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Tenth Annual Survey of North Carolina Case Law

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TENTH ANNUAL SURVEY OF NORTH CAROLINA CASE LAW*

The *Tenth 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 years.

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: Robert G. Baynes (Damages, Eminent Domain and Wills and Administration); Frank W. Bullock, Jr. (Municipal Corporations and Public Utilities); George C. Cochran (Civil Procedure (Pleading and Parties)); Marion A. Cowell, Jr. (Business Associations, Contracts and Insurance); Borden R. Hallowes (Credit Transactions, Negotiable Instruments and Sales); Lawrence T. Hammond (Administrative Law); William R. Hoke (Agency and Workmen's Compensation and Real Property); James M. Kimzey (Criminal Law and Procedure); Mack B. Pearsall (Domestic Relations); S. Epes Robinson (Evidence); H. Arthur Sandman (Taxation); J. Harold Tharrington (Equitable Remedies and Labor Law); William E. Underwood, Jr. (Torts); Arnold T. Wood (Constitutional Law).

Throughout this *Survey* the North Carolina Supreme Court will

* The period covered embraces the decisions of the North Carolina Supreme Court reported in 256 N.C. 1 through 258 N.C. 210.

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

LICENSING

The Supreme Court held in *In re Dillingham*[1] that the license of a real estate broker cannot be revoked for running a house of prostitution or for committing fraudulent acts in dealing with his own property, since under the statute the grounds for revocation of license apply only to conduct as a real estate broker, and the acts complained of were not done in that capacity.[2]

The Court found the case to be one of first impression in this state, but pointed out that there are supporting decisions in Iowa,[3] California,[4] and Missouri,[5] refusing to allow revocation of license on similar grounds. In each of these cases the broker had been guilty of some questionable conduct which was virtually unrelated to his activities as a broker. Each court held that the broker had not violated the statute and that his license could not be revoked. Our Court agreed, and pointed out that however immoral the acts committed might have been, the statute must be construed to include only those matters done in the capacity of a real estate broker.[6]

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[1] 257 N.C. 684, 127 S.E.2d 584 (1962).

[2] N.C. GEN. STAT. § 93A-6 (a) (1958) sets out eleven acts which are grounds for revocation. Among them are making willful misrepresentations, making false promises, fraudulent advertising, acting for more than one party in a transaction, representing two brokers at once, failing to account for money in his possession which belongs to others, etc. The Court construed the statutory requisites for revocation as having to do with the business of a real estate broker, and not as allowing revocation on the general grounds of illegal or immoral conduct committed outside the realm of a broker's business.

[3] Blakely v. Miller, 232 Iowa 908, 7 N.W.2d 11 (1942).

[4] Schomig v. Keiser, 189 Cal. 596, 209 Pac. 550 (1922).

[5] Robinson v. Missouri Real Estate Comm'n, 280 S.W.2d 138 (Mo. 1955).

[6] New Jersey Real Estate Comm'n v. Ponsi, 39 N.J. Super. 526, 121 A.2d 555 (1956), a lower court decision, allowed revocation, but is distinguishable. There the petitioner had been guilty of fraudulent acts involving his own property, which would not be grounds for revocation in North Carolina (nor specifically in New Jersey) but the New Jersey statute requires one applying for a license to exhibit good moral character, which the North Carolina act does not. The New Jersey court carried the specific

Scope of Hearing

Carolina Power and Light Company applied to the Utilities Commission for approval of a new rate schedule, designed to modernize its rates but not to increase its income. Protestants intervened and contested the new schedule for textile mills. At a pre-hearing conference the Commission determined that only the new rate schedule for textile mills was in issue, and that this did not require a determination of the total earnings of the company on all its rate schedules. At the hearing the Commission found that the new rate schedule for textile mills did not increase the company's total revenue, and that there was no increase in the charges to textile mills as a class. The only change was one of twelve per cent between the energy component (cost of supplying kilowatt hours) and the demand component (cost of maintaining sufficient equipment to deliver maximum requirements of consumers at a given time). The cost of equipment to meet maximum demand had increased, while the energy costs (depending on such things as coal prices) had declined. The Commission further found that the shift in components was proper and that the new rate schedule was just.

The superior court upheld the Commission and the protestants appealed to the Supreme Court, which affirmed in *State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc.*[7] Protestants contended that the matter constituted a general rate case as a matter of law. The Court held that the Commission properly treated this as a complaint proceeding, because only a single rate was involved. A general rate case, which is extremely complicated and time-consuming, is used only where the company's entire rate structure is involved.[8] The Commission has the power to determine its own rules within statutory bounds,[9] and this includes a

requirements for application over to the general requisites for license revocation (which were substantially similar to those of North Carolina) and found a legislative intent to allow revocation on the facts presented.

[7] 257 N.C. 560, 126 S.E.2d 325 (1962).

[8] N.C. Gen. Stat. § 62-71 (1960) provides for a fairly informal complaint proceeding when a company seeks to change only one or a few rates. N.C. Gen. Stat. § 62-124 (1960) provides for a general rate case as the proper proceeding to hear proposed changes in a company's entire rate structure, or a great portion thereof, or upon a challenge of its overall profit structure. This proceeding requires evaluation of all the company's property when acquired (and depreciated to date), fair market value of the services rendered, probable earning capacity, and like matters which require a voluminous amount of evidence and a lengthy proceeding.

[9] N.C. Gen. Stat. § 62-26 (1960).

determination of what forum is correct for hearing rate schedule matters.

The Court said that if by pleading excessive rate of return parties could command a complete review of rate structures on every occasion that a matter relating to a rate schedule arises, the reasonable regulation of rates would be impossible.[10]

Protestants were not prejudiced by this decision, for matters excluded from the hearing are not res judicata and protestants can bring a rate case before the Commission at a future time if they have grounds for such. The burden of proof is not shifted by this decision. Protestants would have had the burden of proof had this hearing been a general rate case, and they would have the burden if they instituted a separate general rate case.

AGENCY AND WORKMEN'S COMPENSATION

AGENCY

Adverse Interest of Agent

In *Sparks v. Union Trust Co.*[1] the bank's agent, a branch manager, fraudulently withheld more than 150 thousand dollars worth of checks drawn by Williams, a bank customer and co-conspirator. If these checks had been presented for payment, Williams would have become insolvent. The plaintiff dealt with the agent when borrowing money from the bank to erect a building to lease to Williams. Although he knew the plaintiff's business plans, the agent did not disclose Williams' true financial condition. Consequently, the plaintiff suffered pecuniary damage which became apparent when the acts of the two wrongdoers were discovered. The plaintiff brought this action against the bank for the alleged fraud of its agent in failing to disclose Williams' true financial condition. Denying relief, the Court held that banks have no duty to warn the investing public as to the financial condition of depositors;[2] moreover, the bank had no con-

[10] State *ex. rel.* Utilities Comm'n v. Carolina Power & Light Co., 250 N.C. 421, 109 S.E.2d 253 (1959) was cited and quoted with approval by the Court for the general proposition that where a single rate is involved the proper action is a complaint proceeding and not a general rate case, under the applicable statutes.

[1] 256 N.C. 478, 124 S.E.2d 365 (1962).

[2] This holding reflects the general rule. See Cunningham v. Merchant's Nat'l Bank, 4 F.2d 25 (1st Cir. 1925); Citizens' Trust & Sav. Bank v. Falligan, 4 F.2d 481 (9th Cir. 1925); People's Nat'l Bank v. Southern States Fin. Co., 192 N.C. 69, 133 S.E. 415 (1926); Annot., 48 A.L.R. 528 (1927).

structive knowledge of its agent's conspiracy with Williams since the knowledge of an agent is not imputed to a principal when the agent is acting adversely to the principal.

If we assume that the absence of duty of the bank to warn was sufficient ground for the decision, the opinion on these facts concerning imputed knowledge is probably dictum. Accepting the dictum, what would have been the result if the bank had had the duty to apprise the plaintiff of Williams' insolvency? The Court seems to think it would be the same.

But should the "adverse interest" rule be invoked here to prevent the operation of the principle announced in the leading case of *Hambro v. Burnard*?[3] That case held that a principal may be liable for the acts of his agent, notwithstanding the fact that the latter acted entirely for his own purposes. In an action that seeks to charge the principal *vicariously* with the fraud of his agent, imputed knowledge normally is not a consideration.[4] However, if the bank had been charged not vicariously but *directly* with fraud in failure to disclose, then the principal's knowledge of Williams' financial condition should have been a vital question. But since the principal in this case did not deal with the plaintiff directly, it seems obvious that the cause of action was concerned with vicarious liability.

Custodian of a Child

While in the care of a custodian, a four year old child was fatally burned after coming into contact with one of the defendant's flare pots at a street excavation. A wrongful death action was brought in *Jeffreys v. City of Burlington*.[5]

The plaintiff alleged that the defendant was negligent in leaving the flare pots unattended in the afternoon hours in an area where children were known to play. The defendant, basing its affirmative defense on alleged contributory negligence of the parents, hoped to show either that (1) the parents were directly negligent in that they

[3] [1904] 2 K.B. 10. See also Gleason v. Seabord Air Line Ry., 278 U.S. 349 (1929); Rutherford v. Rideout Bank, 11 Cal. 2d 479, 80 P.2d 978 (1938); RESTATEMENT (SECOND), AGENCY § 262 (1958).

[4] When an agent is acting adversely to his principal, it may be said that he is not acting as an agent, but for himself. Citizens' Trust & Sav. Bank v. Falligan, 4 F.2d 481 (9th Cir. 1925). *Cf.* Sledge Lumber Corp. v. Southern Builders Equip. Co., 257 N.C. 435, 126 S.E.2d 97 (1962). But if there is reasonable reliance on his holding himself out as an agent, adverse interest does not affect the principal's liability. Seavey, *Notice Through an Agent*, 65 U. PA. L. REV. 1, 30-32 (1916).

[5] 256 N.C. 222, 123 S.E.2d 500 (1962).

failed to exercise due care in their supervision of the child,[6] or (2) that the custodian was negligent and her negligence was imputed to the parents.

Reversing a verdict below for the defendant, the Court held that the defendant failed to prove that the parents were negligent or that an agency relationship existed between the parents and the custodian. "Where . . . the relation of master and servant or principal and agent with respect to the care, custody and control of the child does not exist between the parent and custodian, the negligence of the latter is not imputed to the parent . . . ."[7]

Liability Insurance—Omnibus Clause

The employer, upon leaving for a two-weeks vacation, gave his employee permission to drive the company truck home each night. According to the employer, he instructed the employee to drive it straight home, park it, and drive it straight back to work the next morning. According to the employee, he was admonished not to do "too much running around with it at night." While driving the truck on a personal errand at night, with three passengers in the cab, the employee was involved in a collision with the plaintiff's automobile. In *Hawley v. Indemnity Ins. Co.*[8] the plaintiff brought an action against the employer's insurer, based on the omnibus clause[9] in the liability insurance policy. The Court, remanding a verdict for the plaintiff because of an error in the jury instruction, held that North Carolina will abide by the so-called "moderate" rule in construing omnibus clauses.

The term "permission" (of the insured) in omnibus clauses is

[6] "The ordinary rules of the law of negligence apply in determining the parent's contributory negligence. It is the duty of a parent or other person having the care, custody, and control of a child to exercise ordinary care for its safety, and, where failure to do so contributes proximately with the negligence of third persons to cause injury to the child, such parent, or other custodian, is guilty of contributory negligence." 67 C.J.S. *Parent & Child* § 46 (1950).

[7] 65 C.J.S. *Negligence* § 163 (1950), cited by the Court. See also Comer v. City of Winston-Salem, 178 N.C. 383, 100 S.E. 619 (1919), containing a comprehensive discussion of the supervisory duties of custodians of children; and Ferrell v. Dixie Cotton Mills, 157 N.C. 528, 73 S.E. 142 (1911).

[8] 257 N.C. 381, 126 S.E.2d 161 (1962), noted in 41 N.C.L. REV. 232 (1962). Also discussed under INSURANCE, *Automobile Liability Insurance, infra.*

[9] The policy provided that "insured" referred to any person using the vehicle, "provided the *actual use* of the automobile is by the named insured . . . or with the permission" of the named insured. *Id.* at 382, 126 S.E.2d at 163.

subject to divergent interpretations by the courts. The three general views are (1) the strict rule, under which the employee must have permission to use the vehicle for the particular use being made of it at the time in question; (2) the liberal rule, by which the employee need only have initial permission, and any subsequent use is covered; and (3) the moderate rule, under which a slight deviation from permissive use is not enough to withdraw coverage. Under the strict and moderate rules the plaintiff has the burden of showing the nature and extent of the permission granted.[10]

As a result of this decision it appears that, in an area of the law characterized by a dearth of authority in this jurisdiction, North Carolina now has a firm precedent.[11]

Servants and Non-servant Agents

Overnite Transp. Co. v. International Bhd. of Teamsters[12] was an action to recover damages for alleged unfair labor practices of the union in maintaining a strike and secondary boycott against the plaintiff. Although the complaint charged the union directly with calling the strike and directing the boycott, the trial court instructed the jury that the union, as the sole defendant, could be held liable for the acts of its agents performed "within the scope of their employment."[13]

[10] *Id.* at 384-86, 126 S.E.2d at 165-66.

[11] The Court was of the opinion that the legislature, in adopting the 1953 amendment to the Motor Vehicle Safety and Financial Responsibility Act, intended to adopt the moderate rule. The amendment provided that the owner's policy shall "insure the person named therein and any other person . . . using any such motor vehicle . . . with the express or implied permission of such named insured . . . ." N.C. GEN STAT. § 20-279.21(b)(2) (Supp. 1961). Compare the language of the statute before amendment: "[The owner's policy shall] insure . . . the person named, and any other person using or responsible for the use of the motor vehicle with the permission, expressed or implied, of the named insured, or any other person in lawful possession." N.C. Sess. Laws 1947, ch. 1006, § 4(2)(b). The Court in the instant case thought that this language was "sufficiently broad to embrace the liberal rule." *But see* Hooper v. Maryland Cas. Co., 233 N.C. 154, 63 S.E.2d 128 (1951), where the Court, while not finding it necessary to adopt a rule, used this language: "[The employee] could not define or enlarge the scope of his permitted use of his employer's truck by anything said or done by him without the knowledge of his employer, or its proper representatives." *Id.* at 158, 63 S.E.2d at 131.

