UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 40 | Number 3 Article 9

4-1-1962

Ninth Annual Survey of North Carolina Case Law

North Carolina Law Review

NINTH ANNUAL SURVEY OF NORTH CAROLINA CASE LAW*

The *Ninth 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: C. Edwin Allman (Domestic Relations); Jerry W. Amos (Torts); Carl A. Barrington, Jr. (Damages, Eminent Domain and Sales); Frank W. Bullock, Jr. (Municipal Corporations); David M. Connor (Administrative Law and Public Utilities); Joseph S. Friedberg (Criminal Law and Procedure); Robert L. Gunn (Insurance and Real Property); Glen B. Hardymon (Civil Procedure (Pleading and Parties)); Loran A. Johnson (Equitable Remedies and Trusts); H. Morrison Johnston, Jr. (Credit Transactions and Negotiable Instruments); J. Donnell Lassiter (Contracts and Wills and Administration); Herbert A. Sandman (Taxation); Thomas M. Starnes (Constitutional Law, Labor Law and Evidence); Samuel S. Woodley, Jr. (Agency and Workmen's Compensation).

* The period covered embraces the decisions of the North Carolina Supreme Court reported in 253 N.C. 459 through 255 N.C. 746.

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

ADMINISTRATIVE LAW

INTERPRETATION OF STATUTES

In *State ex rel. Utilities Comm'n v. McKinnon*[1] the defendant was an intracity carrier exempt from control of the Utilities Commission except as to rates and controversies concerning extensions and services.[2] In a hearing before the Commission, the defendant was charged with transporting charter parties of high school bands and athletic teams, and passengers to or from religious services, beyond its territorial limits in violation of the Bus Act of 1949.[3] The Commission held that the defendant was authorized to transport charter parties from one part of its operating area to another within its municipal franchise or an adjacent zone fixed by the Commission, but not beyond.

On appeal the Supreme Court affirmed the superior court which reversed the Commission, holding that the transportation of high school athletic teams and bands, and passengers to or from religious services were exempt activities under G.S. §§ 62-121.47(a) and (f).[4] The Court pointed out that in 1949 the Commission had ruled that an exempt carrier under G.S. § 62-121.47(h),[5] such as the defendant, could engage in any or all of the exempted activities under the Bus Act,[6] and that this ruling was silent as to any territorial restrictions. Moreover, in 1955 the defendant received a letter from the Director of Motor Passenger Transportation of the Commission authorizing exempted carriers to engage in other exempted activities, and this letter expressly stated that there were no territorial restrictions.

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[1] 254 N.C. 1, 118 S.E.2d 134 (1961).
[2] N.C. GEN. STAT. § 62-121.47(a)(8) (1960).
[3] N.C. GEN. STAT. §§ 62-121.43 to -121.79 (1960).
[4] N.C. GEN. STAT. §§ 62-121.47(a)(1), (6) (1960).
[5] N.C. GEN. STAT. § 62-121.47(a)(8) (1960).
[6] N.C. GEN. STAT. § 62-121.47 (1960).

The Supreme Court concluded that the defendant carrier could engage in other exempted activities, such as the transportation of high school bands and athletic teams, and passengers to or from religious services, without regard to territorial restrictions so long as the requests for such services arose within the area for which the carrier holds a certificate of exemption. The Court stated that the complete reversal of the interpretation of a statute which has been adhered to over a long period of time by the Commission should not be made unless it clearly appears that the original interpretation was in error.[7]

In *Faizan v. Grain Dealers Mut. Ins. Co.*[8] plaintiff brought an action to recover on an automobile insurance policy. Plaintiff's policy provided that the expiration date was February 22, 1959, at 12:01 a.m. In January 1959 defendant insurer notified plaintiff that the policy would expire unless a renewal premium was received by February 5, 1959. Plaintiff failed to pay the renewal premium. On February 9, 1959, the insurer notified plaintiff that the policy would terminate on February 24, 1959.

On February 22, 1959, at 2:30 a.m., plaintiff was involved in an accident. Plaintiff contended that the policy was still effective because of the February 9 notice of the insurer that the policy would terminate on February 24, and because defendant had failed to give notice of termination to the Commissioner of Motor Vehicles and to plaintiff as required by the Assigned Risk Plan provisions of the Vehicle Financial Responsibility Act of 1957.[9]

The Supreme Court, in affirming a superior court's judgment for the defendant, stated that G.S. § 20-310 only requires advance notice of termination to the plaintiff when the insurer terminates the policy, not when the insured terminates it; and, therefore, the letter of February 9 incorrectly stating that the termination date

[7] See in accord with this statement Los Angeles City School Dist. v. Simpson, 112 Cal. App. 2d 70, 245 P.2d 629 (Dist. Ct. App. 1952), where the court said that a course of administrative procedure or administrative construction of a statute which has been long continued will be accorded great respect by the courts and will be upheld if not clearly erroneous, and Wadsworth v. Dambach, 99 Ohio App. 269, 133 N.E.2d 158 (1954), where the court said that the administrative interpretation of a given law, while not conclusive, if long continued, is to be reckoned with most seriously and is not to be disregarded unless judicial construction makes it imperative to do so.

[8] 254 N.C. 47, 118 S.E.2d 303 (1961); also discussed under INSURANCE, *Automobile Liability Insurance, infra.*

[9] N.C. GEN. STAT. § 20-310 (1957).

was February 24 was not required. As to defendant's contention that the Commissioner's Handbook of Rules interpreted the statute to mean the same thing, the Court, by way of dictum, stated that the construction placed upon legislation by the officer charged with its administration will be given due consideration by the courts, but where the administrative interpretation conflicts with that of the courts, the latter must prevail.[10] The Court found that the insurer had also given proper notice to the Commissioner of the termination of the plaintiff's policy in this case.

Administrative Procedure

In *State v. Ball*[11] the defendant was convicted for drunken driving on January 11, 1960. On January 18, 1960, the Department of Motor Vehicles received notice of the conviction and, as required by G.S. § 20-17,[12] notified the defendant that his license was revoked for one year. The dates specified were from January 23, 1960 to January 23, 1961.

On January 21, 1961, the defendant was arrested for driving on a public highway while his license was revoked. At the trial the defendant contended that the revocation of his license should have been effective January 18, 1960, the date the Department received notice of his conviction, and if that were the case, the year's revocation would have been over when he was arrested on January 21, 1961.

The Supreme Court affirmed his conviction, stating that the statute did not require instantaneous revocation upon receipt of the record of conviction and, furthermore, if the defendant deemed the January 23, 1960 date improper for revocation, he should have

[10] This is in accord with prior North Carolina decisions. *E.g.,* Campbell v. Currie, 251 N.C. 329, 111 S.E.2d 319 (1959); Dayton Rubber Co. v. Shaw, 244 N.C. 170, 92 S.E.2d 799 (1956). See also Bowles v. Mannie & Co., 155 F.2d 129 (7th Cir. 1946), where the court stated that the construction given to a statute by those charged with the duty of executing it is always entitled to respectful consideration and ought not to be overruled without cogent reasons; Woods v. Benson Hotel Corp., 177 F.2d 543 (8th Cir. 1949), where the court said that the construction and interpretation of a statute as applied to a justiciable controversy is a judicial function, and when administrative interpretation and judicial construction conflict, the latter must prevail.

[11] 255 N.C. 351, 121 S.E.2d 604 (1961).

[12] "The Department shall *forthwith* revoke the license of any operator or chauffeur upon receiving a record of such operator's or chauffeur's conviction for any of the following offenses when such conviction has become final: . . . (2) Driving a motor vehicle while under the influence of intoxicating liquor . . . ." N.C. Gen. Stat. § 20-17 (1953). (Emphasis added.)

applied to the Department to correct its records. The Court stated that he could not, when on trial for a criminal offense, collaterally attack the record of revocation which did not on its face disclose invalidity.[13]

JUDICIAL REVIEW

In *McGinnis v. Old Fort Finishing Plant*[14] the plaintiff appealed to the Industrial Commission from a ruling denying a claim of compensation by a deputy commissioner. In his application for review to the full Commission, the plaintiff did not contend as a ground for appeal that the defendant had waived the applicable statute of limitations.[15]

After a hearing, the full Commission affirmed the deputy commissioner. The plaintiff appealed to the superior court, and, for the first time, he maintained that the defendant had waived the statute of limitations. Both the superior court and the Supreme Court affirmed the Commission. The Supreme Court pointed to Rule XXI of the Commission which provides that all grounds for appeal to the full commission must be set out and that all grounds not set out are deemed waived and abandoned.

The Court concluded that the position taken by the plaintiff in the superior court was a change of theory which, according to prior decisions, is not permissible.[16]

ADMINISTRATIVE RULES

In *State ex rel. Utilities Comm'n v. Carolina Coach Co.*[17] coach line *A* filed schedules and rates for "through service" between Dur-

[13] *Accord,* Beaver v. Scheidt, 251 N.C. 671, 111 S.E.2d 881 (1960), discussed in 39 N.C.L. REV. 324 (1961), where the Court said that if the Department of Motor Vehicles has improperly deprived the defendant of his license due to a mistake of law or fact, he cannot contemptuously ignore the quasi-judicial determination made by the Department; his remedy is to apply to the Department for a hearing as provided for by G.S. § 20-16(c) or to apply to the superior court as provided for by G.S. § 20-25. See also Callanan Road Improvement Co. v. United States, 345 U.S. 507 (1953), where the United States Supreme Court held that an action by the Interstate Commerce Commission not appealed from is final. To determine whether the action is right or wrong, a direct attack in such circumstances is the proper procedure; the validity of the Commission's order cannot be collaterally attacked.

[14] 253 N.C. 493, 117 S.E.2d 490 (1960).

[15] N.C. GEN. STAT. § 97-47 (1958).

[16] *E.g.,* Waddell v. Carson, 245 N.C. 669, 97 S.E.2d 222 (1957); Paul v. Neece, 244 N.C. 565, 94 S.E.2d 596 (1956).

[17] 254 N.C. 668, 119 S.E.2d 621 (1961).

ham and Raleigh. Coach line *B* challenged the legality and authority of these schedules and rates. The Utilities Commission recognized that if *A* combined two separate authorities which it held, "through service" between Durham and Raleigh might be proper. However, the Commission did not decide that question, but noted that *A* had not attempted to combine the two authorities for a period of twelve years and stated that any right which may have existed for a combination had been lost by failure to exercise it during this period.

The Commission relied upon its Rule 9 which provides that the non-use of an authorized service for a period of thirty days or longer without the written consent of the Commission shall be considered good cause for cancellation of such service. On appeal the superior court's reversal of the Commission's order that the defendant abandon its through service was affirmed by the Supreme Court. The Court stated that a discontinuance or non-use of a service is not cancellation under Rule 9, but is only cause for cancellation, and that Rule 9 is not self-executing. The existence of the cause must be determined before cancellation can be ordered. Therefore, the Commission erred in deciding that non-use amounted to an automatic cancellation.

AGENCY AND WORKMEN'S COMPENSATION

AGENCY

Family Purpose Doctrine

In *Grindstaff v. Watts*,[1] a case of first impression, the Court held that the family purpose doctrine does not apply to the operation of motorboats. The Court stated that public policy does not require that the doctrine be extended to instrumentalities other than motor vehicles operating on public highways. This decision brings North Carolina into accord with other jurisdictions which have dealt with the problem of extending the family purpose doctrine.[2]

The instant case is the subject of a Note in this volume of the *Law Review*.[3]

[1] 254 N.C. 568, 119 S.E.2d 784 (1961).

[2] *E.g.*, Calhoun v. Pair, 197 Ga. 703, 30 S.E.2d 180 (1944); Felcyn v. Gamble, 185 Minn. 357, 241 N.W. 37 (1932); Pflugmacher v. Thomas, 34 Wash. 2d 687, 209 P.2d 443 (1949).

[3] Note, 40 N.C.L. REV. 647 (1962).

Testimony of Agent to Prove Agency

It is universally held that agency and its extent cannot be proved by the mere declaration of the agent.[4] In *Sealey v. Albany Ins. Co.*[5] an agent offered to testify that he had authority to cancel an insurance policy. The trial judge refused to allow the agent's testimony as proof of his authority.[6] On appeal the Supreme Court reversed, pointing out that this exclusionary rule of evidence applies only to extra-judicial declarations of the agent, and that the agent may of course testify under oath as to the fact of agency.[7]

WORKMEN'S COMPENSATION

Application for Review

G.S. § 97-47 provides that the Industrial Commission may review any award, but that "no such review shall be made after twelve months from the date of the last payment" awarded under that article. In *Baldwin v. Amazon Cotton Mills*[8] plaintiff made application for review within the twelve months period but the review hearing was not actually held until more than twelve months after the last payment of compensation. The Court, for the first time, squarely ruled that the fact that the Industrial Commission did not actually hear the claim until after the twelve months period had elapsed did not bar the plaintiff's right to review.[9]

Pre-existing Conditions

The fact that an employee is suffering from a pre-existing condition which makes him more susceptible to injury does not necessarily

[4] *E.g.*, Kelly v. Arave, 41 Idaho 723, 243 Pac. 366 (1925); Estes v. Aaron, 227 Mass. 96, 116 N.E. 392 (1917); Mally v. Excelsior Wrapper Co., 181 Mich. 568, 148 N.W. 443 (1914); State v. Lassiter, 191 N.C. 210, 131 S.E. 577 (1926). See generally Annot., 80 A.L.R. 604 (1932).

[5] 253 N.C. 774, 117 S.E.2d 744 (1961).

[6] The trial court also refused to admit the agency contract in evidence, and on appeal this too was held to be error.

[7] *E.g.*, Jones v. Carolina Power & Light Co., 206 N.C. 862, 175 S.E. 167 (1934); Hill v. Bean, 150 N.C. 436, 64 S.E. 212 (1909); New Home Sewing Mach. Co. v. Seago, 128 N.C. 158, 38 S.E. 805 (1901).

[8] 253 N.C. 740, 117 S.E.2d 718 (1961).

[9] The Court pointed out that other cases, though not expressly deciding this point, have used language from which this rule could be implied. See, *e.g.*, Harris v. Asheville Contracting Co., 240 N.C. 715, 83 S.E.2d 802 (1954), where the Court stated, "The parties to this appeal are expressly authorized by statute, G.S. 97-47, to apply to the Commission to review the award made in this proceeding, if there is a change in the condition of the plaintiff; provided, the *request for such review is made within the time prescribed by the statute.*" *Id.* at 720, 83 S.E.2d at 805. (Emphasis added.) See also Paris v.

bar him from recovering compensation in case of injury and disability which is proximately caused by an accident arising out of and in the course of his employment.[10] But the employment must have some definite discernible relation to the accident.[11] It has been held that an employee who is seized with an epileptic seizure,[12] or like attack[13] which causes him to fall, may still be awarded compensation if a particular hazard inherent in the working conditions also contributes to the fall and consequent injury. *Allfred v. Allfred-Gardner, Inc.*[14] is the most recent North Carolina case involving this somewhat rare occurrence. There claimant, who was subject to "black-outs," lost consciousness while driving an automobile in the course of his employment and collided with a pole. The Court, in reaffirming its prior position, held that where a combination of the employee's predisposition to injury and the hazards of the employment produce the accident, the resulting injury is compensable.[15]

Carolina Builders Corp., 244 N.C. 35, 92 S.E.2d 405 (1956); Dail v. Kellex Corp., 233 N.C. 446, 64 S.E.2d 438 (1951).

[10] "The hazards of employment do not have to set in motion the sole causative force of an injury in order to make it compensable. By the weight of authority it is held that where a workman by reason of constitutional infirmities is predisposed to sustain injuries while engaged in labor, nevertheless the leniency and humanity of the law permit him to recover compensation if the physical aspects of the employment contribute in some reasonable degree to bring about or intensify the condition which renders him susceptible to such accident and consequent injury." Vause v. Vause Farm Equip. Co., 233 N.C. 88, 92, 63 S.E.2d 173, 176 (1950).

[11] However, compensation cannot be recovered where the incapacity is primarily due to disease or to the physical condition of the employee at the time when he was doing his usual and ordinary work. See, *e.g.*, New Staunton Coal Co. v. Industrial Comm'n, 304 Ill. 613, 136 N.E. 783 (1922); Cox v. Kansas City Ref. Co., 108 Kan. 320, 195 Pac. 863 (1921); Hicks v. Meridian Lumber Co., 152 La. 975, 94 So. 903 (1922). See generally Annot., 28 A.L.R. 204 (1924).

[12] Baltimore Dry Docks & Shipbuilding Co. v. Webster, 139 Md. 616, 116 Atl. 842 (1922). But in Vause v. Vause Farm Equip. Co., 233 N.C. 88, 63 S.E.2d 173 (1950), recovery was denied when plaintiff felt the epileptic seizure coming on, parked his truck, and lay down on the seat in a place of apparent safety. The Court held that there was no showing that any hazard of the employment contributed in any degree to the unfortunate occurrence, and that it was solely the force of his seizure that moved him from his position of safety to his injury.

[13] Gonier v. Chase Co., 97 Conn. 46, 115 Atl. 677 (1921) (spells of unconsciousness); Ramlow v. Moon Lake Ice Co., 192 Mich. 505, 158 N.W. 1027 (1926) (delirium tremens resulting from shock of accident); Freedman v. Spicer Mfg. Corp., 97 N.J.L. 325, 116 Atl. 427 (1922) (fainting when inoculated against influenza).

[14] 253 N.C. 554, 117 S.E.2d 476 (1960).

[15] The Court felt that two circumstances fixed liability on the defendants: (1) a blackout to which the claimant had a predisposition; (2) the blackout occurred at a time when the duties of the claimant's employment required

Waiver and Estoppel

In *Ashe v. Barnes*[16] plaintiff, one of seven employees of the defendant, was injured in an accident arising out of and in the course of his employment. Defendant, at the time of the accident, had not given the notice required to exempt himself from the Workmen's Compensation Act.[17] However, he had taken out accident insurance covering each of his employees. Plaintiff received the benefits of this insurance and then brought this action to recover workmen's compensation payments. From an award of compensation by the Commission, defendant appealed on the ground that plaintiff, by accepting the benefits of the insurance, was estopped to claim under the Workmen's Compensation Act. The Court, in affirming the award, held, in accord with the majority rule,[18] that " 'in general, the doctrines of waiver and estoppel do not apply in workmen's compensation cases. . . .' "[19]

The Court also considered whether defendant was entitled, under G.S. § 97-42,[20] to a deduction for the payments made by the insurance company. In construing this provision for the first time the Court held that it applies only to payments made by the employer and does not authorize an employer to substitute an accident policy for the benefits required by the Workmen's Compensation Act.[21]

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him to be driving an automobile. It was the combination of the two that produced the accident.

[16] 255 N.C. 310, 121 S.E.2d 549 (1961).

[17] N.C. GEN. STAT. § 97-3 (1958), provides that every employer is presumed to have accepted the provisions of the Workmen's Compensation Act unless he has given the notice required by G.S. § 97-4. The latter section provides, "The notice of nonacceptance of the provisions of this article shall be given thirty days prior to any accident resulting in injury or death: Provided, that if any such accident occurred less than thirty days after the date of employment, notice of such exemption or acceptance given at the time of employment shall be sufficient notice thereof." N.C. GEN. STAT. § 97-4 (1958).

[18] *E.g.*, Bell v. Tennessee Coal, Iron, & R.R., 247 Ala. 394, 24 So. 2d 443 (1945); Alabam Freight Lines v. Chateau, 57 Ariz. 378, 114 P.2d 233 (1941); Kennedy-Van Saun Mfg. & Eng'r Corp. v. Industrial Comm'n, 355 Ill. 519, 189 N.E. 916 (1934).

[19] 255 N.C. at 313, 121 S.E.2d at 551, quoting from 100 C.J.S. *Workmen's Compensation* § 389 (1958).

[20] "Any payments made by the employer to the injured employee during the period of his disability . . . which by the terms of this article were not due and payable when made, may . . . be deducted from the amount to be paid as compensation." N.C. GEN. STAT. § 97-42 (1958).

[21] It would seem that the employer might reach the desired result by having the insurance made payable to himself and then paying it over to the employee. Such payments might then be considered payments by the employer under G.S. § 97-42.

CIVIL PROCEDURE (PLEADING AND PARTIES)

PLEADING

Alternative Statements

In *Bryant v. Occidental Life Ins. Co.*[1] plaintiff purported to allege two separate causes of action based upon the defendant's delay in acting upon the plaintiff's intestate's application for life insurance. The plaintiff alleged, in what was designated the first cause of action, that her intestate had made an application for life insurance and had paid the amount of the first premium, and that the defendant delayed unreasonably in acting upon the application. Plaintiff contended that such delay together with retention of the premium constituted an acceptance of the application, entitling her to recover under the policy. In the second cause of action, which sounded in tort rather than contract, essentially the same facts were alleged with the further contention that had the defendant rejected the application within a reasonable time, the intestate could have obtained insurance from another company; and, therefore, because of the defendant's negligent failure to act upon the application, the plaintiff was entitled to recover damages. On the defendant's motion to strike, the trial court stated that the two causes of action were mutually repugnant and inconsistent and gave the plaintiff an opportunity to elect which cause he wished to retain. On the plaintiff's refusal to elect, the trial court struck the second cause of action.

On appeal the Court, confining its decision to the matters raised by the motion to strike, held it was error to dismiss the so-called second cause of action on the ground that the allegations therein were mutually repugnant and inconsistent with the first cause of action. The Court pointed out that the allegations of the first and second causes of action were entirely consistent and, except for minor differences, were identical.

Amendments

In *Dixon v. Briley*[2] action was brought for wrongful death of plaintiff's intestate. After the defendant had filed his answer, he moved for leave to amend to set up the alleged imputed negligence

[1] 253 N.C. 565, 117 S.E.2d 435 (1960).
[2] 253 N.C. 807, 117 S.E.2d 747 (1961).

of the intestate's father as a bar to that portion of the recovery which would inure to the father. The trial court held as a matter of law that the matters alleged in the proposed amendment did not constitute a defense, either absolute or pro tanto, to the plaintiff's action and denied the defendant's motion to amend. On appeal, the Court held that it was error to deny the amendment as a matter of law and that the defendant was entitled to have his motion considered and passed upon by the court as a discretionary matter.[3]

In *Modern Elec. Co. v. Dennis*[4] the defendant sought to amend his answer prior to trial in order to correct mistakes contained therein. The original answer contained allegations to the effect that the defendant had complete control and supervision over certain operations. In the amended answer it was alleged that the plaintiff, and not the defendant, had complete power and authority to supervise and control the operations. The amendment was allowed and plaintiff objected, asserting that such an amendment was improper in that it substantially changed the defense originally set forth by the defendant.

On appeal the Supreme Court affirmed. The Court noted that amendments authorized by G.S. § 1-163 are divided into two classes: (1) amendments before trial, or during trial when the opposing party is given an opportunity to investigate any new matter brought out in the amendment, and (2) amendments offered during or after the trial for the purpose of conforming the pleadings to the facts offered or admitted in evidence. As to the first class of amendments, the trial court has broad discretionary powers, but as to the second class, the right to amend is more restricted.[5] The Court pointed out that the defendant amended his complaint prior to trial for the purpose of correcting a mistake and setting out what he contended were the true facts.[6] The Court then concluded that under such

[3] Woody v. Pickelsimer, 248 N.C. 599, 104 S.E.2d 273 (1958); Pink v. Hanby, 220 N.C. 667, 18 S.E.2d 127 (1942); Cody v. Hovey, 219 N.C. 369, 14 S.E.2d 30 (1941); Tickle v. Hobgood, 212 N.C. 762, 194 S.E. 461 (1938); Townsend v. Williams, 117 N.C. 330, 23 S.E. 461 (1895).

[4] 255 N.C. 64, 120 S.E.2d 533 (1961).

[5] Perkins v. Langdon, 233 N.C. 240, 63 S.E.2d 565 (1951); Freeman v. Thompson, 216 N.C. 484, 5 S.E.2d 434 (1939).

[6] N.C. GEN. STAT. § 1-163 (1953), provides, with respect to mistakes in the pleadings, "The judge or court may, before and after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party; by correcting a mistake in the name of a party, or a mistake in any other respect . . . ."

circumstances there was no abuse of discretion by the trial judge in allowing the amendment since the plaintiff had sufficient time to prepare its case for trial after the motion to strike had been disallowed.

Burden of Proof

In *General Tire & Rubber Co. v. Distributors, Inc.*,[7] the plaintiff sought to recover personal property consigned by it to the defendant and stored in the defendant's warehouse under a warehouse agreement executed between the parties. Plaintiff alleged that it was the owner of the goods and was entitled to immediate possession, and that the property was being wrongfully detained by the defendant. The defendant admitted that plaintiff was the title holder, but denied the allegations as to the plaintiff's right to possession and as to wrongful detention. On the issue whether the plaintiff had wrongfully taken its inventory from the defendant's warehouse,[8] the trial court placed the burden of proof on the defendant. On appeal the Court, holding this to be error, said that the burden of proof as to the plaintiff's alleged right of immediate possession and the defendant's wrongful detention of the property was on the plaintiff. The Court stated: "The burden of proof of an issue ordinarily rests on the party who asserts the affirmative thereof."[9]

Conflicting Statements

The problem of conflicting statements in pleadings was recently considered in *Hunnicutt v. Shelby Mut. Ins. Co.*[10] The defendant insurance company had issued an automobile liability policy to one John Robert Huskey, covering a 1953 Ford. In a prior action, Huskey had been adjudged negligent in the operation of a 1947 Chevrolet, and the plaintiff had obtained a final judgment. The judgment being returned unsatisfied, this action was brought to recover from the defendant the amount of Huskey's legal liability to the plaintiff as established by the judgment.

[7] 253 N.C. 459, 117 S.E.2d 479 (1960).

[8] The Court on appeal stated that the pleadings raised issues of fact as to whether the plaintiff was entitled to immediate possession and whether defendant wrongfully detained the property, and the issue submitted by the trial court was not sufficient to determine these questions.

[9] 253 N.C. at 468, 117 S.E.2d at 486. *Accord,* Benner v. Phipps, 214 N.C. 14, 197 S.E. 549 (1938); Wilson v. Inter-Ocean Cas. Co., 210 N.C. 585, 188 S.E. 102 (1936); McPherson v. Williams, 205 N.C. 177, 170 S.E. 662 (1933).

[10] 255 N.C. 515, 122 S.E.2d 74 (1961).

The plaintiff alleged that the 1947 Chevrolet was "owned by either John Robert Huskey, his mother, or some other member of his household." Under the terms of the policy, if Huskey owned the 1947 Chevrolet at the time of the collision the policy did not cover his liability. Conversely, if the automobile was owned by his mother, or some other member of his household other than his wife, the policy would be operative, and the defendant liable.[11] Before evidence was offered, the defendant demurred *ore tenus* to the complaint on the ground of failure to state a cause of action. The trial court's overruling of the demurrer was reversed on appeal.

The complaint clearly alleged alternative statements of fact as to the ownership of the car, one of which was not legally sufficient to allow recovery under the terms of the insurance policy. The Court held that in such a case, where only a single cause of action is alleged and there are alternative statements of fact, one of which is legally sufficient to constitute a cause of action and the other is not, they neutralize each other, and a demurrer will lie.[12]

Contribution

In *Herring v. Jackson*[13] the Court once again considered whether the insurer of one joint tortfeasor has the right to enforce contribution from the other alleged joint tortfeasor under G.S. § 1-240.[14] In an earlier action the injured third party had obtained a consent judg-

[11] Under the terms of the policy, Huskey was insured while operating the 1953 Ford described in the policy and while temporarily using a substitute automobile when the Ford named in the policy was withdrawn from normal use due to breakdown or repairs, provided that such substitute was not owned by either Huskey or his wife.

[12] *Accord,* Lewis v. Lee, 246 N.C. 68, 97 S.E.2d 469 (1957); Lindley v. Yeatman, 242 N.C. 145, 87 S.E.2d 5 (1955). A contrary result would be reached under the Federal Rules of Civil Procedure. Federal Rule 8(e)(2) provides in part: "When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements."

The Court noted that the plaintiff, under N.C. GEN. STAT. § 1-163 (1953), might move for leave to amend his complaint.

[13] 255 N.C. 537, 122 S.E.2d 366 (1961).

[14] "[A]nd in the event the judgment was obtained in an action arising out of a joint tort, and only one, or not all of the joint tort-feasors, were made parties defendant, those tort-feasors made parties defendant, and against whom judgment was obtained, may, in an action therefor, enforce contribution from the other joint tort-feasors; or at any time before the judgment is obtained, the joint tort-feasors made parties defendant may, upon motion, have the other joint tort-feasors made parties defendant. . . ." N.C. GEN. STAT. § 1-240 (1953).

ment against the present plaintiff, and such judgment was satisfied entirely by the plaintiff's insurer. Contemporaneously with the payment of the judgment, the plaintiff executed a "loan receipt" agreement, its purpose being to confer upon the plaintiff's insurer a right to enforce contribution from the alleged joint tortfeasor.[15]

The trial court dismissed the action, and on appeal the Supreme Court affirmed. The Court pointed out that the right to enforce contribution, if any, must be based on G.S. § 1-240,[16] and under the decisions of this state it is settled that the insurance carrier of one joint tortfeasor cannot enforce contribution under G.S. § 1-240[17] because the insurance company is not deemed to be a joint tortfeasor as contemplated by the statute.[18]

The Court stated that the present action was prosecuted solely for the benefit of the insurance company; therefore, the plaintiff was not the real party in interest and under G.S. § 1-73 could not maintain the action.[19]

Counterclaims

In *York v. Cole* [20] the plaintiff brought action to have a conveyance of realty to the defendants set aside because of alleged fraud and coercion and to recover certain property belonging to the plain-

[15] Under this agreement it was stated that the plaintiff received the sum required to pay the judgment against him from the insurance company as a loan, such loan to be repayable only in the event and only to the extent of any recovery which may be had by the plaintiff from the defendant as a joint tortfeasor. The agreement further provided that the plaintiff agreed to cooperate fully with the insurance company and would allow the suit to be brought in his own name if necessary, to the end that all right of contribution which he had or might thereafter acquire could be enforced. Finally, it was provided that the expense of the litigation, if any, would be borne by the insurance company, and if an action was brought, it would be under the exclusive control of the insurance company.

[16] Potter v. Frosty Morn Meats, Inc., 242 N.C. 67, 86 S.E.2d 780 (1955).

[17] Squires v. Sorahan, 252 N.C. 589, 114 S.E.2d 277 (1960); Lumbermen's Mut. Cas. Co. v. United States Fidelity & Guar. Co., 211 N.C. 13, 188 S.E. 634 (1936).

[18] "A most liberal construction of the statute will not permit the writing into it of the liability insurance carrier of tort-feasors when only tort-feasors and judgment debtors are mentioned therein." Gaffney v. Lumbermen's Mut. Cas. Co., 209 N.C. 515, 519, 184 S.E. 46, 47-48 (1936), quoted with approval in Lumbermen's Mut Cas. Co. v. United States Fidelity & Guar. Co., *supra* note 17, at 17, 188 S.E. at 636.

[19] It thus appears that where the insurer has paid the entire judgment no one can sue for contribution under G.S. § 1-240. For a discussion of the problem of the insurer as the real party in interest, see Note, 38 N.C.L. REV. 99 (1959).

[20] 254 N.C. 224, 118 S.E.2d 419 (1961).

tiff alleged to have been wrongfully converted by the defendants. The defendants set up a counterclaim for services rendered to the plaintiff and for money expended in caring for her in their home. The Court in a per curiam opinion held that the plaintiff's demurrer *ore tenus* to the defendants' counterclaim was properly overruled. The Court stated: "A complainant who seeks to have an instrument, obligation, or transaction canceled or set aside must return or offer to return whatever he may have received from the defendant."[21]

Cross Actions

A cross action is the allegation of a cause of action by a defendant against the plaintiff or a third party.[22] The cross-complaint, therefore, must meet the requirements for a complaint by setting forth a concise statement of ultimate facts constituting a cause of action.[23] In *Freel v. Center, Inc.* [24] the Court held that a demurrer to the defendant's cross action was properly sustained when the allegations contained therein were but mere conclusions of the pleader, not supported by proper allegations of fact.

In *City of Durham v. Reidsville Eng'r Co.*[25] plaintiff instituted an action for breach of contract against the defendant (hereinafter referred to as Construction Company) and its surety. The plaintiff's cause of action was founded on alleged undisclosed defects in both materials and installation which were not discovered until after the city had accepted the work in question. The Construction Company and its surety had executed a "maintenance bond" to guarantee satisfactory performance of the work for a period of two years after its acceptance by the city.

The Construction Company's surety filed a cross action against the supervising engineers alleging the existence of a contractual obligation on the part of the engineers to the surety to properly supervise the performance of the contract by the Construction Company. The cross action further alleged periodic inspection and final approval of the project by the supervising engineers. The surety

[21] *Id.* at 225, 118 S.E.2d at 420. *Accord,* Pure Oil Co. v. Baars, 224 N.C. 612, 31 S.E.2d 854 (1944).

[22] Perkins v. Perkins, 249 N.C. 152, 105 S.E.2d 663 (1958); C.I.T. Corp. v. Watkins, 208 N.C. 448, 181 S.E. 270 (1935); American Nat'l Bank v. Hill, 169 N.C. 235, 85 S.E. 209 (1915).

[23] Cases cited note 22 *supra.*

[24] 255 N.C. 345, 121 S.E.2d 562 (1961).

[25] 255 N.C. 98, 120 S.E.2d 564 (1961); also discussed under CONTRACTS, *Supervising Engineer, infra.*

asserted that if the city was entitled to a judgment against it, then it was entitled to a judgment against the engineers for negligence in failing to properly supervise the work. A demurrer to the cross action was overruled. On certiorari, the Court held that the demurrer should have been sustained because the cross action failed to state facts sufficient to constitute a cause of action. From its examination of the contract between the city and the Construction Company, the Court found that the engineers were not parties to the contract and in no way bound themselves as surety for the Construction Company. Furthermore, the contract specifically provided that the inspection of the project should not relieve the Construction Company of any obligation to do sound and reliable work, and that any omission by the engineers to disapprove of any work should not be construed to be an acceptance by the city of any defective work. The Court further noted that even if the cross action had stated a good cause of action, it could not have survived a demurrer for misjoinder of parties and causes.

It is generally held that a defendant can not, by a cross action, litigate a question against a third party when the issue thus attempted to be raised is not essential to a full and complete determination of the cause of action alleged by the plaintiff.[26] Here the surety's cross action against the engineers was not founded upon or necessarily connected with the subject matter of the plaintiff's suit and was, therefore, improper.

A similar result was reached in *Manning v. Hart*.[27] Plaintiff brought an action to recover for personal injuries resulting from a collision between the automobile in which she was a passenger and the defendant's truck. The defendant denied negligence, pleaded contributory negligence, and set up a cross action against the plaintiff as well as against the driver and owner of the car. The defendant contended that the plaintiff was the agent of the owner under the family purpose doctrine, and, therefore, if the plaintiff was negligent as alleged,[28] he was entitled to recover on his cross action against the owner under the doctrine of respondeat superior.

