot., 119 A.L.R. 807 (1939).

[7] Phillips v. Parker, *supra* note 6; Annot., 119 A.L.R. 807 (1939).

[8] Davis v. Scott, 97 Fla. 148, 120 So. 1 (1929).

[9] Alexander v. Galloway, 239 N.C. 554, 80 S.E.2d 369 (1954).

[10] See 37 Am. Jur. *Mortgages* § 1129 (1941).

[11] 250 N.C. 355, 108 S.E.2d 594 (1959), also discussed in Contracts, *Parol Evidence Rule, supra.*

[12] 207 N.C. 529, 177 S.E. 643 (1935).

competent as between the parties. Although the specific circumstances vary in the two cases, there is no apparent justification for the difference in result as to the rule of law to be applied. Also, in *Wilson v. Allsbrook*[13] the Court held, after a referee had failed to find whether the note had been paid or was to be paid out of a particular fund, that the maker was entitled to such a finding. In both the *Rosenstein* and *Allsbrook* cases, the Court allowed parol agreements to be shown which affected the mode of payment and liability of the maker.[14]

Substituted Note as Payment of Original Note

In *F. D. Cline Paving Co. v. Southland Speedways, Inc.*[15] the plaintiff had done work for the corporate defendant, valued at 43,342 dollars, 15,000 dollars of which was evidenced by a promissory note. The individual defendants were endorsers of the note. Receivers were appointed for Speedways, the corporate defendant, in an action by its creditors. The individual defendants participated in the receivership proceedings. The receiver, with the approval of all the creditors, and on court order, sold the properties of Speedways to Chesnutt, who gave notes to plaintiff and certain other secured creditors to the full value of their claims. Plaintiff's lien against Speedways was cancelled of record, but the note of Speedways was not surrendered. The Chesnutt notes were secured by a deed of trust on the properties formerly owned by Speedways. Chesnutt defaulted in payment of his notes, and the deed of trust was foreclosed and the properties were bid in at sale by Capital Investment Co., a corporation formed by holders of the Chesnutt notes. This left plaintiff holding stock in a corporation which had succeeded to the property on which plaintiff originally had a lien. Plaintiff sold the stock in Capital for one-half of the amount of its claim, and in the present action was suing on the note given by Speedways, and endorsed by the individual defendants for the balance due. The lower court found no evidence that plaintiff had intended the transactions, in taking the Chestnutt notes, to be payment of the original note, and entered judgment for the plaintiff for the balance due on the note. The Supreme Court, in affirming, laid down the rule that acceptance of the other notes would not be payment unless the plaintiff had agreed to accept them as payment. The Court said: "A receipt in full of an account does not establish an agreement on

[13] 203 N.C. 498, 166 S.E. 313 (1932).

[14] *Accord*, Ripple v. Stevenson, 223 N.C. 284, 25 S.E.2d 836 (1943), where the Court said that it is permissible for the parties to agree that a note shall be paid in a certain manner, *i.e.*, out of a particular fund, by the foreclosure of collateral, or from rents collected, and that this agreement may be shown though it rest in parol.

[15] 250 N.C. 358, 108 S.E.2d 641 (1959), also discussed in Negotiable Instruments, *Note of Third Person as Payment of Original Note, infra.*

the part of the creditor to accept as absolute payment at his own risk the note of a third person for the debt."[16]

Generally, unless it is otherwise specially agreed, when the holder of a promissory note takes a new note for the original debt, it is prima facie a conditional payment only.[17] The original debt will be extinguished only upon payment of the substituted note.[18] In other words, receipt of a promissory note of the maker or of a third party will be deemed only a conditional satisfaction of the original debt or note unless otherwise specially agreed between the parties.

Also worthy of mention in this case is the holding of the Court that the amount received by the plaintiff on sale of the stock of Capital, which was accepted in discharge of the lien against Speedways, was not a voluntary payment by the debtor, and, therefore, the debtor was not entitled to direct application of the payment to a particular debt.[19] The Court said that the creditor could not apply the proceeds to his best advantage, but had to apply them equally to the payment of all debts secured by the lien, *i.e.*, the portion of the debt evidenced by the note with endorsers and the portion of the debt not so evidenced. In support of this holding the Court cites *Damai v. Tart*[20] which has no application to the principal case. That case dealt with the application of proceeds of foreclosure to a note after action on the note is barred by the statute of limitations, and the Court held that such application by the creditor did not toll the statute and that there could be no further action on the note.

The principal case should be contrasted with the general rule regarding application of proceeds by the creditor where the debtor has failed to direct specifically application of the payment. As a rule, the creditor can apply proceeds of a voluntary payment to any debt owed by the debtor where debtor has not directed the payment to be applied to a particular debt.[21] In the principal case the Court theorized that since the payment was involuntary, the debtor had no right to direct application of the proceeds, and thus the failure to so direct would not leave the creditor free to apply the payment to his best advantage. This

[16] *Id.* at 361-62, 108 S.E.2d at 644.

[17] First Nat'l Bank of Graham v. Hall, 174 N.C. 477, 93 S.E. 981 (1917); Terry v. Robbins, 128 N.C. 140, 38 S.E. 470 (1901).

[18] *Ibid.*

[19] See Madison Nat'l Bank of London v. Weber, 117 Ohio 287, 158 N.E. 543 (1927), wherein the court held that where a solvent debtor would have the right to direct the application of payment and in the event of his failure to so direct, the creditor could apply the payment as he wished. In insolvency proceedings, or where a general judgment has been rendered covering secured and unsecured claims and there is a fund for distribution, such fund becomes a trust fund, and every debt and every part of every debt is a lien on the fund. Both the debtor and the creditor have lost the right to direct application of the payment and it is to be applied ratably to each debt.

[20] 221 N.C. 106, 19 S.E.2d 130 (1942).

[21] Security Trust & Savings Bank v. June, 38 Ariz. 513, 1 P.2d 970 (1931); Sanders v. Hamilton, 233 N.C. 175, 63 S.E.2d 187 (1951).

distinction between the application of proceeds resulting from voluntary and involuntary payments appears to be in accord with other authorities.[22]

Inapplicability of Deficiency Judgment Statute to Action on an Unsecured Note

In *Brown v. Owens*[23] the Court held that where a note is given for the balance of the purchase price of realty and is not accompanied by any security the statute precluding deficiency judgments on purchase money mortgages is not applicable.[24]

CRIMINAL LAW AND PROCEDURE

Criminal Law

Motor Vehicles

In State v. Brown[1] the court charged that if the jury found that defendant was driving a motor vehicle on the highway at a speed faster than fifty-five miles per hour, it would be their duty to convict him of a misdemeanor. Defendant excepted to this charge on the ground that G.S. § 20-141(b)(5) provides for a maximum speed of sixty miles per hour when the Highway Commission posts signs to that effect. The Court held that the general speed limit is fifty-five miles per hour and that the higher provision is an exception. Thus to bring himself within the exception defendant must show that it is applicable to his case,[2] and here he had failed to do so.

In *State v. Green*[3] the Court held that a farm tractor is a vehicle within the meaning of G.S. § 20-138, and the conviction of defendant for driving a tractor while intoxicated was therefore affirmed.

Aiding and Abetting

In *State v. Hamilton*[4] defendants were tried on separate indictments charging each with the crime of assault with a deadly weapon with intent to kill, resulting in serious injury. The State's evidence tended to show that defendant *A* shot the victim, while defendant *B* aided and

[22] Ohio Elec. Car Co. v. Le Sage, 198 Cal. 705, 247 Pac. 190 (1926). See also Annot., 49 A.L.R. 952 (1927).
[23] 251 N.C. 348, 111 S.E.2d 705 (1959).
[24] For general discussion of deficiency judgments, see Note, 35 N.C.L. Rev. 492 (1957).

[1] 250 N.C. 209, 108 S.E.2d 233 (1959).
[2] State v. Johnson, 229 N.C. 701, 51 S.E.2d 186 (1949). See generally 22 C.J.S. *Criminal Law* § 572 (1940).
[3] 251 N.C. 141, 110 S.E.2d 805 (1959). The procedural aspects of this case are discussed in Criminal Law and Procedure, *Sentencing Problems, infra.*
[4] 250 N.C. 85, 108 S.E.2d 46 (1959).

abetted in the shooting. The trial court instructed the jury that it could find each defendant guilty of "(1) . . . assault with a deadly weapon with intent to kill, inflicting serious injury, (2) or . . . assault with a deadly weapon, that is without the elements of intent to kill and serious injury, or (3) . . . not guilty in each case."[5] The verdict found *A* guilty of the lesser offense of assault with a deadly weapon (without intent to kill) and *B* guilty of assault with a deadly weapon with intent to kill. The judge sent the jury back to reconsider the verdict as to both defendants stating that *B* could not be found guilty of aiding and abetting *A* in the greater offense while *A* was found guilty of the lesser only.[6] The second verdict convicted both defendants of assault with a deadly weapon with intent to kill, recommending mercy on behalf of *A*. On appeal the Court ruled that the judge had no basis for refusing the first verdict against *A*. Thus as to *A* the cause was remanded for judgment on the first verdict. *B*'s case was remanded for a new trial on the ground that if the first verdict as to *A* was good and the first verdict as to *B* was inconsistent and incomplete, then the further instructions of the trial judge given before the second verdict was returned were erroneous.[7]

In *State v. Whitt*[8] the Court sustained a judgment of guilty of murder in the second degree against the aider (principal in the second degree), although the alleged principal in the first degree had been acquitted at a previous trial. *State v. Worley*[9] presented a reverse situation where in a joint trial the defendant who actually did the killing was convicted of second degree murder while the aider was convicted of voluntary manslaughter. Although North Carolina has apparently never squarely held that a principal in the second degree could be found guilty of a higher degree of the crime than the principal in the first degree, this result necessarily would seem to follow from the decision in *State v. Whitt*. Yet *State v. Hamilton* seems to preclude such a result. Since

[5] 250 N.C. at 86, 108 S.E.2d at 47.

[6] The facts at trial showed that the victim had been paralyzed. In view of this it appears that the trial judge considered the first verdict against *B* to be guilty of the felony of assault with a deadly weapon with intent to kill resulting in serious bodily harm, even though the jury's verdict contained no finding of bodily harm. Otherwise there would have been no inconsistency between the verdicts as first returned, since assault with a deadly weapon and assault with a deadly weapon with intent to kill are both general misdemeanors. The inference that the trial judge drew such a conclusion is strengthened by the fact that although the second verdict found both defendants guilty of assault with intent to kill, the judge sentenced both to central prison, a punishment reserved for those convicted of felonies. This he could not do without assuming that the jury had found that the assault resulted in serious bodily injury.

[7] Apparently this instruction was erroneous in that it permitted the jury to raise or lower the verdicts against *A* and *B*. This would have permitted a raising of the verdict against *A* which, as noted, the Supreme Court held not to be permissible. Since the verdict against *A* could not be changed the only acceptable verdict against *B*, at least in the view of the trial judge, would have been a lower one, *i.e.*, guilty of the same offence as *A*, or not guilty.

[8] 113 N.C. 716, 18 S.E. 715 (1893).

[9] 141 N.C. 764, 53 S.E. 128 (1906).

the trial judge in the *Hamilton* case could not refuse to accept the proper verdict in *A*'s case, the remand for retrial in *B*'s case on the basis of instructions given for a second verdict indicates that the Court considered that a second verdict was required as to *B*. This assumes that the first verdict convicting *B* of a more serious offense than his principal was improper. In fact, the trial judge so stated, and the Supreme Court took no issue with his position.

The great weight of authority is to the effect that an aider (principal in the second degree) who is convicted of a higher degree of the crime than the principal in the first degree cannot complain that for some reason the principal in the first degree has been acquitted or has escaped his full reckoning for the crime of which the aider has been convicted.[10] This is unlike the case where one is charged as an accessory before the fact to a felony. An accessory may assert the acquittal of his principal as a defense in his prosecution. It may be that the *Hamilton* case merely represents a confusion of the rule as to aiders with that as to accessories. In any event, the case renders the law on aiders and abbettors rather uncertain.

Self-Defense

In *State v. Goode*[11] the Court reversed a conviction of manslaughter when the trial judge charged that as an essential element of self-defense defendant must show that a felonious assault was being made upon him. Another separate ground for reversal was the trial court's exclusion of a threat on defendant's life made to a third party, but uncommunicated to defendant prior to the fatal shooting. The Court reaffirmed its position that a reasonable belief that the victim was about to inflict great bodily harm is all that is required before one may invoke self-defense, while holding that threats not within the knowledge of defendant are admissible as evidence for the purpose of explaining the situation as it actually existed.

In *State v. Sandlin*[12] the Court reaffirmed its somewhat anomalous position that a defendant who claims self-defense in a homicide case carries the burden of proving the defense, while in a trial for assault with a deadly weapon the burden remains on the State to negative the defense. This inconsistency is explained by the Court on the ground that in a homicide case malice is presumed upon a showing that the victim was killed with a deadly weapon, whereas, in an assault case no such presumption arises.

[10] *Annot.*, 24 A.L.R. 603 (1923). *But see* 90 IRISH L.T. 59 (1956) where it is said that in England the trend of the decisions in misdemeanor cases (where an aider is considered a co-principal) is to the effect that if the only person who could have committed the crime is acquitted on the merits, then a person charged with aiding must also be acquitted.

[11] 249 N.C. 632, 107 S.E.2d 70 (1959).

[12] 251 N.C. 81, 110 S.E.2d 481 (1959).

In *State v. Wagoner*[13] the Court decided a question raised in a prior issue of the *Law Review*.[14] When some evidence in a case tends to support the privilege of self-defense and other evidence supports the view that the killing was accidental, will the defendant be forced to elect which defense he will seek to establish, or may he rely on both? In an earlier case[15] where the defendant had given testimony tending to establish that the act causing death was accidental and not intentional, but leaving a possible inference of self-defense, the Supreme Court affirmed the trial court's refusal to instruct on self-defense. In the *Wagoner* case the defendant gave testimony to the effect that deceased had threatened him and that a quarrel ensued which was followed by a scuffle. Defendant stated that he did not know whether he or the deceased fired the gun, that if he fired it, he did not mean to do so. The Court held it to be reversible error for the trial court, even without a request from the defendant, to fail to charge the jury on the law of accidental homicide, as well as self-defense. The Court properly pointed out that a plea of "not guilty" entitles a defendant to introduce evidence of both defenses and that the uncertainty expressed in this defendant's testimony went only to its evidentiary weight.

Conspiracy

In *State v. Walker*[16] the Court handed down a landmark decision regarding the amount of evidence needed to convict one as a participant in a criminal conspiracy. The State had offered evidence tending to show that defendant Gore, a union agent, was involved in a conspiracy to dynamite certain facilities of a plant against which his union was striking. The State's witness, Aaron, called Gore's hotel room when Gore failed to show up at a pre-arranged meeting, and defendant Payton answered the telephone. Payton cautioned that the connection was through the hotel switchboard, acknowledged to Aaron that he knew of him and relayed Aaron's message to Gore. In this conversation the alleged dynamite plot was not mentioned. The Court also admitted telephone company records of calls by Payton to defendant Auslander, a union official and the instigator of the plot. One call to Auslander shortly followed the one from Aaron. Aaron was permitted to testify concerning statements of Gore to the effect that Payton, who was the union official in charge of the strike, would deliver twenty dollars to Aaron, but that Gore and Payton did not like the fact that Aaron had

[13] 249 N.C. 637, 107 S.E.2d 83 (1959).
[14] *Criminal Law, Survey of the Decisions of the North Carolina Supreme Court 1953*, 32 N.C.L. REV. 379, 425 (1954).
[15] State v. Rawley, 237 N.C. 233, 74 S.E.2d 620 (1953).
[16] 251 N.C. 465, 112 S.E.2d 61 (1960).

called the hotel and spoken to Payton. Although this was all the evidence recited in the reported decision which tended to implicate Payton, it was held, with one dissent, sufficient to take the case against him to the jury.

Illegal Possession of Liquor

The cases of *State v. Taylor*[17] and *State v. Glenn*[18] are illuminating with regard to the North Carolina law of constructive possession of nontaxpaid liquor. In the *Taylor* case the trial court instructed the jury that "where liquor is on the premises of a person . . . with his knowledge *and consent,* it is as a matter of law in his constructive possession."[19] On appeal this instruction was held to be proper. Subsequently in the *Glenn* case the Supreme Court reversed for failure to enter a nonsuit under the following facts: The liquor was found buried in front of defendant's pig pen on another's property just across the road from defendant's house. Numerous paths were found to lead from the pen to defendant's house and to the houses of others. Officers found a jar smelling of whiskey in defendant's house. The defendant had been discovered in possession of a jar of whiskey before but had not been charged.

It appears that consent to having the whiskey on one's premises is the key factor in constructive possession. Presumably if one knew of the presence of illegal liquor, he would have it removed unless he consented to its presence. Thus if the State can offer concrete proof of knowledge on the part of defendant, the case should go to the jury. But where, as in the *Glenn* case, the evidence is of such a nature as to be consistent with the guilt of a number of persons—*i.e.,* since the paths ran to several different houses, the liquor could have been hidden unknown to the defendant—it is not sufficient to withstand a motion for nonsuit.

Inciting To Riot

In *State v. Cole*[20] the Court sustained defendant's conviction of inciting to riot when, after repeated warnings that the Indians of Robeson County were likely to riot, he attended a meeting of armed members of the Ku Klux Klan at which he was scheduled to speak. The criminal aspect of this case is the subject of a Note in this volume.[21] The freedom of speech aspect is discussed in CONSTITUTIONAL LAW, *Freedom of Speech and Assembly, supra.*

[17] 250 N.C. 363, 108 S.E.2d 629 (1959).
[18] 251 N.C. 156, 110 S.E.2d 791 (1959).
[19] 250 N.C. at 365, 108 S.E.2d at 632.
[20] 249 N.C. 733, 107 S.E.2d 732 (1959).
[21] 38 N.C.L. REV. 274 (1960).

CRIMINAL PROCEDURE

Arrest

In *State v. Green*[22] defendant was convicted of driving an automobile on a public street while intoxicated. He collided with a telephone pole, and subsequently officers arrived at the scene and arrested him without a warrant approximately ten minutes after his vehicle had stopped. The Court conceded that the arrest appeared illegal under G.S. § 15-41(a) because the alleged offense was not committed in the presence of the arresting officer. Even though the arrest was unlawful the trial court had jurisdiction over the defendant, and his trial on a warrant proper on its face issued later the same day was held to have been without error. The Court distinguished *State v. Mobley*,[23] where a conviction of resisting arrest was allowed by the trial court even though the defendant was found innocent of the alleged offense giving rise to the arrest, public drunkenness. Mobley's conviction was reversed on appeal on the ground that he had a right to resist an unlawful arrest, and since public drunkenness was not a breach of the peace, the arrest without a warrant was unlawful. It appears that the unlawfulness of the arrest becomes relevant in a criminal prosecution only when it is sought to convict the defendant of resisting such arrest, or to introduce evidence seized by the officers incident to the arrest. It is immaterial that the warrant on which defendant was tried was issued after the unlawful arrest.

Warrants and Indictments

A statute authorizing the solicitor of a recorder's court to issue warrants has been sustained against a contention that it violates article I, section 8 of the North Carolina Constitution which provides for the separation of the legislative, executive, and judicial powers. In *State v. Furmage*[24] the Court adhered to the exact language of this constitutional provision which prohibits encroachment on the "supreme judicial powers." It did not attempt to define this term; but it held that since the issuance of warrants was not an exercise of supreme judicial power it was immaterial whether the issuance be considered a judicial or a ministerial act. Of course the language of this decision seems to leave the legislature free to confer the power to issue warrants on anyone it

[22] 251 N.C. 40, 110 S.E.2d 609 (1959), also discussed in EVIDENCE, *Relevancy of Injuries to Third Parties in Prosecution for Driving While Intoxicated, infra.*

[23] 240 N.C. 476, 83 S.E.2d 100 (1954).

[24] 250 N.C. 616, 109 S.E.2d 563 (1959). This case is also discussed under CONSTITUTIONAL LAW, *Separation of Powers—Issuing of Warrants by Recorder's Court Solicitor, supra.*

chooses, but it is doubtful that the Court would go so far as to uphold the selection of someone who was obviously inappropriate.

In *State v. Banks*[25] it was held that an officer may radio to a fellow officer the circumstances he has observed giving him reason to believe that some person has liquor in his possession for the purpose of sale, and that this is sufficient *information,* within G.S. § 18-13 for the clerk to issue a search warrant to the second officer. A discussion of this case is presented in a Note in this volume.[26]

In *State v. Bissette*[27] the first count of the indictment charged that defendant "Did unlawfully and willfully sell, offer, and expose for sale tobacco seed not labelled in accordance with N. C. General Statutes 106-281,"[28] the statute setting forth labelling standards and procedures for agricultural and vegetable seed. The second count charged that defendant "Did unlawfully . . . sell, offer, *and* expose for sale tobacco seed . . . represented . . . as being Bissette's 711 when in fact said seed was not Bissette's 711 tobacco seed."[29] The jury returned a verdict of "not guilty" on the first count and "guilty" on the second. On appeal the Supreme Court in a split decision reversed and sustained defendant's contention that the second count in the indictment should have been quashed. The majority of the Court also thought the verdict incongruous, since falsely labelling the seed as charged in the second count would necessarily violate the statute named in the first count. As pointed out by Justice Parker in his dissent, however, this incongruity was not before the Court, since a verdict of not guilty was returned on the first count and it was not before the Court on appeal.

The majority had reversed on the ground that the second count failed to charge fraudulent intent and failed to name the purchaser, which elements the majority held necessary for conviction. The statute proscribes the sale, offer to sell *or* exposing for sale of certain seed. Where *or* is used to connect phrases, they are normally considered to be stated in the alternative.[30] The second count of the indictment, however, uses *and* instead of *or*. Apparently the majority proceeded on the theory that the use of the word *and* implied that a sale was charged, since it held the indictment insufficient because of failure to allege the name of the purchaser. The dissent on the other hand interpreted the allegation as also one of an *offer* to sell, and thus it felt the indictment would have been sufficient without naming a *prospective* purchaser.

[25] 250 N.C. 728, 110 S.E.2d 322 (1959).
[26] 38 N.C.L. REV. 277 (1960).
[27] 250 N.C. 514, 108 S.E.2d 858 (1959).
[28] *Id.* at 515, 108 S.E.2d at 859.
[29] *Ibid.* (Emphasis added.)
[30] *E.g.,* State v. Walters, 97 N.C. 489, 2 S.E. 539 (1887); 82 C.J.S. *Statutes* § 335 (1953).

Sentencing Problems

In *State v. Corl*[31] the defendant was charged under one warrant with driving after his license had been revoked and under another warrant with speeding. The charges were consolidated for trial and given docket numbers 6711 and 6712 respectively. The defendant was convicted of both charges and the judgment stated that sentence in case 6711 was to run consecutively, and not concurrently, with sentence in case 6712. The sentence in case 6712 said it was to run consecutively with the sentence in case 6711. Nowhere did the trial judge specify which sentence was to be served first. The Supreme Court, *ex mero motu,* remanded the case for proper judgment which should be framed to indicate in what order the sentences were to be served. This is the first time the precise point has been decided in North Carolina.[32] The Court in the *Corl* case recognized the intent of the trial judge to have the sentences run consecutively, but refused to allow the sentences to stand with no indication of the order in which they were to be discharged. Some courts have held in this situation that the sentences will run concurrently regardless of the intent of the trial judge.[33] The more modern view, however, seems to be that in the absence of a stated order the appellate court will infer that the sentences are to be served in the order of their docket numbers,[34] *i.e.,* the sentence here to be served first would be 6711.

Where the intent of the trial judge is clear that the sentences are to be consecutive, it would seem to be the better rule to imply the order of service rather than remand for another judgment. The Court in the *Corl* case appeared to be concerned with the possibility of a reversal of one sentence or some shortening of one of the sentence terms. In the event one was shortened the Court felt that the second sentence would take immediate effect at conclusion of the shortened term only if the trial judge had specified that the one which was shortened was to be served first and the second sentence was to commence upon its expiration. The same result, however, could be reached by the suggested inference that sentences are to be served in the order of their docket numbers.

In *State v. Green*[35] the defendant specifically objected to the suspension of his sentence on condition, among others, that he not drive his

[31] 250 N.C. 252, 108 S.E.2d 608 (1959).

[32] An oft-quoted dictum in *In re* Black, 162 N.C. 457, 459, 78 S.E. 273 (1913), states that "the sentence must state that the latter term is to begin at the expiration of the former one; otherwise, it will run concurrently with it." The Court in the *Corl* case departs from the dictum in that it holds the sentence not to be concurrent and it requires that the order of serving be made explicit in the language of the sentence.