[12] 257 N.C. 18, 125 S.E.2d 277 (1962). Also discussed under DAMAGES, *Punitive Damages—Loss of Profits,* and LABOR LAW, *Secondary Boycott—Suit for Damages under § 303(b), infra.*

[13] *Quaere:* Is it permissible to impose vicarious liability upon the defendant by allegations that he himself committed the act and by proof that his agent committed it? See Cowan v. Cowan, 179 N.C. 695, 102 S.E. 613 (1920) *(semble).* It is not clear in the *Cowan* case nor in the principal case whether the defendant was found liable vicariously or directly.

The jury thus instructed apparently found the defendant liable for the acts performed by the agents, *i.e.*, the members of the locals involved. On appeal, the North Carolina Supreme Court upheld the award of actual damages and reversed the punitive damages.

While the trial court's delineation of the agency relation does not appear to alter the liability of the defendant, considering the nature of the plaintiff's evidence,[14] the jury instruction is nevertheless interesting, especially since the Supreme Court quoted the following portion of it with seeming approval:

> The distinguishing difference between an agent and servant is that an agent can contract for his principal and bind his principal contractually, whereas a servant cannot so bind in contract his master. Both principal and master are liable for the torts of their agents and servants when acting in the scope of their employment.[15]

This statement of the relation, although mostly in accord with our recent judicial language,[16] could cause difficulty by its sweeping provisions, especially if quoted out of context.

To grasp this concept it is convenient to speak of two types of agents: servants and non-servant agents. The Restatement of Agency which states the concept clearly, points to the element of physical control as the distinguishing characteristic between a servant and a non-servant agent.[17] While the non-servant agent usually represents

[14] The evidence, if believed, would indicate that the International Brotherhood exercised such strict control over the locals that the latter would never engage in the acts complained of without the approval and direction of the former. If this was true, the defendant could be held liable outside the agency relationship. "A person is subject to liability for the consequences of another's conduct which results from his directions as he would be for his own personal conduct if, with knowledge of the conditions, he intends the conduct, or if he intends its consequences . . . ." RESTATEMENT (SECOND), AGENCY § 212 (1958).

[15] 257 N.C. at 27-28, 125 S.E.2d at 284.

[16] The Court usually seems to consider that the terms "agent" and "servant" are synonymous and that their hallmark is physical control by the principal or master. Under this rationale the independent contractor cannot bind another in contract, and, moreover, there is no recognition of an agent who can bind his principal in contract without being subject to physical control. See Pressley v. Turner, 249 N.C. 102, 105 S.E.2d 289 (1958); Lindsey v. Leonard, 235 N.C. 100, 68 S.E.2d 852 (1952); Carter v. Thurston Motor Lines, Inc., 227 N.C. 193, 41 S.E.2d 586 (1947); Kesler Constr. Co. v. Dixson Holding Corp., 207 N.C. 1, 175 S.E. 843 (1934); Aderholt v. Condon, 189 N.C. 748, 128 S.E. 337 (1925). *But see* Holleman v. Taylor, 200 N.C. 618, 158 S.E. 88 (1931), where the Court *did* recognize the existence of the non-servant agent.

[17] RESTATEMENT (SECOND), AGENCY § 220 (1958). *Cf.* FERSON, PRIN-

his principal contractually and is not subject to the principal's physical control, the servant *is* subject to physical control by his master. And while the servant does not normally contract for his master, there is no reason why he cannot. An example is the express company's truck driver, who is a servant in driving his master's truck and a contracting agent when he receives a package and signs a bill of lading binding his principal (and master) to deliver it.[18]

The difference between a servant and a non-servant agent becomes critical in the doctrine of respondeat superior. Vicarious liability for physical torts under this doctrine attaches only where there is physical control,[19] *i.e.*, in the master-servant relation.[20] In the light of this well-established rule the trial court in the principal case probably did not mean that both principal and master are liable for the *physical* torts of their servants and non-servant agents when acting in the scope of their employment. If this was the Court's intention, it probably meant to restrict the statement to apply to physical torts *directed* by the principal. But since directed acts result in non-vicarious, direct liability of the principal, such liability must not be confused with the doctrine of respondeat superior.[21]

WORKMEN'S COMPENSATION

Accident—Definition

In *Harding v. Thomas & Howard Co.*[22] the claimant sustained an injury, diagnosed as a slipped disc, while picking up a twelve-pound box of coffee in his usual manner, as he had regularly done in his employment for over six years. Held: no accident, and consequently, no compensation.

The applicable statute[23] provides that injury in workmen's compensation cases "shall mean only injury by accident arising out of and in the course of the employment." The Court has defined accident as (1) an unlooked-for and untoward event which is not ex-

CIPLES OF AGENCY § 20 (1954); TIFFANY, PRINCIPAL AND AGENT § 37 (2d ed. 1924).

[18] See generally MECHEM, OUTLINES OF THE LAW OF AGENCY §§ 12, 13 (1952).

[19] Beal v. Champion Fiber Co., 154 N.C. 147, 69 S.E. 834 (1910).

[20] RESTATEMENT (SECOND), AGENCY § 220 (1958). In general, a principal is not liable for the physical torts of his non-servant agent. *Id.* at § 250.

[21] It is true, of course, that a principal may be liable for the fraud of his non-servant agent. *Cf.* Sparks v. Union Trust Co., 256 N.C. 478, 124 S.E.2d 365 (1962) discussed *supra.*

[22] 256 N.C. 427, 124 S.E.2d 109 (1962).

[23] N.C. GEN. STAT. § 97-2(6) (1958).

pected or designed by the injured employee, and (2) a result produced by a fortuitous cause.[24] Generally, the Court requires an *external* accident. It sees no fortuitous cause when the injury arises from a situation where the employee is merely carrying on his customary duties in the usual manner.[25] Conversely, where the claimant was not engaged in his usual task in the usual manner at the time of his injury, compensation may be awarded.[26] This doctrine often prevents compensation for hernia and slipped disc injuries, which rarely arise from an external accident, but are often directly connected with some type of accident nevertheless.[27]

It is significant to note that in the *Harding* case the Court for at least the third time in the past five years[28] gave some indication that it is not entirely satisfied with the rule announced.[29]

Judicial Power of Industrial Commission

In *Letterlough v. Atkins*[30] the employee and the employer, who had not brought himself under the provisions of the act, executed a

[24] Harding v. Thomas & Howard Co., 256 N.C. 427, 124 S.E.2d 109 (1962); Smith v. Cabarrus Creamery Co., 217 N.C. 468, 8 S.E.2d 231 (1940); Love v. Town of Lumberton, 215 N.C. 28, 1 S.E.2d 121 (1939).

[25] See Turner v. Burke Hosiery Mill, 251 N.C. 325, 111 S.E.2d 185 (1959) (leaning over knitting machine to make adjustment in usual manner); Holt v. Cannon Mills, 249 N.C. 215, 105 S.E.2d 614 (1958) (lifting hundred-pound box in usual manner); Hensley v. Farmers Co-op., 246 N.C. 274, 98 S.E.2d 289 (1957) (turning and twisting in normal way to pick up basket of chickens); Buchanan v. State Highway & Pub. Works Comm'n, 217 N.C. 173, 7 S.E.2d 382 (1940) (lifting scoop of dirt in usual manner, became sick and blind); Neely v. City of Statesville, 212 N.C. 365, 193 S.E. 664 (1937) (heart failure by fireman as result of fighting fire); Slade v. Willis Hosiery Mills, 209 N.C. 823, 184 S.E. 844 (1936) (normally got wet while washing machinery, died of pneumonia). *But see* Edwards v. Piedmont Publishing Co., 227 N.C. 184, 41 S.E.2d 592 (1947) (concurring opinion), and Smith v. Cabarrus Creamery Co., *supra* note 24, where Seawell, J., did not favor this rule. See also Note, 27 N.C.L. REV. 599 (1949).

[26] See Gabriel v. Town of Newton, 227 N.C. 314, 42 S.E.2d 96 (1947) (heart failure by policeman after subduing prisoner); Moore v. Engineering & Sales Co., 214 N.C. 424, 199 S.E. 605 (1938) (lifting heavy pipe with insufficient help, not in normal line of work).

[27] "The discs . . . are not subject to displacement several times a day or month or year. God is not so poor an engineer." Seawell, J., in Edwards v. Piedmont Publishing Co., 227 N.C. 184, 192, 41 S.E.2d 592, 598 (1947) (concurring opinion).

[28] See Holt v. Cannon Mills, 249 N.C. 215, 105 S.E.2d 614 (1958); Hensley v. Farmers Co-op., 246 N.C. 274, 98 S.E.2d 289 (1957).

[29] "Our interpretation of the Workmen's Compensation Act is well known to the legislative department of the State. If and when a change is desirable, the General Assembly has ample power to make it." Harding v. Thomas & Howard Co., 256 N.C. 427, 429, 124 S.E.2d 109, 111 (1962).

[30] 258 N.C. 166, 128 S.E. 2d 215 (1962).

settlement of the employee's claim for injury. In approving the settlement the Industrial Commission issued an order directing the employer either to provide compensation insurance or else reject the provisions of the act, as provided by law, within thirty days. Finding that the employer had fewer than five employees, the superior court ordered the Commission to set aside its approval of the agreement and to dismiss the proceeding on the ground of lack of jurisdiction. On appeal the Supreme Court held that it was correct for the Commission to set aside the order and award, but that it should not have dismissed the proceeding.

This decision is in accord with the Court's former holdings as to how the judicial power of the Industrial Commission may be invoked.[31] While it may not institute a proceeding *ex mero motu,* the power of the Commission is invoked when a claim is filed with it[32] or when a settlement is submitted to it for approval.[33] In such event the Commission may hold hearings to determine whether or not it has jurisdiction of the case.

Reopening Claims—Estoppel

In *Ammons v. Z. A. Sneeden's Sons, Inc.*[34] the claimant, without the advice of counsel, notified his employer within twelve months after his last compensation payment of a change in his condition. Because he relied upon his employer to handle the matter for him, he did not notify the Industrial Commission of his desire to reopen the claim until after the statutory period had expired.[35] The Commission declined to reopen. Allowing the claimant to invoke estoppel, the Court on appeal held that the employer and its insurer may not "lull the claimant into a sense of security" and then plead the statute in bar of review. The Industrial Commission was directed to hear evidence and determine whether the defendant's plea in bar should be sustained or set aside.

No new attitude of the Court is indicated. Although the facts were insufficient to invoke estoppel in an earlier case, the Court said

[31] See Biddix v. Rex Mills, Inc., 237 N.C. 660, 75 S.E.2d 777 (1953); Thompson v. Johnson Funeral Home, 208 N.C. 178, 179 S.E. 801 (1935).
[32] N.C. GEN. STAT. § 97-24 (1958).
[33] N.C. GEN. STAT. § 97-87 (1958).
[34] 257 N.C. 785, 127 S.E.2d 575 (1962).
[35] G.S. § 97-47 sets a twelve-month limitation on applications for review of any award after the date of last payment.

then that "the law of estoppel applies in compensation proceedings as in all other cases."[36]

Rescission for Mistake

In *Caudill v. Chatham Mfg. Co.*[37] an employee sustained an injury to his back in the course of his employment. He signed a release for consideration, effecting a settlement of past, present, and future claims against his employer, and waiving his right to reopen the claim for change of condition. The release was approved by the Industrial Commission. Later, further complications respecting his injury arose. There was evidence that the difficulty complained of existed in a latent state at the time the settlement was made, and that the first diagnosis had been erroneous. The Industrial Commission rescinded the settlement on the ground of mutual mistake of fact. Reversing, the North Carolina Supreme Court held that the settlement was a compromise agreement and took into account the possibility of future disability.

The case is interesting for the question the Court announced it did not decide: does the Industrial Commission have the equitable jurisdiction to rescind approved settlements on the ground of mutual mistake of fact? The Court pointed out that some states have statutes[38] which confer such jurisdiction. In the absence of a statute the theory seems to be that a commission has the necessary power only if it has continuing jurisdiction over the case, *i.e.,* if no final award has been made.[39] After final award it has been held that res judicata applies.[40] But if the settlement agreement is drafted so as to confer continuing jurisdiction upon the commission, some courts have held[41]

[36] Biddix v. Rex Mills, Inc., 237 N.C. 660, 75 S.E.2d 777 (1953), where the Court held that the employer's paying the claimant's medical bills, without a formal denial of liability, did not result in the employer's admission of liability or constitute a waiver of the requirement of filing claim by the employee under G.S. § 97-24. *Cf.* Ashe v. Barnes, 255 N.C. 310, 121 S.E.2d 549 (1961), where the employer did not take steps to exempt himself from the act, but had accident insurance covering the employee, who accepted the benefits and then brought an action to recover workmen's compensation. The Court did not allow the employer to plead estoppel.

[37] 258 N.C. 99, 128 S.E.2d 128 (1962).

[38] See, *e.g.,* KY. REV. STAT. § 342.125 (1962); MINN. STAT. ANN. § 176.60 (1946).

[39] See 2 LARSON, WORKMEN'S COMPENSATION LAW § 81.53 (1952).

[40] Miller v. Hartford Acc. & Indem. Co., 86 Ga. App. 503, 71 S.E.2d 782 (1952).

[41] Georgia Marine Salvage Co. v. Merritt, 82 Ga. App. 111, 60 S.E.2d 419 (1950); Harnischfeger Corp. v. Industrial Comm'n, 253 Wis. 613, 34 N.W.2d 678 (1948).

that the award is temporary and subject to review within a reasonable time.

Apart from the change of condition provision, can the North Carolina Industrial Commission retain jurisdiction over an award? The Wisconsin commission did so by using these words: "[Applicant] developed osteomyelitis which has now subsided, but which may, in the future, recur and result in additional disability; that the commission, therefore, reserves the right at a future date to pass upon additional liability . . . ."[42] The North Carolina Supreme Court disapproved of a similar award,[43] the Court saying:

> There is nothing in the statute, G.S. Chap. 97, that contemplates or authorizes an anticipatory finding by the Commission that a physical impairment may develop into a compensable disability. Neither does the statute vest in the Commission the power to retain jurisdiction of a claim, after compensation has been awarded, merely because some physical impairment suffered by the claimant may, at some time in the future cause a loss of wages.[44]

It would seem, then, that the Court normally does not favor continuing jurisdiction in the Commission. This being so, it is probable that only a broad equitable jurisdiction of the Commission would allow it to reopen for mutual mistake of fact. As the Court indicated in the principal case, the legislature may desire to set up such a provision in order that the North Carolina position on this point may be made definite.