[26] *E.g.*, Clark v. Pilot Freight Carriers, Inc., 247 N.C. 705, 102 S.E.2d 252 (1958); Hobbs v. Goodman, 240 N.C. 192, 81 S.E.2d 413 (1954); Wrenn v. Graham, 236 N.C. 719, 74 S.E.2d 232 (1953); Schnepp v. Richardson, 222 N.C. 228, 22 S.E.2d 555 (1942).

[27] 255 N.C. 368, 121 S.E.2d 721 (1961).

[28] It was alleged that the plaintiff and the driver of the automobile were engaged in a joint enterprise, and that the alleged negligence of the driver was imputed to the plaintiff.

The plaintiff's demurrer to the cross action was held to have been properly sustained. The Court stated that the cross action against the owner failed to allege sufficient facts to establish the plaintiff as the agent of the owner under the family purpose doctrine or otherwise; therefore, the cross action could not withstand a demurrer.

The general rule in North Carolina is that in order for a defendant to maintain a cross action in the plaintiff's suit, it is necessary that the cross action be germane to, founded upon or connected with the subject matter in litigation between the plaintiff and the defendant.[29] In the present case the existence of the agency relationship between the owner and the plaintiff was necessary to connect the subject matter of the cross action with that of the plaintiff's action, and, hence, without such agency relationship the cross action was improper.[30]

Defective Statement of a Cause of Action

The problem of a defective statement of a good cause of action was again considered by the Court in *Jacobs v. Highway Comm'n.*[31] Petitioner had instituted special proceedings in accordance with chapter 40 of the General Statutes to recover damages for the taking of a leasehold interest in certain property by the Highway Commission. The petitioner alleged ownership of the leasehold interest, the taking of the property by the Commission under statutory authority, and that he had been damaged by the taking. He also requested an appraisal of his damages according to law. However, the petitioner did not state the names of all the parties "who own or have, or claim to own or have, estates or interests" in the land as required by G.S. § 40-12. Because of this omission the trial court sustained the defendant's demurrer *ore tenus* on the ground that the petition failed to state facts sufficient to constitute a cause of action.

On appeal to the Supreme Court this was reversed. The Court held that the petition stated a good cause of action and that the failure

[29] Clark v. Pilot Freight Carriers, Inc., 247 N.C. 705, 102 S.E.2d 252 (1958); Kimsey v. Reaves, 242 N.C. 721, 89 S.E.2d 386 (1955); Wrenn v. Graham, 236 N.C. 719, 74 S.E.2d 232 (1953); Schnepp v. Richardson, 222 N.C. 228, 22 S.E.2d 555 (1942).

[30] Under N.C. GEN. STAT. § 1-137 (1953), the defendant must assert his cause of action by way of counterclaim or cross action in the plaintiff's action where the issues raised in the plaintiff's action, if answered in his favor, will necessarily establish facts sufficient to defeat the defendant's cause of action. Bullard v. Berry Coal & Oil Co., 254 N.C. 756, 119 S.E.2d 910 (1961).

[31] 254 N.C. 200, 118 S.E.2d 416 (1961).

to name all parties who owned or claimed any interest in the land was such a defect that did not go to the substance of the case. The Court concluded that the petition contained a defective statement of a good cause of action and that the action should not have been dismissed upon demurrer until the time for obtaining leave to amend had expired.[32]

Joinder of Causes and Parties

In *Gulf Life Ins. Co. v. Waters*[33] an action was brought on a note and to foreclose a deed of trust securing the same. The defendants admitted the indebtedness to the plaintiff and the execution of the deed of trust in question. For a further answer and defense the defendants alleged that they had owned three lots, one of which had been conveyed to the plaintiff as security and the other two conveyed to third party purchasers. It was further alleged that through mutual mistake of the parties concerned, the defendants had conveyed to the plaintiff and to the third party purchasers lots other than the ones intended to be conveyed. The defendants sought to have the purchasers of the other two lots joined as parties defendant in order that the conveyances might be reformed to correspond with the true intention of the parties. The Court held that the plaintiff's demurrer to the further answer and defense on the grounds of misjoinder of parties and causes was properly sustained.

In order for the joinder to be proper under G.S. § 1-123[34] all parties must be affected by all causes of action. In the present action it is clear that the plaintiff and the additional defendants were not all interested in all of the lots in question. Further, the respective causes of action contained in the complaint and further answer did not arise out of the same transaction and were not connected with

[32] *Accord,* East Carolina Lumber Co. v. Pamlico County, 250 N.C. 681, 110 S.E.2d 278 (1959); Elliott v. Goss, 250 N.C. 185, 108 S.E.2d 475 (1959); Skipper v. Cheatham, 249 N.C. 706, 107 S.E.2d 625 (1959); Adams v. Flora MacDonald College, 247 N.C. 648, 101 S.E.2d 809 (1958); Lindley v. Yeatman, 242 N.C. 145, 87 S.E.2d 5 (1955); Carolina Builders Corp. v. New Amsterdam Cas. Co., 236 N.C. 513, 73 S.E.2d 155 (1952); Davis v. Rhodes, 231 N.C. 71, 56 S.E.2d 43 (1949). In the case of the defective statement of a good cause of action, the plaintiff may move for leave to amend under N.C. GEN. STAT. § 1-131 (1953).

[33] 255 N.C. 553, 122 S.E.2d 387 (1961).

[34] N.C. GEN. STAT. § 1-123 (1953), provides, in part: "[T]he causes of action so united must all belong to one of these classes, and, except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial, and must be separately stated."

the same subject of action. Therefore, there was a misjoinder of parties and causes.[35]

In *Jones v. Douglas Aircraft Co.*[36] plaintiff brought action to recover for the wrongful death of his intestate. It was alleged that the defendant negligently failed to cut off high voltage current on certain transmission lines after it had undertaken and agreed to do so, and that the intestate, relying on the defendant's performance of these duties, was electrocuted when a crane which he was operating came into contact with the charged power lines. The defendant denied negligence and set up a cross action against Boyd & Goforth, Inc., the contractor in charge of the work, for contribution. In the cross action it was alleged that the intestate was on the premises by virtue of a contract between Boyd & Goforth and the intestate's employer; that the intestate received such information as he had regarding the work to be done, including whether or not the power line was energized, from the additional defendant; and that such additional defendant failed to warn the intestate that the power lines were energized.

Boyd & Goforth demurred to the cross action for misjoinder of parties and causes and for failure to state facts sufficient to constitute a cause of action. While the Supreme Court affirmed the sustaining of the demurrer to the cross action for failure to state a cause of action,[37] it pointed out that the cross action was not subject to a demurrer for misjoinder of parties and causes. The additional defendant had contended that the cross action did not relate to and did not stem from the alleged cause of action set forth in the complaint.[38] However, the Court stated that the allegations of the com-

[35] *Accord,* Burleson v. Burleson, 217 N.C. 336, 7 S.E.2d 706 (1940); Holland v. Whittington, 215 N.C. 330, 1 S.E.2d 813 (1939); Smith v. Greensboro Joint Stock Land Bank, 213 N.C. 343, 196 S.E. 481 (1938). The Court further noted that G.S. § 1-73, relied upon by the defendants to support the joinder, allows the trial court to bring in all parties who have such an interest in the subject matter of the action that a final determination of the controversy cannot be made without their presence. But the Court pointed out that this section is subject to the limitations expressly incorporated in G.S. § 1-123 and cannot be used to engraft upon an existing action an independent action which is in no way essential to a final determination of the orginial action. Moore v. Massengill, 227 N.C. 244, 41 S.E.2d 655 (1947).

[36] 253 N.C. 482, 117 S.E.2d 496 (1960).

[37] The Court held that the cross action failed to state a cause of action against the additional defendant because it failed to allege facts sufficient to show a breach of duty upon the part of Boyd & Goforth proximately causing the death of the plaintiff's intestate.

[38] The additional defendant relied upon Hobbs v. Goodman, 241 N.C. 297, 84 S.E.2d 904 (1954), as grounds for sustaining the demurrer. In *Hobbs*

plaint and the cross complaint were in complete accord as to what caused the death of the intestate, and, therefore, there was no attempt in the cross action to set up a cause of action based on facts different from those on which plaintiff's action was based.[39]

The *Jones* case was again considered by the Supreme Court on the defendant's motion to amend his cross action against Boyd & Goforth.[40] In the lower court a consent judgment was entered whereby the original defendant, Douglas, paid $50,000 to plaintiff in complete discharge of its liability. Upon paying such judgment Douglas transferred to its trustee the power to prosecute the action against Boyd & Goforth for contribution under G.S. § 1-240. Douglas then attempted to amend its cross action.

In a per curiam decision the Supreme Court affirmed the trial judge's refusal to allow the amendment. The Court held that by the consent judgment and the assignment thereof, the original parties had settled their controversy, and, therefore, there was no case left in court in which the original defendant could proceed against the additional defendant for contribution. The Court further stated that due to the assignment of all the original defendant's rights to its trustee the original defendant was no longer the real party in interest and could not maintain the suit.[41]

Reply—Departure

In *Nix v. English*[42] plaintiff sought recovery for personal injuries sustained while riding as a passenger in the defendant's car. The complaint alleged that the defendant drove the car at an excessive rate of speed on a dangerous winding road without sufficient

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the plaintiff alleged she was injured when a store sign fell on her. The defendant in a cross action against his landlord alleged that plaintiff was not injured by the falling sign, but rather by a part of an awning negligently erected by the landlord. The demurrer to the cross action was sustained. The Court stated that the original defendant was not entitled to set up a cross action against the additional defendant on an entirely different state of facts which invoked principles of law not germane to the subject matter of the plaintiff's cause of action.

[39] The defendant cannot raise issues by way of cross action which are not essential to a full and complete determination of the plaintiff's action. Hobbs v. Goodman, *supra* note 38.

[40] 254 N.C. 323, 118 S.E.2d 764 (1961).

[41] Fidelity & Cas. Co. v. Green, 200 N.C. 535, 157 S.E. 797 (1931). The Court also noted that the denial of the motion to amend was an exercise of the trial court's discretion and would not be interfered with unless there was an abuse of discretion. *Accord,* Hood v. Elder Motor Co., 209 N.C. 303, 183 S.E. 529 (1936); McKeel v. Latham, 203 N.C. 246, 165 S.E. 694 (1932).

[42] 254 N.C. 414, 119 S.E.2d 220 (1961).

brakes and without proper control, and as a result the car left the road causing injury to the plaintiff. The defendant denied all allegations of negligence contained in the complaint. As a further defense the defendant alleged that she was a diabetic, taking insulin to control her condition; that while operating the car in question in a lawful manner, she was suddenly overcome by an attack of insulin shock and lost consciousness, thus causing her to lose control of the car; that she had never had such an attack while awake. The defendant also alleged that the plaintiff knew of her diabetic condition, and if she were negligent in failing to anticipate such an attack, the plaintiff was likewise negligent in failing to anticipate it.

The plaintiff by reply admitted the allegations of the answer with respect to the defendant's diabetic condition and the fact that the defendant was driving in a lawful manner at the time of the accident. The plaintiff also pleaded gross negligence on the part of the defendant in attempting to operate the car when she should have known she was subject to insulin attacks and when she had knowledge of an impending diabetic coma. However, the plaintiff did not seek leave to amend the original allegations contained in her complaint as to the defendant's gross negligence. The case was submitted to the jury solely on the theory of the reply.

The Supreme Court reversed a judgment for the plaintiff, holding that it was error to permit such a reply as filed by the plaintiff and to submit the case to the jury on the allegations of the reply rather than those contained in the complaint. The Court stated that reply is a defensive pleading, its purpose being to support, not to contradict, the complaint.[43] The Court pointed out that here the allegations of the complaint and reply were in no manner related. The plaintiff's reply, rather than supporting the allegations of the complaint, attempted to set up an entirely new cause of action inconsistent with that set forth in the complaint.

This decision is in accord with the well settled rules in North Carolina that the plaintiff cannot set up in his reply a cause of action entirely different from that contained in the complaint,[44] and that

[43] "[T]he plaintiff may reply to the new matter . . . and he may allege in ordinary and concise language, without repetition, any new matter *not inconsistent with the complaint,* constituting a defense to the new matter in the answer . . . ." N.C. GEN. STAT. § 1-141 (1953). (Emphasis added.)

[44] Phillips v. Hassett Mining Co., 244 N.C. 17, 92 S.E.2d 429 (1956); Scott v. Jordan, 235 N.C. 244, 69 S.E.2d 557 (1952); Miller v. Grimsley, 220 N.C. 514, 17 S.E.2d 642 (1941); Berry v. Hyde County Land Co., 183

the plaintiff must recover if at all on a cause of action stated in the complaint.[45]

Res Judicata

In *Gunter v. Winders*[46] plaintiff brought suit to recover for personal injuries and property damage sustained in a three car collision. In a previous wrongful death action brought by the administrator of a passenger in the plaintiff's car who had been killed in the accident, it was adjudged that the passenger's death was the result of the negligence of the present plaintiff and defendant, who were defendants in that action. The present defendant pleaded the judgment as a bar to the plaintiff's action, asserting that the prior judgment was a final adjudication of the liabilities of the plaintiff and defendant and was conclusive as to their liabilities *inter se*. The lower court sustained the defendant's plea in bar.

On appeal the Supreme Court reversed and held that the record was insufficient to sustain a plea of res judicata because the allegations and findings in the prior action did not, on their face, establish the joint and concurrent negligence of the present plaintiff and defendant as the cause of the accident. The Court stated that in determining whether a prior judgment is res judicata, it must be interpreted with reference to the pleadings and issues submitted to and answered by the jury. The Court pointed out that in the passenger's suit there were no allegations of joint and concurrent acts of negligence, but rather separate and distinct acts of negligence were alleged against the individual defendants. Furthermore, the issues submitted to and answered by the jury in that action were such that they did not establish the joint and concurrent negligence of the drivers.[47] The Court concluded that a judgment against two or more defendants in a tort action should not be held conclusive,

N.C. 384, 111 S.E. 707 (1922); Olmstead v. City of Raleigh, 130 N.C. 243, 41 S.E. 292 (1902). See generally 1 McINTOSH, NORTH CAROLINA PRACTICE & PROCEDURE §§ 1263, 1265 (2d ed. 1956).

[45] Manley v. Greensboro News Co., 241 N.C. 455, 85 S.E.2d 672 (1955); Suggs v. Braxton, 227 N.C. 50, 40 S.E.2d 470 (1946).

[46] 253 N.C. 782, 117 S.E.2d 787 (1961); also discussed under TRIAL PRACTICE, *Judgments—Res Judicata—Effect of Judgment in Favor of Passenger Against Operators of Two Cars as to the Rights of the Car Operators Inter Se, infra.*

[47] The issues submitted to the jury were: (1) was the death of the passenger caused by the negligence of the defendant Cottle as alleged in the complaint, and (2) was the death of the passenger caused by the negligence of the defendant Gunter as alleged in the complaint? Both issues were answered in the affirmative.

inter se, unless their rights and liabilities were put in issue by their pleadings.

This decision overrules prior North Carolina cases,[48] and apparently aligns North Carolina with the majority view[49] which holds, in effect, that a judgment in favor of a passenger of one vehicle against the drivers of both vehicles is not res judicata as to the rights and liabilities of the two drivers as between themselves, unless such rights and liabilities were put in issue by the pleadings and litigated.

A somewhat similar situation arose in *Hill v. Edwards.*[50] There Hill brought an action for damage to his automobile resulting from a collision with an automobile driven by the defendant Edwards. Previously, Carter, a passenger in Hill's car, had brought an action for personal injuries against Edwards, the present defendant. Edwards, pursuant to G.S. § 1-240, moved that Hill be made an additional defendant for the purpose of contribution. Edwards alleged that if he were negligent, Hill was also negligent, and such negligence concurred in jointly and proximately causing the injuries sustained by Carter. There was a verdict against Edwards for seven hundred dollars and a verdict against Hill for one half of that amount in favor of Edwards on his cross action for contribution.

[48] The Court expressly overruled Lumberton Coach Co. v. Stone, 235 N.C. 619, 70 S.E.2d 673 (1952), and subsequent decisions based on its authority to the extent that they conflict with the present decision. In *Coach Co.* there was a collision between the plaintiff's bus and the defendant's truck. Plaintiff sought to recover damages from defendant allegedly sustained in the collision. Defendant set up as a plea in bar an action instituted by a passenger on plaintiff's bus against both the plaintiff and the defendant. In the passenger's suit both defendants denied negligence and alleged that the other's negligence was the sole proximate cause of the accident. There was a settlement and a judgment rendered on the basis of this settlement, whereby the passenger recovered from both the plaintiff and the defendant. The Court sustained this plea in bar. Presumably, under the *Gunter* decision, this would be error because in the case of a settlement, even before the court, the rights and liabilities of the defendants' are not put in issue with respect to each other. Furthermore, in *Coach Co.* the two defendants were original defendants and, hence, not adversaries. Therefore, the rights of the defendants as between themselves were not adjudicated.

[49] *E.g.,* Hellenic Lines v. The Exmouth, 253 F.2d 473 (2d Cir. 1957); Kimmel v. Yankee Lines, 224 F.2d 644 (3rd Cir. 1955); Casey v. Balunas, 19 Conn. Supp. 365, 113 A.2d 867 (1955); Byrum v. Ames & Webb, Inc., 196 Va. 597, 85 S.E.2d 364 (1955). See generally RESTATEMENT, JUDGMENTS § 82 (1942), where it is stated, "The rendition of a judgment in an action does not conclude parties to the action who are not adversaries under the pleadings as to their rights *inter se* upon matters which they did not litigate, or have an opportunity to litigate, between themselves."

[50] 255 N.C. 615, 122 S.E.2d 383 (1961).

In the present action Edwards set up the judgment in the Carter action as a defense and plea in bar to Hill's present action. The Supreme Court, affirming a dismissal of the action, stated:

> [W]here the plaintiff recovers judgment against the original defendant, and the jury finds the additional defendant guilty of negligence and that such negligence concurred in jointly and proximately causing plaintiff's injuries and gives the original defendant a verdict for contribution pursuant to the provisions of G.S. 1-240, such judgment is *res judicata* in a subsequent action between such drivers, based on the same facts litigated in the cross action in the former trial.[51]

The plaintiff relied on *Gunter* as authority for overruling the plea in bar, but the Court distinguished that case on the ground that in *Gunter* the plaintiff and the defendants were all original defendants in the prior action and, therefore, were not adversaries and could not settle their differences *inter se*.

Thus it is apparent that in North Carolina where the first action results in a judgment on the merits, a second action between the original defendants will be barred by the first judgment only when the co-defendants were actually adverse parties in the first suit and had the opportunity to litigate their differences.

In *Jones v. Mathis*[52] the defendants filed cross actions against the plaintiff. By reply and as a plea in bar to one of the cross actions, plaintiff alleged a final judgment in his favor against one of the defendants. The judgment roll in the former action was not incorporated in the plaintiff's reply. Rather, the plaintiff stated that the pleadings and judgment roll in the former action would be offered in evidence upon the trial of the action if required. The trial court heard the plea in bar prior to the impaneling of the jury, and, after considering the judgment roll in the prior action, sustained the plea in bar.

The Supreme Court affirmed, stating that it is within the discretion of the trial judge to determine whether in the circumstances of a particular case a plea in bar is to be disposed of prior to the trial on the merits of plaintiff's alleged cause of action.[53] The Court

[51] *Id.* at 617, 122 S.E.2d at 385.

[52] 254 N.C. 421, 119 S.E.2d 200 (1961).

[53] Hayes v. Ricard, 251 N.C. 485, 112 S.E.2d 123 (1960); Gillikin v. Gillikin, 248 N.C. 710, 104 S.E.2d 861 (1958); McAuley v. Sloan, 173 N.C. 80, 91 S.E. 701 (1917).

also stated that the defendant's contention that the trial court considered the judgment roll prematurely in that it had not been formally offered in evidence was without merit.[54]

Statute of Limitation

In *Speas v. Ford*[55] the plaintiffs instituted an action for breach of contract in March 1955. Because of requests for extensions of time, the defendant did not file his answer until October 1958. In his answer the defendant set up a cross action against three additional defendants, alleging that he had been induced to enter into the contract by their fraudulent misrepresentations. It appeared upon the face of the cross action that the alleged fraud was discovered by the defendant some time prior to March 1, 1955. The Court held that the additional defendants' plea of the three year statute of limitations was properly sustained.

Ordinarily when the statute of limitations has been properly pleaded, it raises an issue of fact to be resolved by the jury.[56] However, in *Speas* it appeared from an examination of the defendant's pleadings that the statute of limitations had run. When it appears upon the face of the pleadings that the action is barred, a judgment dismissing the cross action on that ground, as a matter of law, is proper.[57]

[54] Prior North Carolina cases have held that the record in the former action, being in existence, is the only evidence admissible to prove its contents. Abernethy v. Armburst, 217 N.C. 372, 8 S.E.2d 228 (1940); Bruton v. Carolina Power & Light Co., 217 N.C. 1, 6 S.E.2d 822 (1940); Little v. Bost, 208 N.C. 762, 182 S.E. 448 (1935); Gauldin v. Madison, 179 N.C. 461, 102 S.E. 851 (1920). *Jones* does not appear to be in conflict with this rule in that, while the judgment roll in the former action was not formally introduced into evidence, it was nevertheless considered by the trial court, without objection, and was the basis for sustaining the plea in bar.

[55] 253 N.C. 770, 117 S.E.2d 784 (1961).

[56] Solon Lodge v. Ionic Lodge, 247 N.C. 310, 101 S.E.2d 8 (1957).

[57] Mobley v. Broome, 248 N.C. 54, 102 S.E.2d 407 (1958); Latham v. Latham, 184 N.C. 55, 113 S.E. 623 (1922). It should be noted that had the cross action of the defendant related back to the date when the plaintiff filed his complaint, it would not have been barred by the statute of limitations. In Brumble v. Brown, 71 N.C. 513 (1874), the Court squarely held that a plea of set off or a counterclaim is not barred, even though the statute has run before it is pleaded, if it was not barred at the time the plaintiff commenced his action. However, in North Carolina Cotton Growers' Co-op. Ass'n v. Tillery, 201 N.C. 531, 533, 160 S.E. 767, 768 (1931), the Court stated: "'Where a counterclaim or set-off is pleaded in an amended answer or plea, and not in the original, the statute runs against it until the filing of the amended answer.'" This is based on the theory that the counterclaim is a separate and distinct cause of action. *Accord,* Norfolk & So. R.R. v. Dill, 171 N.C. 176, 88 S.E. 144 (1916).

In *Gillikin v. Bell*[58] the plaintiff alleged that the defendant, a photographer, took pictures of the plaintiff's intestate, which tended to reflect upon and desecrate the body. From the face of the complaint it appeared that the alleged wrongful acts of the defendant occurred in July 1956, and that the action was not begun until August 1959. The Court held that the action was properly dismissed since it appeared from the plaintiff's pleadings that the statute of limitations had run.[59]

Ultimate Facts

The North Carolina Supreme Court has frequently stated that only the material, essential or ultimate facts which constitute the cause of action, defense or counterclaim should be alleged, and not the probative or evidentiary facts which are to be used to prove the claim or defense.[60] In *Dawson Constr. Co. v. Hyde County Bd. of Educ.*[61] the Court once again adhered to this rule. There the plaintiff's motion to strike much of the detail from the defendant's answer and all of the defendant's counterclaim was granted by the trial court

However, the *Cotton Growers* case left open the question of what the Court would do if the counterclaim or cross action were set out in the original answer which was not filed until after the statute had run. This was the question presented in *Speas*. While in *Speas* the Court did not specifically consider the problem in these terms, it is apparent from the result that the cross action will not relate back to the time of the original filing of the complaint by the plaintiff. It should be noted that due to numerous extensions of time, the original answer and cross action in *Speas* were not filed until more than three years after the complaint. A contrary result might have been reached had the answer and cross action been filed within the thirty days normally allowed for the filing of an answer.

In the case of amendments to the plaintiff's pleadings, there is generally no relation back when the amendment introduces a new cause of action. In Stamey v. Rutherfordton Elec. Membership Corp., 249 N.C. 90, 94, 105 S.E.2d 282, 285 (1958), the Court stated: "'[T]he general rule is that an amendment introducing a new cause of action does not relate back to the commencement of the action, with respect to limitations, but is the equivalent of a new suit, so that the statute of limitations continues to run until the time of the filing of the amendment.'" See generally Note, 39 N.C.L. REV. 83 (1960).

[58] 254 N.C. 244, 118 S.E.2d 609 (1961); also discussed under TORTS, *Perjured Testimony—Defamation of the Dead, infra.*

[59] *Accord,* Swartzberg v. Reserve Life Ins. Co., 252 N.C. 150, 113 S.E.2d 270 (1960); Nowell v. Hamilton, 249 N.C. 523, 107 S.E.2d 112 (1959).

[60] Thomas & Howard Co. v. American Mut. Liab. Ins. Co., 241 N.C. 109, 84 S.E.2d 337 (1954); Daniel v. Gardner, 240 N.C. 249, 81 S.E.2d 660 (1954); Foust v. City of Durham, 239 N.C. 306, 79 S.E.2d 519 (1954); Parker v. White, 237 N.C. 607, 75 S.E.2d 615 (1953); Guy v. Baer, 234 N.C. 276, 67 S.E.2d 47 (1951); Long v. Love, 230 N.C. 535, 53 S.E.2d 661 (1949). See generally 1 MCINTOSH, *op. cit. supra* note 44, § 981.

[61] 254 N.C. 311, 118 S.E.2d 753 (1961).

and affirmed on appeal. The Court stated that the defendant's answer and counterclaim contained much evidentiary detail, conclusions and arguments and were, therefore, properly stricken. The Court recognized, however, that in striking much of the defendant's answer and counterclaim some proper allegations were excluded. But this was held not to be error because the trial judge specifically provided for further pleading on the part of the defendant, both as to the answer and the counterclaim. Therefore, proper allegations could be included in the defendant's amended pleadings.

CONSTITUTIONAL LAW

CIVIL RIGHTS

Trespass

In *State v. Avent*[1] the Court held that enforcement of the state's trespass statutes[2] by a state court against Negroes and their white companions who had refused to leave the luncheonette area of a private business at the manager's request did not constitute state action to enforce racial segregation. The Court stated that in the absence of a state statute forbidding a restaurant owner to discriminate on the basis of race or color,[3] the owner or operator of a privately owned and operated restaurant has the right to select the clientele he will serve, and to make such selection based on race if he so desires.[4] Therefore, the trespass statutes may be applied to protect his rights.

The Court further stated that the trespass statutes and the judicial process by which they are enforced are merely a "legal framework" provided by the state to assist a private landowner in protecting himself and his land from trespassers without resorting to force. The Court distinguished between state action to protect a "plain legal right"—protection from trespassers—and the enforce-

[1] 253 N.C. 580, 118 S.E.2d 47 (1961).

[2] N.C. GEN. STAT. §§ 14-126, -134 (1953).

[3] North Carolina has no such statute. For a comprehensive review of statutes against discrimination based on race or color in places of public accommodation, which have been enacted by twenty-four states, see KONVITZ & LESKES, A CENTURY OF CIVIL RIGHTS 157 (1961).

[4] *E.g.*, State v. Clyburn, 247 N.C. 455, 101 S.E.2d 295 (1958), discussed in Note, 37 N.C.L. REV. 73 (1958); Fletcher v. Coney Island, Inc., 165 Ohio St. 150, 134 N.E.2d 371 (1956); Alpaugh v. Woverton, 184 Va. 943, 36 S.E.2d 906 (1946).

ment of covenant's restricting land to the exclusive use of whites.[5] In enforcing the trespass statutes, the Court stated, it was merely punishing those who unlawfully and intentionally invaded the rights of a private landowner and in no way deprived the defendants of the rights guaranteed to them by the fourteenth amendment of the federal constitution[6] or by article 1, section 17 of the state constitution.

Registration—Literacy Test

The Court held in *Bazemore v. Bertie County Bd. of Elections*[7] that the literacy test prescribed by G.S. § 163-28[8] was unreasonably administered when the applicant for registration as a voter was required to write a portion of the North Carolina Constitution from dictation. The statute merely requires that a person be able to read with reasonable proficiency any section of the North Carolina Constitution. Excessive reading and writing, or writing from dictation may not be required.

CONTRACTS

Construction Contracts

In *Robbins v. Meyers Trading Post, Inc.*,[1] the defendant contracted to construct a dwelling house for the plaintiffs "exactly like house built on Endsley Ave. house #13" with certain specified exceptions.[2] After plaintiffs had paid the purchase price and taken

[5] The defendants contended that the rationale of Shelley v. Kraemer, 334 U.S. 1 (1947), discussed in Note, 27 N.C.L. Rev. 224 (1949), which held that the equal protection clause of the fourteenth amendment of the federal constitution prohibited a state court from enforcing racially restrictive covenants in real property deeds, was applicable to the issue here involved.

[6] See in accord with this view Lewis, *The Meaning of State Action*, 60 Colum. L. Rev. 1083 (1960). *Contra*, Ming, *Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases*, 16 U. Chi. L. Rev. 203, 229-36 (1949).

[7] 254 N.C. 398, 119 S.E.2d 637 (1961).

[8] This statute provides, "Every person presenting himself for registration shall be able to read and write any section of the Constitution of North Carolina in the English language. . . ." N.C. Gen. Stat. § 163-28 (Supp. 1961), discussed in 36 N.C.L. Rev. 152 (1958). The constitutionality of this statute, "when reasonably administered," was upheld in Lassiter v. Northampton County Bd. of Election, 248 N.C. 102, 102 S.E.2d 853 (1958), *aff'd*, 360 U.S. 45 (1959), discussed in 37 N.C.L. Rev. 396 (1959).

[1] 253 N.C. 474, 117 S.E.2d 438 (1960).

[2] Defendant was obligated under the contract to complete "as a first class turn-key job the entire construction" of the house. *Id.* at 475, 117 S.E.2d at 439. Considered in connection with the other terms of the contract, the Court

possession, certain defects were discovered in the house which they alleged were due to the use of inferior materials. Plaintiffs sued for breach of contract and were awarded damages in the trial court.

On appeal the Supreme Court reversed. The majority held that since the contract was free from ambiguity, the trial court had erred in admitting parol evidence which tended to modify or alter its terms.[3]

In a concurring opinion three Justices declared that while the contract was not so clear and certain as to preclude admission of parol evidence bearing upon the true intent of the parties at the time the contract was entered, reversal was required due to improper admission of evidence relating to the measure of damages. It was pointed out that on the previous appeal of the case[4] the plaintiffs' evidence showed that in order to remedy the alleged defects a substantial part of the completed work would have to be undone. This being true, the correct measure of damages is the difference in value between the house contracted to be built and that actually built, and not the cost of remodeling the house to make it conform to the contract.[5] The trial court, therefore, erred in allowing, as evidence of plaintiffs' damages, the cost of remodeling the house.

Employment Contracts

In *Thompson v. ALD, New York, Inc.*[6] plaintiff was employed to sell automatic laundry equipment on a commission basis. The employment contract prohibited plaintiff from owning an interest in a laundromat. Plaintiff purchased equipment from defendant to set up his own laundromat. When defendant refused to pay plaintiff the commission on this sale, the latter brought suit. The Court held that the plaintiff was not entitled to the commission because the parties intended, at the time they made the employment contract, that the plaintiff was to be employed to sell equipment to third parties

held that first class turn-key job meant that defendant would build a complete house ready for occupancy as a dwelling.

[3] This merely reaffirms prior North Carolina decisions. *E.g.*, Bost v. Bost, 234 N.C. 554, 67 S.E.2d 745 (1951).

[4] Robbins v. Meyers Trading Post, Inc., 251 N.C. 663, 111 S.E.2d 884 (1960).

[5] *Id.* at 667, 111 S.E.2d at 887. This rule of damages was adopted early in Twitty v. M'Guire, 7 N.C. 501 (1819), and reflects the view of a majority of jurisdictions. *E.g.*, Walsh v. Cornwell, 272 Mass. 555, 172 N.E. 855 (1930); Mahan v. Springer, 155 Wash. 98, 283 Pac. 667 (1930). See generally Annot., 123 A.L.R. 515, 533 (1939).

[6] 255 N.C. 321, 121 S.E.2d 554 (1961).

and not to himself. The Court reasoned that when the plaintiff decided to buy equipment and establish the laundromat, his purpose was inconsistent with that for which he was hired, and therefore, his activities constituted an abandonment of the employment contract. The Court, in accord with the generally accepted rule, stated that the defendant, when advised of plaintiff's activities prior to the time of the sale, was justified in treating the contract as having been terminated by the plaintiff.[7] Therefore, at the date of the sale plaintiff's status was that of a purchaser from the defendant rather than that of a salesman.

In *Welcome Wagon Int'l, Inc. v. Pender*,[8] plaintiff sought to restrain defendant from further violations of her contract of employment with the plaintiff. Defendant had contracted not to engage, during the term of her employment and for a period of five years thereafter, in the same or in a similar business as that of the plaintiff (1) in Fayetteville, North Carolina, or (2) in any other place in North Carolina in which the plaintiff was then engaged in rendering its service, (3) in any other place in the United States in which the plaintiff was then engaged in rendering its service, or (4) in any other place in the United States in which the plaintiff had been or had signified its intentions to be engaged in rendering its service. Shortly after defendant's resignation as hostess of plaintiff's welcoming service in Fayetteville, defendant established her own service in the same city.

The trial court sustained a demurrer to the complaint, on the grounds that the covenant was void as against public policy in that the restrictions were unreasonable both as to length of time and extent of territory.

In a four-to-three decision the Supreme Court reversed. The majority prefaced their decision with a statement of the general law applicable to restrictive covenants in employment contracts. Such contracts will be enforced only if they are reasonable both as to time and territory limitations.[9] Moreover, the Court must take

[7] It is the generally accepted rule that where an employee abandons the contract, he terminates his employment, or at least the employer may treat the contract as having been rescinded. *E.g.*, Bene v. La Grande Laundry Co., 22 Cal. App. 2d 512, 71 P.2d 351 (Dist. Ct. App. 1937); Dube v. Simard, 124 Me. 369, 129 Atl. 488 (1925); Douglas v. Metropolitan Life Ins. Co., 297 S.W. 87 (Mo. App. 1927).

[8] 255 N.C. 244, 120 S.E.2d 739 (1961).

[9] *E.g.*, Sonotone Corp. v. Baldwin, 227 N.C. 387, 42 S.E.2d 352 (1947). *Accord*, Mattis v. Lally, 138 Conn. 51, 82 A.2d 155 (1951); Renwood Food

the contract as written[10] and is without power to vary or reform it so as to bring the restrictions within the realm of reasonableness.[11]

However, the Court, applying the "Blue Pencil" rule,[12] held that where the parties have made divisions of the territory, the Court will take notice of the divisions made by the parties themselves and enforce the restrictions in the territorial divisions deemed reasonable and refuse to enforce the restrictions in those divisions deemed unreasonable. Thus the Court held that division (1), Fayetteville, was not unreasonable. The reasonableness of division (2) was held to be a jury question, while divisions (3) and (4) were rejected by the Court as being unreasonable.