[33] *E.g.,* Puccinelli v. United States, 5 F.2d 6 (9th Cir. 1925).

[34] United States v. Daugherty, 269 U.S. 360 (1925); Jackson v. State, 91 Ga. App. 291, 85 S.E.2d 444 (1954). See generally 24 C.J.S. *Criminal Law* § 1996(g) (1941).

[35] 251 N.C. 141, 110 S.E.2d 805 (1959), also discussed in CRIMINAL LAW AND PROCEDURE, *Motor Vehicles, supra.*

automobile upon the public highways for twelve months. Although only the Department of Motor Vehicles may suspend or revoke an operator's license,[36] the court may suspend the sentence on a conviction for driving under the influence of intoxicating liquor on condition that defendant not drive for a specified period. Any conditional suspension of a sentence must be with the consent of the defendant.[37] On appeal the *Green* case, therefore, was remanded for proper judgment since defendant had not consented. The Court further noted that G.S. § 15-180.1 was effective at the time of the lower court's judgment and applicable to this case. This statute does away with the old rule that consent to the terms of a suspended sentence operates as a waiver of the right to appeal on the merits.[38] Thus in this case defendant could have consented to the suspension and still obtained review on his assignments of substantive error.

Concurrent Jurisdiction

In *State v. Clayton*[39] defendant's case was pending for trial in Vance County recorder's court, and he had given appearance bond and requested a jury trial in that court. The solicitor, without notice to the defendant, took a nolle prosequi in recorder's court and an indictment was brought in Vance County superior court for the same offense that had been docketed for trial in recorder's court. The two courts have concurrent jurisdiction over the offense charged. Defendant contended that the recorder's court had taken jurisdiction of the offense to the exclusion of the superior court. The Supreme Court held, however, that a nolle prosequi divests the recorder's court of jurisdiction and thus leaves the superior court free to hear the case.

G.S. § 7-64 provides that where there is concurrent jurisdiction, it is to be exercised exclusively "by the court first taking cognizance thereof." In addition North Carolina has been cited[40] as one of those jurisdictions which will not permit what was done in the *Clayton* case. *State v. Williford*[41] is the case cited to support the statement that the State cannot, after filing an indictment or information in a court having concurrent jurisdiction, enter a nolle prosequi and file an indictment or information charging the same crime in another court having concurrent jurisdiction. The Court in the *Clayton* case pointed out that *Williford* was not authority for this proposition because no nolle prosequi had been filed. The Court relied on the case of *State v. McNeill*,[42] the facts of which put it directly in point as authority for the holding in *Clayton*.

[36] State v. Cole, 241 N.C. 576, 86 S.E.2d 203 (1955).
[37] *Ibid.*
[38] This statute is discussed in *Criminal Procedure, Comments on North Carolina 1959 Session Laws*, 38 N.C.L. REV. 174-75 (1960).
[39] 251 N.C. 261, 111 S.E.2d 299 (1959).
[40] 16 C.J. *Criminal Law* § 789½ (1918).
[41] 91 N.C. 529 (1884).
[42] 10 N.C. 183 (1824).

G.S. § 7-64, however, was not in effect when the *McNeill* case was decided.

The *Clayton* case, if read literally, would permit the solicitor of the superior court and the solicitor of recorder's court to harass a defendant by going from court to court a number of times. Since no limit is imposed on the discretion of the solicitor, the solicitor of the superior court could now take a nolle prosequi and the solicitor of the recorder's court could bring the action again in that court. If the purpose of the change is simply to harass, the Court will surely disallow this process, but since the solicitor is not required to give any reason for taking a nolle prosequi the possibility of abuse seems to be present.

Prosecutor's Mention of Death Penalty Before Jury

The Court in the cases of *State v. Pugh*[43] and *State v. Manning*[44] held it to be reversible error for the solicitor or the trial judge to tell the jury that the State is seeking the death penalty in a capital case. These cases are the subject of a Note in this volume.[45]

DAMAGES

EMINENT DOMAIN—INTEREST ON THE JUDGMENT

In *Red Springs City Bd. of Educ. v. McMillan*,[1] where condemnor was a state agency, the Court held that interest on the judgment was recoverable from the date of the taking. However, the North Carolina cases are not in accord on the question of whether interest on a judgment is recoverable when the condemnor is a governmental entity. Both the present case and the North Carolina law in this area are discussed in a Note in this volume.[2]

DOMESTIC RELATIONS

PARENTS' LIABILITY FOR TORTS OF THEIR CHILD

In *Lane v. Chatham*[1] the mother of a nine-year-old boy was held liable in tort for her son's wrongful act of shooting plaintiff in the eye with a BB gun. The evidence tended to show that although the mother

[43] 250 N.C. 278, 108 S.E.2d 649 (1959).
[44] 251 N.C. 1, 110 S.E.2d 474 (1959).
[45] 38 N.C.L. REV. 281 (1960).

[1] 250 N.C. 485, 108 S.E.2d 895 (1959).
[2] 38 N.C.L. REV. 89 (1959).

[1] 251 N.C. 400, 111 S.E.2d 598 (1959). For further treatment of this case see TORTS, *Liability of Parent for Tort of Child, infra.* For parents' liability for torts of the child see Note, 19 N.C.L. REV. 605 (1941).

had notice of the son's propensity to shoot people with the BB gun, she did nothing to restrict or supervise its use. This decision is consistent with previous cases,[2] and a composite of all the North Carolina cases indicates that although the mere relationship of parent and child will not make a parent liable for a child's wrongful acts,[3] the parent may be held liable when (1) the child at the time of the tort is the agent of the parent;[4] (2) the parent is negligent by failing to control a child when the parent knows or should know that the child is conducting himself so as to create an unreasonable risk of bodily harm to others;[5] (3) the child injures someone while driving an automobile used for family purposes.[6]

The Court, in the principal case, reversed the lower court's holding that the father was liable, stating that there was no evidence that he knew of his son's misuse of the gun; plaintiff's contention that the mere act of the parents in giving the minor a gun constituted negligence was rejected by the Court on the ground that it is a universal rule that an air rifle is not a dangerous instrumentality.[7] Justice Higgins, in a con-

[2] In Taylor v. Stewart, 172 N.C. 203, 90 S.E. 134 (1916), the father was held liable when his thirteen-year-old son, while driving the father's automobile, killed the plaintiff's intestate. The evidence tended to show that although the father had no knowledge of and had given no consent to the son's driving on this particular occasion, he had allowed the son to drive in violation of the statute on numerous occasions over a period of three years. See also dictum in Brittingham v. Stadiem, 151 N.C. 299, 66 S.E. 128 (1909).

When a nineteen-year-old son, known by his father to be a careless driver, was forbidden to use the automobile on the day that he injured the plaintiff, the Court rejected plaintiff's contention that the father was negligent in not locking up the car and held the father not liable. Linville v. Nissen, 162 N.C. 95, 77 S.E. 1096 (1913).

In Bowen v. Mewborn, 218 N.C. 423, 11 S.E.2d 372 (1940), a suit for damages, the father had encouraged his son, who was under sixteen, to have illicit sexual intercourse. The father was held not liable as a matter of law when the son attempted to rape the plaintiff, the Court saying that the father could not have reasonably foreseen that his advice would lead to the particular assault. This result is criticized in Note, 19 N.C.L. REV. 605 (1941), on the grounds that the father's advice could have resulted only in such wrongful acts as fornication, adultery, or rape, and the father should not escape liability for failing to anticipate which of these acts the son would happen to select.

The parents of a twenty-four-year-old boy who was discharged from a mental institution were held not liable for a homicide committed by their son since there was no evidence that they had notice of his homicidal tendencies. The Court went on to say, however, that it would be possible in the event of "gross negligence" to hold those in charge of the boy liable. Ballinger v. Rader, 153 N.C. 488, 69 S.E. 497 (1910).

[3] Hawes v. Haynes, 219 N.C. 535, 14 S.E.2d 503 (1941); Staples v. Bruns, 218 N.C. 780, 11 S.E.2d 460 (1940); Bowen v. Mewborn, 218 N.C. 423, 11 S.E.2d 372 (1940); Taylor v. Stewart, 172 N.C. 203, 90 S.E. 134 (1916); Linville v. Nissen, 162 N.C. 95, 77 S.E. 1096 (1913); Brittingham v. Stadiem, 151 N.C. 299, 66 S.E. 128 (1909).

[4] Brittingham v. Stadiem, 151 N.C. 299, 66 S.E. 128 (1909) (twelve-year-old boy, while keeping store for his parents, negligently shot plaintiff with a pistol).

[5] Cases cited note 2 *supra*.

[6] Watts v. Lefler, 190 N.C. 722, 130 S.E. 630 (1925) ("family purpose doctrine").

[7] With regard to giving minors dangerous weapons see Note, 22 N.C.L. REV. 333 (1944). The Court has also held that an automobile is not a dangerous instru-

curring opinion, said that "decisions that air rifles are not *per se* dangerous weapons are as out of date as the horse and buggy."[8]

Deed by Wife to Husband by Way of Third Party

By virtue of G.S. § 52-12 a wife cannot convey any interest in her separate real property to her husband without taking a private examination before a certifying officer who makes a finding that the conveyance is not unreasonable or injurious to her. It is well established that this requirement cannot be circumvented by conveying the property to a third person with the understanding that the third person is to convey an interest to the husband.[9] This position was followed in *Brinson v. Kirby*,[10] where the wife, without complying with G.S. § 52-12, conveyed her separate property to a third party who three days later conveyed the property back to the wife and husband as tenants by the entirety; both deeds were recorded within a half hour of each other. The court stated that if the purpose of the transaction was to divest the wife of her separate estate and vest it in husband and wife by the entirety, then failure to comply with G.S. § 52-12 rendered the deeds void. The trial court was held in error for refusing to admit evidence of such purpose.[11]

Deed by Wife of Entireties Property to Third Party—Title by Estoppel

In *Harrell v. Powell*[12] a married woman executed a contract to convey land held by the entireties to a third party; her husband did not join in the contract.[13] The Court held that she was estopped, after her husband's death, to deny the validity of the contract to convey. Although this rule has been applied to a wife's conveyance of her separate estate[14] this is the first application of the rule to an estate by the entireties.

The general rule is that "estoppel is applied against those who are capable of acting in their own right in respect of the matter at issue, and not against those under a specific disability in respect of it."[15] A married woman is prevented by the North Carolina Constitution from conveying her separate estate to a third person without her husband's

mentality in the hands of a minor. Linville v. Nissen, 162 N.C. 95, 77 S.E. 1096 (1913).

[8] 251 N.C. at 406, 111 S.E.2d at 603.

[9] Davis v. Vaughn, 243 N.C. 486, 91 S.E.2d 165 (1956), 34 N.C.L. Rev. 571 (1956).

[10] 251 N.C. 73, 110 S.E.2d 482 (1959).

[11] For further discussion of this case see Real Property, *Estates by the Entirety, infra.*

[12] 251 N.C. 636, 112 S.E.2d 81 (1960), also discussed in Real Property, *Estates by the Entirety, infra.*

[13] A conveyance of an estate by the entirety by one spouse without the joinder of the other is void. Gray v. Bailey, 117 N.C. 439, 23 S.E. 318 (1895).

[14] The leading case is Sills v. Bethea, 178 N.C. 315, 100 S.E. 593 (1919).

[15] Buford v. Mochy, 224 N.C. 235, 239, 29 S.E.2d 729, 732 (1944).

consent.[16] Therefore, so long as coverture exists she is under a specific disability and is not estopped from denying the validity of her conveyance to a third party.[17] But, at the termination of coverture, such as by death of the husband, the wife is no longer under a contractual disability and may be estopped.[18] The principal case extends these rules to a wife's conveyance of an estate by the entirety to a third party.[19]

The rule is different, however, when a wife conveys an estate by the entirety to her husband without complying with G.S. § 52-12 (privy examination). Even though the husband dies she is not estopped to deny the validity of the conveyance.[20] This different result is probably not due to the wife's being under a disability different in kind from that imposed by article X, section 6 of the North Carolina Constitution, but rather because allowing an estoppel in this situation would allow an obvious circumvention of G.S. § 52-12.[21]

Marriage Health Certificate

G.S. § 51-14 requires residents of this state who marry outside the state to file, within sixty days after their return, a health certificate showing that they have conformed to the requirements of the same health examination as is required for persons marrying within the state.[22] In *Hall v. Hall*[23] two North Carolina residents went to South Carolina where they were married; on their return to this state they failed to file the required health certificate. The Court, interpreting the statute for the first time, held that failure to file such a certificate did not invalidate an otherwise valid marriage.[24] The Court gave no hint as to the rationale for the decision. It may be merely an outgrowth of previous cases holding that failure to obtain a marriage license does not invalidate an otherwise valid marriage,[25] or it may have stemmed from hesitance of the Court to allow noncompliance with a North Carolina statute to

[16] N.C. Const. art. X, § 6, supplemented by N.C. Gen. Stat. § 52-2 (1950).
[17] Buford v. Mochy, 224 N.C. 235, 29 S.E.2d 729 (1944).
[18] Sills v. Bethea, 178 N.C. 315, 100 S.E. 593 (1919).
[19] Where there is an estate by the entirety the wife is under no constitutional disability, Davis v. Bass, 188 N.C. 200, 124 S.E. 566 (1924), since article X, section 6 of the North Carolina Constitution applies only to the "sole and separate" property of married women. But she is under a common law disability. See note 13, *supra*. The Court in the principal case found the two disabilities analogous and therefore similarly applied the rules of estoppel to both situations.
[20] Wallin v. Rice, 170 N.C. 417, 87 S.E. 239 (1915); Smith v. Ingram, 130 N.C. 100, 40 S.E. 984 (1902).
[21] See Note, 9 N.C.L. Rev. 216 (1931).
[22] As to the health examination required of persons marrying within the state see G.S. §§ 51-9, -13.
[23] 250 N.C. 275, 108 S.E.2d 487 (1959).
[24] Such failure will subject the parties to criminal indictment, however, as provided by G.S. § 51-13.
[25] State v. Parker, 106 N.C. 711, 11 S.E. 517 (1890); State v. Robbins, 28 N.C. 23 (1845). Nor is the marriage invalid when the license is procured but is illegal. Wooley v. Bruton, 184 N.C. 438, 114 S.E. 628 (1922); Maggett v. Roberts, 112 N.C. 71, 16 S.E. 919 (1893).

invalidate a presumably valid marriage in a sister state.[26] Though the *Hall* case would not be controlling in a case involving the validity of a marriage performed within this state, it is reasonable to assume that the Court would hold such marriage valid since a decision to the contrary would produce the highly incongruous result of a marriage being held valid when no license is procured,[27] yet invalid when a health certificate, which is a requisite to procuring a license,[28] is not filed.

Paternity of After-Born Child

Byerly v. Tolbert,[29] where the trial court was held in error for holding as a matter of law that a child born 322 days after the death of the purported father could not be his child for purposes of sharing in his personal estate,[30] is discussed at length in Wills, *After-born Child, infra.*

EQUITABLE REMEDIES

Mistake

In *Wright v. McMullan*[1] the plaintiff, who had bought savings bonds in his sons' names without their knowledge, brought a declaratory judgment action to determine ownership, alleging that he did not intend to vest title in the sons. The Court ruled that mere ignorance of law

[26] Generally a state of residence will recognize the validity of a marriage valid where celebrated. State v. Ross, 76 N.C. 242 (1877); Note, 8 N.C.L. Rev. 203 (1930). Such marriage may be held void, however, if the parties go to another state to evade the laws of the state of residence, State v. Kennedy, 76 N.C. 251 (1877); or where the marriage shocks the morals of the public of the state of residence. See, *e.g.*, State v. Kennedy, 76 N.C. 251 (1877) (miscegenation); State v. Ross, 76 N.C. 242 (1877) (dictum) (polygamy); State v. Brown, 47 Ohio St. 102, 23 N.E. 747 (1890) (incest). In the principal case no intention by the parties to evade North Carolina laws was found by the trial court. Record, p. 28. Appellant, in his brief argued that the parties by failing to file a health certificate violated a "distinctive policy of this State" of maintaining "biological purity of the blood" by "permitting marriage only by those who had demonstrated their freedom from venereal disease," and thus the marriage in question should be declared void. Brief for Appellant, p. 6. Granting that such a policy exists and that it is sound, it would appear to be wholly inapplicable to residents marrying out of state since G.S. § 51-14 does not require the certificate until sixty days *after their return* to this state *following the marriage*. The deadline date for filing the certificate could thus be extended so long as the parties delayed their return to the state though maintaining their residence in this state.

As to the soundness of the theory of health certificates see Note, 13 Mich. L. Rev. 39 (1914) which suggests that the effect is more to discourage marriage than to inhibit venereal disease.

[27] Cases cited note 25 *supra.*

[28] N.C. Gen. Stat. § 51-9 (1950).

[29] 250 N.C. 27, 108 S.E.2d 29 (1959).

[30] The Court noted that since there is a presumption that the term of pregnancy is 280 days, a child born more than 280 days after the death of the purported father has the burden of proof in proving the relationship.

[1] 249 N.C. 591, 107 S.E.2d 98 (1959), also discussed in Personal Property, *Ownership of United States Savings Bonds, infra.*

without fraud or circumvention is not ground for equitable relief to set aside conveyances or to avoid the legal effects of acts which may have been done. The Code of Federal Regulations governing the issuance of savings bonds provides for the correction of errors;[2] however, the plaintiff in the *Wright* case did not allege any mistake in issuance; he merely stated that his intentional act produced a different legal consequence from that which he had contemplated. The North Carolina Court previously has allowed the correction of an instrument which had been executed pursuant to a prior agreement, by which both parties meant to abide, but which instrument failed to express their true intention by reason of a mistake of law made by both parties,[3] but "a mere naked mistake of law, unattended by any special circumstances furnishes no ground for relief . . . ."[4]

In *Smith v. Smith*,[5] following a divorce of the parties, there was a proceeding by the ex-wife to partition property which had been conveyed to "J. B. Smith and wife, Helen W. Smith, creating an Estate by the entirety." The defense contended that the wife's name had been put on the deed "through error." It is well settled in North Carolina that a mere allegation of "mistake" is not sufficient to warrant reformation. If the deed fails to express the true intention of the parties it may be reformed to express such intent only when the failure is due to the mutual mistake of the parties,[6] to the mistake of one party and fraud of the other,[7] or to a mistake of the draftsman.[8] Further, the law presumes a deed has been correctly written and that it is the true expression of the parties,[9] and it must stand unless this presumption is rebutted by clear and convincing proof of the mistake and a showing of the manner in which the deed ought to be reformed.[10] In the *Smith* case the Court properly held that there could be no reformation as defendant had met none of these requirements.[11]

Money Had and Received

The action for money had and received is a modified form of assumpsit devised by the common law judges to allow relief from the narrow common law procedures which afforded no remedy in many meritorious

[2] 31 C.F.R. § 315, subpart B (1959).
[3] Kornegay v. Everett, 99 N.C. 29, 5 S.E. 418 (1888).
[4] Pelletier v. Interstate Cooperage Co., 158 N.C. 403, 406, 74 S.E. 112, 113 (1912).
[5] 249 N.C. 669, 107 S.E.2d 530 (1959). This case is also discussed under Real Property, *Deeds—Exchange of Deeds by Tenants in Common, infra,* and Civil Procedure, *Pleading—Prior Action Pending, supra.*
[6] Maxwell v. Wayne Nat'l Bank, 175 N.C. 180, 95 S.E. 147 (1918).
[7] America Potato Co. v. Jeanette Bros. Co., 174 N.C. 236, 93 S.E. 795 (1917).
[8] Pelletier v. Interstate Cooperage Co., 158 N.C. 403, 74 S.E. 112 (1912).
[9] Crawford v. Willoughby, 192 N.C. 268, 134 S.E. 494 (1926).
[10] Finishing & Warehouse Co. v. Ozment, 132 N.C. 839, 44 S.E. 681 (1903).
[11] See also Crawford v. Willoughby, 192 N.C. 269, 134 S.E. 494 (1926).

cases.[12] Although it is an action at law it is equitable in nature and is said to resemble, or to be a substitute for, a suit in equity and to lie whenever a suit in equity would lie.[13] Generally, when money is paid to another under the influence of a mistake of fact and it would not have been paid had the paying party known the fact, it may be recovered[14] under the theory that such payment has unjustly enriched the recipient at the expense of the paying party.[15] An express promise to repay is not necessary to support the right to recover; and the law implies such a promise from the possession of the money and the equitable duty to repay it.[16] The fact that the party paying by mistake was guilty of negligence in not discovering the mistake before he paid the money is immaterial as far as the right to recover is concerned.[17]

In *Dean v. Mattox*[18] certain timber was pointed out to plaintiff by defendant as being part of a 176.1 acre tract. Plaintiff paid a price for the tract which included an amount for this timber. The timber was not on the 176.1 acres, and plaintiff having cut the timber subsequently had to pay the true owner for it. He sued defendant to recover the money paid out to the actual owner, claiming mutual mistake of fact. Recovery was allowed under an action for money had and received. The Court pointed out that the remedy of recission was not available to the plaintiff, as the parties could not be placed *in statu quo*. The Court relied on *Allgood v. Wilmington Trust Co.*[19] and stated that the test in an action for money had and received was "not whether the defendant acquired the money honestly and in good faith, but rather, has he the right to retain it."[20] Defendant's further contention that plaintiff was precluded from recovering by the doctrine of *caveat emptor* was held not to be applicable here as both parties mistakenly understood that the timber in controversy was on defendant's 176.1 acre tract.

A different, but distinguishable, result was reached in *Tarlton v. Keith*,[21] where plaintiff was not allowed to recover either the value of timberland, not included in his deed due to defendant's mistake, or the commission received by defendants. Here in a sale of timberland the defendant broker had misrepresented a boundary, and plaintiff's suit was based on mistake. However, since the defendant was merely the agent of the owner, and since the owner knew the correct boundary line, there was no mutual mistake. Furthermore, after plaintiff surveyed his

[12] 4 AM. JUR. *Assumpsit* § 20 (1936).
[13] Annot., 52 Am. Dec. 752 (1910).
[14] 4 AM. JUR. *Assumpsit* § 24 (1936).
[15] Morgan v. Spruill, 214 N.C. 255, 199 S.E. 17 (1938).
[16] Bahnson v. Clemmons, 79 N.C. 556 (1878).
[17] Annot., 64 Am. Dec. 95 (1911).
[18] 250 N.C. 246, 108 S.E.2d 541 (1959).
[19] 242 N.C. 506, 88 S.E.2d 825 (1955).
[20] 250 N.C. at 249, 108 S.E.2d at 544.
[21] 250 N.C. 298, 108 S.E.2d 621 (1959).

purchase and found that part of the timber which had been pointed out to him was not his, he sold the timber he did own for more than he paid for it. There was found to be no cause of action against the defendant broker for recovery of the alleged shortage because there had been only unilateral mistake[22] on the part of the plaintiffs and no attempt had been made to join the owner and rescind the contract; nor did plaintiff have a cause of action to recover the commission which defendant had received because defendant had not been unjustly enriched. The Court stated that generally when one pays money to another under a mistake of fact and he would not have paid it had he known that the fact was otherwise, the money can be recovered. An exception to that rule was applied, however, because a payment induced by mistake cannot be recovered if the payee, in equity and good conscience, is entitled to keep the money so received. Here the defendant broker had performed services in selling the land; and there was no action brought against the grantors to avoid the contract. Therefore, the defendants should have been entitled to keep the commission.

EVIDENCE

SPECIFIC ACTS OF UNCHASTITY OF PROSECUTRIX IN RAPE PROSECUTION

"It is generally accepted . . . that the bad character for chastity of the complainant in a rape charge is relevant and admissible to show the probability of her consent to the intercourse. In evidencing this character, may *particular* acts of the woman's unchastity be resorted to, as showing her to be a person more prone than another to have consented?"[1] The courts are not in accord. The majority rule seems to be that specific acts of unchastity of the prosecutrix with third persons are inadmissible either to impeach or to show consent.[2] However, some jurisdictions which refuse the evidence for impeachment purposes admit it on the issue of consent.[3] Professor Wigmore takes as the better view the one which admits the evidence to show consent.[4] He approaches the problem in this manner: The dangers are (1) that an innocent victim of a carnal assault will be falsely accused; and (2) that an innocent defendant will be at the mercy of an unscrupulous and

[22] The Court stated that North Carolina had not adopted the doctrine that unilateral mistake unaccompanied by fraud, imposition, undue influence, or like circumstances of oppression is enough to avoid a contract.