Traveling Employees

An employee in *Sandy v. Stackhouse, Inc.*[45] was sent by his employer to South Carolina for several days to repair hurricane-damaged power lines. The employer furnished food and a motel room. Having finished his day's work at six P.M., the employee

[42] Harnischfeger Corp. v. Industrial Comm'n, *supra* note 41, at 615, 34 N.W.2d at 678.

[43] In Dail v. Kellex Corp., 233 N.C. 446, 64 S.E.2d 438 (1951) the Commission had ordered that "if at any time within 300 weeks [see G.S. § 97-30] from date of injury by accident the plaintiff, as a result of said injury . . . is totally disabled . . . and does not earn any wages, that he will be entitled to compensation . . . ." *Id.* at 449, 64 S.E.2d at 440.

[44] *Id.* at 447, 64 S.E.2d at 439. *But see* Branham v. Denny Roll & Panel Co., 233 N.C. 233, 25 S.E.2d 865 (1943), where jurisdiction was allowed to continue. See also Harris v. Asheville Contracting Co., 240 N.C. 715, 83 S.E.2d 802 (1954), where the *Branham* case was distinguished.

[45] 258 N.C. 194, 128 S.E.2d 218 (1962).

left his room about nine o'clock and went to a restaurant approximately one-quarter mile down the highway, where he drank a soft drink and bought beer to bring back to the motel. Before reaching his room he was struck by a car and killed. The Court upheld the Commission's decision and denied compensation, holding that the accident did not arise out of and in the course of the employment.

Cases of injuries to employees away from home on company business—usually traveling salesmen—are similar to cases of injuries to employees who are required to live on the employer's premises, in that compensation is sometimes awarded where the source of the injury is directly traceable to the conditions under which the employee is required to live.[46] If the employee in the instant case had been killed while on a side trip to find his evening meal, some courts would have allowed compensation.[47] But where he was merely on a social excursion from his lodgings, compensation is usually denied.[48] The rationale is that injuries the employee sustained while engaged in a purely personal activity spring from the risk to which he would have been exposed whether employed or not,[49] while other hazards, such as going in search of food, are peculiar to the abnormal condition of living on the employer's "leased" premises, the motel room.

Violation of Traffic Statute

The Court held in *Brewer v. Powers Trucking Co.*[50] that the claimant's speeding and driving on the left side of the highway did

[46] 1 LARSON, WORKMEN'S COMPENSATION LAW §§ 24.10, .20, 25.10, .21 (1952). The fact of being on call at all times may allow recovery for injuries received by the employee while engaged in eating or recreation on the premises, even while not actually working. *Ibid.*

[47] See, *e.g.*, Alexander Film Co. v. Industrial Comm'n, 136 Colo. 486, 319 P.2d 1074 (1957); Walker v. Speeder Mach. Corp., 213 Iowa 1134, 240 N.W. 725 (1932).

[48] United States Fid. & Guar. Co. v. Skinner, 188 Ga. 823, 5 S.E.2d 9 (1939) (eighteen-mile side trip to ocean resort to get a seafood dinner and see the ocean); O'Connor v. Complete Mach. & Equip. Co., 5 App. Div. 2d 741, 168 N.Y.S.2d 702 (1957) (drinking with companions at a restaurant); Thornton v. J. A. Richardson Co., 258 N.C. 207, 128 S.E.2d 256 (1962) (unexplained trip away from lodgings at 2:40 A.M. after having been bowling and to a ball game).

[49] "[T]he danger must be peculiar to the work and not common to the neighborhood." Sandy v. Stackhouse, Inc., 258 N.C. 194, 128 S.E.2d 218 (1962), quoting Lockey v. Cohen, Goldman & Co., 213 N.C. 356, 196 S.E. 342 (1938). For a discussion of accidents of traveling employees and the risks of the occupation compared with ordinary risks, see Note, 23 N.C.L. REV. 159 (1945).

[50] 256 N.C. 175, 123 S.E.2d 608 (1962).

not constitute such willful failure to perform a statutory duty as to cause a reduction in his award.[51] Ruling on this fact situation for the first time, the Court aligned itself with the majority view,[52] which holds that a simple violation of traffic statutes, such as speed laws, does not constitute the willful misconduct contemplated by the workmen's compensation acts.

BUSINESS ASSOCIATIONS

Inspection of Corporate Records

In *White v. Smith*,[1] a case of first instance under the 1957 North Carolina Business Corporation Act,[2] the Court held that public policy required building and loan associations to be included under the provisions allowing shareholder inspection of corporate records.

Action for mandamus was instituted to require "defendents to provide plaintiffs an opportunity to inspect the records . . . so that plaintiffs might solicit proxies for use at stockholder's meetings."[3] Defendents denied the right, insisting that the records were confidential. The trial court held plaintiffs were entitled to the information and that it could be furnished by defendents. Affirming on appeal, the Supreme Court found the right of shareholders to inspect records of building and loan associations in other states depends upon an interpretation of their individual statutes.[4]

Building and loan associations have been subject to private corporation law in North Carolina since 1905[5]. The Court found that upon an interpretation of the applicable North Carolina statutes[6] there was no perceivable reason why the shareholder of a

[51] "When the injury or death is caused by the willful failure of the employee to use a safety appliance or perform a statutory duty . . . compensation shall be reduced ten per cent." N.C. Gen. Stat. § 97-12 (1958).

[52] See Ford Motor Co. v. Smith, 283 Ky. 795, 143 S.W.2d 507 (1940); Lemmler v. Fabacher, 19 La. App. 144, 139 So. 683 (1932); Day v. Gold Star Dairy, 307 Mich. 383, 12 N.W.2d 5 (1943); 1 Larson, Workmen's Compensation Law § 35.30 (1952). *Contra,* Fidelity & Deposit Co. v. Industrial Acc. Comm'n, 171 Cal. 728, 154 P. 834 (1916); Aetna Life Ins. Co. v. Carroll, 169 Ga. 333, 150 S.E. 208 (1929). *Cf.* Note, 8 N.C.L. Rev. 326 (1930).

[1] 256 N.C. 218, 123 S.E.2d 628 (1962).

[2] N.C. Gen. Stat. ch. 55 (1960).

[3] 256 N.C. at 218, 123 S.E.2d at 629.

[4] *Id.* at 221, 123 S.E.2d at 631.

[5] *Id.* at 221, 123 S.E.2d at 631; N.C. Gen. Stat. § 54-7 (1960).

[6] N.C. Gen. Stat. § 55-37(a) (1960), requires the corporation to keep

building and loan association should be denied the right to inspect the records of the association, considering that such right is granted to shareholders of other corporations. The Court added that the right was limited to an inspection for a proper purpose.

A noted commentator states that shareholders in building and loan associations are not entitled to inspect the books and records of the association.[7] However, it would appear that the situation is much as our Court states: "[the decisions] which deny a shareholder of a building and loan the right to inspect books in general are based on interpretations of the statutes of those states."[8]

CIVIL PROCEDURE (PLEADING AND PARTIES)

PLEADING

Amendment—Statute of Limitations

In *Roberts v. Coca-Cola Bottling Co.*,[1] the plaintiff, pursuant to the provisions of G.S. § 1-121[2] filed an application with the clerk of superior court of Buncombe County requesting an extension of time in which to file his complaint. The application stated that the nature and purpose of his action was a suit grounded on negligence to recover the sum of 100,000 dollars. The clerk granted the plaintiff

books and records, and a record of the names and addresses of all shareholders and the number of shares held by each. Subsection (b) provides for mandamus to compel compliance with the section; N.C. GEN. STAT. § 55-64 (1960), provides that the officer or agent having charge of the shareholder record shall make a list of shareholders ten days before each meeting of shareholders, and that such list is subject to shareholder inspection; N.C. GEN. STAT. § 55-3(a) (1960), states that the Business Corporation Act is applicable to every corporation for profit, and to those not for profit which have a capital stock. Under N.C. GEN. STAT. § 54-5 (1960), building and loan associations have a capital stock, and the right to inspect books of a bank is expressly given in N.C. GEN. STAT. § 53-85 (1960).

[7] 5 FLETCHER, CYCLOPEDIA CORPORATIONS § 2227 (perm. ed. rev. vol. 1952).

[8] State *ex rel.* Wicks v. Puget Sound Sav. & Loan Ass'n, 8 Wash. 2d 599, 113 P.2d 70 (1941); Henzel v. Patterson Bldg. & Loan Ass'n No. Two, 128 Pa. Super. 531, 194 Atl. 683 (1937); State *ex rel.* Schomberg v. Home Mut. Bldg. & Loan Ass'n, 220 Wis. 649, 265 N.W. 701 (1936); Annot., 134 A.L.R. 699 (1941).

[1] 256 N.C. 434, 124 S.E.2d 105 (1962).

[2] "[T]he clerk may . . . on application of the plaintiff by written order extend the time for filing complaint to a day certain not to exceed twenty (20) days, . . . said application and order shall state the nature and purposes of the suit." N.C. GEN. STAT. § 1-121 (Supp. 1961).

an extension and issued the appropriate order. Within the period granted, but subsequent to the running of the statute of limitations on his cause, the plaintiff filed his complaint. The complaint was not grounded on negligence, alleging instead a breach of warranty. The defendant made a motion to dismiss on the ground that the plaintiff's application did not authorize the filing of a complaint alleging breach of warranty. The lower court overruled the motion. On appeal, the Supreme Court affirmed, finding that the two causes alleged by the plaintiff could have been joined initially under the "same transaction" clause of G.S. § 1-123.[3] This being so, the Court decided that, having "alleged only one, he could as a matter of right before time to answer expired, amend and allege the other. Or he could amend by striking one and substituting the other."[4]

On return to the trial court the defendant made another motion, this time to dismiss the action on the basis that the statute of limitations had run on the plaintiff's cause of action. The trial court overruled the motion and the defendant again appealed. On appeal,[5] the Supreme Court stated that if the plaintiff had filed his complaint alleging negligence the cause would have related back to the time of the issuance of the clerk's order thus stopping the running of the statute.[6] However, since the plaintiff had chosen to allege a new cause, the action was "deemed to have been instituted on the date that the complaint was actually filed,"[7] and accordingly the judgment was reversed.

In finding that the complaint was good for one purpose and bad for another the *Roberts* case brings out vividly the Court's attitude toward amendments. Although the cases are the first of this type[8]

[3] N.C. GEN. STAT. § 1-123 (1953) reads in part that "the plaintiff may unite in the same complaint several causes of action, of legal or equitable nature, or both, where they all arise out of—(1) The same transaction, or transaction connected with the same subject of action."

[4] 256 N.C. at 437, 124 S.E.2d at 107.

[5] Roberts v. Coca-Cola Bottling Co., 257 N.C. 656, 127 S.E.2d 236 (1962).

[6] "The application and order extending the time to plead were, . . . barely sufficient to enable the plaintiff to file a complaint stating a cause of action for damages based on negligence. Such a complaint would relate back to the date of the summons." *Id.* at 657-58, 127 S.E.2d at 238.

[7] *Id.* at 658, 127 S.E.2d at 238.

[8] An evenly divided Court in Whitehurst v. Anderson, 228 N.C. 787, 44 S.E.2d 358 (1947), in a per curiam decision affirmed a trial court holding that when the order issued under G.S. § 1-121 does not sufficiently state the nature and purpose of the action the service is not fatally defective and the plaintiff may cure a deficiency by amendment. Since the Court was evenly divided on this issue no precedent was set.

to be decided under G.S. § 1-121 the holdings are in accordance with previous decisions reflecting the current amendment philosophy of the Court. The finding in the first instance that it was permissible to allege a breach of warranty is in accord with the general rule that, prior to trial, a plaintiff is given comparative freedom to amend even to the point of introducing a new cause of action, subject only to the "joinder of causes" provisions of G.S. § 1-123.[9] As demonstrated in the second case, this rule is not applicable once the statute of limitations comes into play.[10] The finding that the statute continued to run until the time that the complaint was filed follows the now general rule in North Carolina that any amendment that changes the cause as originally set out does not relate back to the time that the action is originally initiated.[11] Thus even though the complaint was otherwise good, it relegated the plaintiff to the position of having for the first time stated a cause of action against the defendant.[12]

Damages

In *Kizer v. Bowman*[13] the plaintiff was awarded damages for nursing, medical, hospital, and other expenses incurred as a result of her personal injuries even though they had not been specifically

[9] The plaintiff should be given complete freedom of amendment confined only by "the exercise of a sound judicial discretion, in connection with the provisions of G.S. 1-123 . . . ." Perkins v. Langdon, 233 N.C. 240, 244, 63 S.E.2d 565, 569 (1951), interpreting G.S. § 1-163. "[I]t was permissible under G.S. 1-163 to allow plaintiff to introduce a new cause of action by way of amendment if the facts constituting the new cause of action arise out of or are connected with the transactions upon which the original complaint is based." Mica Indus., Inc. v. Penland, 249 N.C. 602, 605-06, 107 S.E.2d 120, 124 (1959). It is interesting to note that there has not yet been a decision as to whether a plaintiff may amend his complaint to include a new cause of action initially joinable under any other provision of G.S. § 1-123 than the "same transaction" clause. The decisions have been interpreted by one authority, N.C. INDEX, *Pleadings* § 25 (1960), to hold that this would not be possible. There would appear to be no sound reason for this conclusion. Free amendment is allowed prior to trial because the opposing party still has ample time to investigate the new matter set up. Perkins v. Langdon, *supra; accord* Modern Elec. Co. v. Dennis, 255 N.C. 64, 120 S.E.2d 533 (1961). Therefore it would seem to make no difference which provisions of G.S. § 1-123 are used to justify the insertion of a new cause of action.

[10] See, *e.g.*, Perkins v. Langdon, 233 N.C. 240, 245, 63 S.E.2d 565, 570 (1951).

[11] Perkins v. Langdon, *supra* note 10; Nassaney v. Culler, 224 N.C. 323, 30 S.E.2d 226 (1944).

[12] It would appear that the plaintiff will not be able to bring a new action under the provisions of G.S. § 1-25 since where a new cause of action is alleged the original action is no protection against the statute of limitations. See Woodcock v. Bostic, 128 N.C. 243, 38 S.E. 881 (1901).