Although the Court cited one North Carolina case in support of the rule,[13] it is believed that this decision marks the first application of the rule in this jurisdiction. In prior cases the Court has in several instances enforced only a part of a restrictive covenant.[14] However, those cases are distinguishable since the decisions rested not upon the unreasonableness of the covenant, as in the present case, but rather upon its indefiniteness.[15]

Products, Inc. v. Schaefer, 240 Mo. App. 939, 223 S.W.2d 144 (1949). For a thorough treatment of the various facets to be considered in determining the reasonableness of restrictive covenants, see Note, 38 N.C.L. REV. 395 (1960).

[10] *E.g.*, Henley Paper Co. v. McAllister, 253 N.C. 529, 117 S.E.2d 431 (1960); Noe v. McDevitt, 228 N.C. 242, 45 S.E.2d 121 (1947).

[11] Welcome Wagon Int'l, Inc. v. Pender, 255 N.C. 244, 120 S.E.2d 739 (1961).

[12] The blue pencil rule is followed by the majority of jurisdictions. *E.g.*, Roane, Inc. v. Tweed, 33 Del. Ch. 4, 89 A.2d 548 (Sup. Ct. 1952); Welcome Wagon Int'l, Inc. v. Haschert, 125 Ind. App. 503, 127 N.E.2d 103 (1955) (involving the present plaintiff and an almost identical covenant). See generally 5 WILLISTON, CONTRACTS § 1659 (rev. ed. 1937, Supp. 1947); Note, 26 N.C.L. REV. 402 (1948). *But see* Welcome Wagon Int'l, Inc. v. Morris, 224 F.2d 693 (4th Cir. 1955), where the present plaintiff sought to enforce an almost identical covenant, and the court held the covenant, as judged by North Carolina case law, void for unreasonableness, both as to time and territory limitations.

[13] Hauser v. Harding, 126 N.C. 295, 36 S.E. 586 (1900).

[14] *E.g.*, Wooten v. Harris, 153 N.C. 43, 68 S.E. 898 (1910); Shute v. Heath, 131 N.C. 281, 42 S.E. 704 (1902); Hauser v. Harding, *supra* note 13.

[15] A strong dissent voiced disapproval of the "Blue Pencil" rule as being unsound in that under the rule legality is made to depend on form rather than substance. It was also noted that although the Court will not divide territory under the rule, it will divide what is essentially a single restrictive covenant.

The tenor of the dissenting opinion evidences a fear that the employer, confident that the court will in any case render maximum enforcement, may use his superior barganing power to coerce the employee into unreasonable promises worded in the alternative.

SUPERVISING ENGINEER

Under the English doctrine and that adopted by some jurisdictions in this country, an architect or engineer charged with supervising construction work and issuing his certificate of completion upon the satisfactory performance of the work is held to act in the capacity of an arbitrator between the parties and it not liable to either for negligently certifying the work as being completed.[16] However, a substantial number of jurisdictions recognize that because the supervising architect or engineer actually occupies the dual position of employee as well as arbitrator, he may be held liable by the employer for negligence in giving an erroneous certification.[17]

In *City of Durham v. Reidsville Eng'r Co.*,[18] a case of first impression in this jurisdiction, the Court applied the English doctrine, holding that under the terms of the construction contract before the Court, the supervising engineers were acting in the capacity of arbitrators and could not be held liable in damages to *either* party to the contract in the absence of bad faith.[19]

The decision bears further examination, however, because while the Court stated the engineers would not be liable to *either* party to the contract, the holding as applied to the employer is dictum. Indeed, the only issue present for determination was whether the contractor and its surety on a maintenance bond could hold the supervising engineers liable in a cross-action for damages caused by certain defects discovered after the engineers had certified the work as complete.[20] Moreover, the Court expressly stated that the question of the supervising engineers' liability to the plaintiff employer was not presented for determination on the present appeal.[21]

[16] *E.g.*, Wilder v. Crook, 250 Ala. 424, 34 So. 2d 832 (1948); Corey v. Eastman, 166 Mass. 279, 44 N.E. 217 (1896); Chambers v. Goldthrope, [1901] 1 K.B. 624; Stevenson v. Watson, [1879] 4 C.P.D. 148. See generally Annot., 43 A.L.R.2d 1227 (1955).

[17] *E.g.*, Palmer v. Brown, 127 Cal. App. 2d 44, 273 P.2d 306 (Dist. Ct. App. 1954); School Dist. v. Josenhans, 88 Wash. 624, 153 Pac. 326 (1915).

[18] 255 N.C. 98, 120 S.E.2d 564 (1961); also discussed under CIVIL PROCEDURE, *Cross Actions, infra.*

[19] *Id.* at 102-03, 120 S.E.2d at 567.

[20] The surety alleged that if the contract was not properly performed, it was due to the negligence of the engineers in failing to properly supervise the work, and that, if the plaintiff recovered a judgment against it, it was entitled to judgment over against the supervising engineers.

[21] 255 N.C. at 103, 120 S.E.2d at 567.

CREDIT TRANSACTIONS

OWNER OF VEHICLE UNDER THE FINANCIAL RESPONSIBILITY ACT

In North Carolina, the conditional vendor is considered the holder of legal title.[1] However, for purposes of the Motor Vehicle Safety and Financial Responsibility Act[2] the conditional vendee is deemed to be the owner of the motor vehicle. Thus, in *High Point Sav. & Trust Co. v. King*,[3] where plaintiff sought damages from the conditional vendor for negligence of the conditional vendee, recovery was denied.

The purpose of the act is to protect the public.[4] Therefore, the responsibility imposed by the act is placed on the conditional vendee since he is the party who has possession and use of the automobile.

EQUITABLE LIEN—CONSENT JUDGMENT

Stanley v. Cox[5] involved a separation agreement whereby the parties agreed that a certain piece of improved realty would be owned as tenants in common. The wife was given the right to occupy the premises exclusively for her life and the husband further agreed to make certain payments to her. A divorce judgment was obtained, which recited that by consent of the plaintiff husband, it was ordered that the plaintiff make the payments specified in the separation agreement, and that such payments constitute a lien on his property.

On these facts the Court held that an equitable lien was created and that subsequent purchasers of the husband's interest took subject to the lien. In so holding the Court adopted the language used in *Winborne v. Guy*[6] where the Court held that,

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[1] Whitlock v. Auburn Lumber Co., 145 N.C. 120, 58 S.E. 909 (1907); Perry v. Young, 105 N.C. 463, 11 S.E. 511 (1890); Frick & Co. v. Hilliard, 95 N.C. 117 (1886).

[2] N.C. GEN. STAT. § 20-279.1(8) (Supp. 1961), defines "owner" as "a person who holds the legal title of a motor vehicle, or in the event a motor vehicle is the subject of an agreement for the conditional sale or lease thereof . . . then such conditional vendee . . . shall be deemed the owner for the purposes of this article."

[3] 253 N.C. 571, 117 S.E.2d 421 (1960).

[4] Indiana Lumbermens Mut. Ins. Co. v. Parton, 147 F. Supp. 887 (M.D.N.C. 1957).

[5] 253 N.C. 620, 117 S.E.2d 826 (1961); also discussed under DOMESTIC RELATIONS, *Separation Agreements—Equitable Liens, infra.*

[6] 222 N.C. 128, 22 S.E.2d 220 (1942).

> Every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation . . . creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees and purchasers or encumbrancers with notice.[7]

Although the divorce judgment was signed by neither party, the Court held that this did not prevent the agreement from being binding. The husband's consent was shown by the signature of his attorneys, and the wife's consent was alleged in the complaint in the present case which averred that she claimed that the consent judgment created a lien. Thus there was a binding express executory agreement in writing that indicated an intention to make the property security for the mortgage obligation.[8]

Improper Indexing of Deeds of Trust and Liens

Cuthrell v. Camden County[9] points out once again that pursuant to G.S. § 161-22[10] the proper indexing and cross-indexing of instruments required to be registered is an essential part of their registration. In this case the sole owner of the land was Mollie Cuthrell,

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[7] *Id.* at 131-32, 22 S.E.2d at 222.

[8] *Accord,* Raynor v. Raynor, 212 N.C. 181, 193 S.E. 216 (1937), where the father divided his land into nine shares and deeded each of his nine children a share. Two of the shares were encumbered with a mortgage, and the deeds to the other shares provided that the grantees were to share equally in the payment of the mortgage. The Court held that the language in the deeds created a specific charge in the nature of an equitable lien on the land conveyed. See generally Britton, *Equitable Liens—A Tentative Analysis of the Problem,* 8 N.C.L. Rev. 388 (1930).

[9] 254 N.C. 181, 118 S.E.2d 601 (1961); also discussed under Real Property, *Indexing—Deeds of Trust and Liens, infra.*

[10] This statute provides: "The register of deeds shall provide and keep in his office full and complete alphabetical indexes of the names of the parties to all liens, grants, deeds, mortgages, bonds, and other instruments of writing required or authorized to be registered; such indexes to be kept in well bound books, and shall state in full the names of all parties, whether grantors, grantees, vendors, vendees, obligors or obligees, and shall be indexed and cross-indexed . . . so as to show the name of each party under the appropriate letter of the alphabet . . . . Reference shall be made, opposite each name to the page, title or number of the book in which is registered any instrument: Provided . . . . no instrument shall be deemed to be properly registered until the same has been properly indexed as herein provided . . . ."

but, apparently under the belief that they had inherited one-half interest in the land, her children joined in the execution of the deed of trust on the land to secure a note. The deed of trust was indexed as "R. G. Cuthrell [one of the children] et al."

Subsequently Mollie Cuthrell received old age assistance for which a lien was duly recorded. However, the index referred to the wrong page in the lien recordation book. Thereafter, but before this action was brought, the deed of trust was properly indexed. The indexing of the lien, however, was never corrected.

In a suit to determine which security had priority, the Court held that the original indexing of the deed of trust was improper and that it was not validly recorded until the indexing was subsequently changed, which took place after the lien was recorded. Following *Woodley v. Gregory*[11] the Court held that where the sole owner of the property is not named in the index, but is referred to only by the abbreviation "et al.," the index is improper and the recordation invalid.

Although the lien index referred to the wrong page number, the Court held that this was sufficient to put a careful and prudent examiner on inquiry; thus it was a substantial compliance with the recordation statute.[12] And, since the lien had been properly indexed prior to the deed of trust, it was held that the lien had priority.[13]

Absolute Deed Alleged to Be a Mortgage

In *Isley v. Brown*[14] the plaintiffs sought to have a deed, absolute on its face, converted into a security for debt. They alleged that they did not read the instrument before signing it and that they did not know that it was a deed. The well established rule in North Carolina has been that before an absolute deed will be converted into a mortgage (1) it must be proved that the clause of redemption was omitted by reason of ignorance, mistake, fraud, or undue advantage; *and* (2) the intent to create a security must be established, not merely by proof of declarations, but by proof of facts and circumstances dehors the deed, inconsistent with the idea of an absolute purchase.[15]

[11] 205 N.C. 280, 171 S.E. 65 (1933).

[12] In Johnson Cotton Co. v. Hobgood, 243 N.C. 227, 90 S.E.2d 541 (1955), the index referred to the wrong book and page. The Court held the registration nevertheless valid where the cross-index was accurate.

[13] See generally Note, 6 N.C.L. Rev. 107 (1927).

[14] 253 N.C. 791, 117 S.E.2d 821 (1961).

[15] Perkins v. Perkins, 249 N.C. 152, 105 S.E.2d 663 (1958); Note, 26 N.C.L. Rev. 405 (1948).

The principal case held against the plaintiffs because they had failed to read the deed. In stating the law as to when an absolute deed may be held to be a mortgage, the Court said,

> [I]t must be alleged and proven that the clause of redemption was omitted by reason of ignorance, mistake, fraud or undue advantage. This must be established by proof of declarations and proof of facts and circumstances, *dehors* the deed, inconsistant [*sic*] with the idea of an absolute purchase.[16]

In the principal case the Court failed to mention that the intent to create a security interest must be shown. What the Court said as to the proof of the omission of the defeasance clause by facts dehors the deed had been previously said of the proof of the intention. Furthermore, the Court now calls for proof of declarations *and* facts, whereas previous statements had required proof not merely of declarations but of facts. This case will be the subject of a Note in this volume of the *Law Review*.

CRIMINAL LAW AND PROCEDURE

Criminal Law

Accessory Before the Fact

In *State v. Green*[1] the Court held that the crime of accessory before the fact could not be considered a lesser included offense within the substantive crime of murder. If found that a person indicated as a principal was actually an accessory, then he must be acquitted of the principal crime and tried under a new indictment as an accessory.

In two later cases[2] the Court implied that the rule adopted in *Green* was overruled, but this remained in doubt due to the singular fact situations presented in these later cases.[3] In the recent case of

[16] 253 N.C. at 792, 117 S.E.2d at 823.

[1] 119 N.C. 899, 26 S.E. 112 (1896).

[2] State v. Bryson, 173 N.C. 803, 92 S.E. 698 (1917); State v. Simmons 179 N.C. 700, 103 S.E. 5 (1920).

[3] In *Bryson* the defendant was convicted of murder in the second degree upon an indictment of murder in the first degree. On appeal the defendant contended that the evidence justified his conviction only as an accessory before the fact, and that having been put in jeopardy upon the murder charge he could not subsequently be tried as being connected with the murder in any way. The Court pointed out that G.S. § 14-5, which prohibits a later trial

State v. Jones[4] the defendant was convicted of first degree murder and appealed on the grounds that the judge refused to instruct the jury on the law of accessory before the fact. He would only be entitled to this instruction if the crime of accessory was a lesser included crime in the principal offense of murder. The Court held that it was error to refuse the instruction requested and granted a new trial. This indicates that the rule in North Carolina is now, if not before, that an accessory before the fact is a lesser included crime in the principal crime charged in the indictment.

> An accessory before the fact has been defined as one who procures, counsels, or commands another to commit a felony for him but is not himself present, actively or constructively, when the felony is committed. If such a person were present actually or constructively at the commission of the crime, he would be a principal and not an accessory.[5]

G.S. § 14-5 preserves the distinction between an accessory before the fact and a principal. This distinction is further implied in G.S. § 14-6 which makes the maximum sentence for an accessory before the fact life imprisonment, whereas a principal in the crimes enumerated in the statute can be punished by death. When considering the fact that the legislature has made a statutory distinction between the two offenses by providing for them in two different statutes, it

for the same offense if the defendant has once been tried as an accessory or as a principal, sustained the defendant's contention, provided the trial court erred in trying him for the substantive felony of murder in counseling, procuring or commanding another to slay the victim. However, the Court held that since G.S. § 15-170 authorized conviction of a lesser crime than that charged in the indictment and the jury had found that the defendant had participated in the crime as an accessory, he could not complain that he was convicted of a lesser crime than murder in the first degree, because, as an accessory, G.S. § 14-6 authorized a higher punishment than that actually imposed by the trial court. The Court further stated that the effect of G.S. § 14-7, which authorizes the trial of an accessory either with, after, or in the absence of a prior conviction of the principal, was to abolish the distinction between an accessory and a principal. In *Simons* the question arose on a petition for writ of certiorari, the defendant contending that an accessory before the fact, for which he was convicted, was not a lesser included offense within the crime of arson, with which he was charged. The Court denied the petition because of the failure of the defendant to make a timely appeal, but said by way of dictum that *Bryson* had substantially overruled an earlier case and held that the crime of accessory before the fact was included within the charge of the principal crime. Neither case, however, definitively established this rule.

[4] 254 N.C. 450, 119 S.E.2d 213 (1961).

[5] 1 WHARTON, CRIMINAL LAW AND PROCEDURE § 110 (Anderson 1957).

may well be that the Court has adopted a position contrary to the legislative intent by holding that accessory before the fact is a lesser degree of the principal offense.

It seems that the Court reached a just result in *Jones* because in the fact situation there the defendant would not be prejudiced if found to be an accessory before the fact.[6] However, accepting the Court's ruling literally, a defendant could be convicted as an accessory before the fact upon an indictment as a principal even though his defense was that he did not in any way participate in the crime. In this situation he would be severely prejudiced for he would not logically expect state evidence of or a trial court instruction on his participation as an accessory before the fact. It is therefore submitted that the Court should restrict its ruling in *Jones* to the factual situation presented there.

Corpus Delicti—Corroboration of Confession

> A conviction cannot be had on the extrajudicial confession of the defendant, unless corroborated by proof aliunde of the corpus deliciti. Full, direct and positive evidence, however, of the corpus delicti, is not indispensable. A confession will be sufficient if there be such extrinsic corroborative circumstances, as will, *when taken in connection with the confession,* establish the prisoner's guilt in the minds of the jury beyond a reasonable doubt.[7]

An essential element of both crime against nature and carnal knowledge is penetration.[8] In *State v. Whittemore*[9] the only evidence of penetration shown was that contained in the confession of the defendant. The defendant stated, extrajudicially, that he had "rubbed his privates through the lips of her privates." The prosecutrix stated that the defendant had placed his privates *at* her privates

[6] In *Jones* the defendant had been convicted as a principal and given the maximum sentence; the ruling here resulted in a new trial with the possibility of conviction of a lesser offense. It should also be noted that the defendant did not deny his participation in the crime but contended that he was an accessory before the fact.

[7] Vogt v. United States, 156 F.2d 308, 310 (5th Cir. 1946). (Emphasis is by the Court.) Quoted with approval in Masse v. United States, 210 F.2d 418, 420 (5th Cir. 1954).

[8] State v. Bowman, 232 N.C. 374, 61 S.E.2d 107 (1950).

[9] 255 N.C. 583, 122 S.E.2d 396 (1961); also discussed under CRIMINAL PROCEDURE, *Involuntary Confession—Mental Capacity* and *Time of Essence—Defense of Alibi, infra.*

and was extremely emphatic in her use of the word "at." The Court held that this testimony by the prosecutrix was sufficient to resolve the doubt contained in the confession, and that the confession was, therefore, admissible. The Court said,

> We have said that Barbara's use of the word "at" was not, standing alone, sufficient to establish penetration. It left the question too conjectural. But the defendant's explanation of what occurred is, we think, sufficient to remove the doubt as to the meaning of the word "at."[10]

It is submitted that the holding of the Court is not productive of fundamental fairness. It seems elementary that, in relation to the sexual act, a "placing at" is not the same as "an insertion into." It is paradoxical to say that two terms, mutually exclusive, can corroborate each other.

Highway Robbery

In *State v. Stewart*[11] the petitioner was sentenced in 1945 to eighteen to twenty years upon a plea of guilty to a charge of highway robbery. In 1961 the defendant petitioned for writ of habeas corpus for his release, contending that a conviction for highway robbery subjected him to a maximum penalty of ten years. The trial court denied the petition, holding that the sentence was not excessive under G.S. § 14-87.[12] On petition for writ of certiorari the Supreme Court remanded. The Court pointed out that although G.S. § 14-87 authorizes a maximum sentence of thirty years upon a conviction of robbery with firearms or other dangerous weapons, the defendant's plea here was guilty of robbery with no mention of firearms. Therefore, the offense was governed by G.S. § 14-2,[13] which limited the

[10] 255 N.C. at 589-90, 122 S.E.2d at 401.

[11] 255 N.C. 571, 122 S.E.2d 355 (1961).

[12] "Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implements or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, . . . shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not less than five nor more than thirty years." N.C. GEN. STAT. § 14-87 (1953).

[13] "Every person who shall be convicted of any felony for which no specific punishment is prescribed by statute shall be imprisoned . . . not exceed-

maximum sentence to not more than ten years.[14]

Highway robbery was once considered an aggravated form of common law robbery,[15] but this distinction is not set out in the General Statutes of North Carolina. It would seem therefore that the decision in the instant case is reasonable as the term "highway robbery" no longer contains its historic nefariousness.

Presumption of Malice—Deadly Weapon

In *State v. Guss*[16] the deceased challenged the defendant to a fight and he declined. The deceased then started toward the defendant with his hand in his pocket and somebody in the immediate area shouted "cut him up." The defendant then drew a pistol and fired, fatally wounding the deceased. The deceased did not have a knife upon his person when he was examined by the officers who arrived soon thereafter. This was the evidence presented by the state, and upon this evidence the jury found the defendant guilty of second degree murder. While reversing the decision on other grounds, the Court raised, but did not answer, the question whether the evidence by the state, in itself, rebutted the presumption of malice inferred from the use of a deadly weapon in a homicide.[17]

In order to reduce a homicide to manslaughter, it must appear that the act of the defendant was the result of provocation by the person slain. The defendant must show even stronger provocation when he uses a deadly weapon because the intentional use of a deadly weapon warrants the inferrence of malice.[18] Mere words are not adequate provocation, no matter how insulting or reproachful, but, if these words indicate a present intent to do the defendant serious bodily harm and the victim possesses a present ability to do such harm, then such action is adequate provocation.[19]

North Carolina has held that where a victim directs words to the defendant which are in themselves inadequate provocation to reduce the homicide to manslaughter, the malice can be rebutted if

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ing two years . . . or if the offense be infamous . . . not less than four months nor more than ten years . . . ." N.C. GEN. STAT. § 14-2 (1953).

[14] *Accord, In re* Sellers, 234 N.C. 648, 68 S.E.2d 308 (1951).

[15] See, *e.g.*, State v. Burke, 73 N.C. 83, 86 (1875).

[16] 254 N.C. 349, 118 S.E.2d 906 (1961); also discussed under CRIMINAL LAW AND PROCEDURE, *Self-Defense* and *Character Evidence—Competence to Prove Guilt or Innocence, infra.*

[17] *Id.* at 351, 118 S.E.2d at 907.

[18] 1 WHARTON, *op. cit. supra* note 5, § 276.

[19] *Id.* at § 277.

a mutual affray immediately follows such provocation.[20] It would seem that in the instant case the state's evidence precludes any possibility of a conviction for murder in the first or second degree. Taken in the light most favorable to the state, the evidence shows verbal provocation, admittedly inadequate, accompanied by an intent to do serious bodily harm manifested by the physical action of the deceased which, by the aforestated definition, rebuts the malicious intent.

Self-Defense

In *State v. Guss*[21] the defendant presented the following evidence: the deceased was angry with the defendant; he had previously warned the defendant to stay away from a certain girl; the defendant was with the girl when confronted by the deceased; the deceased advanced toward the defendant with a knife in his hand; a friend of the deceased advanced toward the defendant from the rear; the defendant drew a pistol and killed the deceased at a distance of about fifteen feet. The trial judge instructed the jury that the defendant must have retreated to avoid the conflict, if there was a possibility of doing so, before he could rely on a plea of self-defense. The Court held this to be error and stated that where a felonious assault is made on a man and he is without fault, he may stand his ground and kill his attacker to avert his own death or serious bodily harm. This is true whether the facts, as they appear to him, be real or apparent.[22]

CRIMINAL PROCEDURE

Argument to the Jury

"Every defendant 'should be made to feel that the prosecuting officer is not his enemy,' but that he is being treated fairly and justly."[23] With this philosophy in mind, the Court has on several occasions held the use of derogatory remarks made by the solicitor

[20] State v. Hill, 20 N.C. 628 (1839).

[21] 254 N.C. 349, 118 S.E.2d 906 (1961); also discussed under CRIMINAL LAW AND PROCEDURE, *Presumption of Malice—Deadly Weapon, supra,* and *Character Evidence—Competence to Prove Guilt or Innocence, infra.*

[22] State v. Washington, 234 N.C. 531, 67 S.E.2d 498 (1951); State v. Thornton, 211 N.C. 413, 190 S.E. 758 (1937); State v. Blevins, 138 N.C. 668, 50 S.E. 763 (1905).

[23] State v. Davenport, 156 N.C. 597, 613, 72 S.E. 7, 14 (1911), quoted with approval in State v. Tucker, 190 N.C. 708, 712, 130 S.E. 720, 722 (1925).

to the jury about the defendant to be error. Thus the Court has held that a solicitor may not refer to the defendant as "a small time racketeering gangster"[24] or a "professed bootlegger."[25] And in *State v. Wyatt*[26] the Court held that referring to the defendants as "two of the slickest confidence men we've had in this court for a long time" was an impropriety that should have been corrected by the trial judge, and that his refusal to do so constituted reversible error.

In *State v. Tucker*[27] the Court held that the defendant's looks should not be brought into account unless it was for the purposes of identification. The Court stated that it would be manifestly unjust for a person to be convicted because of his facial features—a factor which the solicitor was obviously trying to interject when he asked the jury to look at the defendant and notice his demeanor.

When ruling on the propriety of derogatory statements by a solicitor, the North Carolina Court has not considered the probable truth of the solicitor's statements. In other jurisdictions the admissibility of such remarks by the prosecuting attorney has turned on the probable truth of his statements. The fact that other jurisdictions have allowed the prosecuting officer to refer to a defendant as "a bootlegger,"[28] "a hoodlum,"[29] and "a sex pervert"[30] supports the assumption that North Carolina has adopted an attitude which seems more calculated to meet the ends of justice.

Character Evidence—Competence To Prove Guilt or Innocence

In *State v. Guss*[31] the Court held that it was error for the trial court to instruct the jury to consider evidence by the defendant of his good character first on his credibility, and " 'secondly, as substantive evidence bearing directly upon his *evidence*.' "[32] The Court stated that where a defendant testifies in his own behalf and introduces evidence of his good character the character evidence goes to the determination not only of the credibility of the testimony of the

[24] State v. Correll, 229 N.C. 640, 50 S.E.2d 717 (1948).
[25] State v. Tucker, 190 N.C. 708, 130 S.E. 720 (1925).
[26] 254 N.C. 220, 118 S.E.2d 420 (1961).
[27] 190 N.C. 708, 130 S.E. 720 (1925).
[28] Gates v. State, 162 Tex. Crim. 327, 285 S.W.2d 728 (1956).
[29] State v. Ayers, 305 S.W.2d 484 (Mo. 1957).
[30] Revill v. State, 210 Ga. 139, 78 S.E.2d 12 (1953).
[31] 254 N.C. 349, 118 S.E.2d 906 (1961); also discussed under CRIMINAL LAW, *Presumption of Malice—Deadly Weapon* and *Self-Defense, supra.*
[32] 254 N.C. at 350, 118 S.E.2d at 907. (Emphasis is by the Court.)

defendant but also to the determination of his *guilt* or *innocence*.[33]

In this connection it should also be noted that where the state offers evidence of the defendant's character, when the defendant has not placed his character in issue, the evidence is competent only on the issue of the credibility of the defendant's testimony.[34] Also, evidence of the defendant's character is inadmissible if the defendant does not testify in his own behalf and does not put his character in issue.[35]

Defective Warrant

G.S. § 14-189.1 provides that it is unlawful to disseminate or to aid in dissemination of obscene matters. The statute further provides a definition of obscenity.[36] In each case the obscenity must be sufficiently described in order to put the defendant on notice as to what particular obscene matter he is charged with disseminating.[37] The evident purpose of this requirement is to prevent retrial of the defendant for the same acts under another general warrant.[38] Thus is *State v. Barnes*[39] the Court held that a warrant which merely set out the relevant words of G.S. § 14-189.1 was insufficient. The Court further stated that if the obscenity is sufficiently described, the obscene matter need not be attached to the warrant or indict-

[33] *Accord*, State v. Worthham, 240 N.C. 132, 81 S.E.2d 254 (1954); State v. Davis, 231 N.C. 664, 58 S.E.2d 355 (1950). See also STANSBURY, NORTH CAROLINA EVIDENCE § 108 (1946).

[34] *E.g.*, State v. Taylor, 121 N.C. 674, 28 S.E. 493 (1897).

[35] State v. Hare, 74 N.C. 591 (1876); STANSBURY, *op. cit. supra* note 33, § 104; see State v. Nance, 195 N.C. 47, 141 S.E. 468 (1928). *But see* State v. Adams, 245 N.C. 344, 95 S.E.2d 902 (1957) (character evidence admissible to show motive).

[36] "A thing is obscene if considered as a whole its predominant appeal is to the prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or presentation of such matters. A thing is obscene if its obscenity is latent, as in the case of undeveloped photographs. Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other especially susceptible audience if it appears from the character of the material or the circumstances of its dissemination to be especially designed for or directed to such an audience. . . ." N.C. GEN. STAT. § 14-189.1(b) (Supp. 1961). For a discussion of United States Supreme Court decisions dealing with obscenity statutes, see Note, 36 N.C.L. REV. 189 (1958).

[37] See State v. Robbins, 253 N.C. 47, 116 S.E.2d 192 (1960); State v. Cox, 244 N.C. 57, 92 S.E.2d 413 (1956), discussed in Note, 35 N.C.L. REV. 118 (1956).

[38] See State v. Cox, *supra* note 37; Note, 35 N.C.L. REV. 118 (1956).

[39] 253 N.C. 711, 117 S.E.2d 849 (1961).

ment.[40] The Court concluded that " 'want of the requisite precision and certainty [in the warrant or indictment] which may, at one time, postpone or ward off the punishment of guilt, may, at another, present itself as the last hope and only asylum of persecuted innocence.' "[41]

Involuntary Confession—Mental Capacity

In *State v. Whittemore*[42] the defendant was not allowed by the trial judge to introduce evidence of his mental capacity for purposes of refuting the voluntariness of his confession. The defendant had an estimated I.Q. of eighty and was crippled with cerebral palsy from birth. The Supreme Court held this exclusion to be error.

Mental capacity alone is not sufficient to void a confession but is a factor in determining whether the purported confession was voluntary. The totality of the circumstances is the guide to whether the confession was voluntary or involuntary.[43] "The limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing. What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal."[44]

Time of the Essence—Defense of Alibi

The time named in a bill of indictment is not usually an essential element of the crime charged, and the state may prove that it was, in fact, committed on some other date.[45] In *State v. Whittemore*[46] the indictment alleged a specific date; most of the state's evidence pin-

[40] *Accord,* Thomas v. State, 103 Ind. 419, 2 N.E. 808 (1885); Commonwealth v. Wright, 139 Mass. 382, 1 N.E. 411 (1885).

[41] 253 N.C. at 718, 117 S.E.2d at 853, quoting from State v. Owen, 5 N.C. 452, 458 (1810).

[42] 255 N.C. 583, 122 S.E.2d 396 (1961); also discussed under CRIMINAL LAW AND PROCEDURE, *Corpus Delicti—Corroboration of Confession, supra,* and *Time of Essence—Defense of Alibi, infra.*

[43] Blackburn v. Alabama, 361 U.S. 199 (1960); Fikes v. Alabama, 352 U.S. 191 (1957); Johnson v. Pennsylvania, 340 U.S. 881 (1950); Turner v. Pennsylvania, 338 U.S. 62 (1949); Watts v. Indiana, 338 U.S. 49 (1949).

[44] Stein v. New York, 346 U.S. 156 (1953); see also Lisenba v. California, 314 U.S. 219 (1941).

[45] N.C. GEN. STAT. § 15-155 (1953), State v. Gentry, 228 N.C. 643, 46 S.E.2d 863 (1948). *But see* Note, 40 N.C.L. REV. 327 (1962), where the author suggests that the time of assault and death is still considered by many jurisdictions as a substantive element of the crime of murder.

[46] 255 N.C. 583, 122 S.E.2d 396 (1961); also discussed under CRIMINAL LAW AND PROCEDURE, *Corpus Delicti—Corroboration of Confession,* and *Involuntary Confession—Mental Capacity, supra.*

pointed the time of the crime at the date alleged; the defendant offered an alibi as to his presence at the time charged in the indictment. The state thereafter introduced further evidence which contained conflicting facts as to when the crime was committed. The trial judge instructed the jury that if they found that the defendant ever committed the acts alleged they should return a verdict of guilty. The Supreme Court held this to be reversible error. The Court stated the defense of an alibi raises an exception to the general rule that time is not of the essence in criminal cases; otherwise, a defendant who relied upon a specific time in his defense would be seriously prejudiced if, without warning, the state attempted to prove that the crime was committed at some other date.[47]

Unlawful Evidence—Lie Detector

In *State v. Foye*[48] the defendants were indicted for robbery and murder. Defendant *A* offered an alibi in his defense. The state attempted to refute the alibi and offered testimony to the effect that defendant *B*, who had implicated defendant *A*, had taken a lie detector test which showed that *B* was telling the truth. The Supreme Court held the admission of this evidence to be error and granted a new trial. The Court stated that the results of lie detector tests, uniformly, are held inadmissible in evidence whether the evidence is offered directly[49] or indirectly,[50] as in the present case. Such evidence is excluded because lie detectors have not, as yet, been scientifically accepted as reliable and accurate.[51]

DAMAGES

Fair Market Value

In *Davis v. Ludlum*[1] plaintiff sought to recover damages allegedly caused to her building by defendant's negligent demolition of an

[47] *Accord,* People v. McCullough, 38 Cal. App. 2d 387, 101 P.2d 531 (Dist. Ct. App. 1940).

[48] 254 N.C. 704, 120 S.E.2d 169 (1961); also discussed under Evidence, *Result of Lie Detector Test Inadmissible, infra.*

[49] For a collection of cases to this effect, see Baer, *Radar Goes to Court,* 33 N.C.L. Rev. 355, 364 (1955); Annot., 23 A.L.R.2d 1306 (1952).

[50] People v. Aragon, 154 Cal. App. 2d 646, 316 P.2d 370 (Dist. Ct. App. 1957); Leeks v. State, 95 Okla. Crim. App. 326, 245 P.2d 764 (1952).

[51] See 3 Wigmore, Evidence § 990 (3d ed. 1940).

[1] 255 N.C. 663, 122 S.E.2d 500 (1961).

adjacent building. The trial court, sitting without a jury, found that the difference in the fair market value of plaintiff's property immediately before and after the demolition was $11,500, and that the estimated cost of repair was approximately the same. However, after considering the deterioration of the building, the diminution in its value resulting from the changed use of the adjacent property and the exposure of defects hidden by the building demolished, the trial court further found that the damages actually suffered by plaintiff as a result of defendant's negligence were $3500. It awarded damages in the smaller amount, and on appeal by the plaintiff, the Supreme Court affirmed. The Court pointed out that the action being for negligence, the plaintiff was entitled to recover only such damages as resulted directly from defendant's act. The plaintiff was not entitled to recover for diminution in the value of his property resulting from exposure of defects in his wall or from changed use of the adjacent property.[2] Therefore, there was no inconsistency in the finding by the trial court of the difference in the fair market value of plaintiff's property before and after the demolition and the award of a smaller amount. The latter represented the damages to plaintiff's building resulting directly from defendant's negligence.