[1] WIGMORE, EVIDENCE § 200 (3d ed. 1940).
[2] WIGMORE, EVIDENCE § 200 (3d ed. 1940); Annot., 140 A.L.R. 364, 380 (1942).
[3] *E.g.*, State v. Wood, 59 Ariz. 48, 122 P.2d 416 (1942).
[4] WIGMORE, EVIDENCE § 200 (3d ed. 1940). Justice Cardozo takes a position in agreement with Professor Wigmore. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 156 (1921).

revengeful prosecutrix. In view of the graver consequences of convicting an innocent defendant and the practical frequency of either danger Wigmore concludes that the admission of the evidence is preferable. He admits, however, that determining which danger is more prevalent and which most needs the court's protection must depend on the experience and the sentiments of each community.

In *State v. Grundler*[5] the defendant attempted to show by direct examination of his witness that the prosecutrix had had relations with the witness on the night of the alleged rape, contending that such evidence was competent as tending to show consent to the alleged act of the defendant. The Court in affirming the exclusion of the evidence[6] quoted reasons usually given for excluding evidence of specific acts of misconduct offered for purposes of impeachment.[7] However, it is apparent that the Court intended to deal with the consent issue only, since such evidence was clearly inadmissible for impeachment purposes.[8]

The North Carolina Court in excluding the evidence was undoubtedly motivated by some of the following factors: The prosecutrix would have only her protestations of innocence on which to rely to rebut a witness' accusations, since acts of intimacy are usually accomplished in private. The admission of such evidence would encourage fraudulent accusations against innocent victims of carnal assault, and would tend to discourage victims of rape from pressing prosecution because of the fear that their character would be specifically assailed. Innocence and virtue of the prosecutrix is not a prerequisite to the crime of rape—prostitutes may be the victims of rape.[9] The defendant is not put to any real disadvantage since he can still show the prosecutrix's reputation for unchastity. For impeachment purposes he can cross examine her about specific acts, and although he is bound by her answer,[10] the jury will nevertheless have an opportunity to observe her demeanor and draw its own conclusions.

The present law in North Carolina in rape and related offenses seems to be that: (1) Direct evidence of specific acts of unchastity of the prosecutrix *with the defendant* is admissible to show consent to the act in question.[11] (2) Evidence of specific acts of unchastity *with third*

[5] 251 N.C. 177, 111 S.E.2d 1 (1959).
[6] The Court cited and relied upon State v. Jefferson, 28 N.C. 305 (1846).
[7] Such reasons are usually stated to be: (1) unfair surprise, *i.e.*, the witness whose character is being attacked is unprepared to rebut specific attacks on her character; (2) confusion of issues, *i.e.*, the witness's character is only a collateral issue and direct evidence on it only tends to confuse the jury; (3) unreasonable delay, *i.e.*, such specific evidence delays the trial and consumes an unwarranted amount of time. See generally STANSBURY, EVIDENCE § 111 (1946); WIGMORE, EVIDENCE § 979 (3d ed. 1940).
[8] STANSBURY, EVIDENCE § 111 (1946).
[9] State v. Long, 93 N.C. 542 (1885).
[10] STANSBURY, EVIDENCE § 111 (1946).
[11] State v. Jefferson, 28 N.C. 305 (1846) (dictum).

parties may be brought out on cross-examination of the *prosecutrix*,[12] but only for purposes of impeachment,[13] and the defendant is bound by her answer.[14] (3) The prosecutrix's reputation for the specific character trait of unchastity may not be inquired into on direct examination of the defendant's witnesses to impeach her;[15] however, such evidence may be volunteered by the witness in response to an inquiry as to the prosecutrix's general reputation.[16] It is probably permissible on direct examination to inqure about the specific character trait of unchastity in order to show consent.[17] (4) Evidence of a specific character trait, brought out on cross examination, is competent both for impeachment purposes[18] and to show consent.[19]

Identification of Antiphonal Party

In *Everette v. D. O. Briggs Lumber Co.*[20] the defendant challenged the admissibility of seven telephone conversations relied on by the plaintiff to establish the contract on which he sued. Two of the calls were made *by* the plaintiff to defendant's place of business. In one instance a person purporting to be the defendant answered. In the other instance the defendant was out at the time, but a party purporting to be the defendant called the plaintiff back later the same day. These two calls were clearly admissible.[21] The other five calls were made *to* the plain-

[12] State v. Murray, 63 N.C. 31 (1868).
[13] State v. Grundler, 251 N.C. 177, 111 S.E.2d 1 (1959).
[14] Stansbury, Evidence § 111 (1946).
[15] Stansbury, Evidence § 114 (1946).
[16] *Ibid.*
[17] State v. Grundler, 251 N.C. 177, 192, 111 S.E.2d 1, 11 (1959) (dictum); State v. Daniel, 87 N.C. 507 (1882) (dictum that evidence of prosecutrix's *reputation for virtue*, a specific character trait, can be elicited on direct examination of defendant's witness to show consent, even though she is not called as a witness); State v. Jefferson, 28 N.C. 305 (1846) (suggestion that evidence that prosecutrix is a strumpet would be admissible to show consent). *But see* State v. Hairston, 121 N.C. 579, 28 S.E. 492 (1897).

By way of analogy it is noted that, where the defendant pleads self defense in a prosecution for homicide, evidence of the deceased's character for violence may be inquired into on direct examination of the defendant's witnesses. Stansbury, Evidence §§ 106, 114 (1946).

[18] Stansbury, Evidence § 114 (1946).
[19] State v. Jefferson, 28 N.C. 305 (1846) (dictum).
[20] 250 N.C. 688, 110 S.E.2d 288 (1959), also discussed in Business Associations, *Corporations—Ultra Vires Acts, supra.*
[21] See International Harvester Co. v. Caldwell, 198 N.C. 751, 153 S.E. 325 (1930). See also State v. Burleson, 198 N.C. 61, 150 S.E. 628 (1929); Stansbury, Evidence § 96 (1946). "According to the weight of authority, evidence is admissible as to a conversation over the telephone where the witness called for a designated person or firm at his or its place of business and the person answering the call claims to be the person called for . . . and the conversation carried on is one regarding the business transacted by such person or firm." 20 Am. Jur. *Evidence* § 367 (1939). "It has been said that telephone calls purporting to have been made by a person are never admissible against him without some proof identifying him as the caller. Where, however, the witness testifies that he made a call for a designated individual and was informed that the person called was not in his office at the time, a later call purporting to come from such person has been held admissible." 20 Am. Jur. *Evidence* § 366 (1939).

tiff by a party purporting to be the defendant. These calls, standing alone, were clearly inadmissible.[22] However, the plaintiff testified that the voice was the same in all seven calls. The defendant admitted that he was the antiphonal party in the call made by the plaintiff. *Held:* The plaintiff's testimony that the antiphonal party was the same in all seven calls, plus the defendant's testimony that he was the antiphonal party to one of the calls, was sufficient to identify the defendant as the antiphonal party in the five otherwise inadmissible calls.

It would seem that there was sufficient identification of the defendant even without his admission that he was the antiphonal party to one of the admissible calls. Two of the calls were admissible under an accepted rule of evidence, even though the plaintiff had never before heard the defendant's voice. For purposes of admissibility this would seem to have established the plaintiff's knowledge of the defendant's voice. Since the plaintiff testified that this same party was the caller in the five calls to the plaintiff, this would seem to identify sufficiently the defendant as the antiphonal party to these calls. However, in the light of the defendant's admission it was unnecessary for the Court to decide this point.

Relevancy of Injuries To Third Parties in Prosecution for Driving While Intoxicated

In *State v. Green*[23] the defendant was being prosecuted for driving while under the influence of intoxicating liquor. The evidence showed that defendant's car had gone out of control and struck a little girl pushing a bicycle. The State's witnesses were allowed to testify as to the nature and extent of the injuries sustained by the little girl, over defendant's objection that such testimony was irrelevant and calculated to prejudice his cause and create sympathy for the State's case. However, at defendant's request the trial court charged the jury not to consider an injury to another person growing out of the car wreck, that the only issue was whether defendant was driving while intoxicated. On appeal the Court held that "the testimony that the child was injured, that the injuries were serious and that she was hospitalized, was clearly relevant as bearing upon the manner of operation of the automobile and the lack of control by defendant."[24]

North Carolina, in a manslaughter prosecution predicated on excessive speeding and driving while intoxicated, has allowed evidence of the *existence* of injuries to the occupants of the car with which defendant's

[22] Griffin Mfg. Co. v. Bray, 193 N.C. 350, 137 S.E. 151 (1927). See also Note, 11 N.C.L. Rev. 344 (1933): "[W]here the witness answers a telephone call and there is no evidence to authenticate the antiphonal speaker, except that the states his name, the evidence is inadmissible as hearsay."

[23] 251 N.C. 40, 110 S.E.2d 609 (1959), also discussed in Criminal Law and Procedure, *Criminal Procedure—Arrest, supra.*

[24] 251 N.C. at 45, 110 S.E.2d at 613.

car collided, in order to show the *speed* of defendant's car.[25] Decisions in other jurisdictions are in conflict on the issue of admissibility of evidence of injuries to third persons in prosecutions for driving while intoxicated. The holdings fall into four categories: (1) Evidence of injuries to third persons and of damage to the other vehicle is irrelevant and immaterial to the question of whether the defendant was driving while intoxicated.[26] (2) Evidence of injuries to other persons and the location of these persons after the collision is admissible, but details as to the extent of the injuries are inadmissible.[27] (3) Evidence of the existence of injuries to third persons is admissible, but the court so holding expressed no opinion as to the extent the injuries may be shown.[28] (4) Evidence of the injuries in detail, including the length of time the injured party spent in the hospital,[29] is admissible to shed light on the force of the collision, the speed at which defendant's car was moving, and the manner of its operation.[30] Texas[31] has stated that evidence of pain and suffering resulting from the injury would be inadmissible, because that would shed no light upon the manner of operation of the automobile.

It should be noted that the cases allowing evidence of injury to be admitted involve injuries sustained by *occupants* of cars.[32] Ordinarily an occupant of a car is seriously injured only when there has been an extraordinary or forceful impact upon the car in which he is riding, whereas a pedestrian is usually more seriously injured with much less impact than is a person protected by the exterior of an automobile. Since the little girl in the instant case was a pedestrian, it is questionable whether the fact and extent of her injuries would shed much light upon "the manner of operation of the automobile and the lack of control by

[25] State v. Leonard, 195 N.C. 242, 141 S.E. 736 (1928).

[26] Walker v. State, 37 Ala. App. 639, 74 So. 2d 617, *cert. denied*, 261 Ala. 700, 74 So. 2d 618 (1954); Goodwin v. State, 36 Ala. App. 680, 62 So. 2d 801 (1953); Phillips v. State, 25 Ala. App. 286, 145 So. 169 (1932); Howard v. State, 24 Ala. App. 191, 132 So. 459 (1931); City of St. Louis v. Cain, 137 S.W.2d 603 (Mo. App. 1940).

[27] Bryant v. State, 302 P.2d 787 (Okla. Crim. 1956).

[28] People v. Dennis, 132 Misc. 410, 230 N.Y. Supp. 510 (Cortland County Ct. 1928).

[29] Massoletti v. State, 303 S.W.2d 412 (Tex. Crim. 1957). In the *Green* case our Court viewed testimony recounting the witnesses' visits to the hospital to see the child as being in the twilight of relevancy, but felt that any error, if made, was cured by the trial court's instructions.

[30] Sanders v. State, 97 Ga. App. 158, 102 S.E.2d 635 (1958); People v. Jeffers, 372 Ill. 590, 25 N.E.2d 35, *cert. denied*, 310 U.S. 638 (1940); Pribyl v. State, 165 Neb. 691, 87 N.W.2d 201 (1957); Massoletti v. State, 303 S.W.2d 412 (Tex. Crim. 1957); Van Ness v. State, 159 Tex. Crim. 295, 263 S.W.2d 162 (1953); Atkinson v. State, 157 Tex. Crim. 556, 251 S.W.2d 401 (1952); Allen v. State, 149 Tex. Crim. 612, 197 S.W.2d 1013 (1946); Brewer v. State, 140 Tex. Crim. 9, 143 S.W.2d 599 (1940); Ladd v. State, 115 Tex. Crim. 355, 27 S.W.2d 1098 (1930).

[31] Allen v. State, *supra* note 30.

[32] Brewer v. State, 140 Tex. Crim. 9, 143 S.W.2d 599 (1940), is the exception. There the injured parties were standing around a wrecked car when the defendant careened into them.

defendant." It is arguable that the relevancy of the evidence is remote, and that in the light of the obvious prejudice to defendant it should have been excluded.[33]

DEAD MAN'S STATUTE

In *Lamm v. Gardner*[34] the plaintiff alleged that she was riding as a passenger in *A*'s car which collided with that of *B*, defendant's intestate, and that she was injured as a result of the joint negligence of *A* and *B*. Plaintiff's theory of *A*'s negligence was that *A* failed to take proper precautions to avoid the collision. Plaintiff alleged and *A* admitted that *B* had zigzagged across the highway in approaching *A*'s car. On *A*'s objection the trial court refused to allow plaintiff to testify as to the manner in which *B* operated his car. On appeal the Court, recognizing that such testimony was incompetent as against *B*'s administrator under the Dead Man's Statute, G.S. § 8-51, nevertheless held that such testimony was admissible against *A*. The testimony was allowed under the rule that evidence, incompetent as to one party, will not be excluded if it is competent as to another party.[35] The proper procedure in such a case is to limit the evidence by instructions to the jury.

DEFINITENESS OF MEDICAL TESTIMONY

In North Carolina a medical expert is confined to stating certain or probable consequences, as opposed to possible consequences, of the future effects of a personal injury.[36] However, a statement that a "very small percentage" of those suffering head injuries will develop epileptic fits as a result of such an injury was held in *Fisher v. Rogers*[37] to be sufficiently certain to be admissible. This would seem to indicate that, though a phsyician may not state that a certain condition "might" result from the injury, yet he may state that this condition follows from the injury in a certain percentage, *e.g.*, five per cent, of the cases involving that type of injury.

[33] See STANSBURY, EVIDENCE § 80 (1946): "Even relevant evidence may, however, be subject to exclusion where its probative force is comparatively weak and the likelihood of its playing upon the passions and prejudices of the jury is great."

[34] 250 N.C. 540, 108 S.E.2d 847 (1959).

[35] STANSBURY, EVIDENCE § 79 (1946).

[36] Dickson v. Queen City Coach Co., 233 N.C. 167, 63 S.E.2d 297 (1951); Dulin v. Henderson-Gilmer Co., 192 N.C. 638, 135 S.E. 614 (1926); Alley v. Charlotte Pipe & Foundry Co., 159 N.C. 327, 74 S.E. 885 (1912).

[37] 251 N.C. 610, 112 S.E.2d 76 (1960).

INSURANCE

AUTOMOBILE INSURANCE

Liability

In *Textile Ins. Co. v. Lambeth*[1] plaintiff insurer sought a declaratory judgment that neither of two policies of liability insurance issued by it to the insured covered insured's liability to the defendants arising out of a collision between the insured's truck and a tractor-trailer owned by one of the defendants.

One of the policies involved had two endorsements which, in effect, limited the insured's liability coverage to operation of the vehicles within a radius of fifty miles from the place at which they were principally garaged or operations authorized by the insured's permit or certificate of public convenience and necessity covering transport of goods between all points throughout North Carolina issued by the North Carolina Utilities Commission. The collision occurred in North Carolina, but more than fifty miles from the place at which the insured's truck was principally garaged while it was engaged in an interstate operation. The Court held that the policy did not cover the accident because: (1) it had occurred more than fifty miles from the place at which the vehicle involved was principally garaged, and (2) the insured was engaged in interstate commerce and the endorsement issued by the insurer to meet the requirements of the Utilities Commission did not extend the policy coverage to the accident in question because the Utilities Commission was neither authorized nor empowered to authorize interstate operation.

This holding is in accord with the general rule that a policy endorsement issued to comply with the requirements of a regulatory agency will provide coverage to the public only with respect to operations validly authorized by the insured's permit or certificate of public convenience.[2]

The other policy involved in *Lambeth* covered the interstate operation of one of the vehicles of the insured but not the one involved in the accident. The defendants offered clear, cogent, and convincing evidence showing that an agent of the insurer, possessing the requisite authority, had orally agreed with the insured to extend the policy coverage to the vehicle involved. The Court, on the basis of this evidence, allowed the insurance policy to be reformed so as to cover the vehicle in question on the ground of mutual mistake.

In *State Farm Mut. Auto. Ins. Co. v. Shaffer*[3] the Court for the first time was called upon to interpret the replacement provision in an auto-

[1] 250 N.C. 1, 108 S.E.2d 36 (1959).
[2] See, *e.g.*, Simon v. American Cas. Co., 146 F.2d 208 (4th Cir. 1944).
[3] 250 N.C. 45, 108 S.E.2d 49 (1959).

mobile liability insurance policy. The insured owned two automobiles, one of which was covered by plaintiff insurer and the other by defendant insurer. The insured traded the car covered by defendant for another car, and subsequently the insured's nineteen-year-old son, while driving the newly acquired car, negligently injured several persons. Both policies' replacement provisions were substantially similar in that each provided that a replacement automobile must be newly acquired and must replace the automobile covered by the policy. The Court held that the provision meant that such replacement vehicle must be *actually acquired* after issuance of the policy and that the previously covered vehicle must be out of the operational control of the insured. Thus, since the insured still owned the automobile covered by the plaintiff, the newly acquired car could not be a replacement of that car. Accordingly it held that the newly acquired automobile was covered by the defendant insurer.[4] The Court rejected the contention of the defendant insurer that since the insured and his son had treated the newly acquired automobile as a replacement for the car covered by the plaintiff, this expressed intent should be determinative of the question. The defendant argued that this intent was shown by the facts that the policy it issued was under a Class 1-B rating[5] whereas the policy plaintiff issued was under a Class 2-A rating covering male drivers under twenty-five years of age and that the insured permitted his son to use the newly acquired car regularly. The Court held that the fact that the car was covered by a policy with a permium rating of Class 1-B did not affect the liability of the insurer even though the operator at the time of the accident was a male member of the insured's household under twenty-five years of age. The Court stated that in order to exclude liability when a male under twenty-five years of age is driving the car, such exclusion must be stated in plain and explicit terms in the policy, and it will not be implied from a premium rating excluding such drivers.[6] The Court

[4] This holding is similar to that in Mitcham v. Travelers Indem. Co., 127 F.2d 27 (4th Cir. 1942), where the policy provided automatic coverage for a newly acquired replacement vehicle. The insured bought a new car to replace the described automobile and left his old car with the dealer for storage and sale. The court held that the new car was not covered under the policy because to so hold would be to subject the insurer to liability on the operation of two vehicles at the same time for one premium, since there was nothing to prevent the insured from getting back his old car and using it at any time.

[5] Class 1-B means:

"(b) the Named Insured is not a male operator of the automobile under 25 years of age, and there is no male operator of the automobile under 25 years of age resident in the same household as the Named Insured . . . ."

Class 2-A means:

"(b) There is a male operator of the automobile under 25 years of age resident in the Named Insured's household . . . ."

[6] This decision is in line with the general construction of exclusionary policy terms. See, *e.g.*, Sutton v. Hawkeye Cas. Co., 138 F.2d 781 (6th Cir. 1943); 45 C.J.S. *Insurance* § 585 (1946): "Clauses of warranty, condition, exclusion, and forfeiture contained in a liability policy must be explicit."

thus held that the fact that the premium was paid under a 1-B rating did not affect the insurer's liability under the policy.

In *Squires v. Textile Ins. Co.*[7] an employee of the insured, while in the scope of his employment, negligently injured the plaintiff. The employee was operating his *own* automobile. Plaintiff sought to recover under a garage liability insurance policy issued by defendant to the employer. The policy contained conflicting provisions. It covered employees driving any automobile which, though not owned by the insured, was being used in connection with his business. However under the definition of "insured" the policy excluded any employee when driving his own automobile. The Court, in holding that the policy covered the employee, determined that the terms of the policy were conflicting and ambiguous and followed the settled rule[8] that in such case the ambiguities and conflicts are to be resolved against the insurer.

In *LeCroy v. Nationwide Mut. Ins. Co.*[9] the Court held that a three-wheeled motor scooter of the type used by the United States Postal Service was an "automobile" within the terms of a comprehensive liability policy, and accordingly the insured was entitled to a recovery. It refused to accept defendant's contention that the so-called "mailster" was similar to a motorcycle which has seldom been classed as an "automobile."[10]

Settlement by Insurer

The Court held in *Beauchamp v. Clark*[11] and *Lampley v. Bell*[12] that the exercised policy right of the insurer to investigate and settle claims against the insured as it deems expedient will not bar the right of the insured or his agent to sue for their personal injuries or property damage because the insurer has no right to compromise the insured's or his agent's claims without their consent. This rule was reiterated in *Campbell v. Brown.*[13] *Beauchamp* and *Lampley* are the subject of a Note in this volume.[14]

Subrogation of Paying Insurer

In *Southeastern Fire Ins. Co. v. Moore*[15] the Court held that payment by an insurer of the damage done to insured's car, less fifty dollars deductible under the policy terms, did not entitle the insurer to sue the third party tort-feasor in his own name when the insured had received

[7] 250 N.C. 580, 108 S.E.2d 908 (1959).
[8] See, *e.g.* Johnson v. New Amsterdam Cas. Co., 234 N.C. 25, 65 S.E.2d 347 (1951).
[9] 251 N.C. 19, 110 S.E.2d 463 (1959).
[10] 29A AM. JUR. *Insurance* § 1239 (1960).
[11] 250 N.C. 132, 108 S.E.2d 535 (1959).
[12] 250 N.C. 713, 110 S.E.2d 316 (1959).
[13] 251 N.C. 214, 110 S.E.2d 897 (1959).
[14] 38 N.C.L. REV. 81 (1959).
[15] 250 N.C. 351, 108 S.E.2d 618 (1959).

the money in the form of a "loan" repayable only in the event of recovery from the tort-feasor. The case is the subject of a Note in this volume.[16]

LIFE INSURANCE

Death on Premium Due Date

A question of first impression in North Carolina was presented to our Court in *Long v. Pilot Life Ins. Co.*[17] The insured had a life insurance policy which provided for annual payments of the premiums in advance on or before the eighth day of October of each year. Also there was a provision for thirty-one days of grace, and in the event of death within the grace period the unpaid premium for the current year would be deducted from the proceeds payable to the beneficiary. The insured died on the premium due date and the insurer deducted the amount of the annual premium from the proceeds paid to the beneficiary. The Court upheld this deduction on the reasoning that the due date was the beginning of a new policy year and the coverage for that date and the grace period was not a gratuity to the insured, but that the insured incurred liability for the annual premium due if death occurred on the due date or within the period of grace. This places North Carolina in line with the weight of authority on the question.[18]

Payment of Premium As Creating Lien on Policy

The Court reaffirmed[19] in *Harrison v. Winstead*[20] its position that in the absence of an enforceable contract entered into between the claimant and the insured, the payment of premiums alone is insufficient to create a lien on the policy and its proceeds in favor of such claimant.

[16] 38 N.C.L. REV. 99 (1959).
[17] 250 N.C. 590, 108 S.E.2d 840 (1959).
[18] See 29 AM. JUR. *Insurance* § 513 (1960), which states: "[W]here an insured dies on the day the annual or periodic premium is due under his life insurance policy, the insurer may require the payment of the premium by the beneficiary and deduct the amount of such premiums from the amount paid to the beneficiary under the policy."
[19] See, *e.g.*, Sorrell v. Sovereign Camp, Woodmen of the World, 209 N.C. 226, 183 S.E. 400 (1936).
[20] 251 N.C. 113, 110 S.E.2d 903 (1959). The facts in the case were that the mother of the deceased was the original beneficiary, but the insured had exercised his right to change the beneficiary in favor of his wife. The mother alleged that she had loaned money to her son with the policy as security and that she had paid the premiums on the policy, but the Court would not allow this evidence because to do so would be a violation of North Carolina's Dead Man Statute, G.S. § 8-51.

LABOR LAW

UNION'S LIABILITY TO MEMBER FOR FAILURE TO SEEK JUDICIAL ENFORCEMENT OF REINSTATEMENT ORDER

In *Glover v. Brotherhood of Ry. Clerks*,[1] a case of first impression in North Carolina, the Court considered whether a union member has a cause of action for damages against his union when it fails to prosecute fully his claim against a railroad for wrongful discharge. Pursuant to the Railway Labor Act[2] the union carried plaintiff's claim to the National Railroad Adjustment Board[3] which ruled in plaintiff's favor and ordered his reinstatement. The railroad refused to reinstate plaintiff or pay his lost wages. Plaintiff alleged that he had agreed to refrain from seeking enforcement of the Board's order in the United States District Court in reliance on the union's promise that it would do so.[4] He further alleged that the union had failed to seek enforcement of his claim and that, as a consequence, the two-year statute of limitations on the enforcement action[5] had run, leaving him with no means of enforcing his claim. The union demurred on the ground that plaintiff, as a member of an unincorporated association, was a co-principal with the other members, all of whom were equally responsible for the acts of their mutual agents.[6]

The trial court sustained the demurrer, but the Supreme Court reversed. The Court acknowledged the validity of the co-principal doctrine as applied in the cases cited by defendant,[7] but held that the principle did

[1] 250 N.C. 35, 108 S.E.2d 78 (1959), also discussed in CIVIL PROCEDURE, *Parties—Real Party in Interest, supra.*

[2] Railway Labor Act, 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151-63 (1958).