[13] 256 N.C. 565, 124 S.E.2d 543 (1962).

alleged. The defendant appealed, assigning as error both the award of damages and the instructions given as to damages to the jury by the trial judge.[14] The Supreme Court affirmed, holding that under a general allegation of bodily injury all such damages were provable.

It is generally held that medical and hospital expenses, expenses of drugs, loss of time from work, loss of earning capacity, and loss of profits are elements of special damages which must be specifically pleaded.[15] The principal case in refusing to follow this rule relied on the earlier case of *Sparks v. Holland*.[16] There the Court held that hospital expenses were collectible under a general allegation. In a dictum, however, it pronounced the much broader doctrine that all these damages, with the possible exception of loss of profits, may be proved under a general allegation of circumstances giving rise to personal injury.

One striking difference between *Sparks* and *Kizer* should be noted. *Sparks* was based partly on the *de minimis* rule, the amount of "special damage" being trivial.[17] The Court in *Kizer*[18] made no mention of this factor, thus giving rise to the presumption that North Carolina has committed itself to an "enlightened rule which should receive general application."[19]

Express and Implied Contract

In *McCraw v. Llewllyn*[20] the plaintiff alleged the testatrix had made a will in which he had been devised and bequeathed all of her property. He did not claim as a beneficiary under the will since he recognized that it had been revoked by the testatrix's subsequent

[14] The instruction appealed from was as follows: "If the plaintiff is entitled to recover at all she is entitled to recover as damages one compensation in a lump sum, for all of her injuries, past, present, and prospective, in consequence of the defendants acts and conduct . . . (These damages are understood to embrace indemnity for actual loss of time, nurses, medical expenses, loss from inability to perform any of her ordinary duties.)" 256 N.C. at 576, 124 S.E.2d at 551.

[15] McCORMICK, DAMAGES § 8 (1935).

[16] 209 N.C. 705, 184 S.E. 552 (1936).

[17] The hospital bill amounted to fifteen dollars as compared with a total judgment of fifteen hundred dollars.

[18] The "special damages" in this case were not by any means trivial, amounting to over three thousand dollars. Record pp. 36-38.

[19] Brandis & Trotter, *Some Observations on Pleading Damages in North Carolina*, 31 N.C.L. REV. 249, 256 (1953).

[20] 256 N.C. 213, 123 S.E.2d 575 (1962). Also discussed in CONTRACTS, *Contracts to Devise* and in WILLS AND ADMINISTRATION, *Contracts to Devise —Sufficiency of Memorandum, infra.*

marriage.[21] Instead he alleged that the will had been made in consideration of services rendered and sought to recover for breach of an express contract. The Supreme Court reversed a judgment for the plaintiff deciding that the will was not a sufficient memorandum to show a special contract. In reversing, the Court stated that the plaintiff had tried his case on an erroneous theory, and that there should be a new trial at which the parties may "present such evidence as they may have relating to an implied promise to pay for services rendered."[22]

In *Yates v. W. F. Mickey Body Co.*[23] the plaintiff alleged that pursuant to an express contract he had printed five thousand catalogs for the defendant, and that a certain sum was due thereon. The defendant answered admitting that he had accepted and used one thousand of the books, but denied liability on the contract alleging that they were not printed to specification. There was conflicting evidence presented on trial as to whether or not the catalogs were printed correctly. The judge submitted only one issue to the jury: "How much, if anything is the plaintiff entitled to recover?"[24] The jury found for the plaintiff on the contract and the defendant appealed. The Supreme Court held that the submission of a single issue was erroneous since many issues had been presented. In reversing, the Court declared that since the plaintiff had received and used one thousand books, an issue should be submitted to the jury as to liability on an implied contract basis since it could be found that no express contract existed, or that if one did exist, the defendant could possibly not be liable thereon.

By reversing in *McCraw* for a trial based on implied contract and by expressly approving of the submission of issues of implied contract and express contract liability on an alternative basis in *Yates* the Court followed what now appears to be the general rule that when a plaintiff declares upon an express contract, grounded on consideration of services rendered, and subsequently fails to prove the contract, he may then proceed on the theory of implied contract without amending his complaint.[25] This principle would seem to be applicable in all

[21] See N.C. GEN. STAT. § 31-5.3 (Supp. 1961).
[22] 256 N.C. at 217, 123 S.E.2d at 578.
[23] 258 N.C. 16, 128 S.E.2d 11 (1962).
[24] *Id.* at 21, 128 S.E.2d at 14.
[25] Thormer v. Lexington Mail Order Co., 241 N.C. 249, 85 S.E.2d 140 (1954); Jamerson v. Logan, 228 N.C. 540, 46 S.E.2d 561 (1948); Lipe v. Citizens Bank & Trust Co., 206 N.C. 24, 173 S.E. 316 (1934); Harris v.

situations where a quantum meruit recovery is warranted by the facts alleged irregardless of whether the express contract is not provable as a matter of law[26] or is a question of fact for the jury.[27] The two cases serve the purpose of buttressing against an earlier suggestion that a plaintiff may be forced to an election between the two remedies since they are inconsistent.[28] By consistently allowing the plaintiff to proceed on both theories the Court has reached the laudable result of allowing an entire case to be tried on the merits without being interrupted and plagued by the technicalities that still survive the common law.

Extention

In *Roberts v. Coca-Cola Bottling Co.*[29] the plaintiff requested and received an extension of twenty days in which to file his complaint under the following provision of G.S.§ 1-121:

> Provided that the clerk may at the time of the issuance of summons on application of plaintiff by written order extend the time for filing complaint to a day certain not to exceed twenty (20) days, and a copy of such order shall be delivered to the defendant, or defendants, at the time of the service of summons in lieu of a copy of the complaint: Provided further, said application and order shall state the nature and purpose of the suit.[30]

Buie, 202 N.C. 634, 163 S.E. 693 (1932); Dorsey v. Corbett, 190 N.C. 783, 130 S.E. 842 (1925); Stokes v. Taylor, 104 N.C. 394, 10 S.E. 566 (1889). See also Coley v. Dalrymple, 225 N.C. 67, 33 S.E.2d 477 (1945); Grady v. Faison, 224 N.C. 567, 31 S.E.2d 760 (1944). In Thormer v. Lexington Mail Order Co., *supra* the facts were almost identical with those in *Yates*. The complaint alleged a contract, duly performed by the plaintiff, to provide illustrations for a mail order catalog. There was conflicting testimony as to the specifications of the illustrations, but it was established that the defendant received and kept at least one for his own use. The trial court in that case, however, sent the case to the jury on theories of both express and implied contract. The case was reversed on appeal, but the Supreme Court seemed to approve the submission of alternative theories.

[26] *E.g.*, McCraw v. Llewllyn, 256 N.C. 213, 123 S.E.2d 575 (1962).

[27] *E.g.*, Yates v. W. F. Mickey Body Co., 258 N.C. 16, 128 S.E.2d 11 (1962).

[28] Graham v. Hoke, 219 N.C. 755, 14 S.E.2d 790 (1941) criticized in 20 N.C.L. REV. 205 (1942). See also Hayman v. Davis, 182 N.C. 563, 109 S.E. 554 (1921), where the Court stated that since the plaintiff had elected to sue on quantum meruit he had renounced all right to recover on the special contract which he had attempted to plead.

[29] 256 N.C. 434, 124 S.E.2d 105 (1962).

[30] N.C. GEN STAT. § 1-121 (Supp. 1961).

The clerk's order read, " 'the nature and purpose of the action is to recover the sum of $100,000.00 for personal injuries received as a result of the negligence of the . . . defendant.' "[31] On receipt of the order, the defendant moved to quash the summons and dismiss the action for failure of the plaintiff's application and the clerk's order to sufficiently give the defendant notice of the nature and purpose of the suit.

In what appears to be a case of first impression[32] the Court held that "the intent of the statute was to require the plaintiff to alert the defendant by giving preliminary notice of the nature of the claim and the purpose of the suit, and that the ultimate factual averments would follow in a complaint later to be filed."[33] The Court held, accordingly, that the application and the order had sufficiently met the statutory requirement.

Insurance—Nonpayment of Premiums

In *Crisp v. State Farm Mut. Auto Ins. Co.*[34] plaintiff brought a suit as a third party beneficiary under an automobile liability insurance policy issued by the defendant. Plaintiff had previously brought an action against the insured for injuries sustained as a result of the insured's negligence. In that action plaintiff recovered a judgment against the insured but it was unsatisfied.

On appeal the defendant contended that the plaintiff had failed to make out a prima facie case in that he had failed to allege and prove that the premiums on the policy had been paid. Thus, the defendant argued, there had been no affirmative showing by the plaintiff that the policy was in effect at the time of the accident. The Court, after first stating that the provisions of the Motor Vehicle Responsibility Act of 1957[35] are applicable to all automobile liability policies, found that the required FS-1 certificate had been issued to the insured, and held that this certificate represented that all conditions precedent had been performed, including payment.[36] The Court further surmised

[31] Roberts v. Coca-Cola Bottling Co., 256 N.C. 434, 435, 124 S.E.2d 105, 106 (1962).

[32] In Whitehurst v. Anderson, 228 N.C. 787, 44 S.E.2d 358 (1947) an evenly divided Court handed down a per curiam decision stating that the plaintiff could amend the order issued under G.S. § 1-121 if it did not sufficiently state the "nature and purpose of the action."

[33] 256 N.C. at 436, 124 S.E.2d at 107 (1962).

[34] 256 N.C. 408, 124 S.E.2d 149 (1962). Also discussed in INSURANCE, *Automobile Liability Insurance, infra.*

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

[36] "Where a statute is applicable to a policy of insurance, the provisions

that after the plaintiff has alleged and proved that the policy has been issued, and that it covered the automobile in question, the only way for the insurer to escape liability is to prove that the policy has been cancelled in accordance with the applicable statutory procedure.

It has been held in numerous instances[37] that nonpayment of premiums is an affirmative defense, unless the policy stipulates otherwise.[38] It is desirable that this defense be unavailable to the issuer of an automobile liability policy since the main purpose of the Motor Vehicle Responsibility Act is to protect those injured by automobiles. With the holding in the principal case the Court has further guaranteed that those injured by the negligent operation of an automobile in North Carolina will receive compensation for their injuries.

Joinder of Parties and Causes

In *Greer v. Skyway Broadcasting Co.*[39] plaintiff alleged in his complaint facts tending to show that he was arrested for the crimes of rape and robbery, that the victim failed to identify him, and that defendant-constable, knowing of the failure of positive identification, announced to the contrary. Plaintiff further alleged that defendant broadcasting company, with full knowledge that there had been no identification, disseminated through its radio and television facilities statements that the plaintiff had been arrested and had been positively identified by the victim. By way of amendment the plaintiff further alleged that the two defendants had conspired to libel and slander him. Defendant broadcasting company demurred on the grounds of misjoinder of parties and causes.[40] The trial court overruled the

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of the statute enter into and form a part of the policy to the same extent as if they were actually written in it." Crisp v. State Farm Mut. Auto. Ins. Co., 256 N.C. 408, 413, 124 S.E.2d 149, 153 (1962).

[37] *E.g.*, Cato v. Hospital Care Ass'n, 220 N.C. 479, 17 S.E.2d 671 (1941); Blackburn v. Sovereign Camp of the Woodmen of the World, 219 N.C. 602, 14 S.E.2d 670 (1941).

[38] Creech v. Sun Life Assur. Co., 224 N.C. 144, 29 S.E.2d 348 (1944); *accord*, Williams v. Philadelphia Life Ins. Co., 212 N.C. 516, 193 S.E. 728 (1937).

[39] 256 N.C. 382, 124 S.E.2d 98 (1962). This case is discussed in TORTS, *Defamation, infra.*

[40] The broadcasting company contended that the complaint alleged four causes of action: (1) a cause of action against the constable as an individual for false imprisonment, false arrest, and malicious prosecution; (2) a cause of action against the constable as an individual for libel; (3) a cause of action against the broadcasting company for libel; and (4) a cause of action against both defendants for conspiracy to libel and slander the plaintiff.

The Court stated that although it was possible to allege a cause of action against a law enforcement officer for malicious prosecution, State v. Swanson, 223 N.C. 442, 27 S.E.2d 122 (1943), the complaint in question did not do so

demurrer and the Supreme Court affirmed, holding that the defendants were properly joined by reason of the allegations of a conspiracy to injure the plaintiff.

It is generally held that two or more individuals uttering slanders against the same person cannot be held jointly liable even though the words may be the same.[41] Once the allegation of conspiracy is inserted however, the requirement that all causes must affect all parties is met.[42] Thus the principal case holds in accord with prior North Carolina decisions[43] that a plaintiff may join all parties who join in a conspiracy to libel or slander.

Notice

Ordinarily, the giving of timely notice as required by a municipal charter is a condition precedent to the right to maintain an action in tort against a municipality.[44] If the plaintiff fails to allege and prove notice, a nonsuit is proper.[45] There is an exception to this rule, however, where the plaintiff alleges and proves that at the time notice should have been given he was under a mental or physical disability. In such a case the plaintiff is not required to give notice so long as he remains disabled.[46]

The general rule was applied recently[47] in a situation where the

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because of the failure of the plaintiff to allege that he was arrested without probable cause.

As to the causes of action for false imprisonment and false arrest the Court concluded that since the warrants were properly issued the officer was protected, thus precluding a cause of action on those grounds. This would have been true even though the warrants were defective. Alexander v. Lindsey, 230 N.C. 663, 55 S.E.2d 470 (1949).

[41] *E.g.*, Gattis v. Kilgo, 125 N.C. 133, 34 S.E. 246 (1899).

[42] N.C. GEN. STAT. § 1-123 (1953). If there is only one libel, however, it is well settled that all who participate in its publication may be sued by the person defamed either jointly or severally. Taylor v. Kinston Free Press Co., 237 N.C. 551, 75 S.E.2d 528 (1953); Tucker v. Eatough, 186 N.C. 505, 120 S.E. 57 (1923).

[43] *E.g.*, Lewis v. Carr, 178 N.C. 578, 101 S.E. 97 (1919); Rice v. McAdams, 149 N.C. 29, 62 S.E. 774 (1908).