This result seems to be in accord with past decisions which have held that the measure of damages for negligent injury to real property is the difference in value of the property immediately before and immediately after the injury, provided this difference represents the damages proximately resulting from the defendant's act.[3]

Equity of Redemption

In *Godwin v. Vinson*,[4] the automobile of the defendant, a traveling salesman, was wrongfully attached by plaintiff. The attachment was later set aside.[5] During the attachment, however, the defendant was unable to continue the payments on his car and the rental payments on another car which he needed in his business. The Wachovia Bank and Trust Company, which held a lien on defendant's car, filed an intervening petition to assert its lien, and obtained pos-

[2] Binder v. General Motors Acceptance Corp., 222 N.C. 512, 23 S.E.2d 894 (1943); Russ v. Western Union Tel. Co., 222 N.C. 504, 23 S.E.2d 681 (1943).

[3] *E.g.*, Owens v. Blackwood Lumber Co., 212 N.C. 133, 193 S.E. 219 (1937).

[4] 254 N.C. 582, 119 S.E.2d 616 (1961).

[5] Godwin v. Vinson, 251 N.C. 326, 111 S.E.2d 180 (1959).

session of the vehicle. Thereafter, the defendant filed a motion in the cause to recover for the loss of use and the loss of equity in the automobile resulting from the wrongful attachment. The trial court awarded recovery, but in his instructions to the jury, the trial judge stated that if the jury found that the defendant was entitled to recover for loss of equity in the vehicle they should award any amount from one dollar to one thousand six hundred and thirty-seven dollars, the amount claimed by the plaintiff. On appeal by the plaintiff, the Supreme Court awarded a new trial on this issue.

The Court stated that under G.S. § 1-440.10, the defendant was entitled to recover the actual damages sustained as a result of the wrongful attachment.[6] As for his loss of equity, the Court stated the measure of damages to be the fair cash value of the equity at the time and place of seizure, with lawful interest on such value from the time of seizure to the time of rendition of the judgment.

This is apparently the first case in this state on the measure of damages for loss of equity. It is interesting to note that in its statement of the rule the Court apparently departed from the general rule that interest is to be awarded in the discretion of the jury,[7] for here it is implied that interest will be given as a matter of law.

[6] A showing of actual loss for the recovery of compensatory damages has long been required by the Court. Lieb v. Mayer, 244 N.C. 613, 94 S.E.2d 658 (1956).

[7] Generally, it is only in actions brought in *contract* that the court can render judgment for interest on the amount found by the jury. Satterwhite v. Carson, 25 N.C. 549 (1843). In tort cases the rule is different. Where the tort is destruction of property, the jury may, *in their discretion,* allow interest on the value of the property from the date of its destruction, in addition to the actual value. Harper v. Atlantic Coast Line R.R., 161 N.C. 451, 77 S.E. 415 (1913). Also, interest has, in the past, been allowed on a judgment only from the first day of the term in which the judgment was rendered. Chatham v. Mecklenburg Realty Co., 174 N.C. 671, 94 S.E. 447 (1917). However, in this case interest was awarded from the time of seizure to the rendition of the judgment. *Cf.* Jackson v. City of Gastonia, 247 N.C. 88, 100 S.E.2d 241 (1957), discussed in 36 N.C.L. REV. 421 (1958). For a general discussion of interest given as a matter of law or at the discretion of the jury, see McCormick, *Interests As Damages,* 9 N.C.L. REV. 237, 249 (1931).

DOMESTIC RELATIONS

ALIMONY WITHOUT DIVORCE

In *Schlagel v. Schlagel*[1] the wife brought an action for alimony without divorce under G.S. § 50-16. After being duly served, the husband failed to file an answer. Upon motion by the plaintiff the clerk of the superior court entered a judgment by default and inquiry and calendared the judgment on the issues docket for hearing at the next term of court.

At the hearing the trial judge, *ex mero motu,* ruled that an action brought under G.S. § 50-16 was not a proper action for judgment by default and inquiry and, therefore, the judgment was null and void.

Upon appeal the plaintiff argued[2] that under G.S. § 1-209 the clerks of the superior courts are authorized to enter all judgments by default final and default and inquiry as authorized by G.S. §§ 1-211, 1-212 and 1-213; and that G.S. § 1-212 provides for judgments by default and inquiry in all other actions, except those mentioned in G.S. § 1-211. Since an action for alimony without divorce is not mentioned in G.S. § 1-211, such action must come under the provisions of G.S. § 1-212; otherwise, litigation brought under the provisions of G.S. § 50-16 would not be an "action" at law.[3]

At first glance this seems to be a logical conclusion. The Court held, however, that in a suit for alimony without divorce brought under G.S. § 50-16 the clerk of court *could not* enter a judgment by default and inquiry because this would be directly contrary to G.S. § 50-10.[4]

The Court reasoned as follows. First, the plaintiff, in order to obtain affirmative relief under the provisions of G.S. § 50-16, must meet the requirements of G.S. § 50-7 for divorce from bed and board.[5] Second, G.S. § 50-10 applies to actions for divorce from

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[1] 253 N.C. 787, 117 S.E.2d 790 (1961).

[2] Brief for Plaintiff, p. 3, Schlage v. Schlage, 253 N.C. 787, 117 S.E.2d 790 (1961).

[3] *Id.* at pp. 3-4.

[4] "The material facts in every complaint asking for a divorce shall be deemed to be denied by the defendant . . . and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a jury . . . ." N.C. GEN. STAT. § 50-10 (1950).

[5] Ollis v. Ollis, 241 N.C. 709, 86 S.E.2d 420 (1955); Best v. Best, 228 N.C. 9, 44 S.E.2d 214 (1947); Pollard v. Pollard, 221 N.C. 46, 19 S.E.2d 1 (1942).

bed and board under G.S. § 50-7.[6] Third, an action under G.S. § 50-16 has precisely the same effect as an action under G.S. § 50-7. Therefore, the provisions of G.S. § 50-10 are applicable to suits for alimony without divorce under G.S. § 50-16 and require that the material facts be found by a jury.[7]

CONSENT JUDGMENTS

In *Stancil v. Stancil*[8] the Court was faced with the issue whether a consent judgment for alimony pendente lite and counsel fees could be enforced by a contempt proceeding. Prior North Carolina decisions have uniformly held that a husband cannot be held in contempt for failure to discharge the provisions of a consent judgment in divorce proceedings[9] unless such judgment is an order of the court.[10] Contrary to other jurisdictions,[11] it appears that the subtleties of the form of the judgment[12] play a major role in determining the subsequent right of the wife to enforce the consent judgment by contempt.

The North Carolina Supreme Court has made a distinction between consent judgments which merely approve an agreement between the parties and consent judgments which order that the agreement be performed. While the Court will not enforce by contempt a consent judgment which is merely a contract between the parties entered into with the sanction of the court,[13] where the decree

[6] Pruett v. Pruett, 247 N.C. 13, 100 S.E.2d 296 (1957); Carpenter v. Carpenter, 244 N.C. 286, 93 S.E.2d 617 (1956).

[7] The Court stated: "[J]urisdiction over the subject matter of divorce and actions affecting the marriage relationship is given only by statute, and in the grant, judgments in favor of the plaintiff affecting the marriage are prohibited, except upon a finding of the material facts by a jury." 253 N.C. at 790, 117 S.E.2d at 793.

[8] 255 N.C. 507, 121 S.E.2d 882 (1961).

[9] Holden v. Holden, 245 N.C. 1, 95 S.E.2d 118 (1956); Davis v. Davis, 213 N.C. 537, 196 S.E. 819 (1938); Webster v. Webster, 213 N.C. 135, 195 S.E. 362 (1938).

[10] Edmundson v. Edmundson, 222 N.C. 181, 22 S.E.2d 576 (1942); Dyer v. Dyer, 212 N.C. 620, 194 S.E. 278 (1937). See generally Note, 35 N.C.L. REV. 405 (1957).

[11] Most jurisdictions hold that once the agreement of the parties is incorporated into the court decree, or is simply restated in the form of a decree, the contract is superseded by the court order and has the full force and effect of a decree enforceable by contempt. See, *e.g., Ex parte* Dukes, 155 Ark. 24, 243 S.W. 863 (1922); Hargis v. Hargis, 252 Ky. 198, 66 S.W.2d 59 (1933); Sessions v. Sessions, 178 Minn. 75, 226 N.W. 701 (1929); Karteus v. Karteus, 67 N.D. 297, 272 N.W. 185 (1937).

[12] See cases cited note 9 *supra*.

[13] Holden v. Holden, 245 N.C. 1, 95 S.E.2d 118 (1956); Davis v. Davis, 213 N.C. 537, 196 S.E. 819 (1938); Webster v. Webster, 213 N.C. 135, 195 S.E. 362 (1938).

satisfies certain technical requirements, it will be considered an order of the court, and enforcement by contempt will be allowed.

In *Dyer v. Dyer*[14] the decree stated that by the consent of the parties the husband was to pay the wife a certain sum "pending further orders of this court."[15] This was held sufficient to be an order of the court rather than a mere sanction of the contract of the parties and, therefore, was enforceable by contempt.

In *Edmundson v. Edmundson*[16] the decree recited that failure to abide by the decree would subject the husband to penalties for contempt. The Court held that the defendant could be held for contempt for failure to meet the requirements of the order. The fact that the decree specifically stated that failure to comply would result in contempt was held to be controlling.

In *Stancil v. Stancil*[17] the decree[18] ordered the husband to pay the wife a certain sum for alimony and subsistence, but did not contain the words "pending further order of the court"; nor was there any specific mention of contempt. Nevertheless, the Court held that the judgment was a court order and would support a contempt proceeding.

While *Stancil* does not give a definitive answer as to when a consent judgment will be held to be an order of the court, it does seem to indicate that less is required to find a court order than previously indicated.

CUSTODY

In a recent custody case, *In Re Hughes,*[19] the Supreme Court expressly held that it is the *residence* of minor children, and not their *domicile,* which is important for custody jurisdiction purposes. Subsequent to the decision in *Allman v. Register,*[20] the Court has been

[14] 212 N.C. 620, 194 S.E. 278 (1937).
[15] *Id.* at 621, 196 S.E. at 279.
[16] 222 N.C. 181, 22 S.E.2d 576 (1942).
[17] 255 N.C. 507, 121 S.E.2d 882 (1961).
[18] 'IT IS NOW, THEREFORE, ORDERED that the defendant pay to the plaintiff alimony and subsistence for herself the sum of $250.00 per month . . . until final determination of this action . . . .'" *Id.* at 507-08, 121 S.E.2d at 883.
[19] 254 N.C. 434, 119 S.E.2d 189 (1961).
[20] 233 N.C. 531, 64 S.E.2d 861 (1951). In this case the children were residing in North Carolina, but the Court found that they were domiciled in Virginia. The Court, therefore, concluded that North Carolina was without jurisdiction to make a custody award except in conformity with a prior Virginia decree which awarded custody to the mother.

moving steadily in this direction.[21] In 1957, in a per curiam decision,[22] the Court quoted with approval the following statement from *Finlay v. Finlay*:[23]

> The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of its parents. It has its origin in the protection that is due to the incompetent or helpless . . . . For this, the residence of the child suffices though the domicile be elsewhere . . . .[24]

The Court in *Hughes* adopts this statement as "the correct rule."[25]

In a dictum in another custody case, *In re Orr*,[26] the Court went even further than it did in *Hughes* by quoting the Supreme Court of Florida[27] to the effect that,

> The law is and has been from time immemorial that each state is not only empowered, but is charged with the duty, to regulate the custody of infants within its borders. This is true even though the parents may be residents of another state. . . . For this, the residence of the child suffices, though the domicile be elsewhere.[28]

Thus it seems clearly established that in North Carolina mere residence of the child is all that is necessary for the court to have jurisdiction to determine custody.

Divorce

In a case of first impression, the North Carolina Supreme Court refused to uphold a divorce where jurisdiction was predicated solely upon G.S. § 50-18.[29]

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[21] See Lennon v. Lennon, 252 N.C. 659, 114 S.E.2d 571 (1960); Cleeland v. Cleeland, 249 N.C. 16, 105 S.E.2d 114 (1958); Holmes v. Sanders, 246 N.C. 200, 97 S.E.2d 683 (1957); Richter v. Harmon, 243 N.C. 373, 90 S.E.2d 744 (1956).

[22] Holmes v. Sanders, *supra* note 21, at 201, 97 S.E.2d at 685.

[23] 240 N.Y. 429, 148 N.E. 624 (1925).

[24] *Id.* at 431, 148 N.E. at 625.

[25] 254 N.C. at 437, 119 S.E.2d at 191.

[26] 254 N.C. 723, 119 S.E.2d 880 (1961).

[27] Di Giorgio v. Di Giorgio, 153 Fla. 24, 13 So. 2d 596 (1943).

[28] *Id.* at 27, 13 So. 2d at 597-98.

[29] "In any action instituted and prosecuted under this chapter [Divorce and Alimony], allegation and proof that the plaintiff or the defendant has resided or been stationed at a United States army, navy, marine corps, coast guard or air force installation or reservation or any other location pursuant

In *Martin v. Martin*[30] the husband, a United States Army officer, instituted an action for absolute divorce on the ground of two years separation and alleged that he had been a resident on the Fort Bragg Military Reservation for more than six months next preceding the commencement of the action. The wife, who was present at the trial, contended that the residence requirement set out in G.S. § 50-18 involved domicile, and averred that the plaintiff did not intend to make North Carolina his home permanently or for an indefinite period.

In evident reliance upon G.S. § 50-18, the trial judge instructed the jury that if they found that the plaintiff had been stationed at Fort Bragg pursuant to military duty for six months prior to the bringing of the action, they should answer the issue of residence in favor of the plaintiff. The defendant excepted to this charge. The jury found for the plaintiff, and judgment was entered in accordance with the verdict.

On appeal this portion of the charge was held to be erroneous in that it omitted the "requirement of intent to adopt North Carolina as [a] legal residence,"[31] and a new trial was awarded. The Court interpreted the word "residence" as used in the statute to embrace the traditional prerequisites of "domicile" as previously defined.[32]

An increasing number of states now have so-called "servicemen's statutes" which provide for divorce jurisdiction without a finding of domicile.[33] Still other states have general statutes which establish bases other than domicile for jurisdiction in divorce cases.[34] It seems reasonable to assume that our legislature intended to follow these states in the enactment of G.S. § 50-18.[35] Yet the Court chose

to military duty within this State for a period of six months next preceding the institution of the action shall constitute compliance with the residence requirement set forth in this chapter . . . ." N.C. GEN. STAT. § 50-18 (Supp. 1961).

[30] 253 N.C. 704, 118 S.E.2d 29 (1961).

[31] 253 N.C. at 710, 118 S.E.2d at 34.

[32] Bryant v. Bryant, 228 N.C. 287, 45 S.E.2d 572 (1947). For a complete review of the legal requirements for domicile in divorce actions, see 38 N.C.L. REV. 154, 176-87 (1959).

[33] GA. CODE ANN. § 30-107 (Supp. 1961); KAN. GEN. STAT. ANN. § 60-1502 (1949); NEB. REV. STAT. § 42-303 (1960); N.M. STAT. ANN. § 22-7-4 (1954); OKLA. STAT. ANN. tit. 12, § 1272 (1961); TEX. REV. CIV. STAT. ANN. art. 4631 (1960); VA. CODE ANN. § 20-97 (1960).

[34] See ARK. STAT. ANN. § 34-1208.1 (Supp. 1961); COLO. REV. STAT. ANN. § 46-1-3 (1954); ME. REV. STAT. ANN. ch. 166, § 55 (Supp. 1959); N.Y. CIVIL PRACTICE ACT § 1166.

[35] For a full exploration of the probable intent underlying enactment of G.S. § 50-18, see Ligon, *Is Domicile a Jurisdictional Prerequisite to a Valid Divorce Decree?*, 3 JAG J. 9 (1961).

to void this action by holding that the statute did not change the former jurisdictional prerequisites of residence and *animus manendi*.[36]

This case is the subject of a Note in this volume of the *Law Review*.[37]

In *Israel v. Israel*,[38] another divorce case, the Court held that a serviceman's domicile remained in this state (the domiciliary state at the time of enlistment) unless there was a showing that he intentionally changed his home and intended to make some other state his home permanently or for an indefinite period.

The serviceman husband, a native of North Carolina, brought an action for divorce, alleging that he had been a resident of North Carolina for more than six months prior to the commencement of the action. The wife contended that since the plaintiff had lived in various other localities during his nineteen years in service, he was no longer domiciled in North Carolina. The trial court instructed the jury as a matter of law that unless the plaintiff intentionally changed his home and intended to make some other state his home permanently or for an indefinite period, his residence (domicile) would remain in North Carolina. The Supreme Court held that the charge as presented to the jury was correct and free of error.

The Court quoted with approval the following rule from *Central Mfgs. Mut. Ins. Co. v. Freidman*:[39]

> The domicile of a soldier or sailor in the military or naval service of his country generally remains unchanged, domicile being neither gained nor lost by being temporarily stationed in the line of duty at a particular place, even for a period of years. A new domicile may, however, be acquired if both the fact and the intent concur.[40]

This decision reaffirms the position taken by the Court in *Hart v. Coach Co.*[41] and conforms to the majority view.[42]

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[36] See note 4 *supra*.

[37] Note, 40 N.C.L. REV. 343 (1962).

[38] 255 N.C. 391, 121 S.E.2d 713 (1961).

[39] 213 Ark. 9, 209 S.W.2d 102 (1948).

[40] *Id.* at 13, 209 S.W.2d at 104.

[41] 241 N.C. 389, 85 S.E.2d 319 (1955). This was an automobile accident case involving a serviceman, a native of Virginia, who was stationed in North Carolina at the time of the accident but who had been transferred out of the state before suit was brought. He contended that he was a resident of North Carolina at the time of the accident and therefore not subject to service of process under the nonresident motorist statute. However, the Court affirmed the trial court's ruling that he was a nonresident at the time of the accident.

[42] *E.g.*, Ellis v. Southeast Constr. Co., 260 F.2d 280 (8th Cir. 1958);

In *Wicker v. Wicker*[43] the husband brought an action for absolute divorce alleging adultery. The wife denied the allegation and contended that a finding of no adultery in a previous proceeding[44] was res judicata to this action. The previous action, a habeas corpus proceeding to determine the custody of children of the marriage, was heard by a trial judge who, sitting without a jury, found as a fact that the wife had not committed adultery.

In a per curiam decision the Supreme Court held that the finding in the previous action was not res judicata since G.S. § 50-10[45] requires that, in a divorce action, the material facts as to the grounds for a divorce must be found by a jury.

While the Court did not elaborate, it seems clear that a finding in a custody proceeding cannot be res judicata in a divorce action. It has been held[46] repeatedly in North Carolina that in order for a judgment in one action to be res judicata to another action, the following three elements must concur: (1) identity of parties; (2) identity of subject matter; and (3) identity of issues. It would seem that in the action for divorce there is neither identity of subject matter[47] nor identity of issues.[48]

In *Moody v. Moody*[49] the wife instituted an action for divorce in 1960 pursuant to G.S. § 50-6.[50] The complaint alleged that the

Kopasz v. Kopasz, 107 Cal. App. 2d 308, 237 P.2d 284 (Dist. Ct. App. 1951); Stevens v. Allen, 139 La. 658, 71 So. 936 (1916).

[43] 255 N.C. 723, 122 S.E.2d 703 (1961).

[44] *In re* Wicker, 253 N.C. 431, 117 S.E.2d 13 (1960).

[45] "The material facts in every complaint asking for a divorce shall be deemed to be denied by the defendant . . . and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a jury . . . ." N.C. GEN. STAT. § 50-10 (1950).

[46] Troy Lumber Co. v. Hunt, 251 N.C. 624, 112 S.E.2d 132 (1960); Stansel v. McIntyre, 237 N.C. 148, 74 S.E.2d 345 (1953); Huffman v. Pearson, 222 N.C. 193, 22 S.E.2d 440 (1942).

[47] In a custody proceeding, the subject matter is the custody of minor children. G.S. § 17-39, which authorizes the procedure of habeas corpus, provides: "When a contest shall arise on a writ of habeas corpus . . . in respect to the custody of . . . children, the court or judge . . . may award the charge or custody of the child or children . . . either to the husband or to the wife . . . ." In the present action the subject matter was the marriage relationship.

[48] The issue before the court in a custody proceeding is which party shall have custody of the child. G.S. § 17-39 provides that custody will be awarded "with such provisions and directions as will, in the opinion of such court or judge, best promote the interest and welfare of the children." In the present action the issue was whether the defendant wife had committed adultery, as alleged in the complaint.

[49] 253 N.C. 752, 117 S.E.2d 724 (1961).

[50] N.C. GEN. STAT. § 50-6 (1950): "Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony on the application of

defendant suffered a brain injury in 1954 and that the parties had lived separate and apart since that time. However, the plaintiff further alleged that the defendant was not incurably insane, but merely incompetent because of his injury and that he had never been confined to an institution for treatment of the mentally disordered. It was also alleged that the separation on the part of the plaintiff was with the intent to terminate the marital relation and that immediately prior to the separation the defendant had expressed such an intent.

The defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action for absolute divorce under G.S. § 50-6. The trial court sustained the demurrer and the Supreme Court affirmed. The Court stated:

> From these allegations the conclusion is inescapable that the separation arose by reason of the brain injury suffered by the defendant, and that he was not then rational to the extent he could form the intention to remain separate and apart from the plaintiff. Furthermore, it does not appear from the complaint that defendant has since been mentally competent for a period of time sufficient to bring the case within the provisions of G.S. 50-6.[51]

To the extent that the Court seems to be requiring mutual consent to separate in order to entitle one to a divorce under G.S. § 50-6, it can find support in several prior North Carolina decisions.[52] However, language in *Byers v. Byers*[53] and *Taylor v. Taylor*[54] seems to indicate that the intent of one of the parties to separate is sufficient,

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either party, if and when the husband and wife have lived separate and apart for two years, and the plaintiff or defendant in the suit for divorce has resided in the State for a period of six months. This section shall be in addition to other acts and not construed as repealing other laws on the subject of divorce."

[51] 253 N.C. at 757, 117 S.E.2d at 727.

[52] *E.g.*, Young v. Young, 225 N.C. 340, 34 S.E.2d 154 (1945); Williams v. Williams, 224 N.C. 91, 29 S.E.2d 39 (1944).

[53] 222 N.C. 298, 22 S.E.2d 902 (1942), where the Court stated: "There must be at least an intention on the part of one of the parties to cease cohabitation, and this must be shown to have existed at the time alleged as the beginning of the separation period . . . ." *Id.* at 304, 22 S.E.2d at 906.

[54] 225 N.C. 80, 33 S.E.2d 492 (1945). There the Court stated that to maintain an action under G.S. § 50-6 mere allegations of separation and residence is sufficient, and "nothing else appearing, the establishment of these allegations by proof would entitle the plaintiff to a divorce . . . . The statute so provides . . . ." *Id.* at 82, 33 S.E.2d at 493-94.

and that mutual consent is not necessary. It seems safe to assume, however, that where one of the parties is mentally incompetent at the time of the separation, the Court will not allow a divorce action under G.S. § 50-6.

This case will be the subject of a Note in this volume of the *Law Review.*

PRESUMPTION OF VALIDITY OF SECOND MARRIAGE

In *Williams v. Williams,*[55] a special proceeding for the allotment of dower, *A,* the admitted first wife of *W,* the decedent, petitioned the court for dower. Thereafter *B* filed an interplea in which she alleged she was the surviving widow. *B* offered in evidence a marriage certificate, proof that at *W*'s death they had lived together as man and wife for nearly five and one-half years, and that her name appeared on his death certificate as the surviving spouse. At the close of this evidence, a motion for judgment as of nonsuit as to the intervenor, *B,* was allowed.

Upon appeal, *B,* relying upon the prior North Carolina decision of *Kearney v. Thomas,*[56] contended that the second marriage was presumed to be valid until the contrary was proven.[57] However, instead of presuming *B*'s marriage to be valid, the Court held that the burden was upon *B* to show that *W*'s prior marriage to *A,* which was admitted to be valid, had been invalidated or dissolved.[58]

Williams is the subject of a Note in this volume of the *Law Review.*[59]

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[55] 254 N.C. 729, 120 S.E.2d 68 (1961).

[56] 225 N.C. 156, 33 S.E.2d 871 (1945). In this case the plaintiffs, children of the first marriage, were heirs at law of Alexander Kearney. The defendant was the second wife. Plaintiffs contended that the property which was the subject of the suit descended to them on the death of their father free of any dower claim of the defendant because the second marriage was bigamous and therefore void. But the Court presumed that the second marriage was valid.

[57] Such a presumption is recognized in a majority of jurisdictions. *E.g.,* Parker v. American Lumber Corp., 190 Va. 181, 56 S.E.2d 214 (1949). There the court stated: "The decided weight of authority, and we think the correct view, is that where two marriages of the same person are shown, the second marriage is presumed to be valid . . . ." *Id.* at 185, 56 S.E.2d at 216.

[58] There was a vigorous dissent. Justice Rodman, speaking for the dissent, stated: "If *Kearney v. Thomas* is not the law in North Carolina, we ought, I think, to expressly overrule it, specifically stating what the law is." 254 N.C. at 733, 120 S.E.2d at 72. (Denny and Bobbitt, JJ., concurred in the dissenting opinion.)

[59] Note, 40 N.C.L. REV. 118 (1962).

SEPARATION AGREEMENTS—EQUITABLE LIENS

In *Stanley v. Cox*[60] the plaintiff brought an action under G.S. § 41-10[61] to quiet title to realty. The complaint alleged that *H*, husband of the present defendant, had instituted an action for absolute divorce against *W*, the present defendant, on the ground of two years separation. While this action was pending, *H* and *W* entered into a separation agreement in which *H* agreed to make certain payments for the use and benefit of *W*. Subsequently *H*'s divorce action was tried, and the divorce was granted. The judgment in that action recited that the parties had entered into a separation agreement and stated the following:[62]

> By consent of the plaintiff, IT IS FURTHER ORDERED AND DECREED that the plaintiff shall pay to the defendant each, every and all the payments specified in the aforesaid agreement . . . and IT IS FURTHER ORDERED AND ADJUDGED that said payment shall be and remain a lien upon the estate and property of the plaintiff . . . . Plaintiff consents to the last paragraph of the foregoing decree:
>
> HARRY R. STANLEY
> NORMAN A. BOREN
> Attorneys for the Plaintiff

Plaintiff, who was one of the attorneys for *H* in the divorce action, purchased from *H* one-fourth undivided interest in certain property which *H* and *W* owned as tenants in common. *W* claimed a lien on the entire property including the plaintiff's one-fourth interest by virtue of the provision in the divorce decree.

In attacking the defendant's claim for a lien on the entire property, plaintiff contended that the lien was to secure alimony and that at the time of the decree a consent judgment for alimony entered in an action for absolute divorce was unenforceable as a decree of the court. He also contended that the lien upon *H*'s property could not be enforced as a contract because *W* did not sign the consent judgment.

The Court pointed to the legal definition of "alimony"[63] in North

[60] 253 N.C. 620, 117 S.E.2d 826 (1961); also discussed under CREDIT TRANSACTIONS, *Equitable Lien—Consent Judgment, supra.*

[61] N.C. GEN. STAT. § 41-10 (1950).

[62] 253 N.C. at 627, 117 S.E.2d at 831.

[63] "Now, 'alimony' in its legal sense may be defined to be that proportion of the husband's estate which is judicially allowed and allotted to a wife for

Carolina and stated that "the agreement referred to in the divorce judgment is an executed separation agreement and property settlement, and is not alimony or a contract for alimony."[64] The Court concluded that the consent part of the judgment created an equitable lien on the described property which was enforceable against all except those having superior title or claim or who took without notice.

While this seems to be the first instance where our Court has held that the provisions of a consent judgment in a divorce action created an equitable lien, it is entirely consistent with prior North Carolina decisions regarding equitable liens.[65]

EMINENT DOMAIN

Fair Market Value

The general rule in North Carolina is that where only a portion of a tract of land is taken by the Highway Commission in an eminent domain proceeding, the measure of damages is the difference in the fair market value of the land immediately before and after the taking, less any special or general benefits accruing to the owner as result of the utilization of the part taken.[1] This rule is now codified in G.S. § 136-112(1). The statute was applied for the first time in *Templeton v. Highway Comm'n*,[2] where the Court held that it was error for the trial court to exclude, on the issue of damages, evidence of the benefits accruing to the remaining portion of the owner's land as a result of the condemnation. Such evidence was relative on the actual damages suffered by the owner as a result of the taking.

The Court in *Templeton* also reiterated the general rule in

her subsistence and livelihood during the period of their separation." Rogers v. Vines, 28 N.C. 293, 297 (1846), quoted with approval in Hester v. Hester, 239 N.C. 97, 79 S.E.2d 248 (1953), and Taylor v. Taylor, 93 N.C. 418 (1885).

[64] 253 N.C. at 629, 117 S.E.2d at 832.

[65] See Winborne v. Guy, 222 N.C. 128, 22 S.E.2d 220 (1942), where the Court stated: "[E]very express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property . . . a security for a debt or other obligation . . . creates an equitable lien upon the property so indicated . . . ." *Id.* at 131-32, 22 S.E.2d at 222.

[1] *E.g.*, Proctor v. Highway Comm'n, 230 N.C. 687, 55 S.E.2d 479 (1949).

[2] 254 N.C. 337, 118 S.E.2d 918 (1961).

North Carolina that loss of revenue[3] to the owner's sport fishing business as a result of silt deposits created by the Commission in clearing the highway and the cost of removal of such deposits[4] were not separate items of damage. Evidence of such deposits is relevant only as a factor which affects the fair market value of the remaining land after the taking.[5]

EQUITABLE REMEDIES

RESTRICTIVE COVENANTS

Tull v. Doctors Building, Inc.[1] presented a new situation to the Court. The plaintiff had paved several lots located within a subdivision restricted to residences only, and used the lots for parking in conjunction with its office building nearby. The plaintiff sought to have the restriction, imposed by covenants in the deeds, removed. In affirming the trial court's denial of the relief sought, the Court stated the general rule that such restrictions will not be removed unless the conditions have changed so radically as to practically destroy the objects and purposes of the restrictions;[2] the subdivision must have substantially lost its character as an exclusively residential area.[3] All jurisdictions follow this rule, but as to what constitutes

[3] The Court has generally stated that loss of profits is not an element of damages in such cases. Pemberton v. Greensboro, 208 N.C. 466, 181 S.E. 258 (1935); State v. Suncrest Lumber Co., 199 N.C. 199, 154 S.E. 72 (1930); and that mere inconvenience alone is not an injury for which there can be recovery. Elks v. Commissioners, 179 N.C. 241, 102 S.E. 414 (1920). See generally Comment, 35 N.C.L. REV. 296, 305 (1957).

[4] *Cf.* Western Carolina Power Co. v. Hayes, 193 N.C. 104, 136 S.E. 353 (1927).

[5] "Any evidence which aids the jury in fixing the fair market value of the land, and its diminution by the burden put upon it, is relevant and should be heard; any evidence which does not measure up to this standard is calculated to confuse the minds of the jury and should be excluded." Abernathy v. South & Western Ry., 150 N.C. 97, 109, 63 S.E. 180, 185 (1908). See also Gallimore v. Highway Comm'n, 241 N.C. 350, 355, 85 S.E.2d 392, 396 (1954), where the Court, speaking of similar items of damages, stated: "[S]uch adverse effects are not separate items of damage . . . but are relevant only as circumstances tending to show a diminution in the overall [*sic*] fair market value of the property."

[1] 255 N.C. 23, 120 S.E.2d 817 (1961).

[2] Rombauer v. Compton Heights Christian Church, 328 Mo. 1, 40 S.W.2d 545 (1931); Booker v. Old Dominion Land Co., 188 Va. 143, 49 S.E.2d 314 (1948).

[3] Kokenge v. Whetstone, 60 Ohio App. 302, 20 N.E.2d 965 (1938).

a sufficiently radical change the courts sometimes differ.[4]

Most courts would concur with the decision of the North Carolina Court in the instant case. In *Pitts v. Brown*[5] minor violations of the restrictions, such as operating a small flower shop in the rear of one residence, a small garage behind another, and a refrigerator and stove repair shop in back of another, were considered not to be such radical changes as would destroy the purposes of the restrictions. Similarly in *Holling v. Margiotta*[6] the use of a lot within the restricted area for free parking, and of part of a garage apartment for storage for an adjacent grocery was deemed to be an insubstantial commercial use.

Clearly in the present case the commercial use of the property within the subdivision was negligible, but as to how great a change is necessary for cancellation of the restrictions is still an open question in North Carolina.

Vested Rights Acquired Prior to Change in a Zoning Ordinance

In another case of first impression the Court held in *Stowe v. Burke*[7] that the defendant did not acquire a vested right where he began construction of an apartment house in an area which by a subsequent change in the zoning ordinance was restricted to one-family residences, unless such construction was begun in good faith. The defendant as an inducement for purchase had represented to plaintiff, buyer of a lot in another tract, that the land in question would be restricted to one-family dwellings. Announcement of an impending zoning change to restrict the area to residences only was given newspaper publicity, and public hearings were held at which defendant did not appear to object to the proposed change. In the interim, the defendant hurriedly began excavation and construction, hoping to acquire a vested right so as to come within the exception for existing nonconforming uses[8] when the ordinance was finally changed.

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[4] See, *e.g.*, Hurd v. Albert, 214 Cal. 15, 3 P.2d 545 (1931); Morgan v. Matheson, 362 Mich. 535, 107 N.W.2d 825 (1961). See generally Annot., 76 A.L.R. 1348 (1932).

[5] 215 S.C. 122, 54 S.E.2d 538 (1949).

[6] 231 S.C. 676, 100 S.E.2d 397 (1957).

[7] 255 N.C. 527, 122 S.E.2d 374 (1961).

[8] The new ordinance here, as is usually the case, contained a clause exempting from operation of the ordinance existing nonconforming buildings and uses.

Ordinarily when substantial construction has begun the builder acquires a vested right.[9] The Court, adopting the prevailing view,[10] pointed out that this is true only where the construction was instituted in good faith reliance on the former zoning laws.

The Court's position is in accord with *Schechter v. Zoning Bd.*,[11] a recent Pennsylvania decision. In that case plaintiff's request for a variance from an ordinance to use part of his property in a farm-residence area as a drive-in theatre was denied by the township. Thereafter the variance was issued in compliance with an order of the county court. Within a few days the town revoked the permit and appealed the county court's order. Plaintiff was notified of this action by registered mail; nevertheless, he began construction. The Court held that the resulting cost was not incurred in good faith reliance on his permit, and that this was a mere attempt to acquire a vested right.

EVIDENCE

Blood Tests

In *State v. Paschal*[1] the defendant was charged under G.S. § 20-138 with operating an automobile while intoxicated. The trial court admitted testimony concerning the defendant's negative reply to an inquiry as to whether he would like to take a blood test. On appeal the admission of this evidence was held to be prejudicial error.