[3] The Board is provided for in 44 Stat. 578 (1926), as amended, 45 U.S.C. § 153(*i*) (1958).

[4] 44 Stat. 578 (1926), as amended, 45 U.S.C. § 153(p) (1958), reads in part, "If a carrier does not comply with an order of . . . [the] Board . . . the petitioner [union], or any person for whose benefit such order was made, may file in the District Court of the United States . . . a petition . . . . The District Courts are empowered . . . to make such order . . . as may be appropriate to enforce or set aside the order of the . . . Board."

[5] 44 Stat. 578 (1926), as amended, 45 U.S.C. § 153(q) (1958).

[6] There were two other grounds for demurrer, both involving the same issue, which the Court dismissed rather summarily.

The co-principal rule is applied in a number of cases. It is based on the rationale that an unincorporated association is not a separate entity but has its existence in the totality of its membership, all members being co-principals and equally responsible for the acts of their mutual agents. Therefore, if a member sues a union for the act of its agent, he either divorces himself from the union, in which case he is not suing the union but only a part thereof, or he considers himself a part of the union, in which case he is suing himself—a legal incongruity. See discussion of cases cited by defendant, note 7 *infra.*

[7] Several of the cases which the Court mentioned actually involved failure of a union to represent its members in claims against a railroad. Kordewick v. Brotherhood of R.R. Firemen, 181 F.2d 963 (7th Cir. 1950); Marchitto v. Central R.R., 9 N.J. 456, 88 A.2d 851 (1952); McClees v. Grand Int'l Bhd. of Locomotive Eng'rs, 59 Ohio App. 477, 18 N.E.2d 812 (1938); Brotherhood of R.R. Trainmen v. Allen, 148 Tex. 629, 230 S.W.2d 325 (1950). Of these cases only *Kordewick*

not apply in this case because plaintiff alleged a contractual obligation on the part of the union to pursue his claim. The Court stated that the complaint was sufficient against a demurrer since a valid contract and breach thereof were alleged. In a concurring opinion Justice Bobbitt discarded the co-principal rule and reasoned that under the Railway Labor Act the union, not its individual members, became the exclusive bargaining agent and a separate entity while representing employees; thus, when the union as a separate entity assumes contractual obligations to employees regarding representation, it is liable as a separate entity if it breaches such a contract.

The North Carolina Court is the first to hold that there is a cause of action in favor of a railroad employee arising out of the failure of his union to pursue fully his statutory remedy under the Railway Labor Act. Both the New Jersey and Rhode Island courts have applied the co-principal rule and held that no cause of action exists.[8] However, the *Glover* case appears to be distinguishable on its facts from these cases. In the New Jersey and Rhode Island cases the plaintiff based his claim on the union's duty to him as a member,[9] as distinguished from the *Glover* claim, based on express contract. Further, both the New Jersey and Rhode Island courts indicated, by way of dicta, that, if the action was based on a promise, undertaking or agreement by the union to act in some specific manner for the benefit of the member as an individual, the member would have a cause of action for its breach.[10]

It should be noted that under the holding of the majority in the *Glover* case the plaintiff must prove a specific contractual undertaking.[11]

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mentions what appears to be a strong factor in denying a member the right to sue his union for failure to pursue his claim: that a union must be left free to make policy decisions concerning the bringing and pressing of members' claims. Most of the remaining cases recognized by the Court were personal injury actions based on negligence of union agents. *E.g.*, Duplis v. Rutland Aerie, No. 1001, 18 Vt. 438, 111 A.2d 727 (1955); Carr v. Northern Pac. Beneficial Ass'n, 128 Wash. 40, 221 Pac. 979 (1924); Hromek v. Gemeinde, 238 Wis. 204, 298 N.W. 587 (1941).

[8] Marchitto v. Central R.R., 9 N.J. 456, 88 A.2d 851 (1952); Cabral v. Local 41, Int'l Moulders Union, 82 R.I. 178, 106 A.2d 739 (1954). See also Kordewick v. Brotherhood of R.R. Firemen, 181 F.2d 963 (7th Cir. 1950); McClees v. Grand Int'l Bhd. of Locomotive Eng'rs, *supra* note 7.

[9] In McClees v. Grand Int'l Bhd. of Locomotive Eng'rs, *supra* note 8, an Ohio case, plaintiff alleged that, through the constitution and rules of the defendant union, the union owed him a contractual duty to determine and enforce his seniority rights. The court held that, though cases where a union owes a member a duty as an individual might arise, here plaintiff was predicating his right solely on his membership in the union. Therefore, it applied the co-principal rule and affirmed the lower court's dismissal.

[10] See also McClees v. Grand Int'l Bhd. of Locomotive Eng'rs, *supra* note 9. Compare DiMaio v. Local 80-A, United Packinghouse Workers, 29 N.J. Super. 341, 102 A.2d 480 (1954) (defamation); Taxicab Drivers' Local Union No. 889 v. Pittman, 322 P.2d 159 (Okla. 1959) (wrongful interference with member's job).

[11] Though the implications of his concurring opinion are not fully ascertainable, it seems likely that Justice Bobbitt would hold that the union would be liable solely because of the membership relationship if that relationship is contractual, since otherwise his opinion is virtually the same as that of the majority.

The complaint and briefs in the principal case are not definite as to the details of the alleged contract,[12] but the Court stated that when liberally construed the complaint alleges a contract of agency whereby the union had "exclusive authority to prosecute the claim."

MUNICIPAL CORPORATIONS

DEDICATION

In *City of Salisbury v. Barnhardt*[1] the Court held that when a street has been dedicated and used for many years, although the use may not have been extended to the full width of the street, the unused part does not lose its character as a street. Here a new street was constructed beside the original street. The old street was not closed but only a small part of it continued to be used. This action was to require the removal of a granite wall which had been built upon an unused part of the original strip over twenty years before this suit was brought. The Court found no evidence to the effect that opening the new street constituted a relocation of the existing street or an abandonment of any portion thereof; therefore, G.S. § 136-96, providing for withdrawal by the dedicator after fifteen years nonuse, was held not to apply.[2] The Court relied in part upon G.S. § 1-45, which provides that no one may acquire any exclusive right to a public way by reason of occupancy or of encroachment upon it. Two exceptions to this latter statute were recognized by the Court: (1) where a street has been dedicated and the municipality has never accepted the dedication, and (2) where the dedicated street, if accepted, was later abandoned. Neither exception was applicable in the *Barnhardt* case, and the Court properly affirmed the trial court's order that the wall be removed.

Withdrawal of certain streets whose dedication was found never to have been accepted was allowed under G.S. § 136-96 in *Steadman v. Town of Pinetops*,[3] which is discussed under REAL PROPERTY, *Dedication, infra,* and BUSINESS ASSOCIATIONS, *Corporations—Effect of Dissolution, supra.*

ZONING—STATUTES AND ORDINANCES CONSTRUED

In *Chambers v. Zoning Bd. of Adjustment*[4] the defendant had granted a permit to construct a multi-family dwelling project. This action was based on a decision by the planning board that the project

[12] Brief for Appellant, pp. 3, 9, 10; Record, pp. 5-10.

[1] 249 N.C. 549, 107 S.E.2d 297 (1959).
[2] See also Spicer v. City of Goldsboro, 226 N.C. 557, 39 S.E.2d 526 (1946).
[3] 251 N.C. 509, 112 S.E.2d 102 (1960).
[4] 250 N.C. 194, 108 S.E.2d 211 (1959).

was properly located and "the provision for on-street parking along the wide (34-foot) paved roads was adequate."[5] The defendant's decision was made pursuant to a municipal ordinance which authorized the issuance of such permits, provided that "(5) garage or other satisfactory automobile storage space is provided on the premises, sufficient to accommodate one car for each building unit. . . ."[6] The superior court affirmed defendant's findings and ordered the permit issued. On appeal to the Supreme Court the issue was whether there had been substantial compliance with the automobile storage provisions of the ordinance. In reversing, the Court stated that not only was there no provision for garages, on-street parking not qualifying as a garage, but such parking did not qualify as "other satisfactory automobile storage space." Construing the ordinance the Court said that when enumerations by specific words or terms are followed by general words or terms, the general shall refer to the same classification as the specific. The Court also stated that even if there were no provision for a garage in the ordinance it would be hard to treat on-street parking as "satisfactory automobile storage space."

In *Penny v. City of Durham*[7] plaintiffs contended that a rezoning ordinance passed by the city council, with less than a three-fourths majority, was void under a statute[8] which required the affirmative vote of three-fourths of the council to change a zone when the owners of at least twenty per cent of the lots "directly opposite" the area made written protests against such change. The plaintiffs owned more than twenty per cent of the footage directly across the street from the land owned by defendant; however, there was a 150 foot "buffer strip" of defendant's land between the street and the area defendant wanted rezoned. The ordinance was upheld, the Court stating that "directly opposite" was to be defined as those tracts of land on opposite sides of the street with only the street intervening.[9]

Taxation and Finance

In *Lewis v. Beaufort County*[10] a referendum had approved a bond issue not to exceed 650,000 dollars to finance the erecting and equipping of "a new building or buildings to be used as a public hospital, and the

[5] *Id.* at 197, 108 S.E.2d at 213, quoting from the board's report.
[6] Winston-Salem, N.C., City Code § 48-13(c) (1953).
[7] 249 N.C. 596, 107 S.E.2d 72 (1959).
[8] "In case, however, of a protest against such change signed by the owners of twenty percent or more . . . of the area of the lots . . . directly opposite thereto extending one hundred feet from the street frontage of such opposite lots, such amendment shall not become effective except by favorable vote of three-fourths of all the members of the legislative body of such municipality." N.C. Gen. Stat. § 160-176 (Supp. 1959).
[9] *Accord*, Montebello Land Co. v. Frank Novak Realty Co., 167 Md. 185, 172 Atl. 911 (1934).
[10] 249 N.C. 628, 107 S.E.2d 77 (1959).

acquisition of a suitable site therefor . . . ."[11] A fully equipped hospital was erected, and a surplus of over 14,000 dollars in authorized bonds remained unissued. The Board of Commissioners passed a resolution to expend this amount for constructing a clinic in the town of Aurora. The plaintiff, a resident and taxpayer, brought suit to enjoin the use of any part of the proceeds for this purpose. An injunction was granted by the superior court, and the Supreme Court affirmed. The Court relied on the provisions of the bond issue that the issue was to acquire *a* site and build and equip *a* hospital, and applied the test of whether the project was included within the general purpose for which the bonds were authorized. The proposed clinic was not considered part of the original project as approved by the electors, but an additional one.

The *Lewis* case is in accord with an earlier case, *Worley v. Johnston County*,[12] where the same test was applied, though the result was different. In the *Worley* case the trustees had wanted to expend funds for the erection of a nurses' home on the hospital grounds. It was held that this was not in excess of, or a departure from, the general purpose declared in the original resolution of the county commissioners as approved by the electorate. An additional expenditure in excess of bond issue funds was disapproved in *Rider v. Lenoir County*[13] where a bond issue not to exceed 465,000 dollars had been authorized for expenditure on a hospital. In the *Rider* case more money was needed in order to accept the lowest construction bid; however, the Supreme Court stated that the stipulation fixing the maximum created a limitation on subsequent official acts based upon the referendum and could not be materially varied. Consequently the proposed supplemental appropriation from the general treasury to supplement the bond issue funds was held to be a material variance and was not permitted. As is shown by these cases, the wording of the bond ordinance is very important if a controversy arises.

Abatement of Nuisance

Rhyne v. Town of Mount Holly[14] involved an action by plaintiff to recover for damage to his property caused by defendant's alleged trespass upon a vacant city lot in bulldozing and scraping away almost all the living trees and other vegetation growing thereon, including over one hundred oak trees. Defendant answered that plaintiff had allowed his lot to become overgrown with weeds in violation of a duly enacted city ordinance which authorized the defendant in such circumstances to enter and cut down the weeds. The jury found that there had been a trespass and damage to plaintiff's property. On appeal the Supreme

[11] *Id.* at 629, 107 S.E.2d at 78.
[12] 231 N.C. 592, 58 S.E.2d 99 (1950).
[13] 236 N.C. 620, 73 S.E.2d 913 (1953).
[14] 251 N.C. 521, 112 S.E.2d 40 (1960).

Court affirmed, stating that when private property is taken for a public use or purpose just compensation must be paid its owner. In addition to the contention that it had authority to clean the lot by virtue of the municipal ordinance[15] defendant contended that it had been abating a nuisance. It also claimed sovereign immunity. While the Court recognized these defenses it set forth the test of liability: "whether, notwithstanding its acts are governmental in nature and for a lawful public purpose, the municipality's acts amount to a partial taking of private property. If so, just compensation must be paid."[16] Thus although the power to abate nuisances is a governmental function, when the municipality enters upon and damages private property it is liable for the payment of just compensation "unless its acts were *in fact* necessary to remove or abate a nuisance."[17] Conceding that the weeds constituted a nuisance which could properly be abated, the Court pointed out that the lot could have been cleared without destroying the trees thereon. Apparently this is a case of first impression in North Carolina, and it seems from the case that a declaration by a municipal corporation that something is a nuisance is not a final determination. The municipality's actions are subject to review both as to their reasonableness and as to whether in fact a nuisance did exist.[18]

NEGOTIABLE INSTRUMENTS

NOTE OF THIRD PERSON AS PAYMENT OF ORIGINAL NOTE

In *F. D. Cline Paving Co. v. Southland Speedways, Inc.*[1] the Court reaffirmed its position[2] that a note of a third person given by the debtor to his creditor is not payment and discharge of the debtor's obligation unless there is a clear and special agreement between the creditor and debtor to that effect. The burden of proof of such agreement is on the debtor. The holding is clearly in the majority[3] which treats such payment as conditional or as collateral security. The effect of this in principal case was to hold the endorsers on the original note liable after the makers of the original note and the makers of the new note given had defaulted.

[15] Town of Mount Holly, Code, art. III, § 3, as authorized by N.C. GEN. STAT. § 160-55 (1952).
[16] 251 N.C. at 527, 112 S.E.2d at 45.
[17] *Id.* at 528, 112 S.E.2d at 46.
[18] See generally 62 C.J.S. *Municipal Corporations* § 279 (1949).

[1] 250 N.C. 358, 108 S.E.2d 641 (1959), also discussed in CREDIT TRANSACTIONS, *Substituted Note as Payment of Original Note, supra.*
[2] Grady v. Pink Hill Bank & Trust Co., 184 N.C. 158, 113 S.E. 667 (1922).
[3] See BRITTON, BILLS & NOTES § 263 (1943); 40 AM. JUR. Payment § 87 (1942); 70 C.J.S. *Payment* § 29 (1951).

BANK AS "OWNER" OF DEPOSITED PAPER

In *State Planters Bank v. Courtesy Motors, Inc.*[4] a bank was allowed to waive the stipulations on its deposit slip that it was collection agent only and sue on deposited paper, against which it had allowed withdrawals, as "owner" and holder in due course. This case is the subject of a Note in this volume.[5]

PERSONAL PROPERTY

OWNERSHIP OF UNITED STATES SAVINGS BONDS

Our Court in two recent cases has recognized the conclusive presumption of ownership arising from the face of United States savings bonds. The first of these is *Wright v. McMullan*,[1] where a father purchased bonds and had his sons registered as the owners, intending to make a subsequent gift of the bonds to the sons. They died without ever having had possession of the bonds, and the father sought to have himself declared the owner of the bonds. In deciding that the bonds belonged to the sons' estates, the Court said: "[S]tate laws fixing the requirements for a valid gift have no application to these bonds."[2] Ownership in such bonds is fixed by the federal regulations in effect when the bonds were issued.[3] While this subject is not a new one to our Court, it does seem that this decision is the most direct answer yet given to the simple question of bond ownership under the federal statutes and regulations.[4]

The second case is *Tanner v. Erwin*,[5] in which the Court faced an unusual factual situation in that the bonds, registered jointly in the names of both husband and wife, had formed part of a separation property settlement in the husband's favor. Survivorship left the legal title in the widow according to the federal regulations. Conceding that legal title

[4] 250 N.C. 466, 109 S.E.2d 189 (1959).
[5] 38 N.C.L. REV. 621 (1960).

[1] 249 N.C. 591, 107 S.E.2d 98 (1959), also discussed in EQUITABLE REMEDIES, *Mistake, supra.*
[2] *Id.* at 595, 107 S.E.2d at 101.
[3] *Id.* at 593, 107 S.E.2d at 99.
[4] The statutory authority for the sale of United States savings bonds under regulations laid down by the Secretary of the Treasury is found in 49 Stat. 21 (1917), 31 U.S.C. § 757(c)(a) (1958). The regulations in effect when these bonds were sold provided that the bonds are issued only in registered form, that the name of the owner or beneficiary must be inscribed on the bonds at the time of issue, and that the form of registration must express actual ownership and will be conclusive of such ownership. The current equivalent is 31 C.F.R. § 315.5 (1959).
[5] 250 N.C. 602, 109 S.E.2d 460 (1959).

was in the widow by force of the regulations,[6] our Court prevented the widow's unjust enrichment and protected the husband's estate by means of a resulting trust. This aspect of the case is discussed in a Note in this volume.[7] The result of this decision seemingly serves to circumvent the non-transferability provision of the federal regulation,[8] as Justice Rodman points out in the dissenting opinion. There is apparently no North Carolina precedent for the decision, which is, however, supported by substantial foreign authority.[9]

Wrongful Execution

Until the case of *Mica Indust., Inc. v. Penland*[10] arose, the North Carolina Supreme Court had apparently not passed on the question of whether a cause of action will lie against the individual who procures a wrongful seizure of personalty to be made. Defendant in this case was a judgment creditor of a third party company, pursuant to whose judgment the sheriff was directed to seize certain property (the nature of which does not appear in the record), some of which belonged to the plaintiff. Before this decision there had been a dictum in one North Carolina case to the effect that even if the judgment creditor had not procured the wrongful execution, he still might be liable if he received any of the proceeds and thereby ratified the sheriff's act.[11] In holding that a cause of action would lie against both the sheriff and the person wrongfully inducing the seizure, our Court adopts the rule generally recognized in most American jurisdictions.[12]

PUBLIC UTILITIES

Rate Making

In *State ex rel. Utilities Comm'n v. State*[1] twenty-five railroads had applied for an increase in freight rates, which the Commission granted. Various protestants appealed. The superior court reversed because the

[6] 31 C.F.R. § 315.61 (1959) provides: "[I]f either co-owner dies without the bond having been presented and surrendered for payment . . . , the survivor will be recognized as the sole and absolute owner." A similar provision was in effect at the time in question.

[7] 38 N.C.L. Rev. 111 (1959).

[8] 31 C.F.R. § 315.15 (1959) contains the current equivalent provisions.

[9] Silverman v. McGinnes, 259 F.2d 731 (3d Cir. 1958); Roman v. Smith, 228 Ark. 833, 314 S.W.2d 225 (1958); Katz v. Driscoll, 86 Cal. App. 2d 313, 194 P.2d 822 (1948); Tharp v. Besozzi, 128 Ind. App. 73, 144 N.E.2d 430 (1957); Annot., 51 A.L.R.2d 163 (1957).

[10] 249 N.C. 602, 107 S.E.2d 120 (1959), also discussed in Civil Procedure, *Pleading—Amendment, supra.*

[11] Draper v. Buxton, 90 N.C. 182 (1884).

[12] 21 Am. Jur. *Execution* § 641 (1939); Annot., 91 A.L.R. 922 (1934); 33 C.J.S. *Execution* § 456 (1942).

[1] 250 N.C. 410, 109 S.E.2d 368 (1959).

Commission had taken no evidence on the fair value of assets used by the railroads in their intrastate business, as is required by G.S. § 62-124. The Supreme Court affirmed the superior court's reversal.[2] In denying a rehearing[3] the Court expanded its original opinion by saying that whether or not the rate increase would be fair and reasonable was still an open question.

The railroads then petitioned the Utilities Commission for a reopening of the case, which petition was granted. A committee of four major railroads which haul eighty-seven per cent of the intrastate freight submitted evidence in regard to the fair value of assets they used in intrastate transportation. The twenty-one minor railroads agreed to be bound by the proof furnished by the committee. The Commission again granted the rate increase and protestants appealed. The superior court affirmed generally but remanded the case for proof as to the fair value of intrastate assets used by the minor companies. Protestants and the minor railroads appealed.

On appeal protestants urged that the Commission had erred in rejecting a plea of res judicada made in answer to the railroads' petition to reopen the case. In rejecting this argument the Court held that this was not a new action before the Commission, and the Court's previous determination had left the Commission free to determine a reasonable rate in accordance with statutory requirements.

The Commission had accepted the evidence concerning the four railroads as typical of the rest. The Court accepted petitioners' argument that since the protestants did not raise their objection to the Commission's treating four railroads as representative of all before the Commission itself, the objection came too late in the superior court. The Court pointed out that G.S. § 62-26.10 required, at the time applicable to this case, that all grounds for relief, in order to be used on appeal, must be set out in the petition for rehearing which is filed with the Commission previous to the appeal. Moreover, the case had been tried on the theory that the evidence concerning the four was typical of the rest. The Court concluded that the Commission's order was accordingly supported by competent evidence as to all the railroads.

In *State ex rel. Utilities Comm'n v. Carolina Power & Light Co.*[4] the Commission had approved rates to be charged to a class of large users of electricity. There was a base rate which varied upward with the increase in coal prices over six dollars per ton. After the rate had been in effect for several years the petitioners brought an action before the Commission to have the coal clause eliminated. The Commission denied the requested relief, finding that petitioners had not shown the

[2] 243 N.C. 12, 84 S.E.2d 727 (1955).
[3] 243 N.C. 685, 91 S.E.2d 899 (1956).
[4] 250 N.C. 421, 109 S.E.2d 253 (1959).

coal clause to be unjust, unreasonable or discriminatory. It was found, however, that the earnings of the power company were not sufficient to justify elimination of the clause but were sufficient to justify a raise in the base coal price from six dollars to seven. The Commission ordered the change in base coal price which had the effect of lowering the rate legally chargeable by the power company.

On appeal the superior court reversed, holding that the Commission's finding that the fuel clause rate was not unjust, unreasonable, or discriminatory precluded, as a matter of law, the further finding in regard to the company's financial condition, upon which the rate reduction was predicated.

The Supreme Court reversed the superior court and affirmed the order of the Commission. The Court approved the theory of the two lower tribunals that the case was a complaint proceeding under G.S. § 62-72, which involves a single rate or a small part of the rate structure, and not a general rate case under G.S. § 62-124, which involves fixing all or a substantial part of the company's rates. The Court pointed out that G.S. § 62-72 provides that where the Commission finds a rate to be unjust, unreasonable, discriminatory, or *insufficient* the Commission shall determine the just, reasonable and *sufficient* rate.

The Court held that the Commission's determination as to the overall financial condition of the company bore on the sufficiency of the rate and went on to say that if the Commission may increase certain rates without making the detailed findings required by G.S. § 62-124 "it may also reduce these same rates without reference thereto. Furthermore, if the Commission may consider the insufficiency of a rate it must necessarily consider the sufficiency thereof."[5]

It is submitted that the Court has construed the word *insufficient* in G.S. § 62-72 as though it means *more than adequate* and *inadequate* in the alternative, whereas the standard definition of the word is only the latter.

It is further submitted that the superior court correctly ruled that a finding by the Commission that the overall financial condition is such that the company can afford to charge a lower rate to this class of users is irrelevant. Although the rate reduction would not cause the company to show an overall loss it could cause a loss on the particular service upon which the rate is being reduced. The Commission should have been required to make findings that the particular rate was more than sufficient to pay a fair proportion of the total fair return to the company before raising the base figure for coal and, in effect, lowering the particular rate.

[5] *Id.* at 433, 109 S.E.2d at 263.

COMMON CARRIERS

Respondent, who carried oil by barge upon the inland waters of North Carolina, was served with a show-cause order in *State ex rel. Utilities Comm'n v. Gulf Atl. Towing Corp.*[6] The undisputed evidence before the Commission was that the respondent carried for large shippers and only by contract negotiated with the particular shipper by submitting bids.[7] Upon this evidence the Commission found that respondent was a common carrier and ordered it to apply for a certificate of convenience and necessity, and if that were issued, to file tariffs and otherwise comply with Commission regulations. The superior court affirmed the Commission's order.