[44] Carter v. City of Greensboro, 249 N.C. 328, 106 S.E.2d 564 (1959); Barnett v. City of Elizabeth City, 222 N.C. 760, 24 S.E.2d 264 (1943); Foster v. City of Charlotte, 206 N.C. 528, 174 S.E. 412 (1934); Hartsell v. City of Asheville, 166 N.C. 633, 82 S.E. 946 (1914).

[45] *E.g.*, Barnett v. City of Elizabeth City, *supra* note 44

[46] *E.g.*, Carter v. City of Greensboro, 249 N.C. 328, 106 S.E.2d 564 (1959). It is also stated that after the disability has been removed it must be shown that the plaintiff "gave notice within a reasonable time after the disability was removed." Sowers v. Forsyth Warehouse Co., 256 N.C. 190, 193, 123 S.E.2d 603, 605 (1962). The rule is obviously sound but as to this time there has been no specific case dealing with this point.

[47] Sowers v. Forsyth Warehouse Co., *supra* note 46.

minor plaintiff was injured when she stepped into a defective place in a sidewalk. After finding no extenuating circumstances[48] to excuse the failure of the plaintiff to give notice to the defendant municipality, the Court took judicial notice of the date of appointment of the next friend, citing *Rowland v. Beauchamp*.[49] *Rowland* held that in an action by a minor to recover for personal injuries negligently inflicted, the statute of limitations begins to run upon the appointment of a next friend for the special purpose of bringing the action. Thus, by citing *Rowland*, the Court seems to infer that even if a minor plaintiff is incapacitated, once the next friend is appointed notice becomes a necessity for maintaining an action.

Plea of Abatement

In *Perry v. Owens*[50] *A* and *B* were involved in an automobile collision. *B* brought suit in the Durham County Civil Court which has a limited jurisdiction (1500 dollars).[51] While this suit was pending *A* brought another action in the Wake County Superior Court alleging damages totalling 11,650 dollars. *B* answered by pleading in abatement, alleging the prior action in bar. *A* demurred to the plea. The trial court overruled the demurrer and accordingly dismissed the action. On appeal, the Supreme Court recognized that if the demurrer was sustained there would be many difficulties arising from the fact that suits were being prosecuted in two different courts, especially in respect to res judicata.[52] These considerations, though,

[48] 256 N.C. at 193, 123 S.E.2d at 605. The Court considered the plaintiff's education, physical condition, reactions of parents and relatives, and age in reaching the conclusion that there was nothing that hindered prompt notice from being given. As demonstrated by the case, the fact that the plaintiff is a minor does not per se do away with the requirement that notice be given. *Cf.* Carter v. City of Greensboro, 249 N.C. 328, 106 S.E.2d 564 (1959); Webster v. City of Charlotte, 222 N.C. 321, 22 S.E.2d 900 (1942). In Webster v. City of Charlotte, *supra*, the plaintiff was eight years old at the time of the injury. Suit was brought when he reached the age of thirteen. On appeal the Court held for the plaintiff although no notice had been given. This case was relied upon by the plaintiff in the principal case for the proposition that minority per se will nullify the requirement of notice. Brief for the Plaintiff, p. 18. Although the decision is not clear as to why the Court held that the plaintiff's cause was still good it made the statement that "inability to comply strictly with the requirement has been recognized as an exception to the rule." 222 N.C. at 323, 22 S.E.2d at 902. This would lead to the conclusion that there were extenuating circumstances that were not brought out in the opinion, thus placing the case within the general rule.

[49] 253 N.C. 231, 116 S.E.2d 720 (1960).

[50] 257 N.C. 98, 125 S.E.2d 287 (1962).

[51] See N.C. GEN. STAT. § 7-372 (3) (1953).

[52] 257 N.C. at 102, 125 S.E.2d at 291.

were overridden by the fact that *A* would not by counterclaim in *B*'s action have her claim fully satisfied,[53] and accordingly the judgment was reversed.

Although the case is one of first instance,[54] this situation was foreseen by a previous writer for the *Law Review* in a note[55] that discussed the need for a statute providing for removal of a trial to the superior court when an adverse party has a claim exceeding the jurisdictional limit of the court in which the action is initiated. The Court in the instant case took judicial notice of this suggestion and stated that the enactment of such a statute "merits the attention and consideration of the General Assembly."[56]

Prior to the instant decision, the appropriate course of action for a defendant confronted with this situation was not clear. It had been decided that he could not counterclaim past the limits of jurisdiction and have the action removed to the superior court.[57] But since the ingredients of our judicially constructed compulsory counterclaim exist in this situation[58] it was not certain whether the defendant could maintain a separate action. This case resolves that point. However, it expressly does not resolve the problem which still inheres in the situation and which gives rise to the compulsory counterclaim conception which ordinarily would prevent a separate suit, namely, collateral estoppel. As resolved by the Restatement of

[53] For the defendant's plea of abatement to suffice two prerequisites must be met: (1) the plaintiff in the second action must be capable of obtaining the same relief in the prior action; and (2) a judgment in favor of the plaintiff in the prior action would be res judicata to the second action. Perry v. Owens, 257 N.C. 98, 125 S.E.2d 287 (1962); Hill v. Hill Spinning Co., 244 N.C. 554, 94 S.E.2d 677 (1956). Based on this criterion the defendant (*B*) failed in meeting prerequisite (1) in substantiating his plea of abatement.

[54] A somewhat analogous situation was presented in Auto Fin. Co. v. Simmons, 247 N.C. 724, 102 S.E.2d 119 (1958). The plaintiff filed suit in the Durham County Civil Court. The defendant then counterclaimed for an amount in excess of the jurisdictional limit and moved that the case be removed to the superior court by reason of his counterclaim. The Supreme Court held that it was error for such an order to issue as there was no statutory provision authorizing such an action.

[55] 32 N.C.L. REV. 231 (1954). This point was also made in the *Sixth Annual Survey of Case Law*, 37 N.C.L. REV. 468 (1959), commenting on Auto Fin. Co. v. Simmons, *supra* note 54.

[56] 257 N.C. at 102, 125 S.E.2d at 291.

[57] Auto Fin. Co. v. Simmons, 247 N.C. 724, 102 S.E.2d 119 (1958).

[58] A defendant is placed in the position of mandatory counterclaim "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, 758, 119 S.E.2d 910, 911 (1961).

Judgments the judgment rendered in the first action would not be conclusive as to the second.[59] Although this solution would resolve the immediate problem presented, it appears that a legislative enactment allowing removal of such suits would allow orderly handling free from such complications and would produce a much more desirable result.[60]

Splitting Causes of Action

As a general rule all damages resulting from a single wrong or cause of action must be recovered in one suit.[61] This rule against splitting causes of action is based partly on the theory of res judicata and partly on "sound policy to prevent the harassing of defendants and the wasting of the time of courts."[62] A recognized exception arises when the wrongful act causes both personal injuries and property damage and the injured party has insurance covering the total amount of the property damage. If the insurer, in such a case, pays the loss in full[63] it becomes the "real party in interest"[64] as to the property damage and must sue in its own name to enforce its right to subrogation.[65] On the other hand the insured may sue in his own name to recover for his personal injuries.[66] Thus, an otherwise indivisible cause of action may be split.

In *Milwaukee Ins. Co. v. McLean Trucking Co.*[67] North Carolina, for the first time, allowed splitting of a cause of action where only property damages were involved. In *McLean* plaintiff was the insurer of cargo which was destroyed in a collision between a truck owned

[59] "[W]here an action is brought in such a court [i.e. one of limited jurisdiction] to enforce a claim for less than the designated amount, and the liability of the defendant depends upon the determination of a particular matter, the determination of this matter, although conclusive in this action, is not conclusive in a subsequent action between the parties involving a claim exceeding the designated sum, brought in a court whose jurisdiction is not limited as to the amount in controversy." RESTATEMENT, JUDGMENTS § 71, comment *d.* (1942).

[60] On March 20, 1963, a bill was favorably reported to the Senate to remedy this situation.

[61] *E.g.*, Eller v. Railroad, 140 N.C. 140, 52 S.E. 305 (1905).

[62] CLARK, CODE PLEADING § 73 (2d ed. 1947).

[63] An assignment by the insured to the insurer of the amount not paid may act as a substitute for a complete payoff. Anything less than that will not suffice. Southeastern Fire Ins. Co. v. Moore, 250 N.C. 351, 108 S.E.2d 618 (1959) (loan agreement for amount deductible insufficient). For a complete analysis of this and related problems see 38 N.C.L. REV. 99 (1959).

[64] N.C. GEN. STAT. § 1-57 (1953).

[65] Underwood v. Dooley, 197 N.C. 100, 147 S.E. 686 (1929).

[66] *E.g.*, Underwood v. Dooley, *supra* note 65.

[67] 256 N.C. 721, 125 S.E.2d 25 (1962).

by the insured and a truck owned by the defendant. In a prior action the insured successfully sued for the damage to the truck and took a voluntary nonsuit as to the loss of the cargo.[68] The plaintiff then brought suit to recover for the loss of the cargo. The defendant pleaded the prior judgment as a bar and the trial court dismissed the action. Plaintiff appealed and, at the same time, filed a motion in the Supreme Court to amend its complaint to allege that it paid the insured the total value of the cargo loss prior to the commencement of the first action. The Supreme Court reversed the dismissal and denied the plaintiff's motion without prejudice. Thus plaintiff was allowed to apply to the trial court for permission to so amend its complaint. The Court reasoned that had the plaintiff totally paid for the loss to the cargo, then the insured would have had no right to recover for such loss in the prior action. In such a case, the plaintiff would become the "real party in interest" as to the cargo.

Prior to the instant decision there had been what appeared to be a wealth of authority that causes of action as to property damage are indivisible,[69] and that the insurer may sue in its own name only after it has paid to the insured compensation for the *total amount* of all property damage.[70] If the amount paid is less, the rule in *Burgess v. Trevathan*[71] is then applicable:

> Where the insurance paid by the insurance company covers only a portion of the loss, the insured is a necessary party plaintiff in any action against the tort-feasor for the loss. The insured may recover judgment against the tort-feasor in such case for the full amount of the loss . . . . [holding] the

[68] McCombs v. McLean Trucking Co., 252 N.C. 699, 114 S.E.2d 683 (1960). Another action for the wrongful death of the driver of the insured's truck was also consolidated with this case, both resulting in judgments against the defendant.

[69] *E.g.*, Burgess v. Trevathan, 236 N.C. 157, 160, 72 S.E.2d 231, 233 (1952); Lumberman's Mut. Ins. Co. v. Southern Ry., 179 N.C. 255, 261, 102 S.E. 417, 421 (1920). Two exceptions have appeared. (1) If the defendant does not object to the causes being split, the objection is deemed waived. Southern Stock Fire Ins. Co. v. Raleigh, C. & S. Ry., 179 N.C. 290, 102 S.E. 504 (1920). (2) If the insured settles with the tort-feasor for all the damages over and above the amount paid by the insurance company the cause is said to be split by the agreement of the parties. In this instance the insured loses all beneficial interest in the cause and the insurer may bring an action against the tort-feasor for the amount that he has paid the insured. Powell & Powell, Inc. v. Wake Water Co., 171 N.C. 290, 88 S.E. 426 (1916).

[70] *E.g.*, Great Am. Ins. Co. v. Modern Gas Co., 247 N.C. 471, 101 S.E.2d 389 (1958).

[71] 236 N.C. 157, 72 S.E.2d 231 (1952).

> proceeds of the judgment, however, as a trustee for the benefit of the insurance company to the extent of the insurance paid by it.[72]

In the instant case the insurance paid by the plaintiff covered only a portion of the entire property damage; therefore, it would appear that the sole right of action remained with the insured.[73] However, other factors must be taken into consideration. First, the insured did not own the cargo, but was a mere bailee. Second, the defendant was given due notice that there had been a cargo loss, and when the insured moved to take a voluntary nonsuit as to its loss, he could have moved to have the insurer brought into the action. Thus, as a matter of policy the decision appears sound. In any event it should stand as a warning to all future defendants in similar situations to attempt to bring in all parties that have an interest in the subject of the action.

Statute of Limitations

In *Kizer v. Bowman*[74] the plaintiff brought suit for personal injuries sustained in an automobile accident that occurred in Florida. After the statute of limitations had run on her cause of action, plaintiff amended to further allege that the defendant's acts constituted gross negligence and willful and wanton misconduct.[75] After the plaintiff's evidence the defendant's motion for nonsuit was denied. On appeal the Supreme Court affirmed on the ground that the amendment alleged no new cause of action or any new facts, and thus the amendment related back to the time that the complaint had been initially filed. The Court stated that "the pleader merely characterized the alleged acts theretofore set out in her complaint . . . ."[76]

Although the Court applied Florida substantive law, it would appear that the same result would have been reached under North Carolina law. The purpose of pleading willful and wanton negligence in this jurisdiction is to eliminate contributory negligence as a de-

[72] *Id.* at 160, 72 S.E.2d at 233.

[73] *Compare* Lumberman's Mut. Ins. Co. v. Southern Ry., 179 N.C. 255, 102 S.E. 417 (1920), where the Court allowed separate suits by five different insurance companies after each had paid a part of the *total* property damage.

[74] 256 N.C. 565, 124 S.E.2d 543 (1962).

[75] It would appear that the reason for the later amendment was to insure that the plaintiff brought herself within the provisions of the Florida guest statute.

[76] 256 N.C. at 570, 124 S.E.2d at 547.

fense[77] or to lay a foundation for punitive damages.[78] Although it is good practice to specifically plead such allegations, if they are omitted the issue will still be considered if the facts alleged are sufficient to show that the defendant's conduct warranted such a characterization.[79] In making these additional allegations the plaintiff is merely "dressing up" his complaint, adding nothing in the way of a new cause of action.[80]

Variance

In *Hall v. Poteat*[81] the plaintiff alleged that she sustained injuries when the defendant pulled his automobile into the path of the plaintiff's oncoming car. On trial, the plaintiff's testimony tended to show that the defendant's car was stopped in his lane of travel at the time of the accident. The Supreme Court affirmed a judgment of nonsuit on the basis that the variance between the plaintiff's proof and allegation was fatal.