The Court pointed out that where a blood speciman is obtained at or near the time in question, subjected to a chemical analysis, and traced and identified throughout the process, the testimony of an expert as to the making of the test, the alcoholic content of the blood specimen, and the effect of certain percentages of alcohol in the bloodstream is competent. The Court further stated that in those juris-

[9] As to what may or may not constitute "substantial," see Fitzgerald v. Merard Holding Co., 110 Conn. 130, 147 Atl. 513 (1929); City of Lansing v. Dawley, 247 Mich 394, 225 N.W. 500 (1929); Rice v. Van Vranken, 225 App. Div. 179, 232 N.Y. Supp. 506 (1929). See generally Annot., 138 A.L.R. 500 (1942).

[10] Grantham Corp. v. Board of Zoning Appeals, 140 Conn. 1, 97 A.2d 564 (1953); Winn v. Lamoy Realty Corp., 100 N.H. 280, 124 A.2d 211 (1956); Pelham View Apartments v. Switzer, 130 Misc. 545, 224 N.Y. Supp. 56 (Sup. Ct. 1927).

[11] 395 Pa. 310, 149 A.2d 28 (1959).

[1] 253 N.C. 795, 117 S.E.2d 749 (1961).

dictions where the privilege against self-incrimination extends only to the process of testifying by word of mouth or in writing, and not to physical evidential circumstances found on the defendant's body, evidence of a defendant's *refusal* to submit to a blood test has been held admissible.[2]

In the principal case, however, the defendant did not *refuse* to submit to a blood test. There was no evidence that the test, if made, would be made otherwise than at the defendant's expense. The Court therefore found that the defendant's declination to take the test was only an indication of his unwillingness to incur the expense; hence, it was unnecessary to decide whether a defendant's refusal to submit to a blood test for alcoholic contents was competent. However, since the testimony of the defendant's negative response to the inquiry whether he wanted to take a blood test was susceptible of use to the defendant's prejudice, and probably was so used, the Court ordered a new trial.

STIPULATION—SILENCE NOT AN ADMISSION

State v. Powell[3] was a criminal prosecution under G.S. § 20-138 for driving an automobile while intoxicated. The indictment charged that the defendant had previously been convicted of a like offense.[4]

The solicitor introduced certain papers which he and defendant's counsel stipulated were the official records of the county recorder's court.[5] The solicitor stated that the records showed that on September 10, 1958, the defendant was found guilty of driving while intoxicated. Neither the defendant nor his counsel said anything at

[2] *E.g.*, State v. Brock, 80 Idaho 296, 328 P.2d 1065 (1958) (defendant deemed by statute to have given consent to blood test); State v. Smith, 230 S.C. 164, 94 S.E.2d 886 (1956); Gardner v. Commonwealth, 195 Va. 945, 81 S.E.2d 614 (1954). *Contra,* People v. Stratton, 1 N.Y. 2d 664, 133 N.E.2d 516 (1956); State v. Severson, 75 N.W.2d 316 (N.D. 1956); Duckworth v. State, 309 P.2d 1103 (Okla. Crim. App. 1957). In the latter case the dissenting judge relied upon Breithaupt v. Abram, 352 U.S. 432 (1957), where the United States Supreme Court held that it was constitutional to take a blood sample from an unconscious person for an intoxication test.

[3] 254 N.C. 231, 118 S.E.2d 617 (1961).

[4] G.S. § 20-179 provides higher penalties in case of repeated convictions under G.S. § 20-138. (The latter statute is erroneously reported in this case as "G.S. § 14-138.")

[5] G.S. § 15-147 provides that in an indictment for an offense which, on the second conviction thereof, is punished with other or greater punishment than on the first conviction, a transcript of the record of the first conviction shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction.

this point, nor was any other evidence offered as to the former conviction.

In his charge to the jury the trial judge stated that the defendant, through his counsel, *stipulated* that he had been previously convicted under G.S. § 20-138. The defendant was convicted and on appeal contended that the former conviction had not been judicially admitted or stipulated but was an issue for jury determination.

The Court ordered a new trial on the grounds that the purported stipulation was not "definite and certain" in that the solicitor did not state (1) that the defendant *admitted* the truth of the matters contained in the recorder's court record or (2) that the defendant *stipulated* that he was the person to whom the record referred. The Court further stated that the defendant's silence in the face of the statements made by the solicitor could not be construed as an assent to the truth of the statements unless the solicitor specified that assent had been given.

Reference to Defendant's Insurance on Cross-Examination

The Court has consistently held that in an action for damages it is not permissible, in the absence of special circumstances, to introduce any evidence of the existence of liability insurance or to make any reference thereto in the presence of the jury.[6] In the recent case of *Adams v. Godwin*,[7] however, the Court cast some doubt on the rigidity with which that rule will be applied in the future. This was a civil action for damages arising out of an automobile accident. The defendant's counsel, in his cross-examination of the plaintiff, brought out that the defendant was insured. The same information was brought out again upon further cross-examination of the plaintiff. No objection was made by the defendant.

On this point the Court held that where the defendant opened the line of inquiry, he could not complain if such inquiry brought out the fact that he was insured. The Court further stated: "[I]t is now a matter of general knowledge that the owner of a motor vehicle in North Carolina is required by law to carry liability insurance at least to the extent required by the Motor Vehicle Safety and Financial Responsibility Act . . . ."[8]

[6] Taylor v. Green, 242 N.C. 156, 87 S.E.2d 11 (1955); Jordan v. Maynard, 231 N.C. 101, 56 S.E.2d 26 (1949).

[7] 254 N.C. 632, 119 S.E.2d 484 (1961). [8] *Id.* at 633-34, 119 S.E.2d at 485.

Query whether the Court will now be less inclined to declare a mistrial because of some reference to the fact that the defendant has automobile liability insurance.

Result of Lie Detector Test Inadmissible

With the exception of one lower court decision in New York,[9] the courts of this country have consistently held that the results of a lie detector (polygraph) test are inadmissible in evidence.[10] This rule was applied in the recent case of *State v. Foye*.[11] In this case counsel for co-defendant *F* elicited testimony from various witnesses concerning the results of a lie detector test that had been administered to *F*. The tenor of the testimony was such as to infer that *F*, who had implicated co-defendant *W* in the crime, was telling the truth. Both defendants were found guilty, but on appeal the Supreme Court reversed. The Court stated that evidence of the result of a lie detector test is inadmissible whether it is presented indirectly, as in the principal case, or directly. The admission of this testimony over the objection of *W* was therefore prejudicial to him.

Probative Force of Trade Name Printed on Commercial Truck

In *Carter v. Thurston Motor Lines, Inc.*[12] the Court held that evidence to the effect that plaintiff was injured by a truck bearing the defendant's trade name was insufficient to make out a prima facie case that the defendant was owner of the truck and that it was being operated by defendant's agent. This decision was apparently overruled in the recent case of *Knight v. Associated Transp., Inc.*[13] In this case the Court held that

> where common carriers of freight are operating tractor-trailer units, on public highways, and such equipment bears the insignia or name of such carrier, and the motor vehicle is involved in a collision or inflicts injury upon another, evidence

[9] People v. Kenny, 167 Misc. 51, 3 N.Y.S.2d 348 (Queens County Ct. 1938).

[10] *E.g.*, State v. Lowry, 163 Kan. 622, 185 P.2d 147 (1947); People v. Becker, 300 Mich. 562, 2 N.W.2d 503 (1942); State v. Bohmer, 210 Wis. 651, 246 N.W. 314 (1933). See generally Baer, *Radar Goes to Court*, 33 N.C.L. Rev. 355, 364 (1955); Annot., 23 A.L.R.2d 1306 (1952).

[11] 254 N.C. 704, 120 S.E.2d 169 (1961); also discussed under Criminal Law and Procedure, *Unlawful Evidence—Lie Detector, supra.*

[12] 227 N.C. 193, 41 S.E.2d 586 (1947).

[13] 255 N.C. 462, 122 S.E.2d 64 (1961).

> that the name of the defendant was painted . . . on the motor vehicle . . . constitutes *prima facie* evidence that the defendant . . . was the owner of such vehicle and that the driver thereof was operating it for and on behalf of the defendant.[14]

This decision is in accord with G.S. § 20-71.1[15] which was inapplicable here because the suit was instituted more than a year after the cause of action accrued.[16] The Court, in accord with the majority of jurisdictions,[17] held that this rule applied even in the absence of statute.

HEARSAY

In a criminal prosecution for the rape of an eight-year-old girl, the trial court instructed the court reporter to take the testimony of the prosecutrix in the absence of the jury because of the difficulty in getting her to answer questions. The court reporter then read the testimony to the jury. This testimony was held to be hearsay in *State v. Payton.*[18] The Court ruled that the defendant was entitled as a fundamental right to have the jury hear the story directly from the prosecutrix and observe her demeanor while telling it.

DECLARATION BY DECEASED OF INTENTION TO GO ON A BUSINESS TRIP—RES GESTAE

In *Gassaway v. Gassaway & Owen, Inc.*[19] the Court held that evidence of a statement by a deceased person expressing an intention to go on a business trip was incompetent unless a part of the *res gestae,* and that in order for the declaration to be a part of the *res gestae* it must be shown to have been spontaneous and made contemporaneously with the act of departure. The Court therefore held that declarations made two days and one day before the declarant began his fatal trip were not part of the *res gestae* and inadmissible. This rule was affirmed in the recent case of *Little v. Power Brake Co.*[20] In *Little* one of the declarations was made thirty minutes

[14] *Id.* at 467, 122 S.E.2d at 69.

[15] This statute provides that proof of ownership of an automobile involved in an accident is prima facie evidence that the vehicle was being used with the authority and consent of the owner at the time of the accident.

[16] This time limitation has been repealed. N.C. GEN. STAT. § 20-71.1 (Supp. 1961).

[17] See generally 9B BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE § 6056 (1954).

[18] 255 N.C. 420, 121 S.E.2d 608 (1961).

[19] 220 N.C. 694, 18 S.E.2d 120 (1942).

[20] 255 N.C. 451, 121 S.E.2d 889 (1961).

prior and the other nine hours prior to the deceased's departure. These declarations were also held inadmissible because not part of the *res gestae*.

The Court has developed no clear criteria for admitting or disallowing evidence of a declaration of intention or design.[21] Its holding in the principal case is contrary to the prevailing view in the majority of jurisdictions.[22]

INSURANCE

ACCIDENT INSURANCE

In *Richardson v. Liberty Life Ins. Co.*[1] the Court for the first time had occasion to construe a provision in an accident policy to the effect that "loss of four fingers entire of a hand shall be construed as loss of such hand." On April 24, 1958, while this policy was in force, the plaintiff had an accident with a rip saw and cut off three fingers of the left hand. On July 16, 1960, he accidentally severed the fourth finger behind the first joint. Plaintiff's evidence showed that when he used this finger it swelled. The defendant contended that the word "entire" as used in the policy meant "whole" or "total," and, therefore, the four fingers of a hand must be entirely severed to meet the requirements for payment under the policy for loss of a hand.

[21] For a comprehensive survey of instances when declarations of intention have been held admissible and inadmissible by the Court, see STANSBURY, NORTH CAROLINA EVIDENCE § 179 (1946).

[22] The leading case in this area is Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285 (1892). The United States Supreme Court there held that certain letters which the deceased had written in which he expressed an intention to embark on a journey were admissible on the issue of the deceased's intention. The Court cited Insurance Co. v. Mosley, 75 U.S. (8 Wall.) 397, 404-05 (1869), to the effect that "wherever the bodily or mental feelings of an individual are material to be proved, the usual expression of such feelings are original and competent evidence . . . . Such declarations are regarded as verbal acts, and are as competent as any other testimony, when relevant to the issue." 145 U.S. at 296.

In American Sec. Co. v. Minard, 118 Ind. App. 310, 77 N.E.2d 762 (1948), the court held in a workmen's compensation proceeding that evidence of a declaration made by the deceased employee one hour prior to his fatal accident that he was going to call on a business customer was admissible as an exception to the hearsay rule. A similar result was reached in Indiana Steel Prods. Co. v. Leonard, 126 Ind. App. 669, 131 N.E.2d 162 (1956), where the declaration was made several hours prior to the fatal accident. See generally Annot., 113 A.L.R. 268 (1938).

[1] 254 N.C. 711, 119 S.E.2d 871 (1961).

In affirming a judgment for the plaintiff the Supreme Court held that under the terms of the policy there was a loss of an entire finger if a sufficient part of it had been destroyed so as to make it useless as a finger.

This decision seems to be in accord with the majority rule that loss of a member means loss of the usefulness of that member rather than actual severance thereof.[2]

AUTOMOBILE LIABILITY INSURANCE

In *Faizan v. Grain Dealers Mut. Ins. Co.*[3] plaintiff brought action to recover on an automobile liability policy. The defendant denied liability on the ground that the policy had expired before the accident in question occurred.

The policy was issued to plaintiff under the Vehicle Financial Responsibility Act of 1957.[4] The period of coverage as stated on the face of the policy was from 12:01 A.M., February 22, 1958, to 12:01 A.M., February 22, 1959. In January 1959, defendant sent plaintiff a notice advising him the policy would expire February 22, 1959, and that in order to renew it, he would have to pay the renewal premium in advance and not later than February 5, 1959. Plaintiff did not pay the renewal premium, and on February 9, 1959, defendant mailed to plaintiff a "Notice of Termination," erroneously stating that the policy would terminate at 12:01 A.M., February 24, 1959.

Plaintiff's automobile was involved in an accident at 2:30 A.M., February 22, 1959. Plaintiff contended that the policy was still in effect at the time of the accident because the defendant had not complied with G.S. § 20-279.22 which provides that a policy issued in accordance with the Motor Vehicle Safety and Financial Responsibility Act of 1953[5] shall not be cancelled until at least twenty days after notice has been given to the Commissioner of Motor Vehicles. Although plaintiff admitted that his policy had been issued pursuant to the Vehicle Financial Responsibility Act of 1957, he contended

[2] Travellers' Protective Ass'n v. Brazington, 71 Ind. App. 130, 123 N.E. 221 (1919); Noel v. Continental Cas. Ins. Co., 138 Kan. 136, 23 P.2d 610 (1933); Beber v. Brotherhood of Railroad Trainmen, 75 Neb. 183, 106 N.W. 168 (1905); Sneck v. Travellers' Ins. Co., 156 N.Y. 669, 50 N.E. 1122 (1898); Lord v. American Mut. Acc. Ass'n, 89 Wis. 19, 61 N.W. 293 (1894).

[3] 254 N.C. 47, 118 S.E.2d 303 (1960); also discussed under ADMINISTRATIVE LAW, *Interpretation of Statutes, supra.*

[4] N.C. GEN. STAT. §§ 20-309 to -319 (Supp. 1961).

[5] N.C. GEN. STAT. §§ 20-279.1-.39 (Supp. 1961).

that G.S. § 20-279.22 was incorporated by reference into the 1957 act by G.S. § 20-314.[6]

The Court held that since section 20-310[7] of the 1957 act sets out specific provisions concerning notice of termination, G.S. § 20-279.22 has no application to policies issued pursuant to the 1957 act. Therefore, the defendant was not required to give notice as required by that section. The Court further stated that G.S. § 20-310 requires advance notice to the insured only when the insurance is terminated or cancelled by the insurer, and not when renewal is rejected by the insured. The Court concluded that termination in the present case was due to the plaintiff's rejection of the offer of renewal which the defendant had mailed to plaintiff. Therefore, since the "Notice of Termination" was not required, it did not extend the coverage period by reason of its erroneous termination date.[8]

LABOR LAW

ARBITRATION

In *Charlotte City Coach Lines, Inc. v. Brotherhood of Ry. Trainmen*[1] the Court had occasion to construe two sections of the North Carolina Labor Arbitration Act[2] for the first time. Here, the collective bargaining agreement provided a definite grievance procedure, the last step of which was arbitration. A dispute arose over the suspension by the company of a driver, and a month later the union, without first employing the prescribed grievance procedure, demanded arbitration of the grievance. A stay of arbitration was

[6] This section provides that the provisions of the 1953 act which pretain to the method of giving and maintaining proof of financial responsibility shall apply to filing and maintaining proof of responsibility under the 1957 act.

[7] "No contract of insurance or renewal thereof shall be terminated by cancellation or failure to renew by the insurer until at least fifteen (15) days after mailing a notice of termination to the named insured at the address shown on the policy. . . . Upon the termination of insurance by cancellation or failure to renew, notice of such cancellation or termination shall be mailed by the insurer to the Commissioner of Motor Vehicles not later than fifteen (15) days following the effective date of such cancellation or other termination." N.C. GEN. STAT. § 20-310 (Supp. 1961).

[8] The Court also noted that the defendant had given notice of termination to the Commission of Motor Vehicles within fifteen days after the effective date of termination as provided by G.S. § 20-310.

[1] 254 N.C. 60, 118 S.E.2d 37 (1961).

[2] N.C. GEN. STAT. §§ 95-36.1 to -36.9 (1953).

granted by the superior court upon application of the company and the Supreme Court affirmed.

The Court found that it was clear from the terms of the contract that the parties had not agreed to arbitrate any issue without prior exhaustion of the grievance procedure. It was further held that the parts of the act in question, G.S. §§ 95-36.6 and 95-36.9(b),[3] were *in pari materia* and must be construed together.

G.S. § 95-36.6 provides that absent an agreement to the contrary the arbitrator shall have power to decide the arbitrability of a dispute. The Court stated, however, that this was qualified by G.S. § 95-36.9(b), which provides that a party against whom arbitration proceedings have been initiated may apply for a stay of arbitration on the ground that he has not agreed to arbitrate the controversy involved. The Court therefore held that the court, and not the arbitrator, was to decide whether a party has agreed to the arbitration of the dispute.[4]

It should be noted that, in view of this decision, the North Carolina Labor Arbitration Act affects an arbitrator's power to determine the arbitrability of a labor dispute in a manner quite contrary to the attitude presently prevailing in the federal courts. The United States Supreme Court has, in three recent cases,[5] greatly extended the role of the arbitrator in labor disputes and diminished that of the

[3] N.C. GEN. STAT. §§ 95-36.6, -36.9(b) (1953).

[4] The union contended that G.S. § 95-36.9(b) was to be interpreted in the light of G.S. § 95-36.6 so that the former authorized a stay of arbitration only when the parties had not agreed to leave the issue of arbitrability to the arbitrator; that their collective bargaining agreement permitted the arbitrator to decide arbitrability and for that reason its demurrer should have been sustained. The Court answered that such a construction of the statute "would make the provision of N.C.G.S. § 95-36.9(b) practically meaningless." 254 N.C. at 69, 118 S.E.2d at 44.

[5] It was held in United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960), that whether the party seeking arbitration is right or wrong is a question of contractual interpretation and is for the arbitrator to decide. In United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), it was held that whether the act in question violated the collective bargaining agreement was for the arbitrator to decide and that in the absence of an express agreement excluding a particular grievance from arbitration only the most forceful evidence of such a purpose would prevail. And in United Steelworkers of America v. Enterprise Wheel & Car Co., 363 U.S. 593 (1960), it was held that the question of interpretation of the contract is for the arbitrator and the courts should not overrule him simply because their interpretation is different. These three cases have been discussed in Hays, *The Supreme Court and Labor Law, October Term 1959*, 60 COLUM. L. REV. 901, 919-35 (1960), and Meltzer, *The Supreme Court, Arbitrability and Collective Bargaining*, 28 U. CHI. L. REV. 464 (1961).

courts. All three of these cases centered around the issue of arbitrability of a grievance, *i.e.*, whether the employer had agreed to arbitrate such a grievance. In each of these cases the gist of the decision was that the arbitrator and not the court was to make that determination. As noted above, the North Carolina Supreme Court in *Charlotte City Coach Lines* interpreted the North Carolina Labor Arbitration Act as extending the role of the court and limiting that of the arbitrator in determining the arbitrability of labor disputes.

MUNICIPAL CORPORATIONS

ANNEXATION

The 1959 act[1] governing extension of corporate limits was before the Court for the first time in *In re Annexation Ordinance of Raleigh.*[2] There, residents in each of the annexed areas filed petition for review, as authorized by the statute,[3] alleging noncompliance with the statutory requirements for annexation and attacking the constitutionality of the act. The Court pointed out that the fundamental rule that the power to legislate cannot be delegated was not applicable in this case,[4] and held that the act did not violate either the state or federal constitution.[5]

The Court, without examining de novo the finding of the lower court that the city's plans for providing services to the annexed area

[1] N.C. GEN. STAT. §§ 160-445 to -453.24 (Supp. 1961). The act provides substantially the same procedure for extending the corporate limits of municipalities of less than five thousand persons as those having a population in excess of five thousand. It sets forth standards of development which areas to be annexed must meet, phrased in terms of population, land use, and extent of land subdivision; outlines the municipal services the annexing municipality must undertake to provide; and outlines the procedure to be followed in annexation, including a provision for judicial review.

[2] 253 N.C. 637, 117 S.E.2d 795 (1961).

[3] N.C. GEN. STAT. § 160-453.18 (Supp. 1961).

[4] Municipal corporations are a well-recognized exception to the rule that the power to make laws cannot be delegated. *E.g.*, Cox v. Kinston, 217 N.C. 391, 8 S.E.2d 252 (1940); State v. Harris, 216 N.C. 746, 6 S.E.2d 854 (1940). The Court held in the principal case that the legislature had the right to delegate the power given in the act since it was incidental to municipal government and involved a purely local matter. 253 N.C. at 649, 117 S.E.2d at 803.

[5] The Court also rejected the petitioner's contentions that the act was unconstitutional because it did not provide for trial by jury, that it did not apply to every county in the state, and that it deprived them of their liberty and property without due process of law.

complied with the requirements of the act, held that these findings were supported by competent evidence. The lower court found that the plan for providing water and sewer services complied with the statutory standards, even though the required timetable for extension of such services was not included.[6] This implies that the Court will uphold a plan for services which *substantially* complies with the statutory requirements.

In two subsequent cases involving the same act the Court clarified its position by expressly stating that compliance with the statute must be *substantial.* Moreover, these cases indicate that the Court will impose a rigid test for finding substantial compliance.

In *Huntley v. Potter*[7] the statutory provision before the Court required that the annexation ordinance contain "specific findings" that the area to be annexed was developed for urban purposes.[8] Petitioners contended that the filing of a report showing on its fact *strict* compliance with the statutory requirements was a condition precedent to annexation. The Court stated that the record of the annexation proceeding must show "complete and substantial compliance" with the statutory requirements.[9] It pointed out that substantial compliance means compliance with the essential requirements of the act. However, when the record shows prima facie compliance, the burden of proof is on the petitioners to show a failure of the municipality to comply with the statute. The annexation report filed here was merely a general statement, not supported by specific findings, that the area was developed for urban purposes.[10] The Court therefore held that it did not comply with the statutory

[6] N.C. GEN. STAT. § 160-453.15(3)(c) (Supp. 1961). The statute requires that the report set forth a proposed timetable for the construction of water mains and sewer lines in the annexed areas and that the contracts must be let and construction begun within twelve months of the date of annexation. The lower court ruled that since the report did provide to let the contracts within the required period, it sufficiently complied with the statute.

[7] 255 N.C. 619, 122 S.E.2d 681 (1961). This case involved a Beaufort annexation ordinance.

[8] N.C. GEN. STAT. § 160-453.5(e)(1) (Supp. 1961).

[9] 255 N.C. at 627, 122 S.E.2d at 686.

[10] The report merely paraphrased the statutory definition of "area developed for urban purposes." N.C. GEN. STAT. § 160-453.4(c) (Supp. 1961). The statute requires that at least sixty per cent of the lots in the area to be annexed be used for residential, commercial, industrial, institutional, or governmental purposes, and that at least sixty per cent of the total acreage, not counting that used for commercial, industrial, governmental or institutional purposes, consists of lots and tracts of less than five acres. The Beaufort report failed to state the percentage of the area that was so developed and was therefore held to be a mere conclusion unsupported by facts.

requirements.[11]

In re Annexation Ordinance of Jacksonville[12] reiterated the rule stated by the Court in *Huntley* that the record must show complete and substantial compliance with the act. The Court stated that the plan of services must give a clear description of the basis upon which these services will be provided by the city and that if this description is insufficient the lower court should remand the plan for amendment. In this case compliance by the city was conditioned upon the performance of certain acts by the property owners within the area to be annexed.[13] The Court stated that the city was in no position to shift to others the duty which the act imposed upon it as a condition precedent to annexation. Therefore, it found that the proceedings here did not satisfy the requirements of substantial compliance.[14]

Drainage Districts

The Albemarle Drainage District sought to levy assessments upon respondent's land which was outside the boundaries of the district. The statute permitting the establishment of drainage districts[15] required that the original boundaries include all the lands that were benefited, and made no provisions for enlargement. Therefore the Court held in *In re Albemarle Drainage Dist.*[16] that since the lands in question were excluded when the district was established, they could not now be assessed for benefits they received from the drainage.[17]

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[11] The lower court attempted to carve out a portion of the area, ordered it annexed and remanded the ordinance as to the remainder. The Supreme Court said the ordinance should have been remanded with respect to the entire area since the statutes which allow an ordinance to be effective as to a part of the area are applicable only when there is no appeal pending as to that part. N.C. Gen. Stat. §§ 160-453.6(e), (h) (Supp. 1961). 255 N.C. at 632, 122 S.E.2d at 690.

[12] 255 N.C. 633, 122 S.E.2d 690 (1961).

[13] The plan of services contained no plans for the municipality to provide street maintenance or water and sewer services in the area beyond those services presently in existence unless they were provided by the landowners and developers in that area.

[14] N.C. Gen. Stat. § 160-453.15(3) (Supp. 1961), requires that the municipality make plans for extending to the new area each major municipal service performed within the municipality at the time of annexation.

The Court also pointed out that the area is considered as a whole when deciding whether it meets the requirements for annexation, and a portion of the area may not be excluded merely because it, taken alone, does not meet the standards set out by the act. 255 N.C. at 643, 122 S.E.2d at 698.

[15] N.C. Gen. Stat. §§ 156-62(4), -65 (1952).

[16] 255 N.C. 338, 121 S.E.2d 599 (1961).

[17] *Accord,* Drainage District v. Cahoon, 193 N.C. 326, 137 S.E. 185 (1927).

The 1961 General Assembly recognized that lands not originally included within the boundaries of the drainage district might subsequently receive benefits through changing conditions and enacted a new statute which permits the enlargement of the original boundaries.[18]

PUBLIC PURPOSE

In *Morgan v. Spindale*[19] a taxpayer brought an action to enjoin the town of Spindale from issuing bonds, the proceeds of which were to be used, together with federal and state funds, for the construction of a national guard armory outside the Spindale city limits. Plaintiff conceded that construction of an armory is normally a public purpose which meets our constitutional requirement.[20] However, he contended that the fact that the proposed armory was to be built outside the corporate limits negatived a public purpose as to the residents of Spindale. The Court rejected this contention, and held that the location of the armory half a mile beyond the corporate limits did not affect the *purpose* for which the expenditure was made.[21] It stated that the test in determining whether property is used for a public purpose is the right to enjoy[22] the property and not the place where this right may be exercised.[23]

[18] N.C. GEN. STAT. § 156-93.3 (Supp. 1961). This statute had not gone into effect at the time of the litigation.

[19] 254 N.C. 304, 118 S.E.2d 913 (1961).

[20] N.C. CONST. art. 5, § 3: "Taxes shall be levied only for public purposes . . . ." The public purposes limitation has been extended by judicial decision to all public funds. Airport Authority v. Johnson, 226 N.C. 1, 36 S.E.2d 803 (1945). As to what constitutes a public purpose, see Note, 25 N.C.L. REV. 504 (1947).

[21] The Court also pointed out that the fact that the property would revert to Rutherford County if abandoned for military purposes did not defeat the purpose of the expenditures. 254 N.C. at 307, 118 S.E.2d at 915. See also Green v. Kitchin, 229 N.C. 450, 50 S.E.2d 545 (1948), where the possibility that a policeman might not remain in the employ of a municipality after receiving special F.B.I. training at city expense was held not to prevent the expenditure from being for a public purpose—maintaining law and order.

[22] It was determined that the armory would also be available for Spindale civic functions and its rifle range could be used by local law enforcement officers.

[23] The Court emphasized that municipalities frequently established sewage plants and water supply systems beyond corporate limits and that their status as a public purpose could not be questioned. 254 N.C. at 306, 118 S.E.2d at 915. For a comprehensive article dealing with extraterritorial spending powers, see Byrd, *Extraterritorial Spending Powers of North Carolina Cities*, Popular Government, June, 1961.

ZONING

G.S. § 160-176 provides that notice and an opportunity to be heard must be given before a zoning ordinance can be amended.[24] Two recent cases raised the question of what constitutes sufficient notice to the public of a proposed change in an existing zoning ordinance.

In *Walker v. Elkin*[25] notice was published in a local newspaper of general circulation. It gave the time and place of the meeting and provided that at the stated time

> the changes of the Zone of the below described property to that of Neighborhood Business . . . and . . . a proposed change in the zoning ordinance . . . to allow "Public Utility Storage or Service Yard" in the Neighborhood Zone will be thoroughly discussed.

Plaintiff contended that this notice referred to a single transaction, *i.e.*, changing the described area to "Neighborhood Business" and allowing public utility storage or service yards in the rezoned area, but not in other "Neighborhood Business" areas. The Court rejected the plaintiff's interpretation and held that the advertisement was sufficient to give notice both that the described area would be rezoned and that public utility or storage yards would be permitted in *any* area zoned "Neighborhood Business."[26]

In *Helms v. Charlotte*[27] the only notice of public hearing of the proposed change in an ordinance was also by publication in a newspaper of general circulation in the city. This notice gave a boundary description of the area to be rezoned but did not name the owner or refer to his property by lot or block number or by reference to a map. Plaintiff contended that although this notice might meet the statutory requirements, it did not meet the requirements of due process. The

[24] This chapter further provides that "a notice of such public hearing shall be given once a week for two successive calendar weeks in a newspaper published in the municipality, or, if there be no newspaper . . . by posting such notice at four public places in the municipality . . . ." N.C. GEN. STAT. § 160-175 (1952). The provisions of the section relative to hearings and notice are applicable to all proposed changes and amendments. N.C. GEN. STAT. § 160-176 (1952).

[25] 254 N.C. 85, 118 S.E.2d 1 (1961).

[26] The Court pointed out that the notice used the words "these proposed changes," which definitely indicated that two separate questions were to be considered. 254 N.C. at 88, 118 S.E.2d at 3.

[27] 255 N.C. 647, 122 S.E.2d 817 (1961).

Court, in accord with the majority of jurisdictions,[28] held this notice to be sufficient. It stated that the notice complied with the statutory requirements and should not be rendered invalid by plaintiff's failure to see it. Thus it seems that the required notice need not contain detailed information in regard to the proposed changes, but is sufficient if it *adequately* informs the persons affected of the hearing and of the proposals to be discussed.

The *Helms* case also held, in accord with the majority view,[29] that in zoning land for residential purposes the test is not whether a residence can be built on the property[30] but whether it would be practical, desirable and of reasonable value.[31] The Court stated that zoning land for residential purposes is unreasonable, confiscatory and illegal where it is practically impossible to use the land for such purpose.

NEGOTIABLE INSTRUMENTS

Presentation of Drafts for Collection

In *Branch Banking & Trust Co. v. Bank of Washington*,[1] *S* (seller) drew drafts on *B* (buyer), payable to the Bank of Halifax. *S* deposited the drafts with the payee between the dates of December 23, 1959, and January 23, 1960. Upon receipt of the drafts, the payee immediately forwarded them for collection to the plaintiff, Branch Banking and Trust Company. Both the payee and the plaintiff accepted the drafts with the express understanding that they were received for collection only and that although credited to the depositor's account, they might be charged back at any time before final

[28] *E.g.*, Braden v. Much, 403 Ill. 507, 87 N.E.2d 620 (1949); Blakenship v. City of Richmond, 188 Va. 97, 49 S.E.2d 321 (1949).

[29] *E.g.*, Corthouts v. Town of Newington, 140 Conn. 284, 99 A.2d 112 (1953); Ehinger v. State, 147 Fla. 129, 2 So. 2d 357 (1941); Janesick v. Detroit, 337 Mich. 549, 60 N.W.2d 452 (1953); Huntley Estates, Inc. v. Town of Eastchester, 283 App. Div. 1090, 131 N.Y.S.2d 578 (1954).

[30] The city, attempting to show that a house could be built on the lots, submitted a map showing a floor plan forty-eight feet long with three widths, varying from seventeen to twenty feet, a design which the Court said could be termed, at best, "unique."

[31] The lower court found that a residence could be built upon the property in conformity with the municipal regulations, but did not find whether it would be practical, desirable, and of reasonable value. The case was remanded with directions that the court determine whether or not the lots in question had any reasonable value for residential use.

[1] 255 N.C. 205, 120 S.E.2d 830 (1961).

payment. They also stipulated that their liability, upon receipt of the drafts, was limited to due care, and that neither would be liable for failure, default, or neglect of any duly selected correspondent.

The plaintiff forwarded the drafts to defendant, the Bank of Washington, for collection. Since *B* had not given defendant authority to honor the drafts, defendant presented them to *B* for payment. *B* neither accepted nor paid when the drafts were presented originally or pursuant to several tracers sent by plaintiff to defendant to learn whether the drafts had been collected. Defendant failed to notify plaintiff of *B*'s failure to honor the drafts. On February 1, 1960, plaintiff notified defendant to present the drafts for payment and if not paid to return them. Defendant did so and on nonpayment returned the drafts on February 2, 1960.

The drafts were then returned to the payee, who refused to accept them because of the lapse of time, which it contended constituted acceptance. Plaintiff admitted its liability on the drafts to the payee and returned them to defendant for payment. Defendant refused to pay and plaintiff brought suit for the value of the drafts plus six per cent interest during the time that defendant held them pending collection.

By statute,[2] where a drawee fails to give notice of nonacceptance of a draft within twenty-four hours after it is presented to him, he is deemed to have accepted it. The Court held, however, that *B*, and not defendant, was the drawee of the drafts;[3] hence, the statute did not apply. And since defendant had not accepted the drafts, it was not liable on them.[4]

The Court also held that defendant was not liable to plaintiff for the value of the drafts because of any negligence on defendant's part. Plaintiff had taken the drafts under the condition that it would not be liable for neglect of its duly selected correspondent (defendant). Hence plaintiff was not precluded from charging the drafts back to the Bank of Halifax because of the delay by the defendant. More-

[2] N.C. GEN. STAT. § 25-144 (1953).

[3] This holding is supported by the fact that the buyer had not authorized the defendant to charge the drafts to its account. Plaintiff sent the drafts to defendant for collection; thus plaintiff apparently knew that defendant had no authority to pay the drafts until authorized by *B*.