The Supreme Court said that what constitutes a common carrier is a question of law and whether or not a particular carrier is a common carrier is a question of fact. The Court reiterated that under G.S. § 62-26.10(e) a finding of fact by the Commission is conclusive if it is supported by competent, material, and substantial evidence, in view of the entire record.[8] In reversing, the Court held that, in view of the entire record, the undisputed evidence did not support a finding that respondent was a common carrier.

In the principal case the Court purported to be dealing with a question of fact in determining whether respondent was a contract or a common carrier. It is submitted, however, that this was a question going to the jurisdiction of the Utilities Commission, which must be subject to judicial review and therefore would have been more properly referred to as a question of law.[9]

REAL PROPERTY

ABANDONMENT

The growth of our cities and the improvement of their streets frequently give rise to a conflict of interests between the individual land owner and the municipality where small strips are isolated and forgotten about for a time. Such a conflict arose recently in the case of *City of Salisbury v. Barnhardt*,[1] where a triangular shaped piece of land was

[6] 251 N.C. 105, 110 S.E.2d 886 (1959).

[7] "The distinctive characteristic of a common carrier is that he undertakes as a business to carry for all people indifferently or to take anybody's freight." Parker, J., speaking for the Court in the principal case, 251 N.C. at 109, 110 S.E.2d at 889.

[8] State *ex rel.* Utilities Comm'n v. Atlantic Coast Line Ry., 238 N.C. 701, 38 S.E.2d 780 (1953); State *ex rel.* Utilities Comm'n v. Fox, 236 N.C. 553, 73 S.E.2d 464 (1952).

[9] See, *e.g.*, Beach v. McLean, 219 N.C. 521, 14 S.E.2d 515 (1941).

[1] 249 N.C. 549, 107 S.E.2d 297 (1959).

left unused in the street adjacent to the two defendants' lots. Defendants made improvements in the form of shrubbery and a rock wall on the strip over the years after 1925. In 1956 the city demanded that the obstructions be removed in prospect of further street improvements for traffic purposes. The defendants claimed that the city had abandoned the property. This issue was resolved in favor of the city at the trial level, and the Court affirmed, saying that mere non-user by the city does not constitute abandonment.

Abandonment is one of two judicially recognized exceptions to G.S. § 1-45, which provides that no exclusive right to parts of streets shall be acquired by encroachment.[2] The other exception applies to a situation where a street has been dedicated but never accepted by the city.[3] Having introduced the concept of abandonment into this area of the law, the Court has had little opportunity to tell us more precisely what it means. In *Lee v. Walker*[4] the Court found that any public interest in an alleyway had been relinquished by resolution of the Board of Commissioners. There is a dictum in the *Lee* case indicating that something less than official affirmative action, for instance allowing the property to be listed for taxes, might be enough.

In other jurisdictions which have considered the problem there is an apparent split of authority,[5] and our Court takes the view expressed in the Virginia case of *Sipe v. Alley*,[6] where defendant had enclosed part of a public street with a fence and this condition had existed for some years. In that case it was said that mere non-user of a portion of a street was not an abandonment thereof by the public. "Some private use of the public way is not infrequently accorded abutting owners until the public use requires its surrender."[7]

BETTERMENTS

The case of *Pamlico County v. Davis*[8] restates the three requirements necessary to invoke the protection of our betterments statute.[9] The claimant must establish (1) that he made permanent improvements, (2) bona fide belief in good title when the improvements were made, and (3) reasonable grounds for such belief.[10] The claimant here was a pur-

[2] Lee v. Walker, 234 N.C. 687, 68 S.E.2d 664 (1952).
[3] *Ibid.*
[4] 234 N.C. 687, 68 S.E.2d 664 (1952).
[5] 25 AM. JUR. *Highways* § 112 (1940).
[6] 117 Va. 819, 86 S.E. 122 (1915).
[7] *Id.* at 824, 86 S.E. at 123.
[8] 249 N.C. 648, 107 S.E.2d 306 (1959).
[9] N.C. GEN. STAT. § 1-340 (1953).
[10] Pamlico County v. Davis, 249 N.C. 648, 651, 107 S.E.2d 306, 309 (1959). See also Rogers v. Timberlake, 223 N.C. 59, 25 S.E.2d 167 (1943); Pritchard v. Williams, 176 N.C. 108, 96 S.E. 733 (1918). The "good title" referred to in the principal case seems to be the equivalent of "colorable title" in Rogers v. Timberlake, *supra*.

chaser at a judicial sale; he had no deed but only a contract to convey from the county. Claimant paid part of the purchase price, went into possession, and spent in excess of twenty-five hundred dollars over a period of three years in ditching, clearing, and building roads on the deteriorated farm land. Some of the heirs of the original owner were not served with process before the sale, and in this action they challeged the claimant's bona fide belief in good title and the basis for such a belief. Under the facts outlined above, our Court held that there was "plenary" evidence of bona fide belief. Nor was the claimant lacking reasonable grounds for such belief since one who bids at a judicial sale may rely on the legality of such official proceedings.[11]

DEDICATION

Where a private developer lays off streets and blocks on a map of a subdivision and has this map registered, the legal consequences are different for the public and for the individual who buys a lot with reference to this map. The case of *Steadman v. Town of Pinetops*[12] illustrates primarily the operation of the dedication rule as it concerns the public. In 1917 a private development corporation registered its map showing a plat of blocks and streets. A few lots were sold, and one street was actually opened and used for a few years after 1936. The area did not develop, however, and most of it had been used by plaintiff for pasture since the 1930's. The original land company became defunct, and the plaintiff who purchased land from that company filed a "Withdrawal Declaration" as provided for by G.S. § 136-96[13] with regard to the earlier dedication by registration of the map. The city later in 1958 resolved to open the streets, and plaintiff filed suit for a restraining order, which was denied below. The Court held that the plaintiff was, by force of the statute, entitled to assert rights in the streets since the land company's corporate existence had lapsed.[14] The Court stated the rule to be that as far as the city was concerned the dedication was only a revocable offer which could be withdrawn, and if after fifteen years no acceptance had been made the offer would be presumed to have been withdrawn.[15] Thus the city in this case could assert no rights in the unopened streets (*i.e.*, those whose dedication had never been accepted by the public), whereas it was free to re-open the one street which had been opened and used by the public in the 1930's.

[11] Cherry v. Woolard, 244 N.C. 603, 94 S.E.2d 562 (1956); Jeffreys v. Hocutt, 195 N.C. 339, 142 S.E. 226 (1928).

[12] 251 N.C. 509, 112 S.E.2d 102 (1960).

[13] This statute creates a presumption of abandonment where a piece of land has been dedicated and not opened or used for fifteen years, provided that a declaration is filed withdrawing it from public use.

[14] This aspect of the case is treated under BUSINESS ASSOCIATIONS, *Corporations—Effect of Dissolution, supra.*

[15] The statute provides that the declaration may be filed by the dedicator or by those claiming under him.

The reason underlying this "offer and acceptance" idea of dedication referred to in this case is that "neither burdens nor benefits with attendant duties may be imposed on the public unless in some proper way it has consented to assume them."[16]

DEEDS

Boundaries

In *Harris v. City of Raleigh*[17] the plaintiff in resisting a paving assessment brought an action to try title to a strip of land along the front of his lot. The description in plaintiff's deed read as follows:

> Beginning at a point in the western side of Butler Street . . . Alonza Haywood's northeast corner, and running thence westerly along said Haywood's northern boundary line, 260 feet; thence northwardly 60 feet; thence eastwardly in a line parallel with said Haywood's line 260 feet to the western boundary line of Butler Street; thence southwardly with said Butler Street, 60 feet to the Beginning.

Plaintiff sought to establish "Alonza Haywood's northeast corner" by starting at the *southwest* corner of the lot and then measuring *eastwardly* 260 feet. This was held improper, because it was an attempt to reverse the calls for a terminus which was the only known reference point in the description. A nonsuit was allowed.

This is in accord with North Carolina's general rule that lines should be run with the calls in the regular order from a known beginning, and they may be reversed only where it is not otherwise possible to establish the terminus of a call.[18] In the recent case of *Batson v. Bell*[19] calls were reversed only to allow an unknown corner to be established from a fixed corner not contested.

Exchange of Deeds by Tenants in Common

North Carolina has long had the rule, relating to an exchange of deeds by tenants in common allotting to each his share in the land, that no new estates were created by the deeds, since they serve only to sever the unity of possession.[20] The corollary to this rule is that if any such deed names the tenant and his spouse as grantees, the presumption is

[16] 251 N.C. at 515, 112 S.E.2d at 107. *Accord,* Irwin v. City of Charlotte, 193 N.C. 109, 136 S.E. 368 (1927); Wittson v. Dowling, 179 N.C. 542, 103 S.E. 18 (1920).

[17] 251 N.C. 313, 111 S.E.2d 329 (1959).

[18] Powell v. Mills, 237 N.C. 582, 75 S.E.2d 759 (1953).

[19] 249 N.C. 718, 107 S.E.2d 562 (1959).

[20] Elledge v. Welch, 238 N.C. 61, 76 S.E.2d 340 (1953); Duckett v. Lyda, 223 N.C. 356, 26 S.E.2d 918 (1943); Wood v. Wilder, 222 N.C. 622, 24 S.E.2d 474 (1943); Borroughs v. Womble, 205 N.C. 432, 171 S.E. 616 (1933); Crocker v. Vann, 192 N.C. 422, 135 S.E. 127 (1926); Garris v. Tripp, 192 N.C. 211, 134 S.E. 461 (1926); Speas v. Woodhouse, 162 N.C. 66, 77 S.E. 1000 (1913); Sprinkle v. Spainhour, 149 N.C. 223, 62 S.E. 910 (1908); Harrison v. Ray, 108 N.C. 215, 12 S.E. 993 (1891).

that no estate by the entirety is created in tenant and his spouse.[21] That this presumption can be overcome and an interest vested in the tenant's wife by provisions in the deed is well illustrated in the case of *Smith v. Smith*.[22] Mother and son were tenants in common of a 26.25 acre tract of land. The son married. Son and wife executed a deed of their interest conveying it to the mother, who responded with a deed of gift for 7.14 acres in fee to son and wife, using the phrase "creating an estate by the entirety." Son and wife were divorced; wife brings suit for partition of her undivided one-half interest in the 7.14 acres. The wife was successful on appeal; the Court held that an estate by the entirety had been created in the son and his wife. The effect of the divorce was to transform the entirety into a tenancy in common. It is apparent from this decision that a mere exchange of deeds by tenants in common will not be determinative. Rather the Court will look to the intention of the parties as evidenced by the deeds and the surrounding circumstances. In this case two factors are of critical importance: first, the fact that the deed in favor of the tenant and spouse used express language "creating an estate by the entirety"; secondly, that equal shares or moieties in the land were not exchanged, and there was no evidence before the Court that the smaller tract was equal in value to the larger tract.[23]

Delivery

Delivery of a deed of conveyance in North Carolina is still a transaction which retains a large measure of its primitive formality. Our Court in the case of *Elliott v. Goss*[24] has once again added gloss to the patina of that rule which from antiquity has required the grantor to put the deed out of his reach—physically as well as legally. After *Ballard v. Ballard*[25] there had been a faint hope that physical delivery might gradually be relegated to the museum along with livery of seizin. In that case there was clear dictum to the effect that the grantor's intention to put the deed into operation could be manifested without relinquishing physical control of the instrument. That hope seems clearly to have disappeared with the decision in the *Elliott* case. Here there had been a signing and an acknowledgment of the deed, but grantee had agreed that grantor should retain possession of the deed until the purchase price was paid. The grantee died owing twenty-three dollars on the price, and his heirs were not permitted to take up his equity since there

[21] Elledge v. Welch, *supra* note 20.
[22] 249 N.C. 669, 107 S.E.2d 530 (1959).
[23] This case is also discussed in EQUITABLE REMEDIES, *Mistake, supra,* and CIVIL PROCEDURE, *Pleading—Prior Action Pending, supra.*
[24] 250 N.C. 185, 108 S.E.2d 475 (1959), also discussed in CIVIL PROCEDURE, *Pleading—Demurrer, supra.*
[25] 230 N.C. 629, 55 S.E.2d 316 (1949), 28 N.C.L. REV. 229 (1950).

had been no "delivery" during grantee's life. The Court quotes approvingly from the older case of *Barnes v. Aycock*:[26]

> [T]o constitute delivery there must be a parting with the possession of the deed and with all power and control over it by the grantor for the benefit of the grantee at the time of delivery. To constitute delivery the papers must be put out of the possession of the maker.

ESTATES BY THE ENTIRETY

There are three recent cases which deserve especial mention in connection with the estate by the entirety. The first one is *Edwards v. Arnold*,[27] in which the existence of such an estate served to defeat the county's tax enforcement proceedings against the husband. The land in question was listed for taxes in the name of the husband. Taxes had been in default for a number of years. The tax collector's certificate was docketed with the clerk of court and it became a valid judgment in accordance with the provisions of G.S. § 105-392.[28] The failure to join the wife in the judgment, the execution, and advertisement for sale was fatal to the whole procedure. The sheriff's deed was held to have passed no title, because the husband taxpayer had no separable interest in the land. This holding seems to be in accord with previous decisions of our Court.[29] The rule announced in those cases is that lands held by the entirety are not subject to levy under execution on a judgment against one spouse alone. And this rule seems quite valid and in consonance with the incidents of what our Court has called the "anomalous" estate of entireties.[30] Nevertheless none of these cases involved tax liens of our relatively new tax enforcement statute.[31] It should be pointed out that the Court was apparently construing G.S. § 105-392 in this type application for the first time. Its interpretation of sections (a) and (c) of the statute seems to be that the docketed tax collector's certificate is a judgment against the taxpayer and not a lien on the land for which taxes are in default. This result is questionable in light of the language of the statute as follows: "It is hereby expressly declared to be the intention of this section that proceedings brought under it shall be strictly in rem." "Immediately upon said docketing and

[26] 219 N.C. 360, 13 S.E.2d 611 (1941).
[27] 250 N.C. 500, 109 S.E.2d 205 (1959).
[28] This statute provides a method of tax collection alternative to the mortgage type foreclosure in G.S. § 105-391.
[29] Winchester-Simmons Co. v. Cutler, 199 N.C. 709, 155 S.E. 611 (1930); Johnson v. Leavitt, 188 N.C. 682, 125 S.E. 490 (1924); Hood v. Mercer, 150 N.C. 699, 64 S.E. 897 (1909).
[30] Hood v. Mercer, *supra* note 29.
[31] G.S. § 105-392 was enacted in 1939. The prospective operation of the statute was considered in Abbott, *Summary Procedure for Foreclosure of Taxes in North Carolina*, 22 N.C.L. REV. 226 (1944).

indexing, said taxes . . . shall constitute a valid judgment *against said property* . . . ." (Emphasis added.)

Another incident of our estate by the entirety is illustrated by the case of *Brinson v. Kirby*,[32] where a tobacco crop produced on the land was sold to satisfy a judgment against the husband. The theory behind such an execution was that since the husband was entitled to the rents and profits, the usufruct, of the land held by both husband and wife by the entirety, the crops were his. Such a theory is well recognized in North Carolina.[33] In this case, however, the Court held that the wife could save the crop in this action by proving that the land was not after all held by the entirety, but was really her own since her deed to the "straw man" and the latter's deed to husband and wife were void for failure to comply with G.S. § 52-12.[34]

An unusual entireties problem was presented in *Harrell v. Powell*,[35] in which husband and wife had contracted to convey to and actually executed a deed in favor of the defendants. The husband subsequently died. The widow brought this action to remove cloud from her title in the land on the theory that the instruments were void because the husband lacked mental capacity to execute instruments. The defendants' demurrer was sustained below; and on appeal a reversal followed only because the defendants' demurrer was based on estoppel and, as neither the deed nor the contract were incorporated in the pleadings so that they could be read in light of the estoppel plea, estoppel could not be taken advantage of by demurrer. The opinion contained rather clear language to the effect that where the widow has joined in a warranty deed she would be treated as a feme sole and could be held estopped to claim title in the *locus in quo*. No North Carolina case in point was cited; however the Court cited a dictum from *Hood v. Mercer*: "[W]here the husband had conveyed the land by deed with warranty without the joinder of the wife, and survived her, his grantee acquired title, but this by way of estoppel."[36] Several foreign authorities are cited.[37] Tiffany lists as the most important incident of a tenancy by the entirety the right of survivorship which cannot be defeated by a conveyance from

[32] 251 N.C. 73, 110 S.E.2d 482 (1959), also discussed in DOMESTIC RELATIONS, *Deed by Wife to Husband by Way of Third Party, supra.*

[33] Taylor v. Taylor, 243 N.C. 726, 92 S.E.2d 136 (1956); Nesbit v. Fairview Farms, Inc., 239 N.C. 481, 80 S.E.2d 472 (1954); Atkinson v. Atkinson, 225 N.C. 120, 33 S.E.2d 666 (1945); Lewis v. Pate, 212 N.C. 253, 193 S.E. 20 (1937).

[34] There was no finding in the case of either deed that the conveyance was not unreasonable or injurious to the wife.

[35] 251 N.C. 636, 112 S.E.2d 81 (1960), also discussed in DOMESTIC RELATIONS, *Deed by Wife of Entireties Property, supra.*

[36] 150 N.C. 699, 700, 64 S.E. 897, 898 (1909).

[37] *In re* Brown, 60 F.2d 269 (W.D. Ky. 1932); Columbian Carbon Co. v. Knight, 207 Md. 203, 114 A.2d 28 (1955); Mount Washington Co-op. Bank v. Bernard, 289 Mass. 498, 194 N.E. 839 (1935); Demerse v. Mitchell, 187 Mich. 683, 164 N.W. 97 (1915); Simon v. Chartier, 250 Wis. 642, 27 N.W.2d 752 (1947).

the other tenant to a third party. "The title of the grantee, however, may become good by estoppel if the grantor is the survivor."[38] This concept finds ready acceptance in other jurisdictions.[39] Apparently North Carolina does recognize a broad principle of transfer of after-acquired title by estoppel, although we seem never to have had just such a case as this, *i.e.*, one involving tenancy by the entirety where the wife is the survivor against whom an estoppel is pleaded.[40] Such a result seems to satisfy the demands of justice, particularly when as in two earlier North Carolina cases[41] there were acts by the grantor after the death of the husband.

Possessory Writs

When both the writ of possession and the writ of assistance are available to the litigant, which shall he use? The Court in *Hill v. Resort Dev. Co.*[42] points out that the two writs are essentially the same, the objects of both being to put the person entitled to the property into possession. One distinction is that writs of possession are legal and follow judgments in ejectment, while writs of assistance are equitable and are used to enforce decrees of equity. To obtain the benefit of either writ, there must first be a judgment which determines that the party seeking the court's aid is the owner and entitled to possession. In this case there had been no such determination in the earlier partition suit. The Court held that without a prior trial of title the plaintiff was entitled to no writ of possession.

Dower in Remainder in Fee

In *In re Will of Smith*[43] the remainderman in fee, by agreement fixed in a consent judgment, was to convey his interest to the caveator of the will, but he declined to do so on the ground that his wife did not sign the consent judgment. *Held:* the wife of the remainderman had no dower interest and the husband was free to convey at will. That the remainderman may convey his interest without joinder by his wife is supported by authorities from other jurisdictions.[44] That a vested remainder is not subject to dower so long as the life estate is in existence is a rule already established in North Carolina.[45]

[38] Tiffany, Real Property 291-92 (abr. ed. 1940).
[39] 19 Am. Jur. *Estoppel* §§ 12-20 (1939).
[40] *Cf.* Mills v. Tabor, 182 N.C. 722, 109 S.E. 850 (1921) (widow accepted payments on the land from the grantee); Sills v. Bethea, 178 N.C. 315, 100 S.E. 593 (1919) (widow advertised the land for sale).
[41] Mills v. Tabor, *supra* note 40; Sills v. Bethea, *supra* note 40.
[42] 251 N.C. 52, 110 S.E.2d 470 (1959).
[43] 249 N.C. 563, 107 S.E.2d 89 (1959).
[44] Geldhauser v. Schulz, 93 N.J. Eq. 449, 116 Atl. 791 (1922); 28 C.J.S. *Dower* § 27 (1949).
[45] Redding v. Vogt, 140 N.C. 562, 53 S.E. 337 (1906); Houston v. Smith, 88 N.C. 312 (1883); Royster v. Royster, 61 N.C. 226 (1867); Weir v. Humphries, 39 N.C. 264 (1846).

SALES

IMPLIED WARRANTIES

The uncontradicted evidence in *Jones v. Siler City Mills, Inc.*[1] showed that the defendant sold the plaintiff chicken feed for the particular use of feeding laying chickens. The plaintiff, through poultry experts, proved that the laying mash he had purchased contained a chemical which is fed only to broilers, and that the feed had a poisonous effect on his laying hens. The Court held that under these circumstances there was an implied warranty that the chicken feed was reasonably fit for the use contemplated by both the seller and purchaser. The principal case establishes in North Carolina the common law view that implied warranties can arise when foodstuff is sold for animal consumption.[2] Although the instant case failed to mention it, there is, in addition to the implied warranty, a statutory warranty that foodstuff sold for animals is reasonably fit for the purpose intended and that it is not composed of harmful or deleterious substances that will produce injury or death.[3]

In *Southern Box & Lumber Co. v. Home Chair Co.*,[4] where the action was to recover the contract price for plywood sold and delivered, the defendant set up as a defense the breach of an implied warranty that the plywood delivered was suited to the making of chair seats for which it was purchased. The trial court found that the seller had no knowledge of the particular type of chair seat made by the buyer nor of the manufacturing method he used. The plywood was unfit for the particular chair seats and manufacturing method, but the weight of the evidence did not show it was unsuitable for other types of chair seats made by other manufacturing methods. The Court, in affirming a judgment for the seller, held that there is no implied warranty of fitness for a particular use if the seller does not know of the intended use.[5]

In *Adams v. Great Atl. & Pac. Tea Co.*[6] the plaintiff brought a

[1] 250 N.C. 527, 108 S.E.2d 917 (1959).

[2] See also Poovey v. International Sugar Feed Number Two Co., 191 N.C. 722, 133 S.E. 12 (1926); 77 C.J.S. *Sales* § 331b (1952).

[3] N.C. GEN. STAT. §§ 106-93, -95 (Supp. 1959); N.C. GEN. STAT. § 106-100 (1952).

[4] 250 N.C. 71, 108 S.E.2d 70 (1959), also discussed in CIVIL PROCEDURE, *Pleading—Counterclaim, supra.*

[5] *Accord,* Stokes v. Edwards, 230 N.C. 306, 310, 52 S.E.2d 797, 800 (1949). "When a buyer purchases goods for a particular purpose known to the seller and relies on the skill, judgment, or experience of the seller for the suitability of the goods for that purpose, the seller impliedly warrants that the goods are reasonably fit for the contemplated purpose, and is liable to the buyer for any damage proximately resulting to him from the breach of this warranty." See also Thomason v. Ballard & Ballard Co., 208 N.C. 1, 179 S.E. 30 (1935); Farquhar Co. v. Hardy Hardware Co., 174 N.C. 369, 93 S.E. 922 (1917).

[6] 251 N.C. 565, 112 S.E.2d 92 (1960). This case reaffirms North Carolina's position that when a retail merchant sells food in a sealed package to a customer there is an implied warranty of fitness for human consumption. Rabb v. Covington, 215 N.C. 572, 2 S.E.2d 705 (1939). See also Davis v. Radford, 233 N.C. 283, 63

damage action for the loss of a tooth allegedly caused by the breach of an implied warranty that a box of corn flakes, sold in the original sealed container by the defendant retailer to the plaintiff, was wholesome and fit for human consumption. Chemical analysis showed that the "object" causing the injury was part of a grain of corn that had been partially crystalized. In affirming a judgment of nonsuit, the Court held that the substance causing the injury was natural to the corn flakes, and therefore a consumer of the product might be expected to anticipate the presence of the substance in the food. The determining criterion of liability established by the instant case, and by the authorities cited,[7] is whether the object causing the injury is "foreign"[8] to the food consumed. While the Court's position in the instant case is defensible, it appears to the writer that the Court might also have been justified in adopting the plaintiff's contention that the corn kernel, after it had gone through its "metamorphosis" had become a foreign object.[9]

S.E.2d 822 (1951), holding that where the vendee sues the retailer for damages due to breach of an implied warranty that goods sold are wholesome and fit for human consumption, the retailer may have the wholesaler and manufacturer joined as codefendants upon an allegation that the wholesaler or distributor or manufacturer is primarily liable upon the warranty.