The case is in accord with a line of decisions[82] holding that if a plaintiff varies his proof from that which he has alleged he is subject to nonsuit, regardless of whether or not the defendant satisfied the trial court that he was misled or prejudiced by the introduction of the new evidence.[83] This case is noted at page 647 *infra.*

PARTIES

Proper Parties

In *Wachovia Bank & Trust Co. v. Buchan*[84] the testator died

[84] 256 N.C. 142, 123 S.E.2d 489 (1962).

leaving a will which set up one trust for his widow and another trust for the benefit of his minor daughter. The widow filed a dissent. While the dissent was pending, Wachovia Bank and Trust Co., acting as trustee and executor of the will, and the widow agreed on a tentative settlement. Action was then brought in equity to obtain the

[77] *E.g.*, McAdoo v. Richmond & D.R.R., 105 N.C. 140, 11 S.E. 316 (1890).
[78] *E.g.*, Hinson v. Dawson, 244 N.C. 23, 92 S.E.2d 393 (1956).
[79] *Id.* at 27, 92 S.E.2d at 396. This case is placed in the context of punitive damages, but it would appear that the same would be true if the issue is contributory negligence. *Accord,* Hansley v. Jamesville & W.R.R., 115 N.C. 602, 20 S.E. 528 (1894).
[80] When such allegations are made, they are treated as mere "conclusions of law" and will be stricken if the facts in the complaint do not substantiate them. Hinson v. Dawson, 244 N.C. 23, 92 S.E.2d 393 (1956).
[81] 257 N.C. 458, 125 S.E.2d 924 (1962).
[82] Beginning with Whichard v. Lipe, 221 N.C. 53, 19 S.E.2d 14 (1942).
[83] See N.C. GEN. STAT. § 1-168 (1953).

advice and consent of the court on the settlement. The court appointed a guardian ad litem to protect the interests of the daughter and made a finding approving the settlement. The guardian ad litem appealed stating that the findings were insufficient to determine whether the proposed settlement adequately protected the vested trust estate of the daughter.

The Supreme Court reversed, agreeing with the guardian's contentions. In its order of reversal, the Court, acting *ex mero motu* ordered that a guardian ad litem be appointed to represent the contingent interests of the possible issue of the daughter, and that a guardian ad litem should also be appointed to represent the heirs-at-law of the testator since they had a contingent interest in the trust if the daughter dies without issue and failed to exercise her power of appointment.

CONSTITUTIONAL LAW

BLUE LAWS

In *Surplus Stores, Inc. v. Hunter*[1] the Court noted the distinction between those "Blue Laws" which prohibit "all occupations on Sunday" and those, like the one under consideration, which apply solely to "certain business activities."[2] In holding the act unconstitutional the Court concluded that its proviso listing the articles which could not be sold on Sunday was so vague that men of common intelligence could not guess as to its meaning.[3]

[1] 257 N.C. 206, 125 S.E.2d 764 (1962).

[2] N.C. GEN. STAT. § 14-346.2 (Supp. 1961) provided: "Any person, firm, or corporation who engages on Sunday in the business of selling, or sells or offers for sale, on such day, at retail, clothing and wearing apparel, clothing accessories, furniture, housewares, . . . and articles necessary for making repairs and performing services, shall, upon conviction thereof be fined or imprisoned in the discretion of the court. Each separate sale or offer to sell shall constitute a separate offense."

[3] The Court mentioned other improprieties in the statute such as the ban on retail sales, but not on wholesale transactions, and the fact that the act made no attempt to control the sale of goods not listed. These inconsistencies were not passed upon since they were not raised by the plaintiffs.

An interesting comparison can be noted between the present case and the United States Supreme Court's holdings in McGowan v. Maryland, 366 U.S. 420 (1960), the banner case on Sunday work laws. The Court considered a law which prohibited all work on Sunday, except for retail sales of "merchandise essential to, or customarily sold at, or incidental to, the operation of" bathing beaches, amusement parks, etc. This "exception" proviso was held to be not so vague as to violate due process.

Class Taxation

In 1959 the Legislature passed three acts which were intended to set up a fund for retired firemen.[4] Under the acts a tax was to be levied on insurance companies of one per cent of the premiums from fire and lightning policies. This tax was not to be levied on contracts of insurance written on property in "unprotected areas." The insurance companies challenged the statutes as a composite act claiming all three parts were invalid because: (1) the maintenance of fire fighting facilities is a local and not a state problem; (2) the proviso referring to "unprotected areas" was void for vagueness; and (3) the insurance companies cannot be taxed as a group for the purpose of paying the salaries of another class or group which consists of public employees. The Court in *Great American Ins. Co. v. Johnson*[5] upheld the third contention of the insurance companies. It was concluded that state funds could be used to aid local governments and also that the term "unprotected areas" was not vague. However, to have a tax imposed on a particular group of insurance companies for the special benefit of a group of public employees is unconstitutional, especially where the tax is imposed without any suggestion of benefit to the group upon which it is levied.

Devolution of Property

In *Dudley v. Staton*[6] the Court declared a part of the new Intestate Succession Act invalid as it applies to the husband's right to dissent from his wife's will.[7] The Court held that the husband could not dissent from his spouse's will since under article X, section 6, of the North Carolina Constitution a married woman in this state is granted the right to devise property *as if she were unmarried.*[8]

[4] N.C. Sess. Laws 1959, ch. 1211, H.B. 689; N.C. Sess Laws 1959, ch. 1212, H.B. 690; N.C. Sess. Laws 1959, ch. 1273, H.B. 785.

[5] 257 N.C. 367, 126 S.E.2d 92 (1962).

[6] 257 N.C. 572, 126 S.E.2d 590 (1962). For further discussion on this case see Note, 41 N.C.L. Rev. 311 (1963).

[7] N.C. Gen. Stat. §§ 30-1 to -3 (Supp. 1961).

[8] "The real and personal property of any female in this State acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations, or engagements of her husband, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried." N.C. Const. art. X, § 6 (1868).

ELECTIONS

In *Thomas v. Board of Elections*[9] the petitioner attempted to enter the 1962 Democratic primary to run for candidate for the office of Lieutenant-Governor which had become vacant prior to the expiration of the term. Thomas claimed the right to run under a statute[10] which provided for the filling of vacancies in state offices at the next regular elections, "except as otherwise provided for in the Constitution." The State Board of Elections refused to accept petitioner's notice of candidacy or filing fee, alleging that the office would not be open for the filing of candidates until the primary of 1964. On motion for mandamus the Court agreed with the Board and held that the constitution provided for the succession of the Governor and Lieutenant-Governor[11] and does not authorize the filling of the vacancy by election prior to the expiration of the term. The Court further held that the Governor could not appoint a successor, but that the duties of the Lieutenant-Governor are to be carried out by the President of the Senate.

In *Ratcliff v. Rodman*[12] the Court refused to decide the validity of the oath required of candidates in primary elections.[13] The section of the oath which was under attack states that the candidate will support all of his party's nominees in the general election.[14] On an action for mandamus the Court refused to decide the issue, finding that since the primary had been held the question was academic.[15]

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[9] 256 N.C. 401, 124 S.E.2d 164 (1962).
[10] N.C. GEN. STAT. § 163-7 (1952).
[11] N.C. CONST. art. III, § 12 (1868).
[12] 258 N.C. 60, 127 S.E.2d 788 (1962).
[13] N.C. GEN. STAT. § 163-119 (1952).
[14] The oath, as required by N.C. GEN. STAT. § 163-119 (1952), reads: "I hereby file my notice as a candidate for the nomination as ——— in the primary election to be held on ———. I affiliate with the ——— party, and I hereby pledge myself to abide by the results of said primary, and to support in the next general election all candidates nominated by the ——— party."
[15] It would appear that in this case an action for damages against the board on the ground that the constitution grants to everyone the civil right to run in an election, regardless of party allegiance, would have been proper. Such an action could be sustained under Carolina Power & Light Co. v. Iseley, 203 N.C. 811, 167 S.E. 56 (1933), where the Court said: "Where, however, it appears from the allegations of the complaint . . . (2) that such controversy arises out of opposing contentions of the parties, made in good faith, as to the validity or construction of a statute . . . and (3) that the parties to the action have or may have legal rights . . . the court has jurisdiction . . . ." The action for mandamus was moot upon the election, but an action for damages would have remained as a live issue since the cause of action would have vested prior to the election.

NOTICE

In *In re Simmons*[16] the appellants attempted to have a lunacy hearing set aside on the ground that there was insufficient notice to the alleged incompetent. The man was given thirty minutes notice prior to the hearing at which he was found *non compos mentis*. The Court held the hearing valid, saying that the incompetent had been present and was examined by a jury.[17] Citing *Collins v. Highway Comm'n.*,[18] the Court held that his failure to request a continuance when he had the opportunity to do so was a waiver of his right to attack the soundness of the hearing.[19] Following a line of cases starting with *Ex parte White*,[20] the Court stated: "A party who is entitled to notice of a motion may waive notice. A party ordinarily does this by attending the hearing of the motion and participating in it." The application of the standards of attendance and participation for waiver of sufficient notice would seem to be cursory at best. These requirements presuppose the incompetent's adequate preparation and apparent readiness which are more likely to be missing in lunacy hearings than any other type proceeding.

The Court in *Sutton v. Davenport*[21] restated a line of decisions which hold that notice is a prerequisite to legal actions.[22] In this case the defendants were pleading res judicata, but in the prior action to settle title to land the grantor of the plaintiff had not been given sufficient notice. Publication of the notice was made to "any and all unknown heirs" and was found invalid. In so holding the Court

[16] 256 N.C. 184, 123 S.E.2d 614 (1962).

[17] In Covey v. Town of Somers, 351 U.S. 141 (1956), the United States Supreme Court found similar notice to be in violation of due process as guaranteed in the fourteenth amendment. In that case, notice of foreclosure for tax delinquency was given an elderly woman. Several days later she was adjudged insane. The notice, although given in compliance with statutory provisions of mailing, posting and publishing was held insufficient. The Court said that notice to an incompetent person is not notice but a mere gesture and does not comply with the requirements of due process.

[18] 237 N.C. 277, 74 S.E.2d 709 (1953).

[19] Although the right to counsel in lunacy hearings was not discussed, it appears that the incompetent appeared alone. It was stated that by his failure to ask for a continuance he waived his right to object. It has been held that such failure to object or appeal in criminal cases where no counsel is provided only emphasizes the need for counsel and such lack of counsel defeats the right for which protection is sought. Williams v. Kaiser, 323 U.S. 471 (1944).

[20] 82 N.C. 377 (1880).

[21] 258 N.C. 27, 128 S.E.2d 16 (1962).

[22] *E.g.*, Bank v. Jordon, 252 N.C. 419, 114 S.E.2d 82 (1960); Peel v. Moore, 244 N.C. 512, 94 S.E.2d 491 (1956); Ferguson v. Price, 206 N.C. 37, 173 S.E. 1 (1934); State v. Collins, 169 N.C. 323, 84 S.E. 1049 (1915).

stated: "The notice must be such as is reasonably calculated to appraise an interested party that his rights may be adversely affected."[23]

CONTRACTS

CONSTRUCTION CONTRACTS

In *Harris & Harris Constr. Co. v. Crain & Denbo, Inc.*,[1] the subcontractor, in compliance with the terms of a contract, agreed that before beginning work on a construction project he would deposit a certain sum in the bank to be used for purchasing supplies and other items. The sum was not deposited and the subcontractor began work. The contractor forced him to give up the project, claiming that his failure to make the deposit was a breach of the contract. The subcontractor then brought an action seeking to recover for the work already performed on a quantum meruit theory. It was argued that the deposit was a condition precedent to the arising of a contract and therefore he could collect the reasonable value of the work rather than being bound by the terms of the contract. The Court, evidencing its historic dislike for conditions precedent,[2] held that the contract was complete and in effect and the deposit was merely a condition precedent to the right to perform the work rather than to the arising of the contract.[3]

One factor rightfully given great weight by the Court was that both the parties had manifested an intent consistent with the holding that the contract was in effect from the time of the agreement rather than from the time of the contemplated deposit.[4]

[23] 258 N.C. at 30, 128 S.E.2d at 18 (1962). The defendant's motion to dismiss because of res judicata was based on N.C. GEN. STAT. § 1-108 (1953). That statute relates only to defendants "against whom publication is ordered" and publication had not been ordered against the plaintiff's intestate in the prior action.

[1] 256 N.C. 110, 123 S.E.2d 590 (1962).

[2] See generally McCall, *Estates on Condition and on Special Limitation in North Carolina*, 19 N.C.L. REV. 334, 345-46 (1941).

[3] 256 N.C. at 118, 123 S.E.2d at 596.

[4] The general rule is that where a material provision of a contract is left open for future treaty or negotiation the contract is rendered incomplete and uncertain. Here the contract was made and there remained nothing for the parties to do as to the formation of a contract. Federal Reserve Bank v. Neuse Mfg. Co., 213 N.C. 489, 196 S.E. 848 (1938).

CONTRACTS OF SALE

In *Yates v. Mickey Body Co.*[5] the defendant had contracted with the plaintiff, printer, for five thousand catalogs. The first one thousand were received by the defendant and despite the fact that he alleged they were not as he had ordered, he, due to an emergency situation, found it necessary to use them in the alleged faulty condition. Upon receipt of this first delivery he immediately contacted the plaintiff and attempted to cancel the order for the remainder. The plaintiff sued for the total price, and argued that the defendant had waived his right to refuse the remainder of the catalogs by accepting the initial group.

The Court held that the defendant had not waived his right to refuse the remainder of the order because his acceptance of the initial catalogs was in an emergency situation. This decision, in accord with the existing North Carolina law,[6] is well calculated to meet the ends of equity and does no harm to any existing contract policies.

CONTRACTS TO DEVISE

In *McCraw v. Llewellyn*[7] the plaintiff brought an action for breach of a contract to devise real and personal property in return for personal services rendered. Defendant, deceased's second husband, denied the special contract to devise, thus invoking the Statute of Frauds.[8] Plaintiff offered as a memorandum of the contract a revoked will, made prior to the deceased's second marriage,[9] which devised and bequeathed certain real and personal property to the plaintiff. The will recited no consideration for the devise. The trial court submitted the question to the jury on the special contract and allowed a verdict for the plaintiff. The Supreme Court granted a new trial, holding that the revoked will of the deceased did not suffice as a memorandum or note of a contract which would meet

[5] 258 N.C. 16, 128 S.E.2d 11 (1962). This case is discussed in CIVIL PROCEDURE, *Express and Implied Contracts, supra.*

[6] *E.g.*, Howie v. Rea, 70 N.C. 559 (1874); *c.f.* West v. Laughinghouse, 174 N.C. 214, 93 S.E. 719 (1917).