[4] N.C. GEN. STAT. § 25-68 (1953), provides: "The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance . . . ." Thus the Court held that a drawee is not liable on a draft until he accepts it, and until he accepts it, the holder must look to the drawer or indorser for payment.

over, there was no evidence of negligence on the part of the plaintiff that would preclude it from being able to charge the drafts back. Plaintiff therefore suffered no damage as a result of any negligence by the defendant, and the stipulation as to liability did not create liability where none existed.[5]

Payment by Check

In *Southern Auto Finance Co. v. Pittman*[6] defendant bought a car from a used car dealer, giving a note secured by a conditional sales contract on the car. The dealer discounted the note and lien to the plaintiff. A few days later the dealer sent the plaintiff a personal check for the amount of the note. Upon receipt of the check the plaintiff marked the note paid. However, the drawee-bank refused to discount the check. Plaintiff then brought suit for the value of the note. The defendant pleaded payment, contending that since the dealer was the agent of the plaintiff, the dealer's worthless check constituted a valid payment. The Court rejected the agency argument on the grounds that the evidence negatived any idea of agency, and that the dealer's giving of his personal check was a gratuitous act that was neither requested nor relied upon by the defendant. The Court therefore held that the dealer's act was of no benefit to the defendant since even a debtor cannot discharge his liability by giving a worthless check. In so holding the Court affirmed the rule that in the absence of an agreement to the contrary, the delivery and acceptance of a check does not constitute payment of the item covered by it until the check itself is discounted by the bank on which it is drawn.[7]

[5] Dissenting, Justice Parker argued that plaintiff's admission was not gratuitous but validly based on the rules of commercial transactions. The machinery set up by modern banking requires the prompt handling of negotiable instruments, and the delay by defendant was negligence which proximately caused plaintiff to lose the face value of the drafts.

[6] 253 N.C. 550, 117 S.E.2d 423 (1960).

[7] See, *e.g.*, Wilson v. Commercial Fin. Co., 239 N.C. 349, 79 S.E.2d 908 (1954). See generally 32 N.C.L. Rev. 491 (1954).

PUBLIC UTILITIES

MUNICIPAL FRANCHISES

Two cases, *Duke Power Co. v. Blue Ridge Elec. Membership Corp.*[1] and *Pee Dee Elec. Membership Corp. v. Carolina Power & Light Co.*,[2] involved similar fact situations and questions of law regarding the rights of rural electric membership corporations to continue serving customers living in areas which are annexed into municipalities which other power companies hold franchises to serve. In both cases, power companies, which had franchises to serve municipal residents, were under contract to sell electrical energy to the membership corporations for resale to rural member consumers.

In the *Duke Power Co.* case the trial court granted the injunction requested by the plaintiff, enjoining the defendant from selling electricity to consumers who were residents of the Town of Hudson. Some of these were formerly rural customers of the defendant who had become residents of the town due to annexation. The trial court also ordered the defendant to remove all of its property within the town limits unless it was sold within a specified time.

On appeal, the Supreme Court decided that the contract between the plaintiff and defendant did not prohibit the defendant from selling to its members merely because they resided within the corporate limits of the town. The Court further held that the extension of the town's boundaries so as to remove some membership customers from a rural to an urban category did not make the original entry of the defendant or its continued operation unlawful.[3] The Court, citing *State ex rel. Southwestern Gas & Elec. Co. v. Upshur Elec. Co-op Corp.*[4] with approval, stated that the membership of customers

[1] 253 N.C. 596, 117 S.E.2d 812 (1961).

[2] 253 N.C. 610, 117 S.E.2d 764 (1961).

[3] In Sanitary Dist. v. City of Lenoir, 249 N.C. 96, 105 S.E.2d 411 (1958), the Court held that a town does not need to secure the approval of a sanitary district in order to enlarge its boundaries and cover the sanitary district; but the mere fact that a person is brought within the town by a change in boundaries does not deprive him or his vendor (the sanitary district) of the privilege of buying and selling water transported through the mains of the vendor.

[4] 156 Tex. 633, 298 S.W.2d 805 (1957), which held that an electrical co-operative could continue to service persons living in areas annexed to a city who were lawful members of the co-operative at the time of the annexation. *Contra*, Farmers Elec. Coop. Corp. v. Arkansas Power & Light Co., 220 Ark. 652, 249 S.W.2d 837 (1952). There the court held that the co-operative's authority to serve members annexed into a town ceased on the date of the annexation. The Arkansas court recognized, however, that this was an

of the defendant was not terminated by a change in the character of the community from rural to urban, and that the defendant had a right and duty to serve its members. The Court also held that it was also error to require the defendant to dispose of its property within the municipal limits of Hudson. The Court stated that the legislature had delegated power to the Utilities Commission to say when and under what circumstances power companies shall furnish service inside as well as outside of municipalities.

Essentially the same facts existed in the *Pee Dee* case where the membership corporation was enjoined from supplying electrical energy within the town limits of Rockingham to former customers living in areas which had been annexed into the town. Pee Dee was also ordered to dispose of and dismantle its power lines and facilities inside the town limits.

The Supreme Court, on reversing, found that under a franchise from the town the commercial power company had the legal right and duty to serve the newly annexed areas. However, the Court pointed out that since the annexed areas were rural when Pee Dee constructed its distribution lines, Pee Dee might continue serving those customers who were members before the date of annexation and who desired to continue to receive its current. But the Court stated that Pee Dee could not, after annexation, extend its service within the town to persons who were non-members at the time of annexation.

In *State ex rel. Utilities Comm'n v. McKinnon*[5] the Court held that an exempted intracity carrier under the Bus Act of 1949[6] has no territorial limitations as to the transportation of high school bands and athletic teams, and passengers to or from religious services, under sections 62-121.47(a)(1) and (6) where the request for such services arises within the area for which the carrier holds a certificate of exemption.

Service Discontinuance

In *State ex rel. Utilities Comm'n v. Southern Ry.*,[7] Southern had petitioned the Utilities Commission for an order authorizing the

awkward situation for a co-operative operating in good faith in a rural area contiguous to a municipality.

[5] 254 N.C. 1, 118 S.E.2d 134 (1961); also discussed under Administrative Law, *Interpretation of Statutes, supra.*

[6] N.C. Gen. Stat. § 62-121.47(a)(8) (1960).

[7] 254 N.C. 73, 118 S.E.2d 21 (1961).

discontinuance of all rail passenger service between Goldsboro and Greensboro. Southern maintained that this service was incurring a burdensome loss and that public convenience and necessity no longer required this service.

After a hearing the Commission denied the request, and Southern appealed on the grounds that the Commission's order was not supported by the evidence and that it was arbitrary and capricious. Both the superior court and the Supreme Court affirmed the Commission.

The Court stated that the doctrine of public convenience and necessity is relative rather than abstract and absolute, and must be considered in the light of the facts of each case; that the convenience and necessity required are those of the public and not of an individual or individuals.[8] The Court outlined the controlling criteria to be considered: (1) the character and population of the territory to be served; (2) the public patronage or lack of it; (3) the facilities remaining; (4) the expense of operation as compared with the revenue from it; and (5) the operations of the carrier as a whole.[9]

The Court noted that Southern was not seeking to reduce its passenger service or other incidental or collateral service, but wanted to discontinue all passenger service between Goldsboro and Greensboro. It was pointed out that if Southern were granted its request, Durham, Orange and Alamance counties, which are in a central, strategic and populous part of the state, would be left without rail passenger service. The City of Durham would be one of five cities in the nation with a population in excess of 70,000 without passenger trains. The Court also pointed out that in 1958, Southern had a net profit of about $30,000,000 and paid dividends of more than $21,000,000; that its total surplus was $300,000,000; that the average loss on passenger traffic for Southern's entire system was $2,776 per mile of track compared with the average loss on the Greensboro-Goldsboro line of $1,090 per mile of track. Furthermore, in 1957 and 1958 passenger operating deficits were a factor in authorizing increased freight rates. In addition the Court found that Southern had done little, if anything, to promote greater use of this service by advertising or providing adequate station depot personnel. On the basis of this evidence, the Supreme Court held that the Commis-

[8] State *ex rel.* Utilities Comm'n v. Casey, 245 N.C. 297, 96 S.E.2d 8 (1957).

[9] See Annot., 10 A.L.R.2d 1121, 1143 (1950); Southern Ry. v. Commonwealth, 196 Va. 1086, 86 S.E.2d 839 (1955), which the Supreme Court cited with approval.

sion's findings were supported by competent, material, and substantial evidence, and that the denial of the authority was not arbitrary or capricious.[10]

In *State ex rel. Utilities Comm'n v. Carolina Coach Co.*[11] the coach company petitioned the Utilities Commission for authority to discontinue a seventeen mile franchise route which included the Town of Columbia, the county seat of Tyrrell County. In affirming the Commission's denial of this authority, the Supreme Court relied upon the legal principles set out in the *Southern Ry.* case.

Utility Rate Bases

In *State ex rel. Utilities Comm'n v. Piedmont Natural Gas Co.*[12] Piedmont applied to the Utilities Commission for approval of a rate increase to compensate for the increased price for gas charged by its supplier, Transcontinental Pipe Line Company. The Commission denied the request, but allowed Piedmont to collect the increased rates under bond to be refunded if they were found to be excessive. In order to determine if the increased rates were reasonable, the Commission held a hearing and chose the twelve months period ending October 31, 1959, as a test period to find the fair value of Piedmont's property and the rate required to produce a fair return. After the hearing the Commission denied the rate increase and ordered Piedmont to refund all payments in excess of the old rates.

The Supreme Court affirmed the superior court's holding that the Commission's findings were not supported by competent, material, and substantial evidence and that the order was arbitrary and capricious. The Court stated that the Commission, in determining the value of Piedmont's property to establish the rate base, erred when it refused to consider evidence of current or replacement cost of the property during the test year determined by "trending" original cost. The Court pointed out that trended cost is useful when, as in the present case, it becomes necessary to fix the present value of facilities which were constructed when cost was low. The Com-

[10] See in accord City of Princeton v. Public Serv. Comm'n, 268 Wis. 542, 554, 68 N.W.2d 420, 427 (1955): "In an application for discontinuance of service because of loss, the commission has the duty of determining whether a point has been reached where the financial loss in passenger service is so disproportionate to the need of the service that the discontinuance is justifiable, irrespective of total financial earnings on the same branch line, or irrespective of the earnings of the system."

[11] 254 N.C. 319, 118 S.E.2d 762 (1961).

[12] 254 N.C. 536, 119 S.E.2d 469 (1961).

mission treated the trended cost evidence as worth no more than minimal consideration. The Court stated that trended cost evidence should be fairly weighed and, therefore, giving it only minimal consideration constituted error.[13]

The Commission also erred in disallowing a substantial portion of Piedmont's promotional expenses in determining operating costs.[14] The Commission compared Piedmont's promotional expenses with the national average and not with other companies in Piedmont's classification. The Court pointed out that Piedmont was selling a new product, natural gas, in competition with electricity and oil, and that new customers had to be "sold" on it. It was also noted that the Commission failed to take into account that Piedmont was a rapidly expanding company and that it needed to promote its expanding facilities.

A third error of the Commission was in using the average net investment for the test year to establish the rate base instead of taking into account Piedmont's rapid expansion and the fact that its investment at the end of the year was greater. The Court stated that the investment at the end of the test year should have been used rather than the average for the year.

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[13] See Smyth v. Ames, 169 U.S. 466, 546-47 (1898), where the United States Supreme Court stated: "[I]n order to ascertain [fair] value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction . . . are all matters for consideration, and are to be given such weight as may be just and right in each case." In Willcox v. Consolidated Gas Co., 212 U.S. 19, 52 (1909), the Supreme Court said: "If the property, which legally enters into the consideration of the question of rates, has increased in value since it was acquired, the company is entitled to the benefit of such increase." See also State *ex rel.* Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 33 (1954), where the Court held that the Commission, by accepting book value as the rate base, had erroneously excluded present cost of replacement and all other factors specified by G.S. § 62-124 from effective consideration. In Equitable Gas Co. v. Pennsylvania Public Utilities Comm'n, 160 Pa. Super. 458, 51 A.2d 497 (1947), the court stated that reproduction cost and all other elements affecting value are to be given their proper weight in determining the fair value of the utility's property. *Contra,* Colorado Interstate Gas Co. v. Federal Power Comm'n, 324 U.S. 581 (1945), holding that the Commission did not err as a matter of law in considering legitimate original costs and not reproduction costs. See generally Hanft, *Control of Electric Rates in North Carolina,* 12 N.C.L. REV. 289 (1934).

[14] *Accord,* West Ohio Gas Co. v. Commission, 294 U.S. 63 (1934), where the United States Supreme Court took judicial notice that gas competes with oil and electricity and stated that, within the limits of reason, advertising and development expenses to foster normal business growth are legitimate charges upon income for rate purposes.

In remanding the case for further consideration, the Court stated that it neither promulgated any new rules by this decision nor did it enlarge or restrict the application of old rules.

REAL PROPERTY

Adverse Possession

In *Chisholm v. Hall*[1] plaintiffs sought to remove a cloud from their title. The defendants denied plaintiffs' ownership and claimed title by adverse possession for twenty years, and also by adverse possession for seven years under color of title. In the statement of the case on appeal the defendants further claimed that they acquired title to the property in question through several conveyances resulting from a tax foreclosure sale. However, they did not put into evidence any record showing a sale of the property for nonpayment of taxes. The defendants did offer evidence that they had paid the taxes on the land for many years. But their only evidence with respect to actual occupancy was limited to the planting of grass seeds on one occasion and the planting and harvesting of oats in another year.

The trial court directed the jury to find for the plaintiffs, and the Supreme Court affirmed. The Court, in accord with prior decisions,[2] stated that the defendants had the burden of establishing their defense of ownership. The Court concluded that even if all of the defendants' evidence was accepted as true, it was insufficient because it failed to show continuous possession for the statutory period.[3] Therefore, the trial court correctly directed the jury to find for plaintiffs.

Covenant of Seisin

In *Smith v. Peoples Bank & Trust Co.*[4] the Court held that a recital by the grantor as to its source of title was, when viewed in the light most favorable to the plaintiff, a covenant of seisin. The deed contained the following language:

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[1] 255 N.C. 374, 121 S.E.2d 726 (1961).

[2] *E.g.*, Wells v. Clayton, 236 N.C. 102, 72 S.E.2d 16 (1952); MacClure v. Accident & Cas. Ins. Co., 229 N.C. 305, 49 S.E.2d 742 (1948).

[3] The Court stated that listing and paying taxes is no evidence of actual possession. *Accord,* Faulcon v. Johnston, 102 N.C. 264, 9 S.E. 394 (1889).

[4] 254 N.C. 588, 119 S.E.2d 623 (1961).

> Grantor, . . . the owner of four-sixths undivided interest of the property hereby conveyed, acquired its title under the terms of the last will and testament of C. G. Shearin, deceased, which is duly probated in Nash County Registry, the said C. G. Shearin, deceased, having acquired a one-sixth interest under the Will of G. T. Shearin, a one-sixth interest from R. L. Shearin, by deed registered in Book 350, page 511, Nash County Registry (see also quit-claim deed from R. L. Shearin to Peoples Bank & Trust Company, dated November 19, 1946, duly registered in Nash County Registry); a one-sixth interest from C. H. Shearin by deed registered in Book 446, page 315, and a one-sixth interest from S. H. Shearin, by deed registered in Book 447, page 244, Nash County Registry.[5]

A covenant of seisin is defined as an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey.[6] It would seem that the Court gave a very liberal construction to the above language in holding it to be a covenant of seisin.

DEDICATION

In general, the dedication of a street shown on a sub-division map is but a revocable offer as to the public, and dedication is not complete until accepted.[7] If not accepted within fifteen years, the offer may be withdrawn by compliance with G.S. § 136-96 or by adverse possession.[8] If accepted by the public by opening and using it at any time before withdrawal the dedication becomes complete and may not thereafter be withdrawn.[9]

In *Janicki v. Lorek*[10] the Court held that a purchaser of a lot in one subdivision could not object to the withdrawal of a street in an-

[5] *Id.* at 589-90, 119 S.E.2d at 625.

[6] See Pridgen v. Long, 177 N.C. 189, 195-96, 98 S.E. 451, 454 (1919); BLACK, LAW DICTIONARY (4th ed. 1951).

[7] Rowe v. City of Durham, 235 N.C. 158, 69 S.E.2d 171 (1952).

[8] N.C. GEN. STAT. § 1-45 (1953), which prohibits one from gaining title to a street by adverse possession, has been held not to apply to streets, alleys and parks which have been offered for dedication if the offer has not been accepted, or if the offer has been accepted, and the property later abandoned. City of Salisbury v. Barnhardt, 249 N.C. 549, 107 S.E.2d 297 (1959); Lee v. Walker, 234 N.C. 687, 68 S.E.2d 664 (1952).

[9] Steadman v. Town of Pinetops, 251 N.C. 509, 112 S.E.2d 102 (1960); Town of Blowing Rock v. Gregorie, 243 N.C. 364, 90 S.E.2d 898 (1956).

[10] 255 N.C. 53, 120 S.E.2d 413 (1961).

other subdivision pursuant to G.S. § 136-96, even though both subdivisions were contiguous and were developed by the same developer.

The plat showing the street in question was filed for record in 1906, but the street was never opened. The defendants filed a declaration of withdrawal in 1954.[11] Shortly thereafter plaintiffs advised the defendants that they were going to use the street in question for access to their property. The defendants forbade plaintiffs to go upon the land, and plaintiffs brought an action for damages and to enjoin the defendants from obstructing their use of the street. The parties stipulated that the street had been dedicated more than fifteen years prior to 1954 and that the street had never been opened or used. The trial court denied plaintiffs' claim for damages and refused to grant the injunction.

On appeal the Supreme Court, in affirming the trial court, stated that one purchasing a parcel of land outside the boundaries of a subdivision has no rights with respect to the dedicated streets of the subdivision other than those enjoyed by the public generally.[12] The Court found that the plaintiffs' property was in a subdivision separate from the one containing the street in question. The Court, therefore, concluded that the plaintiffs' cause of action was barred by the defendants' withdrawal pursuant to G.S. § 136-96.

EASEMENTS

In *Pritchard v. Scott*[13] the testator devised the northern portion of his farm to his wife and the southern portion to his son. The wife instituted special proceedings under G.S. § 136-68 and G.S. § 136-69 to condemn a cartway over the lands of third parties which were adjacent to the farm or over the portion devised to the son. The trial court held that the plaintiff was entitled to have a cartway across the lands of some of the defendants and directed the clerk to appoint a jury to lay off a cartway. All of the third parties appealed, contending that whatever rights plaintiff had to a cartway or to an

[11] N.C. GEN. STAT. § 136-96 (1958), provides that if land dedicated for public use as a street is not actually opened up and used within fifteen years from date of dedication, it shall be conclusively presumed to have been abandoned by the public. The statute further provides that the abandonment shall not be presumed until a declaration of withdrawal is executed and recorded by those entitled to withdraw the dedication.

[12] *Accord,* Hemphill v. Board of Aldermen, 212 N.C. 185, 193 S.E. 153 (1937).

[13] 254 N.C. 277, 118 S.E.2d 890 (1961).

easement, she had no right to condemn a cartway over their lands. The Supreme Court reversed.

The Court distinguished between a cartway condemned pursuant to G.S. § 136-68 and G.S. § 136-69 and a way of necessity under the general law. The Court pointed out that a way of necessity is an easement arising from an implied grant or reservation which arises from the presumption that whenever a party conveys property, he conveys or retains whatever is necessary for its beneficial use. No compensation therefor is required. Conversely, a cartway is obtained by condemnation and payment of compensation where a property owner has no reasonable access to a public road as a matter of legal right[14] or by permission.[15]

The Court noted that it was necessary that the plaintiff be granted access to the public road and stated that the testator must have intended that the plaintiff have a right of access over the land devised to the son. The Court, therefore, held that the plaintiff was not entitled to a cartway over the land of strangers to the title of her testator when the undisputed facts established that a cartway[16] could be laid off over the land devised to the son which, with that of the plaintiff, constituted a single tract before the severence of title.

INDEXING—DEEDS OF TRUST AND LIENS

Cuthrell v. Camden County[17] was an action to determine priority as between a deed of trust executed on certain lands and a subsequent old age assistance lien. The deed of trust was not indexed under the name of the landowners,[18] and the index of the old age assistance lien referred to the wrong page of the Lien Book. In holding the lien to be superior, the Court said in order for registration to be effective there must be substantial compliance with the indexing statutes. The Court stated that there is substantial compliance if enough is disclosed by the index to put a careful and prudent ex-

[14] Kanupp v. Land, 248 N.C. 203, 102 S.E.2d 779 (1958).

[15] Garris v. Byrd, 229 N.C. 343, 49 S.E.2d 625 (1948).

[16] The Court here apparently used "cartway" as meaning a "way of necessity" rather than as the term is used in the statutory sense. The Court seemed to imply that the plaintiff was entitled to a way of necessity rather than a cartway.

[17] 254 N.C. 181, 118 S.E.2d 601 (1961); also discussed under CREDIT TRANSACTIONS, *Improper Indexing of Deeds of Trust and Liens, supra.*

[18] Mollie Cuthrell was owner of the land, but her son, R. G. Cuthrell signed the deed of trust with her, and it was indexed under "R. G. Cuthrell, et al."

aminer upon inquiry, and if upon such inquiry the instrument would be found.[19]

Life Estates—Tenancy by the Entirety

In *Lanier v. Dawes*[20] the Court held that the effect of an absolute divorce between holders of a life estate as tenants by the entirety was to convert it into a tenancy in common for life. Thus each tenant would have a life estate in a one-half undivided interest in the property. Such holding is in accord with the previous position of the Court that an absolute divorce converts a tenancy by the entirety in a fee simple estate into a tenancy in common.[21]

Quieting Title

Waters v. Pittman[22] was an action to remove a cloud on title caused by deeds executed by plaintiff's grantor subsequent to the plaintiff's deed. Plaintiff alleged that she was the owner in fee simple of a one-half undivided interest in the land because she and her divorced husband had held the land as tenants by the entirety. Their deed was dated October 26, 1951, and was registered August 11, 1959. Plaintiff introduced into evidence three other deeds executed subsequent to, but recorded before, the deed under which she claimed title. She alleged the later deeds were given without consideration, although they contained a recital of consideration, for the purpose of depriving her of her interest in the land. At the close of the plaintiff's evidence, defendants' motion for nonsuit was granted.

On appeal the Supreme Court, in reversing, followed the well established rule that in an action to remove a cloud from title, the burden is on the plaintiff to show that his title is superior.[23] The Court pointed out that one way for the plaintiff to do this is to connect the defendant with a common source of title and show that he (plaintiff) has a better title from that source.[24] The Court found that plaintiff had made out a superior title under her prior dated but later recorded deed, unless the defendants were purchasers for value.

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[19] *Accord*, Dorman v. Goodman, 213 N.C. 406, 196 S.E. 352 (1938).

[20] 255 N.C. 458, 121 S.E.2d 857 (1961).

[21] Smith v. Smith, 249 N.C. 669, 107 S.E.2d 530 (1959); McKinnon, Currie & Co. v. Caulk, 167 N.C. 411, 83 S.E. 559 (1914).

[22] 254 N.C. 191, 118 S.E.2d 395 (1961).

[23] Walker v. Story, 253 N.C. 59, 116 S.E.2d 147 (1960); Seawell v. Boone's Mill Fishing Club, Inc., 249 N.C. 402, 106 S.E.2d 486 (1959).

[24] Mobley v. Griffin, 104 N.C. 112, 10 S.E. 142 (1889).

The Court noted that while a recital of consideration in a deed is conclusive as between the parties, it is not binding on a third party.[25] As to third parties, the grantee has the burden of proving consideration. The Court concluded that the defendants had the burden of proving by a preponderance of the evidence that they were purchasers for value,[26] and, as this was a question for the jury, the trial court erred in granting the nonsuit for the defendants.

SALES

BREACH OF WARRANTY

In *Prince v. Smith*[1] plaintiff sought to recover from defendant grocer for breach of implied warranty of fitness, when a bottled soft drink, purchased from defendant, exploded, resulting in her injury.[2] The Supreme Court affirmed a nonsuit entered by the trial court, stating that while the manufacturer impliedly warrants the fitness of the beverage within the container, this doctrine should not be extended to cover the bottle or container which may become weakened by the manner in which it is handled. The Court found that the evidence justified the inference that the explosion occurred due to the pressure increase while the bottle was in plaintiff's possession, and that plaintiff should have been aware of this possibility.[3]

This is apparently the first case in North Carolina seeking re-

[25] Skipper v. Yow, 240 N.C. 102, 81 S.E.2d 200 (1954); Whitehurst v. Abbott, 225 N.C. 1, 33 S.E.2d 129 (1945).

[26] Whitehurst v. Abbott, *supra* note 25; Virginia-Carolina Joint Stock Land Bank v. Mitchell, 203 N.C. 339, 166 S.E. 69 (1932).

[1] 254 N.C. 768, 119 S.E.2d 923 (1961).

[2] Several cases have been brought before the Court to recover for injuries resulting from the explosion of a bottled soft drink. These, however, have generally been based on the negligence of the manufacturer in the preparation of the product. *E.g.*, Grant v. Chero-cola Bottling Co., 176 N.C. 256, 97 S.E. 27 (1918).

There is ample authority within this jurisdiction holding that implied warranty of fitness applies to food which is intended for human consumption. *E.g.*, Draughon v. Maddox, 237 N.C. 742, 75 S.E.2d 917 (1953). For a discussion of these cases, see Note, 32 N.C.L. REV. 351 (1954).

[3] The evidence upon which the Court based this inference is not discussed at any length by the Court. An investigation of the appellate records of the case indicates that there was ample evidence that the pressure increase in the bottle occurred while it was in plaintiff's possession. Testimony was introduced, for example, by an expert witness that in his opinion the explosion could only have been caused by an external blow to the bottle, possibly while in plaintiff's possession. Record, p. 16, Prince v. Smith, 254 N.C. 768, 119 S.E.2d 923 (1961).

covery for injuries resulting from explosion of a bottled soft drink on the theory of breach of implied warranty.[4] Several jurisdictions have held that the container will be covered by the implied warranty,[5] unless it is shown that the purchaser or one not in privy with the manufacturer has improperly handled the container.[6] The language of the Court indicates that it will refuse to apply the doctrine irrespective of any showing of improper handling by the purchaser.[7]

It is submitted that the manufacturer is in a far better position than the purchaser to take necessary steps to prevent injuries resulting from defective containers. To insure that he assumes this duty, the implied warranty of fitness should be extended to cover the container as well as the product therein. Only by a clear showing of improper handling of the container by the purchaser should the manufacturer be relieved of liability.

TAXATION

Income Tax

Unitary Business Carrying on Operations in Several States

In *Virginia Elec. & Power Co. v. Currie*[1] the plaintiff (VEPCO) brought an action to recover income taxes paid under protest to the state for the taxable year 1953. VEPCO was a foreign corporation doing business as an electric power company which operated in Northeastern North Carolina, Viriginia, and West Virginia. The

[4] See Brief for Appellant, p. 5, Prince v. Smith, 254 N.C. 768, 119 S.E.2d 923 (1961).

[5] These authorities hold that no distinction can be made between actions for injuries caused by deleterious substances in sealed packages and injuries caused by the containers thereof. *E.g.*, Heller v. Rudmann, 249 App. Div. 831, 292 N.Y. Supp. 586 (1937) (plaintiff cut by defective alcohol bottle when she unscrewed cap); Nicholas v. Nold, 174 Kan. 613, 258 P.2d 317 (1953) (plaintiff allowed to bring actions for both negligence and breach of implied warranty where soft drink bottle exploded).

[6] Natale v. Pepsi-Cola Bottling Co., 7 App. Div. 2d 282, 182 N.Y.S.2d 404 (1959) (plaintiff injured by exploding bottle while attempting to open it on a metal hasp of a gate); Soter v. Griesedieck Western Brewery Co., 200 Okla. 302, 193 P.2d 575 (1948).

[7] However, the Court quotes language to the effect that the doctrine will be denied only where there is evidence of impropr handling by the purchaser. Soter v. Griesedieck Western Brewery Co., *supra* note 6 at 307, 193 P.2d at 580: Implied warranty of suitability for human consumption is not applicable "to a bottle or container which may have become weakened by *the manner or method in which* it is handled." (Emphasis added.)

[1] 254 N.C. 17, 118 S.E.2d 155 (1961), *cert. denied*, 367 U.S. 910 (1961).

dispute arose when VEPCO objected to the use of the gross receipts method of computing its income tax, as provided by G.S. § 105-134-II(3),[2] contending that it would subject it to excessive taxation. Pursuant to G.S. § 105-134-II(4),[3] VEPCO petitioned the North Carolina Tax Review Board, requesting that it be permitted to use either its separate accounting method, or to substitute a wage and salary method for the gross receipts method, or to use an averaging of the wage and salary method and the gross receipts method.[4]

The Tax Review Board permitted VEPCO to substitute for the statutory method an averaging of the wage and salary method and the gross receipts method.[5] (This was VEPCO's third alternative and subjected it to the highest tax of the three it submitted.)[6] VEPCO excepted to this ruling and at a subsequent review by the Board the exceptions were overruled.

The Court affirmed, stating that VEPCO failed to show by clear, cogent, and convincing evidence that the tax imposed by the Tax Review Board was excessive, or that it was taxed on net income which was not reasonably attributable to its operations in North Carolina. The Court also pointed out that VEPCO, in its petition, did not preclude the use of the method selected by the Tax Review Board, nor did VEPCO show that the Tax Review Board had acted in an arbitrary or unlawful manner by allowing it to use an alternative formula which VEPCO had suggested.

The Court did not establish any rule of thumb in the principal case, and it seems that future disputes in this area will be settled on a case by case basis after looking to all of the facts and circumstances surrounding the particular situation. However, the Court did say that the only requirement for a valid allocation formula was that it should not be "intrinsically arbitrary or produce an unreasonable result."[7]

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[2] This is now N.C. GEN. STAT. § 105-134(6)(3)(f) (1958), which is basically the same except for a different definition of "gross receipts."

[3] Now N.C. GEN. STAT. § 105-134(6)(3)(g) (1958).

[4] The gross receipts method gave a net income of $1,292,911 with a tax of $77,574.66. The separate accounting method gave a net income of $317,144 with a tax of $19,026.84. The wage and salary method gave a net income of $892,031 with a tax of $53,521.86. The averaging of the wage and salary method with the gross receipts method gave a net income of $1,092,471 with a tax of $65,548.27.

[5] North Carolina Tax Review Board, Administrative Order No. 27, June 28, 1955.

[6] See note 4 *supra*.

[7] 254 N.C. at 31, 118 S.E.2d at 165. See also Hans Rees' Sons v. North Carolina *ex rel.* Maxwell, 283 U.S. 123 (1931).

"Itemized Personal Deductions" for Nonresident Taxpayers

In *Stiles v. Currie*[8] the taxpayer was a resident of Georgia and operated motels in Georgia, South Carolina and North Carolina. For the years 1954, 1955, and 1956, in addition to taking a deduction for the business expenses related to his North Carolina income, the taxpayer claimed as a deduction a percentage of his total itemized personal deductions which equalled the ratio of his North Carolina gross income to his total gross income. The Commissioner, pursuant to G.S. § 105-147(18),[9] disallowed the deductions which were not related to the taxpayer's business in North Carolina. The taxpayer paid the assessment under protest and brought this suit for refund.

The Court, in affirming the lower court's decision disallowing the recovery by the taxpayer, held that the North Carolina statute in question did not create an arbitrary discrimination against nonresident taxpayers in violation of the United States Constitution.

This statute has been part of the law of North Carolina since 1923.[10] It was modified slightly in 1961 so that now nonresidents may deduct certain contributions paid under the provisions of G.S. §§ 105-147 (15) and (16) even though they are not related to the taxpayer's business income in this state.[11] While it is hard to distinguish between allowing a pro rata part of the personal exemptions to nonresidents[12] and not allowing them a pro rata part of certain itemized deductions, this is the applicable law in North Carolina. This seemingly "arbitrary discrimination on its face" has been held constitutional by the United States Supreme Court in regard to a New York statute,[13] and it is unlikely that the North Carolina statute

[8] 254 N.C. 197, 118 S.E.2d 428 (1961).

[9] "In the case of a nonresident individual, the deductions allowed in this section shall be allowed only if and to the extent that they are connected with income arising from sources within the State . . . ." N.C. GEN. STAT. § 105-147(18) (1958). This statute was modified slightly in 1961. See text at note 11 *infra*. The constitutionality of this section had not been presented to the Court before.

[10] N.C. Sess. Laws 1923, ch. 4, § 306(11).

[11] N.C. GEN. STAT. § 105-147(18) (Supp. 1961).

[12] N.C. GEN. STAT. § 105-149(b) (1958).

[13] N.Y. TAX LAW § 360(11), Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920); this statute was subsequently challenged in Goodwin v. State Tax Commission, 286 App. Div. 694, 146 N.Y.S.2d 172 (1955), *aff'd*, 1 N.Y.2d 680, 133 N.E.2d 711 (1956), *appeal dismissed*, 352 U.S. 805 (1956). A similar statute, OKLA. STAT. ANN. tit. 68, § 880(i) (1954), was upheld in Shaffer v. Carter, 252 U.S. 37 (1920). See also CAL. REV. & TAX CODE § 17301. *But cf.* GA. CODE ANN. § 92-3112(d) (1961). It should also be noted that

will be changed since it was apparently drawn to conform to the New York statute.

The Court pointed out that the taxpayer had the right to deduct these expenses form his Georgia tax return. However, no inference should be drawn that this solved the situation. The tax brackets in Georgia start out at a lower rate;[14] thus this right did not give him as great a tax benefit as he would have gotten if this same deduction were allowed in North Carolina. It is also evident that there will be a complete loss of any tax benefit to the taxpayer who is domiciled in a state which has no income tax law.

INTANGIBLES TAX

Exemption in Cases of Executors Holding Intangible Personal Property for Nonresident Beneficiaries

In *Allen v. Currie*[15] the action was to recover an alleged overpayment of intangible personal property taxes for the years 1956 and 1957 on property which the plaintiff held as co-executor of an estate.[16] The will, after making certain bequests and stipulations, provided that the residue be distributed to six named relatives, all of whom were nonresidents of North Carolina. The plaintiff claimed that under the provisions of G.S. § 105-212 an exemption was allowed "if any intangible personal property held or controlled by a fiduciary domiciled in this State is so held or controlled for the benefit of a nonresident or nonresidents . . . ."[17] The plaintiff contended that as co-executor of the estate she was entitled to this exemption for intangible personal property held for the benefit of nonresidents during the time the estate was in process of administration.[18] The Commissioner disallowed the exemption.

The trial judge held the exemption applicable to the taxpayer's situation, and thus reversed the ruling of the Commissioner. How-

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the United States Supreme Court in the *Travis* case held that a statute which allows personal exemptions to residents but which allows no equivalent exemption to non-residents is in violation of the United States Constitution. *Quaere* whether there is a real justification for this distinction.

[14] GA. CODE ANN. § 92-3101 (1961).