In the instant case the plaintiff made no attempt to hold the manufacturer liable. There being no contractual relationship between the manufacturer and the plaintiff to which an implied warranty could have attached, any action against the manufacturer would have to sound in negligence, or perhaps in express warranty. Thomason v. Ballard & Ballard Co., 208 N.C. 1, 179 S.E. 30 (1935). On warranty and tort claims see generally Notes, 32 N.C.L. REV. 351 (1953); 30 N.C.L. REV. 191 (1952); 19 N.C.L. REV. 551 (1941); 15 N.C.L. REV. 430 (1937).

[7] The following cases, all cited in the principal case, held that there had been no breach of an implied warranty: Shapiro v. Hotel Statler Corp., 132 F. Supp. 891 (S.D. Cal. 1955) (fish bone in fish dish); Lamb v. Hill, 112 Cal. App. 2d 41, 245 P.2d 316 (1952) (chicken bone in chicken pie); Sliva v. F. W. Woolworth Co., 28 Cal. App. 2d 649, 83 P.2d 76 (1938) (turkey bone in roast turkey and dressing); Mix v. Ingersoll Candy Co., 6 Cal. 2d 674, 59 P.2d 144 (1936) (chicken bone in chicken pie); Goodwin v. Country Club of Peoria, 323 Ill. App. 1, 54 N.E.2d 612 (1944) (chicken bone in creamed chicken); Brown v. Nebiker, 229 Iowa 1223, 296 N.W. 366 (1941) (splinter of bone in pork chop); Courter v. Dilbert Bros., 19 Misc. 2d 935, 186 N.Y.S.2d 334 (Sup. Ct. 1958) (prune pit in prune butter). See Annots., 147 A.L.R.2d 1027 (1949); 171 A.L.R. 1209 (1947); 168 A.L.R. 1054 (1947); 143 A.L.R. 1421 (1943); 105 A.L.R. 1939 (1936); 104 A.L.R. 1033 (1936); 98 A.L.R. 687 (1935); 50 A.L.R. 231 (1927); 47 A.L.R. 148 (1927); 35 A.L.R. 921 (1925); 5 A.L.R. 1115 (1920); 4 A.L.R. 1559 (1919). See also Note, 17 TEMP. L.Q. 203 (1943).

[8] A foreign substance is defined as a not organically connected or naturally related substance occurring in any part of the body or organism where it is not normally found, usually introduced from without, O'Hara v. Petersen, 174 Misc. 481, 21 N.Y.S.2d 487 (Mun. Ct. 1940).

[9] Brief for Plaintiff, pp. 10-11.

TAXATION

INCOME TAX

Loss Carry-over

In *Royle & Pilkington Co. v. Currie*[1] plaintiff had operated at a loss for the years 1953, 1954 and 1955. Until 1957 the North Carolina Revenue Act had allowed an operating loss to be carried forward as a deduction for only the two tax years next following the year of the loss.[2] An amendment by the 1957 General Assembly, now codified in G.S. § 105-147(9)d, allows a loss to be set off against income for the next five years beginning with the tax year 1957. When plaintiff prepared its 1957 North Carolina income tax return it deducted an unused loss for the year 1953. The Commissioner disallowed the deduction and assessed a deficiency which plaintiff paid under protest. When plaintiff's demand for a refund was refused, it sued the Commissioner and had judgment in the superior court.

On appeal the Commissioner's contention that the amendment was prospective in effect was rejected. The Court, in affirming for the taxpayer, reasoned that the intent of the legislature was to enlarge rather than diminish the right to deduct losses for previous years, and that if the Commissioner's contentions were upheld no loss occurring before 1957 could be carried over, since the two-year carry-over provision had been repealed. This decision is in accord with the view taken by the United States Supreme Court in *Reo Motors, Inc. v. Commissioner*,[3] where the Court said that the amount of the loss, for federal tax purposes, is determined by the law in effect during the year the loss occurred, while the amount of the carry-over is determined by the law in effect at the time of the attempted carry-over.

The loss carry-over provision in G.S. § 105-147(9)d was also the subject of litigation in the recent case of *Good Will Distribs. (Northern), Inc. v. Currie*.[4] Plaintiff corporation had absorbed two other corporations in a merger. All three corporations were theretofore owned by the same stockholders and carried on the same sales operation in dif-

[1] 250 N.C. 726, 110 S.E.2d 339 (1959).
[2] N.C. Sess. Laws 1939, ch. 158, §§ A, B; N.C. Sess. Laws 1941, ch. 50, § 1.
[3] 338 U.S. 442 (1950).
[4] 251 N.C. 120, 110 S.E.2d 880 (1959), also discussed in CIVIL PROCEDURE, *Pleading—Judgment on the Pleadings, supra.* The principal case had been before the Court in *Good Will Distribs., Inc. v. Shaw*, 247 N.C. 157, 100 S.E.2d 341 (1956), where a judgment on the pleadings for the taxpayer was reversed. There it was held that the taxpayer must show itself to be "substantially the same taxpayer" that had incurred the loss, in order to claim the loss carry-over deduction. The Court said that the allegations of the complaint were insufficient to demonstrate such identity. This case was commented on in *Survey of the Decisions of the North Carolina Supreme Court—Taxation*, 36 N.C.L. REV. 449 (1958). Plaintiff failed to amend its complaint, but the Commissioner stipulated certain pertinent facts, the import of which appears in the text above.

ferent territories. At the time of the merger one of the absorbed corporations was showing a small profit for the year against which it applied part of a net operating loss for the previous year. The plaintiff took the unused portion of that corporation's loss as a deduction against plaintiff's gross income for North Carolina tax purposes. The Commissioner disallowed the deduction and refused plaintiff's demand for the refund of an assessment paid under protest. Plaintiff sued for a refund and had judgment in the superior court. On appeal the Court looked to cases arising under the related federal income tax section and, in reversing, relied on *Lisbon Shops v. Koehler*.[5]

In the *Lisbon* case the taxpayer had absorbed sixteen separately incorporated ready-to-wear shops. Three of those shops had substantial pre-merger losses which the taxpayer sought to take as a loss carry-over deduction. The government's argument that the taxpayer seeking to deduct the loss was not the same entity that had suffered the loss was side-stepped in favor of the alternative argument that "the prior year's loss can be offset against the current year's income *only to the extent* that this income is derived from the operation of substantially the same business which produced the loss."[6] The significant fact in this case seems to be that in the year of the attempted deduction all three of the business units, for which the pre-merger loss was claimed, were still operating at a loss. The Court said that had there been no merger, there would be no deduction available to the absorbed corporations because they had no incomes against which to set off the losses. The Court said that a holding for the taxpayer would allow a windfall to it simply because it had merged.

In the *Good Will* case the North Carolina Court quoted the final sentence of the *Lisbon* case:[7] " 'We conclude that petitioner is not entitled to a carry-over since the income against which the offset is claimed was not produced by substantially the same businesses which incurred the losses.' "[8] The North Carolina Court went on to say: "By reason of the merger a new and more extensive enterprise has emerged. This new enterprise did not suffer the loss and cannot claim a deduction therefor."[9] It seems that the Court has interpreted the *Lisbon* case as holding that the taxpayer must be substantially the same corporation that incurred the loss in order to take the carry-over deduction.

It is submitted that *Lisbon* is more readily suceptible of being interpreted to mean that the loss carry-over will be limited to the contribution made to the income of the taxpayer by the assets of the absorbed

[5] 353 U.S. 382 (1957).
[6] *Id.* at 386. (Emphasis added.)
[7] *Id.* at 390.
[8] 251 N.C. at 125, 110 S.E.2d at 884.
[9] *Id.* at 127, 110 S.E.2d at 885.

corporation that had shown the loss. This view is supported by the approval the United States Supreme Court gives to the government's alternative contention that the deduction can be taken "only to the extent" that income is derived from the same business which incurred the loss. It would seem that the quoted words imply that merger *limits* rather than *extinguishes* the deductibility of an acquired loss. This interpretation gains strength when the government's alternative contention is read with the Court's statement of the issue to be decided in *Lisbon*:

> The issue before us is whether . . . a corporation resulting from a merger of 17 separate incorporated businesses, which had filed separate income tax returns, may carry over and deduct the pre-merger net operating losses of three of its constituent corporations from the post-merger income *attributable to the other businesses.*[10]

The theory of *Lisbon* seems to be that a taxpayer should not be entitled to acquire a corporation and use a loss that would have been unavailable to the acquired corporation were it still independent. In the *Good Will* case the North Carolina Court has denied a carry-over where the acquired business unit was contributing at least some profit to the total enterprise during the tax year for which the plaintiff claimed the deduction. In *Good Will* it appears that the Court was not asked to consider allowing a deduction "to the extent" of the contribution made by the acquired corporation to plaintiff's total income. It is hoped that if in the future a taxpayer can prove that setting off a pre-merger loss against post-merger income would not amount to a tax windfall the Court will allow the deduction to that extent.

PROCEDURE

Real Party in Interest

Petitioner received notice of assessment for income taxes against the estate of her deceased husband in *Brauff v. Commissioner.*[11] She attempted to enter a special appearance before the Commissioner, where she moved to vacate the notice on the ground that she had been removed as executrix of the assessed estate. The Commissioner, after stipulating the fact of her removal, overruled the motion, holding that notice was given in accordance with the provisions of G.S. § 105-241.1. That section provides for notice to the "taxpayer" and makes no provision for notice to the estate when it has succeeded to the obligation of the taxpayer. The Board of Tax Appeals and the superior court affirmed the action of the Commissioner.

[10] 353 U.S. at 382. (Emphasis added.)
[11] 251 N.C. 452, 111 S.E.2d 620 (1959).

On appeal the Court reversed, holding that petitioner was not the proper party. The Court relied on G.S. § 28-176 which provides that actions or proceedings where an estate is the real party in interest must be brought by or against the executor or administrator in his representative capacity. The Court said that notice to petitioner, who had no power to act for the estate was insufficient notice to the estate.

Period of Limitations on Refund

In *Kirkpatrick v. Currie*[12] plaintiffs-administrators sued the Commissioner of Revenue in the superior court alleging that they had paid inheritance taxes under protest in July 1955 and that their demand for a refund in February 1957 had been wrongfully denied. On the basis of G.S. § 105-267,[13] which allows a direct suit for the refund of taxes paid under protest if demand made within thirty days of such payment is not honored, the Commissioner's motion for nonsuit was granted.

On appeal the Court reiterated[14] that a timely demand is a condition precedent to the institution of an action under G.S. § 105-267. Plaintiffs urged that the action was maintainable under G.S. § 105-266.1[15] which provides for an administrative remedy with right of appeal to the superior court. The administrative remedy is available until three years after the tax becomes due or six months after payment is made, whichever is later. In rejecting plaintiffs' argument, and affirming the trial court, it was held that plaintiffs had the right to choose between the remedies offered by the two statutes and "having chosen, they are bound by the limitations fixed for that route."[16] The Court seems to leave unanswered the question whether, assuming that there was enough time remaining, plaintiffs could still pursue the administrative remedy. It would seem that since in ordinary civil cases a nonsuit does not preclude the bringing of another action,[17] the remedy under G.S. § 105-

[12] 250 N.C. 213, 108 S.E.2d 209 (1959).

[13] "Whenever a person shall have a valid defense to the enforcement of the collection of a tax . . . such person shall pay such tax . . . and such payment shall be without prejudice to any defense or rights he may have . . . . At any time within thirty days after payment, the taxpayer may demand a refund . . . ; and if the same shall not be refunded within ninety days thereafter may sue the Commissioner of Revenue. . . ." N.C. GEN. STAT. § 105-267 (1958).

[14] Williamson v. Spivey, 224 N.C. 311, 30 S.E.2d 46 (1944); Nantahala Power & Light Co. v. Clay County, 213 N.C. 698, 197 S.E. 603 (1938); Blackwell v. City of Gastonia, 181 N.C. 378, 107 S.E. 218 (1921).

[15] "(a) Any taxpayer may apply to the Commissioner of Revenue for refund of tax . . . paid by him at any time within three years after the date set by statute for filing of the return . . . or within six months from the date of payment . . . . The Commissioner shall grant a hearing thereon . . . ." N.C. GEN. STAT. § 105-266.1 (1958).

[16] 250 N.C. at 216, 108 S.E.2d at 211.

[17] N.C. GEN. STAT. § 1-25 (1953); Bourne v. Southern Ry., 224 N.C. 444, 31 S.E.2d 382 (1944).

G.S. § 1-25 allows the plaintiff to bring a new action within one year after a nonsuit, thus tolling the statute of limitations or any time condition annexed to the cause of action. It seems, however, that this rule does not apply when a *new*

266.1 would still be available. It is hoped that the Court will treat the unsuccessful pursuit of one of the statutory remedies as a waiver of the right to proceed under the other.[18]

SALES TAX

In *Campbell v. Currie*[19] plaintiff sold lumber which was used in the buyer's mine shafts and tunnels for bracing. G.S. § 105-164.5 provides that sales of "mill machinery or mill machinery parts and accessories to manufacturing industries and plants" shall be taxed at the wholesale rate of one twentieth of one per cent. Regulation No. 4[20] stated that: "Sales of . . . property used in direct production or extractive processes inside the mine shall be considered sales of mill machinery. . . ." The same regulation said that materials used in the construction of buildings would be taxed at the retail rate. In reliance upon Regulation No. 4 plaintiff returned the tax on its sale to the mining company at the wholesale rate. The Commissioner, maintaining that the retail rate of three per cent applied, assessed a deficiency. Plaintiff brought this action to recover a payment made under protest and prevailed in the trial court.

On appeal the Commissioner contended that the materials were used to build "housing" in which the miners worked; thus, under Regulation No. 4 the retail rate should apply. The Commissioner also contended that in classifying mill machinery Regulation No. 4 went beyond the power granted by the legislature.[21] The Court ignored the first argument, and, as to the second, held that the regulation was within the Commissioner's statutory power. In affirming, the Court said that since the regulation had been in effect some fifteen years, had never been

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cause of action is pleaded in the second suit. See, *e.g.*, Woodcock v. Bostic, 128 N.C. 243, 38 S.E. 881 (1901). Whether the nonsuit in the principal case would stop the running of the statute of limitations as to the second remedy would depend upon whether the two remedies were held to provide a single cause of action or separate and distinct causes of action.

[18] In the principal case the Court said that the two review statutes afforded due process of law. In Bowie v. Town of West Jefferson, 231 N.C. 408, 57 S.E.2d 369 (1950), the Court held that a tax valuation statute was invalid for failure to afford due process because it did not contain a provision for notice and hearing. The two review statutes discussed in the principal case provide for a hearing on the question of liability but they are separate from the sections imposing the income, inheritance and gift taxes. Apparently the separate provision for hearing involved in the princiapl case does not come within the rule of the *West Jefferson* case because of the exception pointed out therein by Seawell, J.: "Not all tax procedures, of course, are subject to the rule we have outlined, that is the presence in the statute of a provision requiring notice and permitting hearing; in some of them the tax is imposed on a declaration or report of the taxpayer, and the amount of the tax is merely a matter of mathematical computation." 231 N.C. at 411, 57 S.E.2d at 371.

[19] 251 N.C. 329, 111 S.E.2d 319 (1959).

[20] N.C. Sales & Use Tax Reg. No. 4 (1944).

[21] G.S. § 105-262 authorizes the Commissioner of Revenue to promulgate regulations necessary to implement the provisions of the Revenue Act.

changed by the legislature, and was by statute made prima facie correct,[22] the regulation controlled.

The Court pointed to an amendment added to G.S. § 105-264 by the 1957 General Assembly which allows a taxpayer to rely on rulings and regulations of the Commissioner. Since the decision for the taxpayer had already been affirmed, the Court found it unnecessary to decide whether or not the amendment would be retroactive.

In the case of *In re Virginia-Carolina Chem. Corp.*[23] the Court had held in effect that the Commissioner was without power to make a retroactive regulation increasing taxes. The principal case seems to announce a sound corollary rule, that a regulation of the Commissioner, unless clearly contrary to a statute, cannot be repudiated retroactively.

TORTS

NEGLIGENCE

Insulating Negligence[1]

The doctrine of insulating negligence was held inapplicable in *Friday v. Adams.*[2] There defendant *A* parked his truck on the highway at night without flares or proper warning devices. Defendant *B,* with plaintiff as a passenger, was proceeding at excessive speed and without his glasses and collided with the rear of the parked truck. A verdict was rendered against both *A* and *B,* and defendant *A* appealed. The Court, without citing any principles of the doctrine of insulating negligence, said, "[I]t may not be held that the allegations are so fatally defective as not to allege concurring negligence. . . . [T]he evidence offered upon the trial in Superior Court is of sufficient probative value to take the case to the jury and to support the verdict."[3]

The Court cited *Riddle v. Artis*[4] as a comparable case. In the *Riddle* case defendant *A* skidded across the centerline and collided with plaintiff's car, and defendant *B* negligently ran into the rear of plaintiff's car. On the theory that it was *foreseeable* that should plaintiff have to stop for any reason *B* would be unable to avoid a collision, the Court held that defendant *B*'s negligence in following too closely and speeding was not insulated by defendant *A*'s negligence.

[22] G.S. § 105-264 makes regulations interpreting the Revenue Act prima facie correct.

[23] 248 N.C. 531, 103 S.E.2d 823 (1958).

[1] Insulating negligence is the subject of Comments, 38 N.C.L. REV. 104 (1959) and 33 N.C.L. REV. 498 (1955).

[2] 251 N.C. 540, 111 S.E.2d 893 (1960).

[3] *Id.* at 549, 111 S.E.2d at 900.

[4] 243 N.C. 668, 91 S.E.2d 894 (1956), discussed in Comment, 38 N.C.L. REV. 104 (1959).

The defendant trucker in the *Friday* case cited and relied on the following cases as authority for contending that his negligence in parking the truck on the highway was insulated by the *active* negligence of the other defendant who was speeding and driving without his glasses:

(1) *Smith v. Grubb*:[5] There defendant *A* negligently parked on the highway. Plaintiff, observing defendant *A*'s parked car, stopped behind him. Defendant *B* then crashed into the rear of plaintiff's truck. The Court held that defendant *A*'s negligence was insulated by the negligence of defendant *B*. The Court spoke of defendant *B*'s *active* negligence and combined the *but for* and *foreseeability* tests in insulating *A*'s negligent parking on the highway.

(2) *Potter v. Frosty Morn Meats, Inc.*:[6] There defendant *A* negligently parked his truck on the highway. Defendant *B*, in whose car plaintiff was a passenger, collided with the rear of defendant *A*'s truck. The Court held that it was the *active* negligence of defendant *B* in failing to observe the truck which proximately caused the collision.

(3) *Howze v. McCall*:[7] There defendant *A* left his automobile parked in the highway with no lights. Plaintiff, upon observing *A*'s parked vehicle, applied his brakes and was struck from behind by defendant *B* who was driving negligently. The Court held that, conceding defendant *A*'s negligence in parking on the highway, there would have been no collision *but for* the negligence of defendant *B*.

After reading the above decisions which the defendant trucker relied on in support of his plea for insulating negligence, it is difficult to understand how the Court can say, "Decisions cited and relied upon by defendant Dulin [trucker] have been duly considered and found *readily* distinguishable in factual situations."[8]

Another recent decision on facts somewhat similar to those in the *Friday* case reached the opposite result. In *Rowe v. Murphy*[9] defendant *A* parked his disabled automobile partially on the highway. Plaintiff stopped to offer aid and parked his car in front of defendant *A*'s car. Plaintiff was standing between the two parked automobiles when defendant *B*, driving while intoxicated, collided with the rear of defendant *A*'s automobile crushing the plaintiff between the parked vehicles. The Court held that defendant *A*'s car was not negligently parked. But the Court went on to indicate that even conceding that defendant *A was* negligently parked, the negligence of defendant *B* was the proximate cause of the collision.

[5] 238 N.C. 665, 78 S.E.2d 598 (1953).
[6] 242 N.C. 67, 86 S.E.2d 780 (1955), discussed in Comment, 38 N.C.L. REV. 104 (1959).
[7] 249 N.C. 250, 106 S.E.2d 236 (1958), discussed in Comment, 38 N.C.L. REV. 104 (1959).
[8] 251 N.C. at 549, 111 S.E.2d at 900. (Emphasis added.)
[9] 250 N.C. 627, 109 S.E.2d 474 (1959).

Though the holdings of both the *Friday* and *Rowe* cases seem sound on their facts, a comparison of these with other rear-end collision cases leads one to agree that "any effort to reconcile the North Carolina law on the subject of insulating negligence seems futile."[10]

Effect of Removal of Stop Signs by Vandals

In *Tucker v. Moorefield*[11] plaintiff's intestate was proceeding north on *X* street, and the defendant was proceeding west on *Y* street. A collision occurred at the intersection resulting in the death of plaintiff's intestate. Stop signs had been placed on *Y* street, but the sign facing the defendant as he approached the intersection had been removed by vandals some two months before; however, the metal post remained. Plaintiff's intestate had been used to traveling along *X* street for several years, but the defendant was not familiar with the interesection. The Court said that evidence of the existence, at the time of the collision, of the metal post on the north side of *Y* street and the stop sign on the south side facing west was admissible as circumstances to be considered by the jury in determining whether the defendant exercised due care. In awarding a new trial for the defendant, however, the Court held that the fact that the stop sign *had been* on the north side of *Y* street was irrelevant as to the duty of either party absent a showing that the defendant knew it had been there or that the plaintiff's intestate knew it had been removed. The Court said that the duty of both parties must be determined by conditions as they existed at the time of the collision, and if in fact there was no stop sign facing the defendant, the plaintiff's intestate was not legally entitled to act as if there were.

Speed Exemption Statute

G.S. § 20-145 provides that vehicle speed limits "shall not apply to vehicles when operated with due regard for safety[12] under the direction of the police[13] in the chase or apprehension of violators of the law . . . . This exemption shall not, however, protect the driver of any such vehicle from the consequences of a reckless disregard of the safety of others." In *Goddard v. Williams*[14] an action was brought against a police officer

[10] Cronenberg v. United States, 123 F. Supp. 693, 699 (E.D.N.C. 1954).
[11] 250 N.C. 340, 108 S.E.2d 637 (1959).
[12] Various courts have interpreted the "due regard" portion of similar statutes as essentially satisfied (1) when the driver of the emergency vehicle has by suitable warning given the user of the street or highway an opportunity to yield the right of way and (2) if having discovered the peril in which another has knowingly or negligently become involved despite the operation of the required warning devices the driver reasonably exercises any last clear chance to avoid the accident. Duff v. Schaefer Ambulance Serv., 132 Cal. App. 2d 665, 283 P.2d 91 (1955); Lakoduk v. Cruger, 48 Wash. 2d 642, 296 P.2d 690 (1956).
[13] The statute applies equally to other emergency vehicles (fire department vehicles and ambulances) providing they are on official business. N.C. GEN. STAT. § 20-145 (1953).
[14] 251 N.C. 128, 110 S.E.2d 820 (1959).

for negligence in the operation of his patrol car. The plaintiff alleged that he was proceeding down a city street and attempted to make a left turn when the officer approached from the rear at approximately seventy miles per hour in a thirty-five mile speed zone. The two vehicles collided when the officer attempted to pass the turning plaintiff. The officer filed a cross-action alleging negligence on the part of the plaintiff. The officer also alleged that at the time of the collision he was pursuing the plaintiff for running a stop sign, and that his siren was turned on. The jury returned a verdict for the officer, and on appeal the Court granted a new trial. The trial court had charged that the officer would not be negligent unless he acted wilfully and wantonly and for the purpose of injuring the plaintiff. Although the language of the Court is not clear,[15] it apparently held that the charge was erroneous, and that "in such situation, an officer is liable for his negligent acts as well as for his wilful and wanton acts."[16]

As to the standard of care required of an officer in pursuit of an offender the Court quoted two authorities to the effect that he is to exercise the care which a reasonable and prudent man in discharge of official duties of a like nature under like circumstances would exercise.[17] The Court said, however, that "mere speed alone, unaccompanied by any recklessness or disregard of the rights of others, would be insufficient to support an allegation of negligence on the part of the [officer] . . . ."[18] Thus, under the speed exemption statute, it appears that in order for speeding to constitute negligence on the part of the officer the plaintiff must not only show the speed of the officer but must go further and show circumstances under which such speed would constitute a reckless disregard of the safety of others.