[7] 256 N.C. 213, 123 S.E.2d 575 (1962).

[8] "All contracts to sell or convey any lands . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith . . . ." N.C. GEN. STAT. § 22-2 (1953). See, *e.g.*, Grantham v. Grantham, 205 N.C. 363, 171 S.E. 331 (1933).

[9] Marriage after the execution of a will serves to revoke the will. N.C. GEN. STAT. § 31-5.3 (Supp. 1961).

the requirements of the Statute of Frauds.[10] The Court said that "exercise of the statutory right to dispose of one's property at death is not of itself evidence that the disposition directed is compelled by a contractual obligation."[11] A writing to be sufficient must show the promise of obligation which the complaining party desires to enforce.[12] The contract being void under the Statute of Frauds, the plaintiff's remedy was in quantum meruit for the reasonable value of services rendered under an implied contract to pay.[13]

Interference by Third Party

In *Fowler v. Nationwide Ins. Co.*[14] the plaintiff-attorney had a contingent fee contract with his client. The potential action was against the defendant insurance company. During the existence of the attorney-client relationship, the client went to see the defendant without the knowledge of plaintiff, and was induced by the defendant to breach her contract with the plaintiff. Some time later the

[10] An indivisible oral contract to devise both real and personal property is void under the Statute of Frauds. *E.g.*, Grady v. Faison, 224 N.C. 567, 31 S.E.2d 760 (1944). See note 8, *supra*. In Doub v. Hauser, 256 N.C. 331, 123 S.E.2d 821 (1962), action was instituted to recover for services rendered under an abandoned oral contract to devise. Defendant lived alone and needed someone to care for him. Plaintiffs and the defendant orally agreed that if they would live with and care for defendant he would give them part of his farm. Plaintiffs complied with the defendant's request, and lived there for seven and one-half years. Plaintiffs cared for defendant's personal needs, worked the fields, and paid the bills. Defendant made a will leaving property to the plaintiffs which was later revoked. Defendant, after receiving a windfall of a few thousand dollars, forced the plaintiffs to leave and they demanded compensation for services rendered; defendant refused. The evidence was controverted, but the jury found that there was an agreement between the parties as alleged and that plaintiffs rendered services to defendant and improved his property. A judgment was entered for plaintiffs, and defendant appealed. The Supreme Court affirmed the trial court stating: "When it is alleged that there was an agreement to provide compensation by will for services rendered and there is proof that services were rendered, but claimant fails to satisfy the jury by the greater weight of the evidence that there was an agreement to make testamentary provision for compensation, the claimant may still recover upon a quantum meruit for services rendered." 256 N.C. at 337, 123 S.E.2d at 826. In *Doub* the jury found that there had been an agreement for compensation by will, but the remedy of a promisee rendering services under a void oral contract to devise is in either event an action on implied assumpsit or quantum meruit for the value of services rendered. Gales v. Smith, 249 N.C. 263, 106 S.E.2d 164 (1958).

[11] 256 N.C. at 217, 123 S.E.2d at 578.

[12] *E.g.*, Yeager v. Dobbins, 252 N.C. 824, 114 S.E.2d 820 (1960).

[13] Gales v. Smith, 249 N.C. 263, 106 S.E.2d 164 (1958); Grantham v. Grantham, 205 N.C. 363, 171 S.E. 331 (1933). For a late decision see Pickelsimer v. Pickelsimer, 257 N.C. 696, 127 S.E.2d 557 (1962).

[14] 256 N.C. 555, 124 S.E.2d 520 (1962).

client, realizing that she had been duped by the defendant, entered into a new contract with the plaintiff. The plaintiff negotiated a settlement in the case and received his contingent fee. The theory of the instant case was based upon a cause of action for wrongful interference with contractual relations by a third party.[15]

The trial court allowed the motion for non-suit by the defendant and the Supreme Court affirmed. It was held that when the plaintiff accepted benefits under the new contract, it worked a novation on the original contract and therefore any action upon the original contract must fail.[16]

Release Agreements

In *Davis v. Davis*[17] the plaintiff, prior to presenting her claim on the merits, was faced with the necessity of destroying the effect of a release which she had signed. It is readily deductible from the language quoted in the opinion and the facts of the case that the plaintiff was either illiterate or semi-literate.[18]

The Court held that in order to escape the consequences of her actions, *i.e.* signing the release, on the grounds of fraud in the inducement, the plaintiff would have to show that she had acted with reasonable prudence under the circumstances. This holding is arguably opposed to the old North Carolina case of *Bean v. Western N.C.R.R.*[19] where the Court intimated that when the signer of a release is ignorant and illiterate an almost irrebutable presumption of fraud arises and the document will most often be struck down. Certainly the latter view is more productive of fundamental fairness.

[15] "[A]n action lies in tort against an outsider who knowingly, intentionally and unjustifiably induces one party to a contract to breach it to the damage of the other party." *E.g.*, Childress v. Abeles, 240 N.C. 667, 674, 84 S.E.2d 176, 181 (1954).

[16] The instant case seems to be an extension of the doctrine. In Morgan v. Speight, 242 N.C. 603, 89 S.E.2d 137 (1955), where the same result was reached, the original contract was unenforceable; and in Burns v. McFarland, 146 N.C. 382, 59 S.E. 1011 (1907), the original contract had been abandoned. In Swift v. Beaty, 39 Tenn. App. 292, 282 S.W.2d 655 (1954), the injured party had given the party breaching the contract an effective release and cancellation of the contract alleged to have been interfered with and there had been no fraudulent interference.

[17] 256 N.C. 468, 124 S.E.2d 130 (1962).

[18] *Id.* at 470, 124 S.E.2d at 132.

[19] 107 N.C. 731, 12 S.E. 600 (1890).

CREDIT TRANSACTIONS

CONDITIONAL SALES

Re-possession Without Notice to Vendee—Damages

In *Rea v. Universal C.I.T. Credit Corp.*,[1] the defendant, assignee of a conditional sales vendor of an automobile, upon default and without notice to the vendee, went on the latter's property, unlocked the car with a coat hanger, and drove it away. The vendee alleged there were 650 dollars worth of tools in the car when it was re-possessed and that the defendant had converted them. The conditional sales contract contained a clause providing that unless the vendee, within twenty-four hours after re-possession, notified the vendor that there were articles in the car not covered by the contract, any claim for them would be waived. Damages were awarded in the lower court for the wrongful seizure. The Supreme Court ordered a new trial.

After default a conditional vendor is entitled to the possession of the chattel and may seize and take possession without legal process provided he does so without provoking a breach of the peace.[2] The right to re-possess after default includes the right of the vendor to enter peaceably upon the premises of the vendee.[3] The Court held neither compensatory nor punitive damages may be recovered against one exercising his legal rights. Therefore, the trial court erred in holding that the plaintiff might recover for wrongful seizure. However, in failing to advertise the foreclosure sale as required, the defendant subjected himself to the penalty of

[1] 257 N.C. 639, 127 S.E.2d 225 (1962).

[2] Freeman v. GMAC, 205 N.C. 257, 171 S.E. 63 (1933); UNIFORM CONDITIONAL SALES ACT § 16.

[3] Westerman v. Oregon Auto Credit Corp., 168 Ore. 216, 122 P.2d 435 (1942); Willis v. Whittle, 82 S.C. 500, 64 S.E. 410 (1909). North Carolina, in the only case in point, has allowed nominal damages to the vendee where the re-possessor's agent entered the vendee's home while he was away. But the Court did say that in the absence of any injury to the premises, the vendee could not recover compensatory damages. Parris v. Fischer & Co., 221 N.C. 110, 19 S.E.2d 128 (1942). Whether or not this is the established rule in North Carolina is immaterial in the instant case, since the contract expressly provided that the vendor or his assignee had the right upon default to enter the vendee's premises.

While the Court speaks of the mortgagee's right to re-possess, it is well settled in North Carolina and elsewhere that a conditional sale has the legal effect of a chattel mortgage. State v. Stinnett, 203 N.C. 829, 167 S.E. 63 (1933); Harris v. Seaboard Air Lines Ry., 190 N.C. 480, 130 S.E. 319 (1925); Willis v. Whittle, *supra;* Note, 30 N.C.L. REV. 149 (1952).

the excess of the fair market value of the car over the balance due under the sale contract.[4]

In addition the defendant is liable in conversion for the value of the tools left in the car. The Court held the contract provision as to waiver does not apply where the car is re-possessed without notice to the conditional vendee.

Mortgages and Deeds of Trust

Independent Trustee

In *Denson v. Davis*,[5] an action to try title to land, the Court attempted to distinguish *Mills v. Mutual Bldg. & Loan Ass'n.*[6] In *Mills* the original owners executed a deed of trust to the chief active executive officer of a corporation to secure a debt to the corporation. The powers to demand a foreclosure, to advertise and sell, and to determine the bid were vested in a single agent of the creditor who was also the trustee. The Court held that the trustee's acting in a dual capacity rendered the transaction, in effect, a mortgage, and made the foreclosure sale to the mortgagee voidable.[7] In the instant case the trustee of the trust deed was an agent of the creditor-corporation, but had no power to order a foreclosure or to determine the bid—these powers were held by another agent. The purchaser at the foreclosure sale was also an agent of the creditor. The trial court's charge was based on the assumption that these facts constituted the transaction a mortgage and not a deed of trust. The Supreme Court reversed and held that where two agents of the creditor supervise the foreclosure instead of one, the rule of *Mills* does not apply.

In the principal case the trustee, in relation to the other two agents, did not seem to have been acting in his capacity as an impartial trustee any more than did the trustee in the *Mills* case. The distinction made by the Court concerning the principles of law involved is without substance. There is no reason to believe that

[4] 257 N.C. at 642, 127 S.E.2d at 225.
[5] 256 N.C. 658, 124 S.E.2d 827 (1962).
[6] 216 N.C. 664, 6 S.E.2d 549 (1940); Note, 18 N.C.L. Rev. 350 (1940).
[7] The same is not true of a creditor-beneficiary under a deed of trust. This difference is based on the idea that with a deed of trust, the trustee is acting in his capacity as an independent third party, which prevents the creditor from having an undue advantage over the debtor. But on a showing of fraud or collusion with the trustee, the cestui que trust has no right to buy in the property at the foreclosure sale. Graham v. Graham, 229 N.C. 565, 50 S.E.2d 294 (1948); Hare v. Weil, 213 N.C. 484, 196 S.E. 869 (1938).

where corporate power is dispersed among three agents rather than concentrated in one, any more independent judgment will be exercised by the agents in the former than in the latter case.

REGISTRATION AND PRIORITY OF SECURITY

Estoppel by Conferral of Indicia of Ownership

In *Central Nat'l Bank v. Rich*[8] a buyer, resident of Virginia, gave a worthless check in payment for a car bought in North Carolina. Before the check had cleared the seller delivered the car and gave the buyer a Dealer's Application for Certificate of Title for New Motor Vehicle. The buyer returned to Virginia and obtained a title certificate in that state. Later his assignee gave a deed of trust on the car to secure a loan from the plaintiff bank in Virginia. The deed of trust was never recorded in Virginia or North Carolina. When the check was not honored the seller demanded and obtained return of the car. The seller then sold the car to the defendant Rich. From a judgment for the foreclosure of the bank's security Rich appealed. The Supreme Court granted a new trial.

Since a purchaser who gives a worthless check in payment for merchandise acquires no title[9] as against his vendor, the bank's deed of trust cannot prevail, unless it can be shown that the seller is estopped to assert rightful ownership against a party who in good faith has relied on the indicia of ownership conferred on the ostensible vendee.[10] If we assume the dealer here invested the buyer with sufficient indicia of ownership to invoke estoppel in an action by the creditor of the buyer, does the estoppel extend to a good faith purchaser without notice from the dealer? As a general rule, the operation of an estoppel against the claim of a grantor does not extend to the claim of his grantee.[11] But where the grantee at the

[8] 256 N.C. 324, 123 S.E.2d 811 (1962).

[9] Carrow v. Weston, 247 N.C. 735, 102 S.E.2d 134 (1958). The seller may elect to rescind the sale and re-possess or he may ratify the sale and sue for the purchase price. Here the seller elected the first remedy. *First Annual Case Law Survey*, 32 N.C.L. REV. 491 (1954).

[10] Wilson v. Finance Co., 239 N.C. 349, 358, 79 S.E.2d 908, 915 (1954). In this case, while the vendor delivered possession of the car and the unsigned registration card to the vendee, he retained the certificate of title.

[11] United States v. Chatham, 298 F.2d 499 (4th Cir. 1962); Avery v. Drane, 77 Ariz. 328, 271 P.2d 480 (1954); Dade County v. South Dade Farms, 133 Fla. 288, 182 So. 858 (1938); Boyden v. Clarke, 109 N.C. 664, 14 S.E. 52 (1891).

time of his purchase knew of the existence of the facts which operate as a bar to the claim of the grantor, he is likewise estopped.[12] Rich at the date of the purchase acted in good faith and without actual or constructive notice, since the plaintiff's deed of trust was unrecorded.

If Rich was not estopped to claim good title this should properly have disposed of the case. But the Court went further and intimated that Rich was also protected by G.S. § 44-38.1. That statute provides that a security on personal property brought into this state is not valid as against lien creditors and purchasers of the *grantor or mortgagor* unless it is properly registered in the state of prior location. Rich did not acquire his title from the grantor of the deed of trust, but from the vendor of such grantor. The Court was of the opinion that to hold the statute inapplicable in this case would defeat the legislative intent. This view is in contrast with the Court's construction of the general recording statute, G.S. § 47-20, which provides that no encumbrance of real or personal property is valid as against lien creditors or purchasers "from the grantor, mortgagor or conditional sales vendee" unless recorded. In *Friendly Fin. Corp. v. Quinn*[13] the Court held that as between an out-of-state conditional sales vendor and a subsequent purchaser of the car, the former prevailed even though the contract was not recorded because it did not appear that the purchaser had acquired title directly or by mesne conveyances from the conditional vendee.[14]

Due to a 1961 statute,[15] which requires any dealer transferring a new vehicle to a consumer-purchaser to furnish the latter with the proper manufacturer's certificate of origin, the estoppel problem of the principal case is not likely to arise again. Having delivered the certificate of origin to the first vendee, the dealer's inability to

[12] Rone v. Sawrey, 197 Ark. 472, 123 S.W.2d 524 (1939); Davis v. Auerbach, 78 Ga. App. 575, 51 S.E.2d 527 (1949).