[15] 254 N.C. 636, 119 S.E.2d 917 (1961).

[16] Plaintiff was a North Carolina resident, and the other co-executor was a nonresident.

[17] N.C. GEN. STAT. § 105-212 (1958). This is the first time the Court has ruled on this exemption as applied to executors.

[18] The refunds demanded were $10,444.65 and $6,396.36 respectively. These amounted to three-fourths of the amounts paid since this was the percentage of the gross adjusted estate which went to the nonresidents.

ever, the Court on appeal reversed the lower court and held for the Commissioner. The initial observation of the Court was that an executor acts in a fiduciary capacity.[19] The Court then noted the provisions of the testator's will and concluded that since the nonresidents were to receive the "residue" under the will, no *specific* property was bequeathed to them. The Court said the executor held and controlled intangibles constituting general assets during the process of administration, and that this was enough to defeat the exemption provision. It is hard to see how the Court arrived at this "specificity" requirement since the statute plainly says *any* intangible property held or controlled. The Court gave no examples of what would qualify under its "specific bequest" rule, except for possibly a testamentary trust;[20] moreover, any bequest of intangible personal property, no matter how specific it might be, is subject to the debts of the estate provided the general estate is insufficient to cover the debts of the decedent.[21] *Quaere* whether this would be enough for the Court to remove a "specific" bequest from within the specificity requirement.

It seems that this case could have been decided on the aforementioned point alone, but the Court by dictum continued and fortified its view. The Court pointed out that the statute says the fiduciary must be *domiciled in this state.* This left the Court with the problem of what to do when a nonresident qualified as an executor since he would not be considered as "domiciled" within the state. In answer to this the Court said, "the General Assembly did not intend the exemption should apply when the executor is a resident, or when a co-executor is a resident, but not when a sole executor is a nonresident."[22] While this wording is difficult to interpret, it seems the Court is saying that since the exemption cannot apply to all executors, it applies to none.[23] Thus the probable conclusion of

[19] N.C. GEN. STAT. § 105-163.1(8) (1958); N.C. GEN. STAT. § 32-2 (1950); *In re* Will of Covington, 252 N.C. 551, 114 S.E.2d 261 (1960); McMichael v. Proctor, 243 N.C. 479, 91 S.E.2d 231 (1956).

[20] The Court indicated that the exemption would definitely apply to inter vivos trusts.

[21] See Alsop v. Bowers, 76 N.C. 168 (1877); ATKINSON, WILLS § 136 (2d ed. 1953); Leath, *Lapse, Abatement and Ademption,* 39 N.C.L. REV. 313, 319 (1961).

[22] 254 N.C. at 643, 119 S.E.2d at 923.

[23] The quoted sentence has been interpreted as stating that the exemption applies when the executor or co-executor is a resident, but does not apply when the sole executor is a nonresident. CCH STATE TAX CAS. REP. *N.C.* ¶ 200-800 (1961). It is submitted that this interpretation is clearly erroneous.

the Court appears to be that even though an executor is by definition a fiduciary, this exemption does not apply to executors since by the wording of the statute it cannot apply to all executors, and it would be inequitable and not the intent of the legislature to allow it for some while not allowing it for others. However, the Court did not explicitly say that the exemption would not apply where there was a "specific" bequest. In future cases where the "specific" bequest requirement is met, it is still arguable that the statute will apply, but any such argument would be quickly rebutted if the Court upheld the dictum of the principal case.

It is submitted that the result of the Court in the principal case was correct although the way in which it was reached has left a "cloud" upon the future applicability of the exemption. It seems that the probable reason for the insertion of this exemption in 1947 was to help banks and trust companies in North Carolina who hold property in trust for nonresident beneficiaries. However, North Carolina has neither published records of committee reports nor any publication from which the actual intent of the legislature can be deciphered. For this reason the Court, while it touched upon this probable intent in its opinion, did not decide the case on this ground alone.[24] The problems of who is a "fiduciary" under this statute and the breadth of the exemption were obvious from the outset.[25] While the extent of the exemption still is not settled, the principal case has gone a long way toward the proposition that the Court will not allow the exemption to apply to executors even though they do fall within the broad meaning of the term "fiduciary."

TORTS

NEGLIGENCE

Foreseeability

In *Herring v. Humphrey*[1] a ten-year-old child started a bulldozer which the defendant had parked on a vacant lot, and thereby caused it to run into and damage the plaintiff's house. The Court, in affirming a nonsuit for the defendant, held that under the circum-

[24] The Attorney General in his brief also indicated that this was the probable intent of the legislature.

[25] See generally 25 N.C.L. REV. 376, 475 (1947).

[1] 254 N.C. 741, 119 S.E.2d 913 (1961).

stances of this case foreseeability was essential to the basic element of negligence.[2] Thus the defendant would be liable for leaving the bulldozer so that it could be started by an unauthorized person only if he could reasonably have foreseen that a trespassing child would likely set it in motion.

Ordinarily foreseeability of injury is considered an element of proximate cause by our Court.[3] It is pointed out in the principal case, however, that the test of foreseeability is applicable in both instances—first to determine whether the defendant was negligent, and second to determine whether his negligence was the proximate cause of the alleged injury.

While many courts hold in accord with North Carolina that foreseeability of harm is an essential element of proximate cause,[4] there is a strong current of authority that foreseeability is pertinent only to the question of negligence and does not enter into the test of proximate cause.[5]

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[2] *Id.* at 745, 119 S.E.2d at 916. The Court distinguished the principal case from Campbell v. Model Steam Laundry, 190 N.C. 649, 130 S.E. 638 (1925), and Arnett v. Yeugo, 247 N.C. 356, 100 S.E.2d 855 (1957), stating that the question in the latter two cases was whether the defendant should have reasonably foreseen that consequences of an injurious nature would likely result from the *illegal* parking of the vehicle. *Cf.* Drum v. Millen, 135 N.C. 204, 208, 47 S.E. 421, 422 (1904), where the Court stated: "There is a distinction, we think, between the case of an injury inflicted in the performance of a lawful act and one in which the act causing the injury is in itself unlawful . . . . In the latter case the defendant is liable for any consequence that may flow from his act as the proximate cause thereof, whether he could foresee or anticipate it or not . . . ."

[3] *E.g.*, McNair v. Richardson, 244 N.C. 65, 92 S.E.2d 459 (1956); Patterson v. Moffitt, 236 N.C. 405, 72 S.E.2d 863 (1952).

[4] *E.g.*, Ellis v. Burns Valley School Dist., 128 Cal. App. 550, 18 P.2d 79 (Dist. Ct. App. 1933); Numan v. Bennett, 184 Ky. 591, 212 S.W. 570 (1919); Prees v. Goodrich Oil Co., 49 R.I. 120, 140 Atl. 665 (1928). It is also well settled that foreseeability is an essential element of negligence. *E.g.*, Lawrenceburg v. Lay, 149 Ky. 400, 149 S.W. 862 (1912); Le Roux v. State, 307 N.Y. 397, 121 N.E.2d 386 (1954). See generally Annot., 155 A.L.R. 157 (1945).

[5] *E.g.*, Buckland v. Oregon Short Line R.R., 56 Idaho 703, 56 P.2d 773 (1936); Osborne v. Montgomery, 203 Wis. 223, 234 N.W. 372 (1931). See generally Note, 74 U. PA. L. REV. 485 (1926).

According to the rule prevailing in England, the question of foreseeability is pertinent to the question of negligence; once negligence is established, however, the defendant is liable for all the *direct* consequences of his act, regardless of whether or not he could have foreseen them. *In re* Polemis, Furness, Withy & Co., [1921] 3 K.B. 560. *But see* Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'r Co., [1961] 2 W.L.R. 126, where the defendant was undeniably negligent and thus the only pertinent question, according to the *Polemis* rule, would have been whether the injury was a "direct result" of the negligence. Instead of considering that question, however, the Privy Council based its decision upon the incorrectness of the question itself. It

Joint-tortfeasors

In *Boykin v. Bennett*[6] the question was raised whether the participants in a race on the public highway are joint-tortfeasors.[7] In this case, plaintiff's intestate was killed while riding as a gratuitous passenger in an automobile engaged in a race on a public highway with two other cars. The drivers of all three vehicles were joined as defendants. One of the defendants demurred on the ground that the negligence of each defendant, if any, was independent of and neither concurred with nor joined in the negligence of the other defendants.[8] The Supreme Court overruled the demurrer and held, in accord with the weight of authority,[9] that the participants were engaged in a joint venture and were jointly and concurrently liable for injuries proximately resulting therefrom, provided, of course, the injured party was not a participant in the race or had not acquiesced in it. The Court also pointed out that "a participant who abandons the race, to the knowledge of the other participants, before the accident and injury, may not be held liable."[10]

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stated: "If defendant's liability depends on the reasonable foreseeability of the consequent damage, how is that to be determined except by the foreseeability of the damage which in fact happened." The holding was that *Polemis* "should no longer be regarded as good law." Thus foreseeability became an essential test of proximate cause. *Overseas* is discussed in Note, 36 N.Y.U.L. REV. 1043 (1961).

[6] 253 N.C. 725, 118 S.E.2d 12 (1961).

[7] N.C. GEN. STAT. § 20-141.3(b) (Supp. 1961), makes it a criminal offense for "any person to operate a motor vehicle on a street or highway wilfully in speed competition with another vehicle." The Court in the principal case held that violation of this statute is negligence per se.

[8] The car in which the plaintiff's intestate was a passenger overturned on a curve in the highway. The other two cars did not collide or otherwise interfere with the operation of the car in which the plaintiff's intestate was a passenger.

The other two drivers demurred on the ground that it appeared from the face of the complaint that plaintiff's intestate was contributorily negligent as a matter of law. The lower court sustained the demurrers. This was reversed on appeal because it did not affirmatively appear that the plaintiff's intestate knew or reasonably should have known before the race that the defendants would engage in speed competition; nor did it appear that the intestate "failed to take such measures as a reasonably prudent person would have taken after he learned that a race was contemplated or in progress." 253 N.C. at 727, 118 S.E.2d at 14.

[9] *E.g.*, Saisa v. Lilja, 76 F.2d 380 (1st Cir. 1935); Landers v. French's Ice Cream Co., 98 Ga. App. 317, 106 S.E.2d 325 (1958); Bybee v. Shanks, 253 S.W.2d 257 (Ky. 1952); Reader v. Ottis, 147 Minn. 335, 180 N.W. 117 (1920). See generally 2 BERRY, AUTOMOBILES § 2398 (7th ed. 1935).

[10] 253 N.C. at 732, 118 S.E.2d at 17.

Standard of Care

In *Sparks v. Phipps*[11] the thirteen-year-old plaintiff was seriously injured when his bicycle struck defendant's automobile.[12] The trial judge charged the jury in part as follows: "Now the plaintiff . . . contends that in this case the defendant . . . saw, or should have seen, a thirteen-year-old boy riding a bicycle on the highway . . . and, therefore, realized that that would require a *higher order* of care."[13] Plaintiff appealed the trial court's judgment for the defendant, contending that the trial judge committed error in stating the quantity of care required of the defendant as a contention of the plaintiff, rather than as the law of the case. The Court found, however, that the trial judge had "adequately declared, explained, and applied the law arising on the evidence"[14] in other portions of his charge to the jury.

Negligence is generally defined as the failure to exercise that degree of care which an ordinarily prudent man would exercise in like circumstances.[15] While the standard of care is invariable,[16] the degree of care varies with the exigencies of the occasion,[17] and must be determined by the circumstances in which the plaintiff and the defendant are placed with respect to each other.[18]

The principal case holds, in accord with numerous North Caro-

[11] 255 N.C. 657, 122 S.E.2d 496 (1961).

[12] Defendant's evidence was to the effect that the plaintiff was riding his bicycle down a moderately declining hill with his head down. As he approached the defendant's automobile, which was traveling in the opposite direction, he angled into the defendant's line of traffic. Defendant applied his brakes and pulled over on the shoulder. Just as defendant stopped, plaintiff rode into defendant's left front fender.

[13] 255 N.C. at 661, 122 S.E.2d at 498. (Emphasis added.)

[14] *Id.* at 662, 122 S.E.2d at 499.

[15] *E.g.*, Barnes v. Caulbourne, 240 N.C. 721, 83 S.E.2d 898 (1954); Pritchett v. Southern Ry., 157 N.C. 88, 72 S.E. 828 (1911).

[16] Rea v. Simowitz, 225 N.C. 575, 35 S.E.2d 871 (1945). *But see* Jackson v. Stancil, 253 N.C. 291, 116 S.E.2d 817 (1960), discussed in Note, 39 N.C.L. REV. 294 (1961), where the Court said by way of dictum that the phrase "highest degree of care" establishes a different and higher *standard* by which the common carrier's conduct is measured.

[17] Diamond v. McDonald Serv. Stores, 211 N.C. 632, 191 S.E. 358 (1937). The Court has employed various phrases to state the degree of care. Dunn v. Bomberger, 213 N.C. 172, 195 S.E. 364 (1938) (care not to willfully or wantonly injure); McAllister v. Pryor, 187 N.C. 832, 123 S.E. 92 (1924) ("the greatest degree of care"); Turner v. Southern Power Co., 154 N.C. 131, 69 S.E. 767 (1910) ("the highest degree of care"); Haynes v. Raleigh Gas Co., 114 N.C. 203, 19 S.E. 344 (1894) ("the utmost degree of care").

[18] Rea v. Simowitz, 225 N.C. 575, 35 S.E.2d 871 (1945).

lina decisions[19] and with the great weight of authority,[20] that a motorist must exercise a *higher degree of care* when he sees or reasonably should see children on or near the highway.

Rear-end Collisions

Smith v. Rawlins[21] raised the question whether a following motorist who collides with a vehicle ahead could ever obtain a nonsuit in an action by the driver of the latter vehicle.[22] In that case the Court implied, apparently for the first time, that the mere fact that a following motorist collides with a vehicle ahead furnishes some evidence that the following motorist was negligent. This question was answered affirmatively in *Clark v. Scheld*.[23] In *Clark* the Court stated that while the above rule was generally true, the relative duties owed by drivers of vehicles traveling in the same direction " 'are governed ordinarily by the circumstances in each particular case.' "[24]

Violation of a Statute as Negligence

Generally, violation of a safety statute is negligence per se.[25] However, if the intent of the legislature is to protect only a limited class of individuals, the plaintiff must bring himself within that class in order to maintain an action based on the statute.[26] The rule was

[19] *E.g.*, Pope v. Patterson, 243 N.C. 425, 90 S.E.2d 706 (1956); Greene v. Mitchell County Bd. of Educ., 237 N.C. 336, 75 S.E.2d 129 (1953).

[20] *E.g.*, Christian v. Smith, 78 Ga. App. 603, 51 S.E.2d 857 (1949) ("greater duty of care"); Woodard's Adm'r v. Yellow Transit Freight Lines, Inc., 264 S.W.2d 861 (Ky. 1954) ("high degree of care"); Clouatre v. Lees, 321 Mass. 679, 75 N.E.2d 242 (1947) ("high degree of care"); Lawrence v. Eicher, 271 P.2d 320 (Okla. 1954) (care commensurate with the danger arising from disposition of children); Volkmann v. Fidelity & Cas. Co., 248 Wis. 615, 22 N.W.2d 660 (1946) ("a special degree of care").

[21] 253 N.C. 67, 116 S.E.2d 184 (1960).

[22] See 39 N.C.L. REV. 394 & n.15 (1961).

[23] 253 N.C. 732, 117 S.E.2d 838 (1961). Plaintiff's car was hit from behind when he stopped on the highway to avoid colliding with a vehicle which had stopped just ahead. A fogging machine traveling in the opposite direction had impaired visibility.

[24] *Id.* at 737, 117 S.E.2d at 842.

[25] E.g., N.C. GEN. STAT. § 20-154 (1953), as amended, N.C. GEN. STAT. § 20-154 (Supp. 1961) (failing to give signal when stopping or turning), Queen City Coach Co. v. Fultz, 246 N.C. 523, 98 S.E.2d 860 (1957). See 33 N.C.L. REV. 215 (1955).

[26] *E.g.*, Alsaker v. De Graff Lumber Co., 234 Minn. 280, 48 N.W.2d 431 (1951); Bennett v. Odell Mfg. Co., 76 N.H. 180, 80 Atl. 642 (1911); Gaines Leathers v. Blackwell's Durham Tobacco Co., 144 N.C. 330, 57 S.E. 11 (1907); Erickson v. Kongsli, 40 Wash. 2d 79, 240 P.2d 1209 (1952).

applied in *Benton v. Montague.*[27] In this case the individual defendant set fire to grass on a certain lot which he was using under an agreement with the corporate defendant.[28] He failed to give notice to the adjoining property owners as required by G.S. § 14-136.[29] The fire spread to an adjoining lot and severely burned the three-year-old plaintiff who was playing there. The Court held that the evidence was sufficient to make out a prima facie case of actionable negligence against the individual defendant.[30] The Court "conceded that the primary purpose of the statute was to protect *property,*"[31] but found that the language was sufficiently broad to cover the personal injuries involved in the principal case.[32]

Jenkins v. Leftwich Elec. Co.[33] raised the question whether violation of an administrative safety code is also negligence per se. In this case the plaintiff alleged that the defendant installed a switch box in the plaintiff's home and failed to comply with the National Electrical Code;[34] as a result the house caught fire and was de-

[27] 253 N.C. 695, 117 S.E.2d 771 (1961).

[28] The lot was owned by the corporate defendant and was being used by the individual defendant under an agreement providing that it would be cleared by the individual defendant who would be entitled to use a portion of it for garden purposes.

[29] N.C. GEN. STAT. § 14-136 (1953), provides that any person who intentionally sets fire to any grassland without giving notice to adjoining land owners and without taking care to watch such fire and to extinguish it before it reaches adjoining lands, shall be guilty of a misdemeanor. It further provides that "this section shall not prevent an action for the damages sustained by the owner of any property from such fires." Failure to give notice as required by this statute is negligence per se. Lamb v. Sloan, 94 N.C. 534 (1886).

[30] A nonsuit for the corporate defendant was affirmed. The Court found that it was a mere licensor, and held that the owner of land is not liable for injury caused by the acts of a licensee unless such acts constitute a nuisance which the owner knowingly suffers to remain. 253 N.C. at 702, 117 S.E.2d at 776.

[31] *Id.* at 700, 117 S.E.2d at 775.

[32] The Court said: "[W]here the field, as here, is in a more or less thickly populated community and is adjacent to inhabited lots upon which children are known to play, a violation of the provisions of the statute would constitute negligence. If such negligence is the proximate cause of injury to a child, liability results." *Ibid.*

[33] 254 N.C. 553, 119 S.E.2d 767 (1961). For an excellent discussion of this problem, see Morris, *The Role of Administrative Safety Measures in Negligence Actions,* 28 TEX. L. REV. 143 (1949).

[34] The Building Code Council is authorized by N.C. GEN. STAT. § 143-138(a) (1958), to adopt a North Carolina State Building Code. NORTH CAROLINA STATE BUILDING CODE art. XVI, provides in part. "Except as may be otherwise provided by rules promulgated by the Building Code Council, the electrical systems of a building or structure shall be installed in conformity with the 'National Electrical Code,' as approved by the American Standards Association and as filed in the office of Secretary of State."

stroyed. The Court held, in accord with the majority of jurisdictions which have ruled on this point,[35] that violation of this safety code was negligence per se.

Contributory Negligence

North Carolina decisions appear to be in conflict as to whether a child under fourteen can be held contributorily negligent as a matter of law. Two early cases[36] granted nonsuits because of the contributory negligence of infant plaintiffs. These two cases were criticized, but not expressly overruled, in a later decision[37] which held that it was error for the trial court to instruct the jury that an infant was incapable of contributory negligence.[38] However, a nonsuit on the basis of the contributory negligence of an infant was allowed in the subsequent case of *Tart v. Southern Ry.*[39]

Recently, in *Wilson v. Bright,*[40] it was held that the contributory negligence of a child under fourteen was not a question of law, but one of fact. The Court stated that whether the nine-year-old plaintiff was capable of contributory negligence presented a jury question, with a rebuttable presumption that he was incapable.

Despite this apparent conflict in the cases, there seems to be no

[35] *E.g.,* Langazo v. San Joaquin Light & Power Corp., 32 Cal. App. 2d 678, 90 P.2d 825 (Dist. Ct. App. 1939) (violation of electric-transmission-line regulations); Hyde v. Connecticut Co., 122 Conn. 236, 188 Atl. 266 (1936) (violation of Public Utility Commission rule on the proper place for discharging bus passengers); Pennsylvania R.R. v. Moses, 42 Ohio App. 220, 182 N.E. 40 (1931) (violation of I.C.C. regulation on headlights); Rinehart v. Woodford Flying Serv., 122 W. Va. 392, 9 S.E.2d 521 (1940) (violation of air traffic rules).

Several jurisdictions have held that proof of deviation from administrative regulations is only evidence of negligence. *E.g.,* Ursprung v. Winter Garden Co., 183 App. Div. 718, 169 N.Y. Supp. 738 (1918) (violation of Building Code). See Morris, *supra* note 33, at 185.

[36] Foard v. Tidewater Power Co., 170 N.C. 48, 86 S.E. 804 (1915); Baker v. Seaboard Airline Ry., 150 N.C. 562, 64 S.E. 506 (1909).

[37] Fry v. Southern Pub. Util. Co., 183 N.C. 281, 111 S.E. 354 (1922).

[38] "The responsibility of an infant for contributory negligence is not necessarily a question of law and some expressions in our reports apparently to the contrary are misleading and contrary to the accepted and approved principle which governs in such cases. . . . We cannot approve all that was said, with respect to this question, in *Baker v. R.R.* . . . and *Foard v. Power Co.* . . ." *Id.* at 290, 111 S.E. at 359.

The Court in *Fry* states the test for contributory negligence of an infant: "while a child of tender years is not held to the same degree of care as one of mature years in avoiding an injury arising from the negligent act of another, it is ordinarily a question of fact for the jury to determine, in his action to recover damages therefor, whether, under the circumstances, and considering his age and capacity, he should have avoided the injury complained of by the exercise of ordinary care . . . ." *Ibid.*

[39] 202 N.C. 52, 161 S.E. 720 (1932).

[40] 255 N.C. 329, 121 S.E.2d 601 (1961).

reason why a child under fourteen should not be found contributorily negligent as a matter of law where the evidence admits of but one conclusion and the fact is one about which reasonable minds cannot differ. There is authority in other jurisdictions holding binding instructions for the defendant proper in such circumstances.[41]

The question of contributory negligence was also presented in *Johnson v. Southern Ry.*[42] In this case plaintiff suffered personal injury and property damages when the pickup truck he was driving was struck by defendant's train at a railroad crossing. Plaintiff alleged and offered to prove that the automatic signal light at the crossing failed to give warning of the approaching train.[43] The Court, in reversing a nonsuit for the defendant, held that the momentary failure of an automatic signaling device was not evidence of negligence on the part of the railroad,[44] but that the evidence taken as a whole was sufficient to establish defendant's negligence as the proximate cause of the collision.

The decision therefore turned upon the question whether plaintiff was contributorily negligent as a matter of law. The Court held that the failure of the signal was relevant on the question of plaintiff's contributory negligence, and that although plaintiff was not relieved from his duty to look and listen for an approaching train, he could have relied to some extent on the apparent safety to be implied from the silence of the signal.

This decision is consistent with the view taken by the Court that the failure of an engineer to give warning of an approaching train by ringing a bell or blowing a whistle[45] does not justify the operator of a vehicle in assuming that no train is approaching.[46] He still has a duty to look and listen[47] before attempting to traverse the crossing.[48]

[41] *E.g.*, Teague v. St. Louis S. W. Ry., 36 F.2d 217 (5th Cir. 1929), *cert. denied*, 283 U.S. 827 (1931); Baltimore & O. R.R. v. Hawkes, 34 Del. 25, 143 Atl. 27 (1928); Blackwell v. Union Pac. R.R., 331 Mo. 34, 52 S.W.2d 814 (1932).

[42] 255 N.C. 386, 121 S.E.2d 580 (1961).

[43] Plaintiff also alleged that the train failed to give any warning of its approach, and that the view at the crossing was obstructed by two box cars.

[44] Where, as in the principal case, there is additional evidence of negligence, the failure of the automatic signaling device may be considered with the other evidence, particularly where the railroad has had notice of its defective condition. See generally Annot., 99 A.L.R. 729 (1935).

[45] *E.g.*, Godwin v. Atlantic Coast Line R.R., 220 N.C. 281, 17 S.E.2d 137 (1941); Norton v. North Carolina R.R., 122 N.C. 910, 29 S.E. 886 (1898).

[46] See cases cited note 45 *supra*.

[47] Some courts say the traveler has a duty to stop before traversing a railroad crossing. See, *e.g.*, Scholl v. Philadelphia Surburban Transp. Co., 356 Pa. 217, 51 A.2d 732 (1947).

[48] The operator of a vehicle "is not required to leave his vehicle and go

LAST CLEAR CHANCE

The Court in *Arvin v. McClintock*[49] recognized the doctrine of last clear chance,[50] but held that the doctrine is not applicable where the plaintiff is contributorily negligent as a matter of law. Although this holding is in accord with many prior North Carolina cases,[51] there was a strong dissent on this point in the principal case,[52] which contended that the view taken by the majority of the Court did not accurately express the correct legal principle. In support of the view taken by the dissent, it has been suggested that this exception to the last clear chance doctrine, unique to North Carolina,[53] is as illogical[54] as it is confusing.[55]

The last clear chance doctrine was also before the Court in

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upon the tract on foot to make his observations. Yet, it is his duty to take such precautions as an ordinarily prudent man would take under the same or similar circumstances." Johnson v. Southern Ry., 255 N.C. 386, 390, 121 S.E.2d 580, 582 (1961).

[49] 253 N.C. 679, 118 S.E.2d 129 (1961).

[50] "The contributory negligence of the plaintiff does not preclude a recovery where it is made to appear that the defendant, by exercising reasonable care and prudence, might have avoided the injurious consequences to the plaintiff, notwithstanding plaintiff's negligence; that is, that by the exercise of reasonable care defendant might have discovered the perilous position of the party injured or killed and have avoided the injury, but failed to do so." Ingram v. Smoky Mtn. Stages, Inc., 225 N.C. 444, 447, 35 S.E.2d 337, 339 (1945).

In referring to this rule the Court has often employed the phrase "doctrine of *discovered* peril." See, *e.g.*, Wade v. Jones Sausage Co., 239 N.C. 524, 80 S.E.2d 150 (1954). The doctrine of discovered peril requires that the perilous position of the plaintiff be actually discovered by the defendant. As the Court requires only that the defendant might have discovered the peril of the injured party, it seems the Court is actually applying the doctrine of *discoverable* peril. See Note, 36 N.C.L. REV. 545 (1958).

[51] *E.g.*, Dowdy v. Southern Ry., 237 N.C. 519, 75 S.E.2d 639 (1953); Ingram v. Smoky Mtn. Stages, Inc., *supra* note 50; Redmon v. Southern Ry., 195 N.C. 764, 143 S.E. 829 (1928).

[52] Three Justices dissented to this statement but concurred in the result, stating that the evidence was insufficient to show that the defendant saw or should have seen the perilous position of the plaintiff's intestate in time to avoid injuring him. 253 N.C. at 686, 118 S.E.2d at 134.

[53] See Note, 33 N.C.L. REV. 138, 139 (1955).

[54] See Dowdy v. Southern Ry., 237 N.C. 519, 528, 75 S.E.2d 639, 645 (1953) (dissenting opinion): "It is stated in the majority opinion that the doctrine of last clear chance 'does not apply when the plaintiff is guilty of contributory negligence as a matter of law.' Conversely, may it not be said with equal force that one may not be adjudged contributorily negligent as a matter of law when the doctrine of last clear chance applies?"

[55] See Note, 33 N.C.L. REV. 138 (1955), where the author points out the problem of determining the point at which *mere* contributory negligence becomes contributory negligence *as a matter of law*, which bars the submission of the issue of last clear chance to the jury.

Green v. Charlotte Chem. Lab., Inc.[56] In this case the Court reasoned that since the doctrine presupposes negligence on the part of the plaintiff,[57] it is inapplicable as between defendants who are concurrently negligent.[58] This holding is in accord with the established majority view.[59]

PERJURED TESTIMONY—DEFAMATION OF THE DEAD

Plaintiff's intestate was killed in a head-on collision between an automobile driven by the intestate and a truck owned by the county coroner, in his individual capacity, and driven by his agent. The coroner instituted an action as a result of this collision and Gillikin, as administrator of the intestate, set up a counterclaim.[60] A nonsuit was entered on the counterclaim and the four cases[61] here discussed were brought by Gillikin as a result of occurrences prior to and during that trial.

In the first case[62] plaintiff alleged that the coroner conspired to suborn perjured testimony in the prior action[63] and that he perpetrated a fraud on the plaintiff by the perjured testimony, thereby preventing him from recovering for the wrongful death of his intestate.[64] The Court held (1) that although perjured testi-

[56] 254 N.C. 680, 120 S.E.2d 82 (1961), discussed in Note, 40 N.C.L. REV. 633 (1962).

[57] Taylor v. Rierson, 210 N.C. 185, 185 S.E. 627 (1936).

[58] "[O]ne defendant may not resist recovery by plaintiff on the ground that a co-defendant had the last clear chance to avoid the accident. . . . The doctrine has application only as between plaintiff and a defendant." 254 N.C. at 689, 120 S.E.2d at 88.

[59] *E.g.*, Pacific Tel. & Tel. Co. v. Parmenter, 170 Fed. 140 (9th Cir. 1909); Shield v. F. Johnson & Son Co., 132 La. 773, 61 So. 787 (1913); Kimbriel Produce Co. v. Mayo, 180 S.W.2d 504 (Tex. Civ. App. 1944). See generally 38 AM. JUR. *Negligence* § 227 (1941). *But cf.* Colorado & So. Ry. v. Western Light & Power Co., 73 Colo. 107, 214 Pac. 30 (1923), where the court seems to have recognized the possibility of applying the doctrine as between persons charged with successive acts of negligence so as to show the later act was the sole proximate cause of the injury.

[60] The appellate records do not disclose the nature of the counterclaim, but apparently it was for the wrongful death of the plaintiff's intestate.

[61] Gillikin v. Ohio Farmers Indem. Co., 254 N.C. 250, 118 S.E.2d 605 (1961); Gillikin v. United States Fid. & Guar. Co., 254 N.C. 247, 118 S.E.2d 606 (1961); Gillikin v. Bell, 254 N.C. 244, 118 S.E.2d 609 (1961); Gillikin v. Springle, 254 N.C. 240, 118 S.E.2d 611 (1961).

[62] Gillikin v. Springle, *supra* note 61.

[63] Plaintiff alleged that he was nonsuited in the prior action because the coroner, the insurer of the vehicles and a commercial photographer coerced witnesses, concealed the truth, and conspired with others to show that the collision was caused by the negligence of the plaintiff's intestate.

[64] Plaintiff also alleged that the coroner defamed the intestate by asserting

mony[65] and the subornation of perjured testimony are criminal offenses, neither are torts supporting a civil action for damages,[66] and (2) that plaintiff could not recover for fraud unless and until the judgment denying him the right to recover was vacated.[67]

In the second case[68] plaintiff alleged that the defendant, a commercial photographer, took pictures falsely depicting conditions at the collision and permitted the use of these pictures at the prior trial. Plaintiff also alleged that these derogatory pictures were distributed throughout the county. Thus, the Court, for the first time, was called upon to decide whether one may recover damages for the defamation of a dead person. It held that since there was no common law right to recover for defamation of a dead person[69] and no such right had been created by statute in North Carolina[70] the plaintiff had failed to state a cause of action.[71]

The defendant in the third case[72] was the holder of the coroner's surety bond. In this case plaintiff based his right to recover on the refusal of the coroner to hold an inquest in regards to the collision. The Court held that a judicial officer cannot be held accountable in an action for damages for the manner in which he performs his duties even though it is alleged that he acted corruptly and maliciously[73] and, thus, it follows that no right of action exists

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that he was drunk when he drove the automobile and by exhibiting derogatory pictures of the intestate, and that he prostituted the office of coroner to his personal advantage. These allegations were considered by the Court in *Gillikin v. Bell* and *Gillikin v. United States Fid. & Guar. Co.*, respectively.

[65] N.C. GEN. STAT. §§ 14-209-10 (1953).

[66] *Accord,* Brewer v. Carolina Coach Co., 253 N.C. 257, 116 S.E.2d 725 (1960); Godette v. Gaskill, 151 N.C. 52, 65 S.E. 612 (1909).

[67] *Accord,* Scopano v. United States Gypsum Co., 166 Misc. 805, 3 N.Y.S.2d 300 (Sup. Ct. 1938).

[68] Gillikin v. Bell, 254 N.C. 244, 118 S.E.2d 609 (1961); also discussed under CIVIL PROCEDURE, *Statute of Limitation, supra.*

[69] Fleagle v. Downing, 183 Iowa 1300, 168 N.W. 157 (1918); Hughes v. New England Newspaper Publishing Co., 312 Mass. 178, 43 N.E.2d 657 (1942).

[70] See N.C. GEN. STAT. § 28-173 (Supp. 1961). Some states have statutes making defamation of the dead a criminal offense, but they generally are construed to create no civil liability. *E.g.,* Saucer v. Giroux, 54 Cal. App. 732, 202 Pac. 887 (Dist. Ct. App. 1921); Renfro Drug Co. v. Lawson, 138 Tex. 434, 160 S.W.2d 246 (1942).

[71] The Court also found that this conduct would not create civil liability for perjury or subornation of perjury for the reasons given in *Gillikin v. Springle.*

[72] Gillikin v. United States Fid. & Guar. Co., 254 N.C. 247, 118 S.E.2d 606 (1961).

[73] *Accord,* Ravenscroff v. Casey, 139 F.2d 776 (2d Cir. 1944), *cert. denied,* 323 U.S. 745 (1944), *rehearing denied,* 323 U.S. 814 (1944) (police and

against the surety on the coroner's official bond.[74]

The defendant in the fourth case[75] was the insurer of both vehicles involved in the collision. In this case plaintiff alleged that the defendant conspired to defeat his right of action in the prior litigation. The Court held that plaintiff failed to state a cause of action entitling him to damages in a civil action.[76]

TRESPASS

At early common law, every unauthorized entry into the close of another was a trespass, imposing liability upon the trespasser.[77] The modern trend, however, is to limit liability to invasions which are intended, or negligent, or the result of abnormally dangerous activity.[78]

The first time our Court was faced with the question whether an unintentional and non-negligent entry to land constituted trespass it followed the common law rule.[79] When again faced with this question, however, the Court reversed its former position,[80] and held, in accord with the weight of authority,[81] that an unintentional entry on the land of another does not subject the actor to liability, absent a showing of negligence. This latter holding was reaffirmed in the

a county judge); Burgin v. Sullivan, 151 Ala. 416, 44 So. 202 (1907) (mayor acting as a magistrate); Furr v. Moss, 52 N.C. 525 (1860) (justice of the peace); Price v. Cook, 120 Okla. 105, 250 Pac. 519 (1926) (county attorney). See generally Annot., 173 A.L.R. 836 (1948).