Unexplained Automobile Accidents

The doctrine of *res ipsa loquitur* was held not applicable to unexplained automobile accidents in *Lane v. Dorney*,[19] and the judgment of nonsuit was sustained. The Court "carefully" distinguished the case of *Etheridge v. Etheridge*[20] which apparently heretofore had been assumed to have applied the doctrine.[21] However, a petition to rehear the *Lane*

[15] The Court stated: "There is no exemption granted by G.S. § 20-145 from reckless and negligent conduct by an officer unless such reckless and negligent conduct is wilful and wanton, intentional and purposeful, and made for the purpose of injuring the person the officer was seeking to arrest." *Id.* at 133, 110 S.E.2d at 824.

[16] *Ibid.*

[17] McKay v. Hargis, 351 Mich. 409, 88 N.W.2d 456 (1958); 60 C.J.S. *Motor Vehicles* § 375 (1949).

[18] 251 N.C. at 133, 110 S.E.2d at 824; *accord*, McKay v. Hargis, *supra* note 17.

[19] 250 N.C. 15, 108 S.E.2d 55 (1959).

[20] 222 N.C. 616, 24 S.E.2d 477 (1943.)

[21] "The Supreme Court of North Carolina recently applied the doctrine of *res ipsa loquitur* in a civil action for personal injuries arising out of an unexplained automobile accident." Note, 21 N.C.L. REV. 402 (1943).

case was granted, and the Court reversed the nonsuit by a four-to-three decision.[22] The Court affirmed its prior holding that *res ipsa* was not applicable to unexplained automobile accidents but held that there was sufficient evidence of negligence to require submission of the case to the jury.[23]

Proximate Cause

In *Williamson v. Bennett*[24] plaintiff was driving her automobile down a one-way street when the defendant, operating a small foreign sports car, pulled into the street from her driveway and struck the plaintiff's automobile near the center on the driver's side. The plaintiff did not see what made contact with her car, and all that she heard was a "grinding sound on the left side." About a month before the time in question a little girl riding a bicycle was killed when she ran into the side of the plaintiff's brother-in-law's car. Plaintiff testified that when she heard the grinding sound all she could think of was that she had killed a child on a bicycle. There was no physical injury to the plaintiff, but she later developed a severe nervous disorder resulting in pseudo-paralysis. In denying the plaintiff damages for personal injury the Court said the plaintiff's condition was not proximately caused by what actually happened but by what might have happened. The defendant was under no duty to anticipate or take precautions against the mere possibility that the plaintiff or others might imagine a state of facts which did not exist.

Owners and Occupiers of Land

In *Hood v. Queen City Coach Co.*[25] the plaintiff, desiring to purchase a ticket for transportation on the defendant bus line, entered the rear of the station by a driveway provided as the exit for buses and taxicabs instead of following the sidewalk to the front of the station. The defendant maintained an office building adjacent to and parallel with the driveway. There was a considerable upgrade from the street entrance of the driveway to the rear of the station. To provide a level walkway from the street to the side entrance of its building the defendant excavated the grade and installed a retaining wall. The wall was capped by a concrete curbing which extended a few inches above the level of the driveway. The walkway was three feet below the level of the driveway at one end and flush with the sidewalk at the other.

After purchasing his ticket, the plaintiff proceeded from the rear entrance of the station back down the driveway. In order to avoid a

[22] 252 N.C. 90, 113 S.E.2d 33 (1960). Denny, J., joined by Winborne, C.J., and Moore, J., concurred with the majority in holding *res ipsa* inapplicable, but dissented in the finding of sufficient evidence to carry the case to the jury.

[23] *But see* Boyd v. Harper, 250 N.C. 334, 108 S.E.2d 598 (1959).

[24] 251 N.C. 498, 112 S.E.2d 48 (1960).

[25] 249 N.C. 534, 107 S.E.2d 154 (1959).

bus which had started up behind him, the plaintiff stepped upon the curb above the excavation and fell into it, sustaining injuries.

The accident occurred at night, and lights from the street, the rear of the station, and other buildings illuminated the drive but did not illuminate the excavation below the surface of the drive. In affirming the judgment for the plaintiff the Court held that the evidence permitted the finding that the plaintiff was an invitee, and that the duty was thereby imposed upon the defendant to maintain the premises in a reasonably safe condition and to provide safeguards against injury by reason of depressed holes, pitfalls, or other hidden dangers.[26]

The Court relied on two factors in determining that the evidence supported a finding that the plaintiff was an invitee. First, it was to the mutual benefit[27] of the parties for the plaintiff to enter the station for the purpose of purchasing a ticket on the defendant bus line. Second, the plaintiff knew the public had used this approach for a long period of time, and the defendant had not given notice to the public that the approach was not to be used. The evidence of inadequate lighting was found sufficient to support a finding of negligence.

In *Powell v. Deifells, Inc.*[28] the plaintiff entered the defendant's department store around eleven a.m. to make a purchase. At the time plaintiff entered the store it was raining and there had been flurries of snow. The plaintiff sustained injuries when she slipped on the asphalt tile floor which was wet because of water which the customers had tracked in. The plaintiff appealed a judgment of involuntary nonsuit and the Supreme Court reversed. The Court held the jury should decide the question of negligence since: (1) the floor was of asphalt tile, impervious to water, and known by the defendant to be slippery when wet; (2) it was customary for the defendant to mop the floor and put mats at the entrances on rainy days, and the defendant had neglected to do either; (3) the defendant gave the plaintiff no warning of the danger and failed to remove the danger.

This is the first case before the Court where the fall of the plaintiff was due to water tracked in by the defendant's customers. The rule is well established in North Carolina that where the dangerous condition was not created by the defendant the plaintiff must establish that the condition existed for such a length of time that the defendant knew, or in the exercise of reasonable care should have known of its existence.[29] The store had been open for less than three hours and the plaintiff fell some twenty-five feet from the store entrance. There was no showing

[26] *Accord,* Batts v. Home Tel. & Tel. Co., 186 N.C. 120, 118 S.E. 893 (1923).

[27] Mutual benefit is necessary to designate one an invitee. Pafford v. J. A. Jones Constr. Co., 217 N.C. 730, 9 S.E.2d 408 (1940).

[28] 251 N.C. 596, 112 S.E.2d 56 (1960).

[29] Harris v. Montgomery Ward & Co., 230 N.C. 485, 53 S.E.2d 536 (1949); Note, 31 N.C.L. Rev. 134 (1952).

that the defendant had actual knowledge of the existing condition, and the case appears to be a relatively liberal application of constructive notice. This could be explained however by the fact that the case does not fit squarely into the cases where the defendant created the danger,[30] nor those where the independent agency created the danger.[31] Here the danger was created partially by the defendant in having floors which he knew became slippery when wet and partially by the independent agency's tracking in the water.[32]

In *Witherspoon v. Owen*[33] North Carolina apparently recognized for the first time a duty of a proprietor of a public business establishment to protect patrons from assaults by other patrons.[34] The plaintiff was a customer in the defendant's tavern and when he attempted to leave he was assaulted and knocked down a flight of stairs by an irate patron. The Court conceded the duty of the defendant proprietor to protect his patrons against foreseeable assaults, but affirmed the nonsuit on the ground that apparently nothing had transpired which would indicate that the plaintiff could not proceed down the steps safely. The authorities are in accord that a proprietor of a public place of business may be liable for harm to patrons caused by other patrons. By the majority rule liability will be imposed if the proprietor by the exercise of reasonable care could have discovered that such acts were being done or were about to be done and could have protected the patron by controling the conduct of the assaulting patron or by giving a warning adequate to enable the assaulted patron to avoid harm.[35]

Attractive Nuisance Doctrine

In *Matheny v. Stonecutter Mills Corp.*[36] plaintiff's intestates, ages nine and ten years, were drowned in an industrial reservoir owned by the defendant. The reservoir was enclosed by a six foot mesh fence

[30] Hughes v. Anchor Enterprises, Inc., 245 N.C. 131, 95 S.E.2d 577 (1956) (soapy substance left by employee); Brown v. Montgomery Ward & Co., 217 N.C. 368, 8 S.E.2d 199 (1940) (oil dripped from machine on display).

[31] Cooke v. Great Atl. & Pac. Tea Co., 204 N.C. 495, 168 S.E. 679 (1933) (plaintiff slipped on a banana peeling); Fox v. Great Atl. & Pac. Tea Co., 209 N.C. 115, 182 S.E. 662 (1935) (plaintiff slipped on a beet in the aisle).

[32] Two other cases in this area of business visitors were recently before the Court. In Garner v. Atlantic Greyhound Corp., 250 N.C. 151, 108 S.E.2d 461 (1959), the plaintiff was denied a recovery when she slipped leaving a store allegedly because of an optical illusion created by defendant's step. In Little v. Wilson Oil Corp., 249 N.C. 773, 107 S.E.2d 729 (1959), recovery was denied when the plaintiff tripped on the edge of a protruding portion of the concrete slab in front of the defendant's filling station.

[33] 251 N.C. 169, 110 S.E.2d 830 (1959).

[34] North Carolina has recognized this duty of protection with respect to common carriers. See Mills v. Atlantic Coast Line R.R., 172 N.C. 266, 90 S.E. 221 (1916); Pruett v. Southern Ry., 164 N.C. 3, 80 S.E. 65 (1913).

[35] Sidebottom v. Aubrey, 267 Ky. 45, 101 S.W.2d 212 (1937); Peck v. Gerber, 154 Ore. 126, 59 P.2d 675 (1936); Weihert v. Piccione, 273 Wis. 448, 78 N.W.2d 757 (1956); Annot., 106 A.L.R. 1003 (1937); RESTATEMENT, TORTS § 348 (1934).

[36] 249 N.C. 575, 107 S.E.2d 143 (1959).

topped with barbed wire. There was no gate in the fence. The reservoir was so constructed that once in the water one could not get out without assistance. Children for many years had frequented the reservoir to swim and fish, and an officer of the defendant corporation had been notified of this fact some years prior to the time in question. The children usually gained entrance by climbing over the fence with the assistance of the vines which covered it.

It is settled law in North Carolina that one who maintains even an unenclosed pond is not guilty of negligence per se.[37] However, if the pond owner knows or should know that children of tender years are frequenting the premises, the owner must exercise reasonable care to provide for their protection.[38] In *Matheny* the Court held that the defendant had erected a suitable safeguard, and that the motion for nonsuit was properly granted.[39]

The attractive nuisance doctrine was again before the Court in *Dean v. Wilson Constr. Co.*[40] where a fourteen year old boy entered a street construction site, after work for the day had ceased, climbed upon a bulldozer, and started it. The boy was then told by a neighbor to leave and was warned to stay off the equipment. The boy then proceeded to a crane which was also on the site, opened the unlocked cab door, climbed into the cab, started the engine, and began to operate the crane. He caused the boom of the crane to come into contact with some high-tension wires and was electrocuted. The Court, noting that the boy was a trespasser in climbing into and operating the crane,[41] said that since there was no evidence of wilful and wanton negligence on the part of the construction company, the plaintiff based his right to recover on the so-called attractive nuisance doctrine. The Court refused to apply the doctrine, however, since the evidence showed that the boy knew he was a trespasser, was conscious of the danger, and deliberately risked the consequences of his wrongful conduct.

The fact that the boy was fourteen years old seemed to weigh heavily with the Court. The Court noted that the doctrine was designed to protect children of tender years who are too young to understand and appreciate the danger and quoted from *Brisco v. Henderson Lighting & Power Co.*[42] where it was said: "[I]n the numerous cases which we

[37] Stribbling v. Lamm, 239 N.C. 529, 80 S.E.2d 270 (1954); Fitch v. Selwyn Village, Inc., 234 N.C. 632, 68 S.E.2d 255 (1951).

[38] Barlow v. Gurney, 224 N.C. 223, 29 S.E.2d 681 (1944). See also Notes, 13 N.C.L. Rev. 340 (1935), 26 N.C.L. Rev. 227 (1948).

[39] Compare Price v. Atchison, 58 Kan. 551, 50 Pac. 450 (1897), where the defendant had erected a fence, but knew boys habitually climbed it to gain access. The court held it was the duty of the defendant to expel the intruders or adopt other measures to avoid accident.

[40] 251 N.C. 581, 111 S.E.2d 827 (1960).

[41] The duty owed to a trespasser is that he must not be willfully or wantonly injured. Jessup v. High Point, T. & D.R.R., 244 N.C. 242, 93 S.E.2d 84 (1956).

have examined we do not find any in which a boy of thirteen years, 'with the usual intelligence of boys of that age,' has been permitted to rely upon the attractive allurements of machinery to children."[43]

Manufacturer's Liability—Defective Machinery

In *Tyson v. Long Mfg. Co.*[44] the plaintiff was working as a looper on a tobacco harvester. As the machine lurched the plaintiff lost her balance and caught her thumb in a partially covered perforated sprocket. Plaintiff brought suit against the manufacturer and the retailer alleging that the harvester was negligently constructed in that it had a sprocket with holes large enough to catch one's finger, and that the sprocket was inadequately guarded. She also alleged that the sprocket and guard were so constructed as to constitute a concealed danger. On appeal the judgment of nonsuit was affirmed.

With respect to the duty of a manufacturer owed to a user of its product, the Court quoted from a New York decision,[45] stating that " 'the manufacturer of a machine, . . . dangerous because of the way in which it functions, and patently so, owes to those who use it a duty merely to make it free from latent defects and concealed dangers.' "[46] The Court stated: (1) There was no latent defect or danger concealed from the plaintiff. (2) The machine was not inherently dangerous to the plaintiff. (3) There was no evidence of negligence in the design or construction of the machine. (4) The evidence was insufficient to show that the injury to the plaintiff was foreseeable. The Court said that *MacPherson v. Buick Motor Co.*[47] was distinguishable in that there the defect in an automobile was concealed from the plaintiff.

With respect to the seller, the Court held that absent an express warranty, no greater duty rested upon the seller than upon the manufacturer.[48]

Liability of Parent for Tort of Child

The question of the liability of parents for injuries inflicted by their minor son with an air rifle was presented in *Lane v. Chatham.*[49] The plaintiff was shot in the eye with a "BB" gun by the defendants' nine

[42] 148 N.C. 396, 62 S.E. 600 (1908).
[43] *Id.* at 414, 62 S.E. at 607. See also 65 C.J.S. *Negligence* § 29, at p. 469 (1950); RESTATEMENT, TORTS § 339 (1934); Wilson, *Limitations on the Attractive Nuisance Doctrine,* 1 N.C.L. REV 162 (1922).
[44] 249 N.C. 557, 107 S.E.2d 170 (1959).
[45] Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950). Plaintiff was feeding onions into an onion topping machine and was injured when his hand became caught in the machine's revolving steel rollers. See also Stevens v. Allis-Chalmers Mfg. Co., 151 Kan. 638, 100 P.2d 723 (1940).
[46] 249 N.C. at 559, 107 S.E.2d at 172.
[47] 217 N.Y. 382, 111 N.E. 1050 (1916).
[48] *Accord,* Kientz v. Carlton, 245 N.C. 236, 96 S.E.2d 14 (1957).
[49] 251 N.C. 400, 111 S.E.2d 598 (1959), also discussed in DOMESTIC RELATIONS, *Parents' Liability, supra.*

year old son. There was evidence that the son had on two prior occasions shot other persons with the air rifle, and that this was known by the feme defendant. The Court said that the parents entrusting an air rifle to their minor son would be liable *"based on their own negligence,* if under the circumstances they could and should, by the exercise of due care, have reasonably foreseen that the boy was likely to use the air rifle in such a manner as to cause injury, and failed to exercise reasonable care to prohibit, restrict or supervise his further use thereof."[50]

The feme defendant was held liable because of her knowledge of the prior misuse and her failure to restrict or supervise the child's further use of the rifle. The defendant father, however, was excused from liability, having no knowledge of the prior misuse. It might be argued that the knowledge of the wife should be imputed to the husband.[51] However, the only cases in which knowledge of one spouse has been imputed to the other in North Carolina have been cases in which a clear principal-agent relationship appeared.[52]

The rule of the instant case appears to be in accord with that of other jurisdictions which have considered the question and allowed recovery.[53] In the cases denying recovery[54] the plaintiff apparently failed to show that the parent had knowledge of any dangerous propensities of the child or of any prior misuse of the air rifle.

It should be noted that the Court in the instant case held that an air rifle was not a dangerous instrumentality per se. Thus, liability could not be imposed merely upon showing that the parent gave the air rifle to the child.[55] Though it appears to be the universal holding that air rifles in general are not per se dangerous, it would seem that these decisions are based largely on precedent rather than sound reasoning, especially in view of the modern advances in the power and precision of

[50] *Id.* at 405, 111 S.E.2d at 603.

[51] It would seem that this is analogous to the situation wherein knowledge of the wife of the dangerous propensities of their dog is imputed to the husband. See Benke v. Stepp, 199 Okla. 119, 184 P.2d 615 (1947); Barber v. Hacstrasser, 136 N.J.L. 76, 54 A.2d 458 (1947).

[52] Tomlins v. Cranford, 227 N.C. 323, 42 S.E.2d 100 (1947); Francis v. Reeves, 137 N.C. 269, 49 S.E. 213 (1904). Both of these cases involved deed transaction.

[53] Gudziewski v. Stemolesky, 263 Mass. 103, 160 N.E. 334 (1928); Sullivan v. O'Ryan, 206 Misc. 212, 132 N.Y.S.2d 211 (Sup. Ct. 1954); Johnson v. Glidden, 11 S.D. 237, 76 N.W. 933 (1898).

[54] Martin v. Barnett, 120 Cal. App. 2d 625, 261 P.2d 551 (1953); Norlin v. Connolly, 336 Mass. 553, 146 N.E.2d 663 (1957); Fleming v. Kravitz, 260 Pa. 428, 103 Atl. 831 (1918); Highshaw v. Creech, 17 Tenn. App. 573, 69 S.W.2d 249 (1933); Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892).

[55] It is negligent to give a dangerous weapon to a minor child incompetent to handle it. Dickens v. Barham, 69 Colo. 349, 194 Pac. 356 (1920) (rifle); Parman v. Lemnon, 119 Kan. 323, 244 Pac. 227 (1926) (shotgun). In Brittingham v. Stadiem, 151 N.C. 299, 66 S.E. 128 (1909), the feme defendant who employed her twelve year old child as a clerk in her pawn shop was held liable, on the theory of *respondeat superior* and on the theory of her negligence in entrusting the child with a dangerous instrumentality, for the negligent act of her son in shooting a customer with a pistol.

pneumatic arms.[56] In spite of the view that air rifles are not inherently dangerous, some courts have indicated that one would be negligent in giving a minor child an air rifle knowing him to be incompetent to exercise judgment in its control and use.[57] Statutes in some states make it unlawful to give an air rifle to children under certain ages.[58]

TORT CLAIMS ACT

The State as a Joint Tort-Feasor

In *Branch Banking & Trust Co. v. Wilson County Bd. of Educ.*[59] a child was struck and killed after alighting from a school bus by a motorist who had passed the stopped bus. Suit was brought for wrongful death against the county board of education before the Industrial Commission pursuant to the provisions of the Tort Claims Act.[60] The plaintiff alleged various acts of negligence on the part of the bus driver in failing properly to supervise the discharge of the child. The action was dismissed by the Commissioner, and the full Board and the superior court affirmed. On appeal, the Supreme Court held that the Commission committed error in concluding as a matter of law that the affidavits and stipulations of the parties showed that the negligence of the motorist insulated any negligence on the part of the bus driver.[61]

The defendant's motion to dismiss was based on its contention that no public agency covered by the Tort Claims Act could be liable for the negligence of its employees unless that negligence was the *sole* proximate cause of the injury. The Court held that interpretation to be erroneous. The Act provides:

> The Industrial Commission shall determine whether or not each individual claim arose as the result of a negligent act of any . . .

[56] In the view of Mr. Justice Higgins in a concurring opinion in the *Lane* case, such holdings are "as out of date as the horse and buggy." 251 N.C. at 406, 111 S.E.2d at 603.

[57] Mazzocchi v. Seay, 126 W. Va. 490, 29 S.E.2d 12 (1944). Here plaintiff alleged that the parents of a four year old child negligently gave their infant son an air rifle, knowing that because of his infancy he was incapable of exercising proper judgment, care, and discretion in the use and control of it. The court sustained the demurrer and said that even though an air rifle cannot be said to be inherently dangerous it could be a dangerous instrumentality in the hands of an infant and the parents thus liable for giving it to him. This case is reviewed in Note, 22 N.C.L. REV. 333 (1944).

[58] N.Y. PENAL CODE § 1896 (misdemeanor to give or sell any air rifle to a child under sixteen); PA. STAT. Ann. tit. 18, §§ 3-841 to -848 (Supp. 1958) (unlawful to give or sell a minor under eighteen an air rifle under certain circumstances).

[59] 251 N.C. 603, 111 S.E.2d 844 (1960), also discussed in ADMINISTRATIVE LAW, *Pleading and Evidence, supra.*

[60] N.C. GEN. STAT. §§ 143-291 to -300.1 (1958).

[61] While the state is not liable for the negligent omissions of its employees, Flynn v. North Carolina State Highway & Pub. Works Comm'n, 244 N.C. 617, 94 S.E.2d 571 (1956), G.S. § 143-300.1 provides that a county board of education is responsible for the negligent omissions of its school bus drivers.

> employee . . . of the State[62] while acting within the scope of his . . . employment . . . *under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.* If the Commission finds that there was such negligence on the part of an . . . employee . . . which was the proximate cause of the injury . . . the Commission shall determine the amount of damages which the claimant is entitled to be paid . . . .[63]

The Court said that the agency being sued under the act is liable under the same circumstances as a private person would be liable. Thus since the negligent acts of a private person need only be *one* of the proximate causes of the injury to impose liability, the Court felt it was not the intent of the legislature to limit liability under the act as contended by the defendant.

Apparently, in view of the Court's interpretation of the act, the state may become liable as a joint tort-feasor should the negligence of its employees concur with that of a third person to produce an injury. If this is true, it raises some interesting, but unanswered questions concerning the contribution statute[64] viewed in the light of the Tort Claims Act. In attempting to answer these questions it must be kept in mind that our Court has said that since the Tort Claims Act is in derogation of the sovereign immunity from liability for torts the act should be strictly construed.[65]

The question is raised as to whether in the joint tort-feasor situation the plaintiff could maintain an action against both the state and the third person and obtain a joint judgment. The answer would seem to be in the negative. Since the Tort Claims Act created the Industrial Commission as the court for hearing tort claims against the state, it would seem unlikely that the plaintiff would be allowed to join the state in a superior court action or the third person before the Industrial Commission.

The next question is, does the right to contribution exist where the state is a joint tort-feasor? The contribution statute provides that in any case where judgment has been or may be rendered against two persons liable jointly and severally for its payment as joint tort-feasors but only one joint tort-feasor was made defendant, the tort-feasor against

[62] An employee of a county or city board of education is not an employee of the State Board of Education or of the state. Turner v. Gastonia City Bd. of Educ., 250 N.C. 456, 109 S.E.2d 211 (1959). However, this action was brought under the provisions of G.S. § 143-300.1 allowing claims against the county and city boards of education for accidents involving school buses under rules of liability and procedure as provided with respect to tort claims against the State Board of Education.

[63] N.C. GEN. STAT. § 143-291 (1958). (Emphasis added.)

[64] N.C. GEN. STAT. § 1-240 (1953).

[65] Floyd v. North Carolina State Highway & Pub. Works Comm'n, 241 N.C. 461, 85 S.E.2d 703 (1955).

whom the action was brought may enforce contribution in a separate action or join the other tort-feasor in the original action.[66] The Court has said that the intent and purpose of the contribution statute is to permit a defendant who has been sued in a tort action to bring into the action for the purpose of enforcing contribution any joint tort-feasor against whom the plaintiff could have originally brought suit in the same action.[67] Thus it could be argued that the contribution statute contemplates the ability to obtain a joint judgment, and where that ability does not exist the right of contribution does not exist.

Assuming that the Court would construe the contribution statute liberally and hold that the right of contribution exists where the state is a joint tort-feasor, there is still the problem of exercising that right. The statute provides for the enforcement of contribution by a cross action or by bringing a separate suit therefor. The apparently exclusive jurisdiction of the Industrial Commission would seem to preclude the state from being a defendant in the superior court and the third person from being a defendant before the Industrial Commission. As to bringing a separate suit, the state would probably be allowed to bring its contribution action in the superior court after having judgment rendered against it in the Industrial Commission.[68] However, should the third person be sued in the superior court, it is questionable whether he could bring his contribution action before the Industrial Commission. The Tort Claims Act states that the Commission is a court "for the purpose of hearing and passing upon tort claims" against the state.[69] Thus it could be argued that a claim for contribution is not a tort claim but a statutory claim not existing at common law. On the other hand it could be argued that though the claim is not a tort claim, it nevertheless is a claim arising out of a tort as it "arose as the result of a negligent act of [a state employee] . . . ."[70]

It would seem wise for the third person joint tort-feasor seeking contribution from the state to stress the language in the Tort Claims Act making the state liable as if it were a private person. This language was relied on in the instant case in indicating that the state would be liable for the concurring negligent acts of its employees. This language was also stressed in *Lyon & Sons, Inc. v. North Carolina State Bd. of*

[66] N.C. GEN. STAT. § 1-240 (1953).
[67] Wilson v. Massagee, 224 N.C. 705, 32 S.E.2d 335 (1944).
[68] State Highway & Pub. Works Comm'n v. Cobb, 215 N.C. 556, 2 S.E.2d 565 (1939). The state was denied a recovery of expenditures made in recapturing the defendant who had escaped from prison. However, the Court held that the infirmity of the state's case did not consist in an inability to sue, but in its inability to maintain that particular suit. The Court said that a sovereign may bring an action for tort in its individual capacity and with respect to its individual and proprietary rights.
[69] N.C. GEN. STAT. § 143-291 (1958).
[70] *Ibid.*

Educ.[71] holding that the right of subrogation against the state existed under the Tort Claims Act. To be sure, the state, if a private person, would be liable to the third person for contribution.