[74] For cases holding in accord with the principal case that the surety on an official bond is not liable on the bond where the principal has judicial immunity, see Phelps v. Dawson, 97 F.2d 339 (8th Cir. 1938); Anderson v. Manley, 181 Wash. 327, 43 P.2d 39 (1935).

[75] Gillikin v. Ohio Farmers Indem. Co., 254 N.C. 250, 118 S.E.2d 605 (1961).

[76] This holding was based on the reasons given in *Gillikin v. Springle*. See text at note 62 *supra*.

[77] *E.g.*, Gregory v. Piper, 9 B. & C. 591, 109 Eng. Rep. 220 (K.B. 1829). See RESTATEMENT, TORTS § 166, comment *b* (1934).

[78] *E.g.*, Edgarton v. H. P. Welch Co., 321 Mass. 603, 74 N.E.2d 674 (1947); Puchlopek v. Portsmouth Power Co., 91 N.H. 440, 136 Atl. 259 (1940). See generally PROSSER, TORTS § 13 (2d ed. 1955).

[79] Newsom v. Anderson, 24 N.C. 42 (1841). In this case the defendant innocently cut down a tree on his own land, the top of the tree falling on the plaintiff's land. The trial judge charged that "the plaintiff could not recover, unless the tree was designedly or carelessly felled by the defendant." The charge was held to be error. See also Dougherty v. Stepp, 18 N.C. 371, 372 (1835), where the court stated in a dictum that "every unauthorized, and therefore unlawful, entry into the close of another, is a trespass."

[80] Smith v. Pate, 246 N.C. 63, 97 S.E.2d 457 (1957), discussed in Note, 36 N.C.L. REV. 251 (1958).

[81] *E.g.*, Jewell v. Dell, 284 S.W.2d 92 (Ky. 1955). See generally RESTATEMENT, TORTS § 166 (1934).

recent case of *Schloss v. Hallman*.[82] In this case the defendant was traveling in the right lane of a four lane street when another vehicle turned into the lane immediately in front of him. In order to avoid a collision with the other vehicle and a vehicle immediately following him, he applied his brakes and turned his truck to the right. When his wheel hit the curb, he lost control and ran into a billboard adjoining the street. In an action brought by the owner of the billboard, the Court held that the evidence was insufficient to establish actionable negligence on the part of defendant.

TRIAL PRACTICE

PROCESS

Moss v. Winston-Salem[1] again presented to the Court the question of the constitutionality of G.S. § 55-145(a)(3). Under that statute a foreign corporation is subject to suit by a resident of this state, whether or not it is transacting business in this state, on any cause of action arising

> out of the production, manufacture, or distribution of goods by such corporation with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed, regardless of how or where the goods were produced, manufactured, marketed, or sold or whether or not through the medium of independent contractors or dealers.

The statute had been held unconstitutional upon the facts involved in *Putnam v. Triangle Publications, Inc.*[2] and *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*[3] On the other hand, the statute was held constitutional upon the facts appearing in *Shepard v. Rheem Mfg. Co.*[4]

[82] 255 N.C. 686, 122 S.E.2d 513 (1961). For a recent discussion of liability for damages resulting from trespass and concussion damages, see Note, 40 N.C.L. REV. 640 (1962).

[1] 254 N.C. 480, 119 S.E.2d 445 (1961).

[2] 245 N.C. 432, 96 S.E.2d 445 (1957), commented upon in 36 N.C.L. REV. 458 (1958), and Note, 35 N.C.L. REV. 535 (1957).

[3] 239 F.2d 502 (4th Cir. 1956), discussed in Note, 35 N.C.L. REV. 546 (1957).

[4] 249 N.C. 454, 106 S.E.2d 704 (1959), commented upon in 37 N.C.L. REV. 465 (1959).

In the *Moss* case suit was brought against an Illinois corporation as manufacturer of a power mower which caused injury to the plaintiff while being operated in North Carolina. The negligence charged was that the manufacturer had failed to supply a guard or to advise that a screening guard should be used. Service was made pursuant to G.S. § 55-145(a)(3) on the theory that the Illinois corporation defendant had manufactured the mower with reasonable anticipation that it would be used in North Carolina. It appeared that the defendant corporation had no agents in, or contacts with, the state of North Carolina; that it sold the mower in question to Todd Company of Norfolk, Virginia; that it had no interest in Todd Company and that Todd Company was an independent distributor. On the basis of these facts the Court held the service was invalid and that if the statute in question authorized such service it would be unconstitutional if applied in this situation in that it would deprive the defendant of its property without due process of law and would also unreasonably obstruct and burden interstate commerce. The Court found that the case was controlled by its decision in *Putnam v. Triangle Publications, Inc.*[5]

Discovery—Physical Examination

In the ordinary personal injury case, it is customary for counsel to agree that the defendant may have a physician of his choice examine the plaintiff. When such examination is refused application must be made to the court. No statute covers the situation in this state, but the Supreme Court has held that trial judges have inherent power, in their discretion, to order the personal injury plaintiff to submit to a physical examination.[6]

[5] 245 N.C. 432, 96 S.E.2d 445 (1957).

[6] Two leading cases in North Carolina on the subject of physical examination by defendant are Fleming v. Holleman, 190 N.C. 449, 130 S.E. 171 (1925), and Flythe v. Eastern Carolina Coach Co., 195 N.C. 777, 143 S.E. 865 (1928). In *Fleming* it was held that when a plaintiff shows the injured portion of his body to the jury while testifying, the defendant has a right to a physical examination. This examination, the Court said, could, in the court's discretion, be made either in or out of the presence of the jury. The Court restricted defendant's right to a physical examination to that portion of the plaintiff's body revealed to the jury. In *Flythe* defendant asked for an x-ray examination after the jury was empanelled. The examination was denied and the Supreme Court upheld the denial both because the request had not been made in due time and because x-rays had been introduced by the plaintiff which the defendant's physicians were permitted to examine. It was in the *Flythe* case that the Court expressly upheld the inherent power of a trial judge to order a physical examination of the plaintiff in his discretion.

In *Helton v. J. P. Stevens Co.*[7] plaintiff sued for damages alleged to be the result of a brain injury. Defendants answered, denying the negligence and the injury. Plaintiff refused defendant's request that he be examined by a neurologist named by defendant, and thereupon defendant applied to the trial court for an order requiring the plaintiff to submit to an examination by the named neurologist. The court made the order as requested. Plaintiff excepted and appealed assigning two grounds: (1) lack of authority on the part of the court to make the order, and (2) the selection by the court of the neurologist named by defendants.

On appeal, the Supreme Court upheld the discretionary power of the trial judge to make the order, but reversed because the lower court had named the neurologist designated by the defendant. The significant language of the Court is, "It goes without saying the exclusive duty to make the selection rests with the Court. Neither party should have advantage in the selection."[8] The Court then quotes, apparently with approval, the following language from *American Jurisprudence,*

> When the examination is compulsory, there is obvious propriety in the selection of the experts by the court rather than by one or both of the parties. . . . The court, in making the order . . . and in designating the experts to execute it, is serving the interest of neither the defendants nor the plaintiff, but the ends of justice.[9]

In remanding the case, the Court said it was certain the trial judge did not intend to hold the scales unevenly between the parties when he selected the specialist named by the defendants. But, it found that "it was the duty of the court to make the selection independently of the wishes of either."[10] And to the end that "even appearances of favoritism may be removed"[11] the Court directed the trial court to make its own selection of the specialist to make the examination.

This ruling of the Court raises various side questions.

(1) Is the doctor who is selected by the court to be deemed the court's witness or the witness of the defendant? If

[7] 254 N.C. 321, 118 S.E.2d 791 (1961).
[8] *Id.* at 322, 118 S.E.2d at 792.
[9] *Ibid.*, citing 17 AM. JUR. *Discovery and Inspection* § 45 (1957).
[10] 254 N.C. at 323, 118 S.E.2d at 792.
[11] *Ibid.*

the court's witness, presumably the court would call him to the stand and conduct the direct examination, whereupon, both counsel for the plaintiff and defendant could cross-examine. If he is deemed the defendant's witness, the defendant must conduct the direct examination and cannot under normal circumstances cross-examine.

(2) Suppose the defendant has suggested to the trial judge that Dr. *X* make the examination. The trial judge, being aware of the *Helton* decision replies, "You should not have suggested the name of Dr. *X*, although to be perfectly frank with you I contemplated ordering plaintiff to be examined by Dr. *X*." May the court now appoint Dr. *X* or is he barred from so doing by reason of defendant's suggestion?

(3) May the court ask for a list of names of specialists in the particular field from both counsel for plaintiff and defendant and being supplied with the same may he choose from the list submitted by either party a name which does not appear on the list of the other?

It is submitted that, if the procedure outlined by the Court in the *Helton* case is to be followed, the trial judge should call the physician named by him to the stand as the court's witness. He should then be subject to cross-examination by both parties. The jury would appreciate the full impartiality of the witness in such a situation. But, if the defendant is required to call the doctor to the stand as his witness, he not only loses the right of cross-examination under the general rule applicable, but the doctor appears to the jury to be the defendant's witness. Jurors expect the physician called by the plaintiff to be favorable to him and the physician called by the defendant also to be favorable to the defense. Appropriate weight is given to this fact and the testimony of both physicians is looked upon by the jury in terms of, "Well, you know he was the plaintiff's doctor and probably wants to help him out," or "I never found any doctor called by the defendant yet, who every finds anything wrong with the plaintiff."

Since the plaintiff generally has the choice in calling his own physician, be he specialist or otherwise, one may well wonder if the scales are evenly balanced when on the one side is a physician chosen

by the plaintiff and on the other a physician in whose selection the defendant has had no choice. While a strict application of the maxim "What's sauce for the goose is sauce for the gander" would result in the court naming any physician designated by the defendant, the discretionary power of the judge is to be used in determining the suitability of the named physician for the purpose. But, it is submitted, that too much "sauce" is denied the defendant when the trial judge is told he cannot name a physician requested by the defendant even though the judge finds he is an eminently able doctor for the purpose.

REFERENCES

A compulsory reference is an interlocutory order and an appeal therefrom will not lie forthwith unless it appears that the order deprives the appellant of a substantial right which might be lost were he required to await a review after final judgment. In *Harrell v. Harrell*[12] a wife sued for alimony without divorce. After answer had been filed she made application for subsistence allowance pendente lite together with counsel fees. The trial court considered affidavits filed by both parties together with certain testimony but was unable to determine therefrom the amount of the defendant's income. Believing he should have this information, the trial court made an order of reference and directed the referee to take evidence from the parties and all known sources and to report his findings as to the defendant's income. He also ordered the defendant, who was in the business of hauling produce from Florida, to pay into the clerk's office $200 as an undertaking to pay such expenses as might be incurred.

Defendant excepted to these orders and gave notice of appeal. The court declined to sign the appeal entry and refused to fix an appeal bond. The defendant again excepted and on his application the Supreme Court granted certiorari.

On certiorari the Court reversed the action of the lower court in making the order of reference and requiring the deposit by the defendant. It found sufficient evidence in the record upon which the trial court could make a subsistence award and an allowance of counsel fees pendente lite. Determination of the amount of defendant's income was deemed not necessary at this preliminary hearing. The Court noted that it is common knowledge that references are costly

[12] 253 N.C. 758, 117 S.E.2d 728 (1961).

and said there was no need to put the defendant to this expense which might well exceed the $200 bond required by the trial court. Were the defendant not allowed the appeal at this time, the Court said, he would be deprived of a substantial right in that he would have become saddled with the costs of an unnecessary reference.

The Court distinguished *Cram v. Cram*[13] in which a trial judge had made an order of reference to ascertain the amount of the husband's income *after* a final hearing on the merits and a determination in favor of the wife for alimony. Without expressly approving the language of the Court in the *Cram* case, the Court noted that the decision was inapplicable in *Harrell* because *Cram* did not involve alimony pendente lite, but permanent alimony.

In *Rudisill v. Hoyle*[14] action was brought against the executor of a deceased executrix by an administrator for an accounting. Defendant demurred on three grounds: (1) want of jurisdiction; (2) misjoinder of parties and causes; and (3) that the deceased executrix was the owner in fee of the entire estates of the decedent. The trial judge overruled the demurrer. Defendant also pleaded that he had filed a final account. The trial judge, being of the opinion that the issues raised by the pleadings required examination of a long account, made a compulsory reference.

On appeal the Supreme Court upheld the rulings of the trial court on the demurrer. On the question of whether, in the face of the plea of having filed a final account, a reference could be made, the Court declared that the plea was "not such a plea in bar as to prevent a reference."[15] Accordingly, the case was remanded to the lower court for further proceedings.

JUDGMENTS

Vacation of Consent Judgment on Ground of Lack of Authority of Attorney to Consent

In *Howard v. Boyce*[16] motion was made in the cause to vacate a

[13] 116 N.C. 288, 21 S.E. 197 (1895).
[14] 254 N.C. 33, 118 S.E.2d 145 (1961).
[15] *Id.* at 254, 118 S.E.2d at 154. For a leading authority setting out the types of pleas which are deemed pleas in bar and will prevent a reference until the plea is disposed of, see Murchison Nat'l Bank v. Evans, 191 N.C. 535, 132 S.E. 563 (1926). See also on pleas in bar Solon Lodge v. Ionic Lodge, 245 N.C. 281, 95 S.E.2d 921 (1957), commented upon in 36 N.C.L. REV. 460 (1958); Sledge v. Miller, 249 N.C. 447, 106 S.E.2d 868 (1959), commented upon in 37 N.C.L. REV. 468 (1959).
[16] 254 N.C. 255, 118 S.E.2d 897 (1961).

consent judgment of nonsuit approved by persons appearing as counsel for plaintiff and defendant. The judgment had been entered in 1945 and the motion to vacate was filed in 1960. The motion was denied by the trial court both for the reason that the movants failed to show they had a meritorious cause of action and that the movants had been guilty of laches, *i.e.*, unreasonable delay in moving to vacate the judgment.

On appeal the Supreme Court reversed. It held that it was unnecessary for the movants to show they had a meritorious case when their contention was that the attorney purportedly representing them had no authority to do so.[17] Further, the Court held that the mere passage of a long length of time did not in and of itself establish laches. It remanded the case to the lower court with instructions that it determine the facts as to the existence of the authority in the attorney and also find facts relative to the alleged laches of the movants.

Res Judicata—Effect of Judgment in Favor of Passenger Against Operators of Two Cars as to the Rights of the Car Operators Inter Se

In *Lumberton Coach Co. v. Stone*[18] the Court held that a judgment in favor of a passenger against both motorists involved in the two car collision which resulted in injuries to the passenger was res judicata and operated as a bar to one of the motorists suing the other on the theory that the judgment against both motorists in the passenger suit, whether it be consent or otherwise, established the joint negligence of each motorist. The same rule was applied by the Court in *Pack v. McCoy*,[19] where a consent judgment entered in a minor's action against the drivers of the two motor vehicles involved was held to bar action between the owners of the two motor vehicles.

In reaching the above results, the North Carolina Supreme Court went contra to the majority rule in this country.[20] Now in *Gunter v.*

[17] In holding that the showing of a meritorious defense was not required the Court was following the view expressed by Justice Bobbitt in behalf of the majority of the Court in Owens v. Von Cannon, 251 N.C. 351, 111 S.E.2d 700 (1959).

[18] 235 N.C. 619, 70 S.E.2d 673 (1952).

[19] 251 N.C. 590, 112 S.E.2d 118 (1960).

[20] See criticism of the *Pack* case in Note, 39 N.C.L. REV. 90 (1960), and comment in 39 N.C.L. REV. 407 (1961).

Winders[21] the Court has overruled the *Lumberton Coach Co.*[22] case and those cases based on it, and has fallen in line with the weight of authority. The rule of *Gunter* is that a judgment in favor of a passenger against several motorists involved in the accident is not to be deemed res judicata in an action between the motorists *unless* it appears that the rights and liabilities of the motorists, *inter se,* were put in issue by the pleadings in the suit brought by the passenger.

This decision will be a welcome relief to the bar in that it now makes possible settlements in infants' friendly suits against several motorists without running the risk that the consent judgment will be deemed res judicata (as it was in *Pack*) between the motorists.

COVENANT NOT TO SUE—CREDIT OF AMOUNT PAID ON JUDGMENT

In *Ramsey v. Camp*[23] the plaintiff was a passenger in a car driven by one Wilson which collided with a car driven by Camp. On June 3, 1958, plaintiff gave a covenant not to sue to Wilson in the amount of $1,000. This action against Camp was instituted on July 12, 1957, prior to the giving of the covenant, and came to trial after the covenant had been given in August 1958. On motion of Camp, Wilson was made an additional defendant and Camp filed a cross-action against him for contribution.

The jury returned a verdict for the plaintiff against Camp in the amount of $1,000 and held that Wilson was not negligent. Camp had not pleaded the payment by Wilson for the covenant but now moved the trial judge that the judgment against him be credited with the $1,000 paid by Wilson. (This, if done, had the effect of satisfying the judgment to the extent of the $1,000 jury verdict.) The trial judge refused to allow the credit and defendant appealed.

The Supreme Court held that the plaintiff was entitled to but one satisfaction and that any amount paid by Wilson to the plaintiff in exchange for the covenant not to sue had to be credited on the judgment against Camp. The Court restated the rule that where a party settles with one joint tortfeasor by way of a covenant not to sue the remaining tortfeasors are entitled to credit.[24] The fact that

[21] 253 N.C. 782, 117 S.E.2d 787 (1961); also discussed under CIVIL PROCEDURE, *Res Judicata, supra.*

[22] 235 N.C. 619, 70 S.E.2d 673 (1952).

[23] 254 N.C. 443, 119 S.E.2d 209 (1961).

[24] On the general subject of the effect of covenants not to sue, as distinguished from the effect of releases, see *Statutory Comment,* 40 N.C.L. REV. 88 (1961).

the covenant not to sue was given to one who is found later by the jury to have not been a joint tortfeasor is immaterial. Neither was it material that the defendant Camp had not pleaded the existence of the covenant not to sue and the payment thereunder.

TRUSTS

Precatory Words

In *Clark v. Connor*[1] the Court had to determine whether the testator's devise to his wife was in trust or in fee simple. The testator left all his property to his wife "to take, hold, and do with as she shall deem best and proper for the benefit of herself and our children." The will further provided that any advancements made to his children by him or subsequently by his widow should be accounted for in a division of the property. In so providing the testator stated: "the intent and purpose of this provision is that said children shall share equally in my estate and in their mother's estate."

The trial court held that the testator had created a trust. The Supreme Court, reversing, discounted the words "take, hold, and do with as she deem best and proper for the benefit of herself and our children" as being merely precatory and not mandatory. A clear intention to make the devise in fee simple was found. In so holding the Court declared that prior cases are of little value in the constructions of wills, because no two wills can be interpreted the same although the language used may be practically identical. Nevertheless, other cases are occasionally helpful.

In *Young v. Young*[2] a trust was found just as readily as the present Court found a fee where the language of the will was,

> To my beloved wife I give all my estate, real, personal, and mixed, to be managed by her (and that she may be enabled the better to control and manage our children), to be disposed of by her to them in that manner she may think best for their good and her own happiness.[3]

[1] 253 N.C. 515, 117 S.E.2d 465 (1961); also discussed under Wills and Administration, *Construction, infra.*

[2] 68 N.C. 309 (1872).

[3] *Id.* at 310. The language here is very similar to language of the will in the *Clark* case.

In *St. James v. Bagley*[4] the question arose whether a trust had been imposed on land by the deed conveying it to plaintiff church. The grantor gave the land "for the purpose of aiding in the establishment of a Home for Indigent Widows or Orphans or in the promotion of any other charitable or religious objects to which the property hereinafter conveyed may be appropriated."[5] A home for elderly women was built but subsequently burned. The church, having no other use for the land, questioned whether it had a fee simple title to the land. Learning of this the grantor wrote the pastor of the church, informing him that no trust was imposed and that he had made the conveyance in fee.

In holding that there was no trust the Court said that the expression of motive imposed no trust; precatory words are not imperative unless it is clear from the context that the grantor intended them to be. The words declaring motive were in the recital and not in the habendum where declarations of trust are usually found. The Court also noted that the grantor was an intelligent man and "*evidently* knew how to use language declaring a trust,"[6] and that an eminent lawyer witnessed the deed.[7] The Court claimed that it was not using the grantor's letter to support its conclusion.

In *Brinn v. Brinn*[8] the will passed all property to the wife of the testator during her widowhood "to be handled as she chooses." In so devising his property the testator made the following requests of her in the will: (1) that she consider advancements in distributing the property to the children and that she make such distribution as or when she saw fit; (2) that she undertake complex insurance investments for his sons; (3) that she invest $1,000 for the benefit of his church for ten years, and this bequest was to be continued at the discretion of his heirs; (4) that his sister be cared for and that she be given a proper burial; and (5) that should his wife die before she fully executed his requests the estate should be equally divided between his four children and his son, Preston, should be made executor or administrator to carry out his wishes.

The Court stated that where a limited estate is devised to the

[4] 138 N.C. 384, 50 S.E. 841 (1905).
[5] *Id.* at 385, 50 S.E. 841.
[6] *Id.* at 394, 50 S.E. 844. (Emphasis added.)
[7] In the *Clark* case the Court cited *St. James* with approval for the proposition that because a prominent lawyer witnessed the instrument, this indicates that no trust was intended since none was clearly and definitely expressed.
[8] 213 N.C. 282, 195 S.E. 793 (1938).

first taker, words of request addressed to the devisee will usually make him a trustee for the persons in whose favor such requests are made. In such a situation the words of request are prima facie testamentary and imperative and not precatory in effect. In other words, the Court found an intention to create a trust from all the provisions of the will, taken as a whole, despite particular precatory expressions.

From a reading of these cases it appears that the only way to avoid the possible thwarting of the grantor's or testator's wishes is by more careful drafting of wills and deeds by the members of the bar. If a trust is intended accurate technical trust language should be employed. If the conveyance or devise is meant to be in fee simple, any other possibility should be expressly negatived.

UNEMPLOYMENT INSURANCE

SEVERANCE AND VACATION PAY—ELIGIBILITY FOR UNEMPLOYMENT INSURANCE BENEFITS

In *In re Tyson*[1] and *In re Shuler*,[2] the Court reached divergent results as to the relationship between unemployment insurance benefits under the North Carolina Employment Security Law[3] and severance and vacation payments and supplementary unemployment benefits provided for in collective bargaining contracts between unions and employers. In *Tyson*, it was held that the severance and vacation payments, for a projected period on a pro rata basis, precluded eligibility for unemployment insurance benefits; in *Shuler*, the unemployed worker was permitted to receive both the contract payments and the statutory benefits. The legislative policy statement[4] was used in support of both results. The problem in *Tyson* has given rise to much difference of opinion;[5] the decision in *Tyson* is in line with the majority view. *Shuler* appears to be the only supreme court decision of its kind. However, it is in accord with most of the administrative interpretations of the relevant statutes

[1] 253 N.C. 662, 117 S.E.2d 854 (1961).
[2] 255 N.C. 559, 122 S.E.2d 393 (1961).
[3] N.C. GEN. STAT. §§ 96-8 to -19 (1958), as amended, N.C. GEN. STAT. §§ 96-8 to -18 (Supp. 1961).
[4] N.C. GEN. STAT. § 96-2 (1958).
[5] See 57 COLUM. L. REV. 437 (1957); 36 MINN. L. REV. 113 (1951); 100 U. PA. L. REV. 144 (1951).

and with the statutes enacted to overcome the few administrative and court decisions to the contrary.[6] In both *Tyson* and *Shuler*, the Employment Security Commission was overruled.[7]

The situations dealt with in *Tyson* and *Shuler* are basically distinguishable. In *Tyson*, all of the employees had been discharged and their employment terminated when the employer, in an economy move, had shut down the plant. In *Shuler*, the men were out of work because of a temporary layoff imposed by the employer for business reasons; the employment relation had not been severed. In *Tyson*, the duplication of severance and vacation payments and unemployment insurance benefits, on a pro rata basis for a projected period following the discharge, would have resulted in payments substantially greater than the weekly earnings while the men were employed. In *Shuler*, the duplication of the contractual supplementary unemployment benefits and the statutory unemployment insurance benefits would have amounted to substantially less than the weekly earnings while the men were employed. Moreover, a specific statute was thought to disqualify[8] the applicants in *Tyson*. Perhaps, however, this statute should be interpreted as applicable only when an employee has been wrongfully discharged and then is reinstated with reimbursement for lost pay. In any event, the statute was not a factor in *Shuler*, where the men were laid off rather than discharged. There, the Court felt free to laud the employer for his co-operation in bolstering the inadequate relief available under the Employment Security Law during periods of temporary layoff.

Under most state unemployment insurance statutes, including ours,[9] a worker is ineligible for benefits for any week if he performs services during that week or if wages are payable to him "with

[6] See U.S. DEP'T OF LABOR, No. U-172, SUPPLEMENTAL UNEMPLOYMENT BENEFIT PLANS AND UNEMPLOYMENT INSURANCE (1957, Supp. 1959); Chernick & Naef, *Legal and Political Aspects of the Integration of Unemployment Insurance and SUB Plans*, 12 IND. & LAB. REL. REV. 20 (1958).

[7] *In re* Tyson, N.C. Employment Security Comm'n, No. 2882 (1959); *In re* Shuler, N.C. Employment Security Comm'n, No. 3008 (1960).

[8] N.C. GEN. STAT. § 96-14(8) (1958): "For any week with respect to which he has received any sum from the employer pursuant to an order of the National Labor Relations Board or by private agreement, consent or arbitration for loss of pay by reason of discharge. When the amount so paid by the employer is in a lump sum and covers a period of more than one week, such amount shall be allocated to the weeks in the period on a pro rata basis . . . ."

[9] N.C. GEN. STAT. § 96-8(10)(a) (Supp. 1961): "An individual shall be deemed 'totally unemployed' in any week with respect to which no wages are payable to him and during which he performs no services."

respect to" that week. It is believed, however, that the question whether severance or vacation pay or supplementary unemployment benefits constitute "wages payable with respect to" any particular week of unemployment depends more upon the policy considerations reflected in the two decisions under review than upon abstract or mechanical conceptions.

WILLS AND ADMINISTRATION

CONSTRUCTION

In the construction of a will, the effect to be given to the fact that the will was witnessed by a lawyer was discussed in *Clark v. Connor*.[1] In that case testator devised all his property to his spouse "to take, hold, have and do with as she shall deem best and proper, for the benefit of herself and our children."[2] The Court rejected plaintiff's contention that a trust was created and held that the wife took the property in fee simple absolute.[3] In the course of its opinion the Court noted that a lawyer had witnessed the will. From this the Court inferred that the lawyer either wrote the will or was consulted in regard to it. Because a lawyer is familiar with the language required to create a valid trust and since, according to the Court, the dispositive words which appeared in the will have been held in many cases not sufficient to create a trust, the Court reasoned that no trust was intended.[4]

In *Wimberly v. Parrish*[5] testator devised all his property to his wife for life and at her death to one Parrish, provided Parrish stayed with and took care of testator's wife until her death; otherwise, the property was to pass to testator's next of kin.

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[1] 253 N.C. 515, 117 S.E.2d 465 (1960); also discussed under TRUSTS, *Precatory Words, supra.*

[2] *Id.* at 517, 117 S.E.2d at 466.

[3] The Court relied upon N.C. GEN. STAT. § 31-38 (1950) (presumption of a fee unless contrary plainly appears), and upon the rule of construction that a will must be construed from its four corners in order to ascertain the intent of the testator.

[4] The same conclusion was reached in St. James v. Bagley, 138 N.C. 384, 50 S.E. 841 (1905), where it appeared that the deed in question had been witnessed by a lawyer. Generally, if the will is drawn by a lawyer, the courts will give more significance to the technical language used. *E.g., In re* Trimble's Estate, 234 Iowa 994, 14 N.W.2d 673 (1944); Hardin v. Crow, 310 Ky. 814, 222 S.W.2d 842 (1949); Moon v. Stewart, 87 Ohio St. 349, 101 N.E. 344 (1913); Thellusson v. Rendlesham, 7 H.L. 429 (1859).

[5] 253 N.C. 536, 117 S.E.2d 472 (1960).

The Court held that Parrish did not take a vested remainder because his compliance with the terms of the will was a condition precedent to his receiving any interest in the property, and the question of compliance could only be determined after the life estate had terminated.[6] Moreover, there was a limitation over in the event Parrish failed to fulfill the conditions. The presence of such a limitation is some evidence that the testator intended the condition to be precedent rather than subsequent.[7]

In view of the general rule that the Court will construe a condition as being a condition subsequent whenever possible in order to hold an estate vested,[8] it seems that the Court could have found the remainder vested subject to divestment. If a conditional element is incorporated into the description of a gift to a remainderman, the remainder is held to be contingent; but if after words giving a vested interest, a clause is added divesting it, the remainder is said to be vested.[9] The condition in the principal case was not incorporated into the description of the gift; rather the property was given to Parrish absolutely and then made subject to the condition. However, the Court found that the testator's primary purpose was to see that his widow was adequately cared for and that Parrish, in no event, was to take any interest in the property unless he performed these duties.[10]

INTEGRATION

Integration of a will is the process of embodying into one instrument several sheets of paper intended by the testator to constitute his

[6] The Court relied upon the general rule that a remainder is contingent so long as there is uncertainty as to what person or persons will be entitled to enjoy it. Carolina Power Co. v. Haywood, 186 N.C. 313, 119 S.E. 500 (1923). It is interesting to note, however, that the uncertainty in the principal case was the event—whether Parrish would fulfill the condition.

[7] Because of the limitation over the Court held the present case to be distinguishable from Patterson v. Brandon, 226 N.C. 89, 36 S.E.2d 717 (1946), where the testator used almost identical language and the remainder was held to be vested.

[8] St. Peter's Church v. Bragaw, 144 N.C. 126, 56 S.E. 688 (1907). See generally McCall, *Estates on Condition and on Special Limitation in North Carolina*, 19 N.C.L. REV. 335 (1941).

[9] Whitesides v. Cooper, 115 N.C. 570, 20 S.E. 295 (1894); Starnes v. Hill, 112 N.C. 1, 16 S.E. 1011 (1893).

[10] See in accord with this statement Helms v. Helms, 137 N.C. 206, 49 S.E. 110 (1904), where the Court stated that whether a condition is precedent or subsequent depends upon the intent of the testator as determined by a reading of the whole instrument. In *Helms*, however, the Court held that the condition was a condition subsequent.

will.[11] Proof of the intent to integrate the several sheets is supplied by demonstrating their physical connection or connection through their internal sense or coherence.[12] However, where competent witnesses may be found to identify the several sheets as constituting the will, neither physical nor coherent connection is necessary.[13]

In *In re Sessom's Will*[14] the evidence tended to show that the writing offered for probate consisted of two sheets of paper. The dispositive provisions appeared on the first sheet, and the second sheet contained the designation of an executor, the attestation clause and the signature of the testator. While there was no direct evidence that the two sheets were fastened together at the time the will was executed, one witness testified that the writing offered for probate was the same as that witnessed and signed as a will in the presence of the testator and the witnesses. Moreover, at the time the instrument was offered for probate the sheets were stapled together.

The Court held the two sheets to be clearly identifiable as one will by their internal sense and coherence, and, therefore, failure of the trial judge to instruct the jury as to rules of integration was not prejudicial error.[15]

PROCEDURE

In *In re Cox's Will*[16] a caveat was filed in the name of the testatrix's next of kin. The issue of devisavit vel non was resolved in favor of the propounders, and the will was admitted to probate.

The present parties, who were listed as caveators in the original proceeding, filed a second caveat, alleging that they were not in fact parties to the first proceeding and had no knowledge of the same. From a judgment dismissing the present action on the ground that

[11] *In re* Robert's Will, 251 N.C. 708, 112 S.E.2d 505 (1960). See generally ATKINSON, WILLS § 79 (2d ed. 1953); Annot., 38 A.L.R.2d 477 (1954).

[12] *In re* Swaim's Will, 162 N.C. 213, 78 S.E. 72 (1913). On this point, the North Carolina Court is in harmony with a majority of jurisdictions. *E.g.,* Bradshaw v. Pennington, 225 Ark. 410, 283 S.W.2d 351 (1955); Cole v. Webb, 220 Ky. 817, 295 S.W. 1035 (1927).

[13] *In re* Robert's Will, 251 N.C. 708, 112 S.E.2d 505 (1960); *accord,* Cole v. Webb, *supra,* note 12.

[14] 254 N.C. 369, 119 S.E.2d 193 (1961).

[15] Compare *In re* Baldwin's Will, 146 N.C. 25, 59 S.E. 163 (1907), where the attestation appeared on a sheet separate from that containing the testator's signature. The Court refused probate, holding that the attestation must appear on the same sheet as the testator's signature or be *physically* attached thereto.

[16] 254 N.C. 90, 118 S.E.2d 17 (1961).

the original proceeding constituted a bar to a second caveat, the caveators appealed.

The Supreme Court stated that the correct procedure to raise the question whether the caveators were actually parties to the original caveat or had knowledge of the same was by a motion in the original cause to set aside the judgment.[17] If successful in having the judgment set aside, those not parties to the initial caveat may then file a second caveat.

The Court stated, however, that the trial court might have treated the prayer to set aside the probate in solemn form as a motion in the cause and disposed of it as such.[18] Failure to do so was held to be reversible error.

The purport of this novel decision is interesting in that while a motion in the cause is the proper procedure, a second caveat would seem to be equally proper since the trial judge risks reversal for abuse of discretion if he fails to treat the caveat as a motion in the cause.

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[17] Care must be taken to distinguish the present case from prior North Carolina decisions where there was no question that the heirs at law were not made parties to the caveat proceedings and had no knowledge of the same. Under such circumstances they are not estopped to file a second caveat. *E.g.*, Mills v. Mills, 195 N.C. 595, 143 S.E. 130 (1928). In the instant case, the very question to be determined was whether the caveators were in fact parties to the original caveat or had knowledge of it.

The ruling as to the correctness of a motion in the cause is a sound one in light of previous North Carolina decisions in which the Court has stated that a decree of the probate court acting within its jurisdiction is not subject to collateral attack. Groome v. Leatherwood, 240 N.C. 573, 83 S.E.2d 536 (1954); Coker v. Coker, 224 N.C. 450, 31 S.E.2d 364 (1944).

[18] This is in accord with prior decisions of the Court that when a party mistakenly brings an independent action and his remedy is by motion in the original cause, the court in its discretion may treat the complaint as a motion. Abernethy Land & Finance Co. v. First Security Trust Co., 213 N.C. 369, 196 S.E. 340 (1938). See also Coker v. Coker, *supra* note 17.