It is submitted that a liberal construction of both the contribution statute and the Tort Claims Act is desirable. As was stated by Cardozo, J., in *Anderson v. John L. Hayes Constr. Co.*,[72] "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."[73]

TRESPASS

The Court for the first time applied the "ownership of space"[74] and the "lawfulness of flight"[75] statutes in *Wall v. Trogdon*.[76] The defendant flew his crop-spraying airplane over the plaintiff's fishing pond at an altitude of from seventy-five to one hundred feet while emitting a fluid used for spraying crops. An oily substance was observed on the pond shortly after the flight. The plaintiff brought an action for trespass and negligence allegedly resulting in the death of his fish. The Court held the nonsuit was proper as to the trespass of the airplane because plaintiff failed to show the causal relationship between the death of the fish and the operation of the airplane necessary to establish an unlawful flight under the statutes. Similarly, the absence of the causal connection defeated the plaintiff's action for negligence. Although the decision on the trespass by the airplane and negligence in its operation is not questioned, it would seem that had plaintiff been allowed all the reasonable inferences to which he was entitled on a motion for nonsuit the jury should have been allowed to determine the question of a technical trespass. The Court said plaintiff could not recover for trespass merely by showing the flight over the pond with a liquid streaming from the airplane without showing the liquid "landed on the plaintiff's property rather than somewhere else." At an altitude of seventy-five to one hundred feet it would seem reasonable to infer that some of the liquid landed on the land below.

[71] 238 N.C. 24, 76 S.E.2d 553 (1953). See also Note, 32 N.C.L. REV. 242 (1954).
[72] 243 N.Y. 140, 153 N.E. 28 (1926).
[73] *Id.* at 147, 153 N.E. at 29.
[74] N.C. GEN. STAT. § 63-12 (1960). The statute provides: "The ownership of the space above the lands and waters of this State is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in § 63-13."
[75] N.C. GEN. STAT. § 63-13 (1960). The statute provides: "Flight in aircraft over the lands and waters of this State is lawful, unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be injurious to the health and happiness, or imminently dangerous to persons or property lawfully on the land or water beneath. . . ."
[76] 249 N.C. 747, 107 S.E.2d 757 (1959).

MALICIOUS PROSECUTION

Will one who makes a mistake of law in his decision to prosecute another criminally thereby subject himself to a suit for malicious prosecution? An affirmative answer was clearly implied in the recent case of *Gray v. Bennett.*[77] There the plaintiff in the malicious prosecution action entered into a contract with the defendant by which the plaintiff was to collect and deliver laundry for the defendant's business. Plaintiff's only compensation was a certain percentage of all sums collected by him from laundry customers, and his agreement with the defendant required him to make a bi-monthly accounting of the sums he collected, less the commission. The laundry company did not maintain customer accounts, and the defendant and his company looked to the plaintiff for their money. The plaintiff was responsible for any loss he sustained by extending credit. He established his own laundry route and furnished his own delivery truck. The defendant caused a warrant to be issued and plaintiff was arrested for embezzlement of funds due on the account. The criminal trial resulted in a directed verdict of not guilty. Plaintiff thereafter brought an action for malicious prosecution. Appeal was taken from the granting of defendant's motion of nonsuit and the Supreme Court reversed.

The Court determined that the relationship between the plaintiff and the defendant was that of debtor and creditor, and that therefore the plaintiff could not be convicted of embezzlement.[78] The Court's reversal was apparently on the theory that since the plaintiff could not as a matter of law have been convicted on these facts, the defendant did not have probable cause to have the plaintiff prosecuted for embezzlement.

Want of probable cause, malice, and favorable termination of the proceeding upon which plaintiff's action is based are essential elements of the tort of malicious prosecution.[79] Malice may be inferred by the jury from a want of probable cause, but the existence of malice does not create an inference that probable cause was lacking.[80] The weight of authority appears to follow the rule that a mistaken belief in regard to the facts may furnish probable cause for initiating criminal proceedings.[81] If, however, through ignorance of the law, the accuser erroneously believes that the acts of the accused are such as to constitute the offense charged, his mistaken belief as to the legal consequences of the acts of the accused does not furnish probable cause.[82] Some courts hold that

[77] 250 N.C. 707, 110 S.E.2d 324 (1959).

[78] The Court also said that even if the relationship of employer-employee existed, the evidence was sufficient to support a finding of want of probable cause.

[79] Taylor v. Hodge, 229 N.C. 558, 50 S.E.2d 307 (1948).

[80] Rouse v. Burnham, 51 F.2d 709 (10th Cir. 1931); Motsinger v. Sink, 168 N.C. 548, 84 S.E. 847 (1915).

[81] Motsinger v. Sink, *supra* note 80.

[82] Vasser v. Berry, 85 Ga. App. 435, 69 S.E.2d 701 (1952); Smith v. Deaver, 49 N.C. 513 (1857); RESTATEMENT, TORTS § 662, comment *j* (1938); 54 C.J.S. *Malicious Prosecution* § 31 (1948).

mistake of law based on advice of counsel does afford protection.[83] North Carolina has held that advice of counsel is only evidence on the issue of probable cause and malice.[84]

It has been said that this rule concerning a mistake of law is apparently based on the antique and questionable theory that one is required at his peril to know the law.[85] It is submitted that the better view would be that a reasonable mistake of law should be placed on the same basis as mistake of fact, since probable cause is determined by examining the impressions the plaintiff's conduct made upon the defendant.

Malicious Interference With Contractual Relations

In *Johnson v. Graye*[86] plaintiff schoolteacher alleged that the principal of her school made false charges about her to the school superintendent. The allegations were that the false charges (1) reflected directly upon plaintiff's professional efficiency, ability, character, and attitude, (2) were made maliciously for the unjustifiable and unlawful purpose of having her contract with the school board terminated and her renewal contract denied, and (3) were material in forcing her discharge and in preventing a renewal of her contract. The lower court granted the defendant principal's motion to dismiss on the ground that plaintiff's action was for slander or libel, and that in either case the applicable statute of limitations had run.[87] The Supreme Court, in reversing, stated that the gravamen of the cause of action alleged was malicious intereference with plaintiff's contractual relationship with the school board and that the three year statute would apply.[88]

It is well settled in North Carolina that an action may be maintained against one who knowingly,[89] intentionally,[90] and unjustly[91] induces a party to a contract to breach it to the damage of the other party.[92] Similarly, a cause of action may arise against one who interferes with the making of a contract as distinguished from one who interferes with an existing contract.[93] Where defamation is the means used to induce the breach or to interfere with the making of the contract, it would seem

[83] Paulk v. Buczynski, 106 So. 2d 100 (Fla. Dist. Ct. App. 1958).
[84] Downing v. Stone, 152 N.C. 525, 68 S.E. 9 (1910).
[85] Prosser, Torts § 98 (2d ed. 1955).
[86] 251 N.C. 448, 111 S.E.2d 595 (1959).
[87] N.C. Gen. Stat. § 1-55 (1953) (slander—limitation six months); N.C. Gen. Stat. § 1-54 (1953) (libel—limitation one year).
[88] N.C. Gen. Stat. § 1-52(5) (1953).
[89] Morgan v. Smith, 77 N.C. 37 (1877).
[90] Holder v. Manufacturing Co., 135 N.C. 392, 47 S.E. 481 (1904).
[91] Winston v. Williams & McKeithan Lumber Co., 228 N.C. 786, 47 S.E.2d 19 (1948). The defendant would be without justification if he had no sufficient lawful reason for his conduct, and it is not necessary to show malice in the sense of ill will to maintain the action. Childres v. Abeles, 240 N.C. 667, 84 S.E.2d 176 (1954).
[92] Haskins v. Royster, 70 N.C. 601 (1874).
[93] Coleman v. Whisnant, 225 N.C. 494, 35 S.E.2d 647 (1945).

that the plaintiff would have a choice of bringing either an action for defamation or an action for malicious intereference with the contract. The *Johnson* case did not preclude this possibility, but stated that whether the plaintiff could or could not bring a suit for defamation was immaterial since plaintiff's complaint did not contain the words "libel," "slander," or "defamatory." If *either* action could be established, bringing one instead of the other might prove advantageous. In addition to actual damage suffered, in both actions exemplary damages may be recovered where actual malice is shown.[94] However, defamation which is calculated to injure one in his trade or profession is actionable per se, with legal malice and damage conclusively presumed.[95] Thus punitive damages could be assessed by the jury in the slander or libel suit upon a showing of actual malice without the necessity of proving actual damages.[96] If the action is for malicious interference with the contract the plaintiff must prove actual damage to be entitled to any recovery.[97] On the other hand, as pointed out by the *Johnson* case, plaintiff would have a longer time in which to bring his malicious interference action due to the different statutes of limitations applicable.

TRIAL PRACTICE

Process

Several questions of importance relating to process were passed upon in *Morton v. Blue Ridge Ins. Co.*[1] Summons was issued by the clerk of the superior court of Carteret County on March 17, 1959 and directed to the sheriff of Cleveland County. The sheriff of Cleveland County returned the summons to the clerk without any notation thereon but accompanied with a letter stating that the defendant was not in Cleveland County but in Mecklenburg County.

Under the provisions of G.S. § 1-95, as most recently amended in 1955, when a defendant is not served with the summons within the time allowed for service, twenty days from the date of issue, it is not necessary that new process issue, but the clerk, within ninety days of the issuance of the summons, may endorse on the original summons an extension of time within which to serve it or may issue an alias or pluries summons returnable in the same manner as the original process.

[94] Wade v. Culp, 107 Ind. App. 503, 23 N.E.2d 615 (1939); Reichman v. Drake, 890 Ohio App. 222, 100 N.E.2d 533 (1951) (malicious interference with the contract); Roth v. Greensboro News Co., 217 N.C. 13, 6 S.E.2d 882 (1940); Broadway v. Cope, 208 N.C. 85, 179 S.E. 452 (1935) (defamation).

[95] Broadway v. Cope, *supra* note 94.

[96] *Ibid.*

[97] Childress v. Abeles, 240 N.C. 667, 84 S.E.2d 176 (1954).

[1] 250 N.C. 722, 110 S.E.2d 330 (1959).

In the *Morton* case, on receipt of the unserved summons and the accompanying letter from the sheriff of Cleveland County, the clerk did not make an endorsement on the summons nor did he issue an alias or pluries summons. Instead he scratched out, in the line on the original summons reading "To the Sheriff of Cleveland County," the word "Cleveland" and inserted the word "Mecklenburg." He made no other change and mailed the summons to the Mecklenburg sheriff who served it on March 25, 1959. Thereafter on motion of the defendant the superior court vacated the judgment and dismissed the action on the ground that the summons was void.

In reversing the action of the superior court, the Supreme Court held that, in the absence of an extension of time on the original summons or the issuance of an alias, the action had been discontinued. The Court further said that the act of the clerk in striking out "Cleveland" in the summons and inserting "Mecklenburg" and then sending it to the sheriff of Mecklenburg County "worked a discontinuance of the action commenced on 17 March, 1959, by issuance of summons to Cleveland County and instituted a new action at the time of the issuance of the summons to Mecklenburg County."[2]

It will be noted that the Court states on the one hand that a discontinuance resulted because of the failure of the clerk to endorse an extension of time or issue an alias summons and then proceeds to declare that the act of the clerk in changing the name of the county and sending the summons as changed to the sheriff of Mecklenburg also "worked a discontinuance." Since the plaintiff had ninety days from the date of the issuance of the summons to obtain an extension or the issuance of an alias, it is difficult to see how the action was discontinued prior to the expiration of the ninety day period by either the failure of the endorsement or issuance of an alias or the action of the clerk in changing the county name and sending the changed summons to Mecklenburg. At the time judgment was entered, plaintiff could have had an endorsement made on the original summons or an alias issued since the ninety day period had by no means expired.

After finding that the original action was discontinued the Court then holds that a new action was instituted when the clerk inserted Mecklenburg County in the original summons in place of Cleveland County. When was this "new action" instituted? Since the summons bears the date of March 17, 1959, the clerk not having changed the date when he changed the county, the Court holds that the new action was *prima facie* begun on the same date as the original, March 17, 1959, but adds that if time is of importance the court may hear evidence and determine the true date of issuance, presumably of the "second" summons.

[2] *Id.* at 724, 110 S.E.2d at 331-32.

If the court were to take evidence and determine that the true date of issuance of the "second" summons was March 24, 1959, and if, for the purpose of discussion, the statute of limitations expired March 20, 1959, the plaintiff would be deprived of his action by the conduct of the clerk when, as a matter of fact, the plaintiff had ninety days from March 17, 1959, the date of the issuance of the original summons within which to have an endorsement extending the time for service made or an alias summons issued. For these reasons, it is submitted that the language of the Court declaring there had been a discontinuance by reason of the clerk's action is unfortunate and declares a questionable rule of law.[3]

Service of Process on Non-resident Labor Unions

Melton v. Hill[4] points up what would appear to be serious deficiencies in our statutes relating to the service of process on non-resident labor unions. The plaintiff had sued two individuals and two unincorporated labor unions. The decision on appeal relates only to the validity of the service made on the defendant International Brotherhood of Teamsters, a non-resident unincorporated labor union. Two summonses had been issued for service on International. One of them was served on A. L. Gunter, trustee or agent for the collection of money for International, and the other was served on the Secretary of State of North Carolina as statutory process agent.

On motion to dismiss the action against International for want of proper service the superior court judge made findings of fact and denied the motion. He found as a fact that A. L. Gunter was trustee of a local of International and in complete control of all assets and affairs of the local as agent and representative of International. He also found that International had not appointed a process agent in North Carolina.

The Supreme Court declared that the service on A. L. Gunter was ineffective because he had not been designated as the International's

[3] The court cites Phillips v. Holland, 78 N.C. 31 (1878), as being in point. It is submitted that the situations in the two cases are not comparable. In the *Phillips* case process in a claim and delivery proceeding had been issued by the clerk of Davie County directing the sheriff of Davidson County to seize two mules. The sheriff failed to execute the process, informing the plaintiff and the clerk that the mules were in Forsyth County. At the request of the plaintiff, the clerk struck Davidson County from the process, inserted Forsyth and sent the process to the sheriff of Forsyth. That sheriff was unable to execute the process because the mules had, in fact, never been taken to Forsyth. Plaintiff instituted an action for damages against the sheriff of Davidson for his failure to execute the process. While that action was pending he applied to the trial court for an order striking out Forsyth in the process and reinstating Davidson. The trial court granted the motion. The Supreme Court reversed on the ground that the sheriff of Forsyth and the sheriff of Davidson had acquired rights that the process remain as it was when delivered to the sheriff of Forsyth. As to the effect of the original change in the county names, the Court said nothing about a discontinuance but said the effect of it was the same as if when the process was originally issued it had been directed to the sheriff of Forsyth instead of to the sheriff of Davidson. Whether this alteration relieved the Davidson sheriff from liability the Court did not say.

[4] 251 N.C. 134, 110 S.E.2d 875 (1959).

process agent and noted that G.S. § 1-97(1), which permits service on a managing agent of a foreign corporation, does not apply to foreign unincorporated associations. However, the Court found the trial judge refused to dismiss because of the service on the Secretary of State and that he did not base his refusal on the service on Gunter.

G.S. § 1-97(6) provides that every unincorporated association, be it resident or non-resident, which desires to do business in this state shall appoint an agent for the service of process in this state and shall certify the name and address of that agent to the clerk of the superior court of each county in which the association wishes to carry on its business. The same statute also provides that upon failure to make such an appointment process may be served upon the Secretary of State. It is to be noted that there is no requirement compelling the association to certify the name and address of its process agent to the Secretary of State and appointing the Secretary its process agent in the event of its failure so to do.[5]

As to whether International had complied with G.S. § 1-97(6), which is the only statutory provision prescribing the manner of service on nonresident unincorporated associations, no evidence had been offered except a certificate of the Secretary of State certifying that, according to the Secretary's records, International had not appointed a process agent in North Carolina.

Since no provision of G.S. § 1-97(6) or any other statute required a certification by International to the Secretary of State, the Secretary's certificate was of no value. The evidence failed to disclose whether International had certified the name of a process agent to the clerk of any superior court and the Supreme Court finds that apparently no inquiry was made into that material fact. Rather, the Court finds that the trial judge had held the Secretary of State's certificate was enough to warrant service of process on him. Since no statute so authorizes, the order denying the motion to dismiss was vacated and the case was remanded for a hearing de novo at which time, presumably, facts might be found as to whether International had complied with G.S. § 1-97(6).

It seems clear that present provisions for service on non-resident unincorporated associations are inadequate. It is suggested that the statutes be amended so as to provide for service on such associations in a manner similar to that provided for service on foreign corporations under G.S. § 1-97(1)(b).[6] It is also suggested that G.S. § 1-97(6) be amended by dispensing with the requirement of the certification of the name and address of the agent appointed for the service of process to the clerk of the superior court of each county in which the association

[5] Compare the provisions relating to foreign corporations appearing in G.S. § 55-143 to -146.

[6] Under such a provision service on an officer or managing agent, etc. of International in this state would have been adequate.

wishes to carry on business and by providing instead that such certification be made to the Secretary of State and that in default of such certification service may be made on the Secretary of State.[7]

TRUSTS

Power of Trustee To Convey

In *Callaham v. Newsom*[1] the trustee was given all the shares of a corporation whose only asset was real estate, with full power to sell the stock and reinvest the proceeds, pay the net income to grantor while he lived, and at grantor's death divide the corpus into thirteen parts "whatever may then be the nature and character of the property . . . and he shall hold and administer each part. . . ."[2] After grantor's death the corporation was dissolved and the trustee received the real property as a dissolution dividend. The trustee entered into a contract to sell this land to defendant who subsequently refused to purchase it. In an action to recover damages the Court was presented with the question of whether the power of the trustee to sell the corpus should be continued when the trust property was changed from corporate stock to real estate. The Court held that the change in character of the corpus did not "exhaust" the trustee's power and that he could convey good title to the land. No authority was cited by the Court, and no case exactly in point has been found; however, other authorities indicate that the Court properly found this action to be within the trustee's authorized power.[3]

Resulting Trusts

Tanner v. Ervin[4] held that pursuant to treasury regulations a wife, as surviving owner, might cash United States Savings Bonds issued to her and her husband as co-owners, although she had transferred all of

[7] It is obviously a distinct advantage if plaintiff need only make inquiry to one office rather than being compelled to make inquiry to the county clerks of various counties to determine if the non-resident association has made the necessary certification.

[1] 251 N.C. 146, 110 S.E.2d 802 (1959).

[2] *Id.* at 148, 110 S.E.2d at 803.

[3] Authority to sell personal property and execute conveyances implies power to sell real estate. *In re* Hardenbugh's Will, 144 Misc. 248, 258 N.Y.Supp. 651 (Surr. Ct. 1932). When grantor authorizes trustee to sell shares of stock and invest the proceeds and dividends are paid trustee in the form of shares of another corporation, the trustee has authority to sell such shares and invest the proceeds. Delaware Trust Co. v. DuPont, 22 Del. Ch. 115, 194 Atl. 31 (1937). The vesting of the legal title in the trustees with a power of sale creates a power coupled with an interest which survives the death of the grantor. Eisel v. Miller, 84 F.2d 174 (8th Cir. 1936). See generally Bogert, Trusts & Trustees § 741 (2d ed. 1960).

[4] 250 N.C. 602, 109 S.E.2d 460 (1959).

her interest to her husband for a valuable consideration during his lifetime. The Court, however, required that a resulting trust be impressed on the proceeds for the benefit of the deceased husband's estate. This case is discussed in a Note in this volume.[5]

WILLS AND ADMINISTRATION

After-born Child

In *Byerly v. Tolbert*,[1] where the action was to determine whether a child born 322 days after his purported father's death could share in wrongful death proceeds, the Court held that when a child is born more than ten lunar months (280 days) after the death of its alleged father, a rebuttable presumption is created that no parenthood exists. The Court further held that the statute[2] stating the ten lunar month rule, apparently as a matter of law, applies only to the descent of realty and intimated that it is not conclusive even as to that. Distinguishing *Britton v. Miller*,[3] where a child born more than ten lunar months after the intestate's death was found not *in posse* at the time of death and therefore not entitled to share in the intestate's real property, the Court said: "Since no contention was made that . . . [the child in question] was born or *en ventre sa mere* when . . . [intestate] died, the reference to the statute, now G.S. 29-1, Rule 7, may not be regarded as the basis of the decision."[4]

The Court also pointed out that no provision of the North Carolina chapter on administration[5] mentions the ten lunar month rule nor does the statute on after-born children.[6]

Under the provisions of the new intestate succession law regarding after-born children,[7] the ten lunar month rule is stated in a fashion similar to the present real property rule. Since the new act abolishes the distinction between real and personal property for inheritance purposes,[8] whatever interpretation the Court gives to the new provision

[5] 38 N.C.L. Rev. 111 (1959).

[1] 250 N.C. 27, 108 S.E.2d 29 (1959).

[2] G.S. § 29-1(7) provides: "No inheritance shall descend to any person, as heir of the person last seized, unless such person shall be in life at the death of the person last seized, or shall be born within ten lunar months after the death of the person last seized."

[3] 63 N.C. 268 (1868).

[4] 250 N.C. at 33, 180 S.E.2d at 34.

[5] N.C. Gen. Stat. §§ 28-1 to -201 (1950), as amended, N.C. Gen. Stat. §§ 28-1 to -201 (Supp. 1959).

[6] N.C. Gen. Stat. § 28-154 (1950).

[7] G.S. § 29-9 provides: "Lineal descendants and other relatives of an intestate born within ten lunar months after the death of the intestate, shall inherit as if they had been born in the lifetime of the intestate and had survived him."

[8] N.C. Gen. Stat. § 29-3 (Supp. 1959).

must be applied to both real and personal property. Adherence to the rule which the Court has established for personal property and which it has intimated would be applicable to realty under the present law would seem to be preferable to an interpretation establishing a conclusive presumption.

The apparent fairness of establishing a rebuttable presumption, as the Court has clearly done with personal property, is that in proper cases it will allow representatives of a child carried by its mother more than 280 days to assemble and present medical evidence in support of its claim as an after-born child.

Son's Adopted Child as "Grandchild"

In *Bullock v. Bullock*,[9] where the testator left life estates to his sons with remainders to "my grandchildren from my sons," the Court held that he intended only natural children to take and excluded children adopted by one son prior to testator's death but after execution of his will.

In a 1953 case the Court in applying the adoption statutes[10] said:

> [They] have no bearing . . . except so far as they establish and define the parent and child relationship between the adoptive parents and the adopted child. When an adopted child is entitled to take under a will is usually dependent upon whether such child comes within a particular class designated by the testator as "children," "issue," "descendants," or "heirs of the body," etc., of a designated person. And whether an adopted child comes within such class must be determined by ascertaining the intent of the testator.[11]

This construction, in effect, restricted application of the adoption statutes to cases of intestacy only.

In 1955 the legislature amended G.S. § 48-23 and added the liberal provision that "an adopted child shall have the same legal status, including all legal rights and obligations of any kind whatsoever, as he would have had if he were born the legitimate child of the adoptive parents."

Notwithstanding the liberal language of the new statute the Court in the principal case said that the primary question was still one of the intent of the testator to include the infant and thereby refused to accord the infant what seemingly would be "all legal rights . . . whatsoever, as he would have had if he were born the legitimate child of the adoptive parents."

[9] 251 N.C. 559, 111 S.E.2d 837 (1960).
[10] N.C. Gen. Stat. § 28-149(10) (1950); N.C. Gen. Stat. § 29-1, Rule 14 (1950); N.C. Gen. Stat. § 48-23 (1950).
[11] Bradford v. Johnson, 237 N.C. 572, 578, 75 S.E.2d 632, 636 (1953).