[13] 232 N.C. 407, 61 S.E.2d 192 (1950).

[14] The Court said: "The conditional vendor in a conditional sale contract (when such contract is properly recorded in the State of its execution if registration is required by the law of that state. G.S. 44-38.1) possesses a valid title to the property therein described, enforceable in this State without registration as against anyone in possession except 'creditors or purchasers for a valuable consideration' from the conditional vendee; that is, the title is valid as against all except those who deraign their title from the conditional vendee . . . . They alone are the beneficiaries of the statute." 232 N.C. at 410, 61 S.E. 2d at 195.

[15] N.C. GEN. STAT. § 20-52.1 (Supp. 1961).

furnish one to the second vendee should at least put the latter on inquiry notice as to the facts. However, unless the mortgagee records his lien he may lose nevertheless if the Court adheres to its construction of G.S. § 44-38.1.

Fraudulent Assignment—Negligence of Creditor

Smart Fin. Co. v. Dick[16] involved the problem of registration, not of the car, but of a lien on the car. Dick, as agent for a corporation, bought a car for it. He then transferred the title to himself, and procured from the plaintiff a loan secured by a chattel mortgage on the car.[17] The plaintiff allowed Dick to keep the original dealer's application and assignment forms so that he could apply for a certificate of title.[18] Dick detached the assignment form on which the lien of the plaintiff was noted, attached to the original dealer's application a new assignment form, and as an officer of the corporation transferred the car to a third party. In an action against Dick and a subsequent purchaser the lower court concluded as a matter of law that plaintiff was estopped to assert its mortgage because plaintiff was negligent in allowing Dick to retain both forms.[19] The Supreme Court disagreed and granted a new trial. While it is probably sound to assume that the proper procedure was for the creditor to transmit the application to the department, there is no language in the statute which declares such a duty.[20] The Court found that there had been no former dealings between Dick and the plaintiff, and that there was no inference that would suggest that plaintiff did not act in good faith, or that it had any reason

[16] 256 N.C. 669, 124 S.E.2d 862 (1962).

[17] The mortgage was duly recorded.

[18] The only application for certificate of title ever made was that of the subsequent purchaser.

[19] *Cf.* Flatte v. Nichols, 233 La. 171, 96 So.2d 477 (1957). Here a car dealer took a check (which later bounced) and gave the buyer a carbon copy of an order blank showing that the car had been purchased and paid for. The dealer had signed the order blank. The buyer later sold the car to the defendant. In an action to reclaim the car it was held that the dealer was estopped to assert title.

[20] N.C. GEN. STAT. § 20-58 (Supp. 1961) provides that a security interest shall be perfected by delivery to the department of either the certificate of title or the application for one which contains the name and address of the lien holder, the date, the amount and nature of his security agreement and the required fee. It further provides that the lien is perfected as of the time of its creation if the delivery of the certificate or application is completed within ten days, otherwise it is perfected as of the time of delivery.

to suspect that in order to perpetrate a fraud Dick would detach the two forms.

Time of Acquisition of Title to Motor Vehicles

In *Community Credit Co. v. Norwood*[21] the defendant bought a second hand car under a conditional sales contract. The defendant received the old certificate of title from the dealer and applied to the Department of Motor Vehicles for a new one.[22] On the same day as the application, but before actual issuance of a new title by the department, the plaintiff levied on this car under an execution issued on a judgment duly docketed in its favor. General Motors Acceptance Corporation, as the assignee of the sales contract, had failed to register the conditional sales contract until the day that the defendant received his new certificate of title. It intervened and contended the execution levy was void[23] since the defendant did not have title to the car on the day the plaintiff made the levy. The Supreme Court reversed judgment for GMAC and held that the amendments to G.S. § 20-72(b) and § 20-75[24] now provide that the transferee of a car has title as of the time he receives the old certificate of title and applies for a new one, if the other requirements of the statute are observed. Therefore, it was not necessary to the defendant's title that a new certificate be issued to him. The case was remanded to determine if the levy was in conformity with the statutory requirements.[25]

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[21] 257 N.C. 87, 125 S.E.2d 369 (1962).

[22] N.C. GEN. STAT. § 20-73 (Supp. 1961).

[23] In North Carolina conditional sales contracts are treated the same as chattel mortgages. Observer Co. v. Little, 175 N.C. 42, 94 S.E. 526 (1917). Such sales contracts are valid against lien creditors and purchasers for a valuable consideration only from the time of registration. N.C. GEN. STAT. § 47-20 (Supp. 1961). Since GMAC had failed to register before the plaintiff's levy, its only recourse was to contend that the levy was void, and not merely inferior to its lien.

[24] The amendments only provide that the transfer of ownership in a vehicle is not effective until the provisions of the sections have been complied with. They do not relate to the duty of the department to issue a new certificate, but rather to the dealings between the transferor and transferee. The Court felt that if the legislature had intended the amendments to mean the purchaser acquired no title until the department issued him a new certificate, it would have said so.

[25] An additional condition has been imposed to constitute the levy a valid one. That is, to treat the levy as a security interest valid against subsequent creditors and purchasers, the officer making such levy must notify the Department of Motor Vehicles of the execution. N.C. GEN. STAT. § 20-58.6 (Supp. 1961).

SURETYSHIP

Non-disclosure of Facts Increasing Risk

In *Harris & Harris Constr. Co. v. Crain & Denbo, Inc.*,[26] a compensated surety had promised to reimburse a main contractor for any damages suffered due to default of the principal-subcontractor. The subcontractor defaulted. The surety denied liability on the grounds that plaintiff concealed a letter from the defendant subcontractor tending to reflect on the subcontractor's ability to perform. Held, surety's motion for non-suit properly disallowed. The Supreme Court held that even if the main contractor had made further investigations of the subcontractor's ability to perform the contract, the evidence did not disclose that it learned any facts not already known to the surety or which the surety could not have discovered by a reasonable investigation of its own. It is now well settled that a creditor is under no duty to disclose every fact within his knowledge to the surety, except a material fact, which the creditor knows the surety will not discover, and which is of such importance to the risk that the creditor must have been aware that the non-disclosure would in effect amount to a contrary representation to the surety.[27] The nature of the surety contract does not require full disclosure unless there is a duty on the part of the creditor to do so. Further still, the concealment must in fact or in law be fraudulent.

CRIMINAL LAW AND PROCEDURE

CRIMINAL LAW

Kidnaping

G.S. § 14-39 provides in part that it shall be "unlawful for any person . . . to kidnap . . . any human being . . . ."[1] This statute, passed in 1933, omits the words "forcibly or fraudulently" found in the prior kidnaping statute.[2] In two cases where the taking was by force, dicta indicate that taking by either fraud or force invokes the present statute.[3]

[26] 256 N.C. 110, 123 S.E.2d 590 (1962). Also discussed under CONTRACTS, *Construction Contracts, supra,* and DAMAGES, *General Overhead Expense, infra.*

[27] 4 WILLISTON, CONTRACTS § 1249 (rev. ed. 1936).

[1] N.C. GEN. STAT. § 14-39 (1953).

[2] N.C. Sess. Laws 1901, ch. 699, § 1.

[3] State v. Dorsett, 245 N.C. 47, 95 S.E.2d 90 (1956); State v. Witherington, 226 N.C. 211, 37 S.E.2d 497 (1946).

In *State v. Gough*[4] the Court was faced for the first time with an alleged kidnaping by fraud rather than by force. The defendant telephoned a fifteen year old girl who had advertised as a babysitter. Representing himself as a doctor in need of a babysitter he got the girl and her sister to ride with him "to his house." Instead he stopped on a country road and told the girls "to be nice to him and co-operate with him" and they wouldn't get hurt; whereupon the girls fled to the nearest house in safety. The Court affirmed a conviction for kidnaping.

The word *kidnap* as used in G.S. § 14-39 was defined by the Court as "the unlawful taking and carrying away of a person by force or fraud and against his will, or the unlawful seizure and detention of a person by force or fraud and against his will."[5] The prosecuting witnesses being minors incapable of consent,[6] the taking of them allegedly for a baby-sitting job, but in fact for immoral purposes, constituted a fraudulent taking and the elements of the definition established by painstaking analysis were met.

Shoplifting

Prior to the passage of the shoplifting statute, G.S. § 14-72.1, in 1957, a person suspected of shoplifting was charged with common-law larceny which required the proof of larcenous intent as well as wrongful taking.[7] As a matter of practicality store owners waited until the goods were out of the store to accost the suspect. This aided the proof of larcenous intent and lessened the possibility of a suit for malicious prosecution, false arrest, or similar tort. In *State v. Hales*[8] the Court made it clear that such precautions are no longer necessary. The ruling upheld the constitutionality of G.S. § 14-72.1, the shoplifting statute. In this, the first case construing the new statute, the Court held the crime of shoplifting to consist of four elements. They are: (1) a person acting without authority, (2) willfully conceals goods, (3) which are not theretofore purchased, (4) while he is still on the premises.[9]

The decision recognizes the intent of the legislature that felonious or criminal intent should not be a necessary element of the crime.

[4] 257 N.C. 348, 126 S.E.2d 118 (1962).
[5] *Id.* at 356, 126 S.E.2d at 124 (1962).
[6] State v. Marks, 178 N.C. 730, 101 S.E. 24 (1919).
[7] State v. Griffin, 239 N.C. 41, 79 S.E.2d 230 (1953).
[8] 256 N.C. 27, 122 S.E.2d 768 (1961).
[9] *Id.* at 33, 122 S.E.2d at 773.

The Court agreed that goods concealed upon a person, even while still in the store, can logically be deemed prima facie evidence of a "willful concealment" as the statute provides. This liberal construction subjects the statute to possible abuse since the prima facie case can be made equally against the prospective purchaser who places merchandise into a purse or other container and the wrongdoer acting with criminal intent. However, the decision looks to the nature of the crime and the difficulty of protection against it under the common law,[10] and interprets the North Carolina shoplifting statute in a manner that should provide maximum protection for merchants.

Unauthorized Practice of Law

G.S. § 84-4 provides that it shall be unlawful for any person or association of persons, except members of the Bar, to prepare for another person, firm or corporation, any legal document.[11] However, *State v. Pledger*[12] held that a lay person acting for a firm or corporation having a primary interest, not merely an incidental interest, in a transaction may prepare legal documents necessary to the furtherance and completion of the transaction without violating this statute.[13]

CRIMINAL PROCEDURE

Absence of Counsel—Implied Motions

The defendant was found guilty in *State v. Whitfield*[14] of a charge that he "feloniously did steal and carry away" a pony. Defendant's evidence showed that he thought he was taking the pony of the prosecuting witness in a trade for the defendant's chain saw. The state's evidence was insufficient to show any felonious intent in the taking. Not represented by counsel, the defendant stated to the Court, "I don't see how I can be guilty when Mr. Pendergrass helped load the pony on the truck."

The Court reversed the conviction stating that the defendant's statement, in absence of counsel, should be treated as a demurrer to the evidence and motion for judgment as in case of nonsuit. Such

[10] *Id.* at 31, 122 S.E.2d at 771-72.
[11] N.C. GEN. STAT. § 84-4 (1958).
[12] 257 N.C. 634, 127 S.E.2d 337 (1962).
[13] For a complete discussion of the ramifications of this decision as well as other possible remedies see Note, 41 N.C.L. REV. 225 (1963).
[14] 256 N.C. 704, 124 S.E.2d 869 (1962).

opinions have a salutary effect in correcting the lack of court-appointed counsel in less than capital crimes.[15]

Alibi

In *State v. Allison*[16] the Court held that an instruction placing the burden of proof on a defendant relying on an alibi was reversible error even though the error occurred in the last sentence of an otherwise correct paragraph.[17] Refusing to apply the doctrine of contextual interpretation as grounds for upholding inexact charges on an alibi, the Court narrows that doctrine oft repeated in prior North Carolina cases.[18]

In *State v. Spencer*[19] the Court dealt further with instructions regarding an alibi, and held that the defendant was entitled to an instruction on his defense of alibi without asking for it. Clarifying North Carolina procedure,[20] the Court suggested the following charge that should be given when a defendant relies on an alibi.

> An accused, who relies on an alibi, does not have the burden of proving it. It is incumbent upon the State to satisfy the jury beyond a reasonable doubt on the whole evidence that such accused is guilty. If the evidence of alibi, in connection with all the other testimony in the case, leaves the jury with a reasonable doubt of the guilt of the accused, the State

[15] See FED. R. CRIM. P. 44; Johnson v. Zerbst, 304 U.S. 458 (1938). See generally Fellman, *The Constitutional Right to Counsel in Federal Courts*, 30 NEB. L. REV. 559 (1951). See Gideon v. Wainwright, 31 U.S.L. WEEK 4291 (U.S. March 18, 1963).

[16] 256 N.C. 240, 123 S.E.2d 465 (1962).

[17] *Id.* at 242, 123 S.E.2d at 466.

[18] For cases where the doctrine of contextual interpretation was used to uphold inexact charges on alibi see State v. Sheffield, 206 N.C. 374, 174 S.E. 105 (1934); State v. Rochelle, 156 N.C. 641, 72 S.E. 481 (1911); State v. Freeman, 100 N.C. 429, 5 S.E. 921 (1888); State v. Starnes, 94 N.C. 973 (1886); State v. Jaynes, 78 N.C. 504 (1878). The Court distinguished these cases saying they expressly or substantially stated that the burden of proving an alibi does not rest upon the defendant. The refusal to follow this doctrine in the principal case seems to be a substantial limitation since the instruction here could be interpreted to have substantially placed the burden in the proper place in spite of the last sentence.

[19] 256 N.C. 487, 124 S.E.2d 175 (1962).

[20] These two "instructive" decisions clarify prior law on the subject of alibi in North Carolina. On the first point of the exactness of the instruction see State v. Minton, 234 N.C. 716, 68 S.E.2d 844 (1952); and concerning the latter point of defendant being entitled to the instruction see, *e.g.*, State v. Ardrey, 232 N.C. 721, 62 S.E.2d 53 (1950); State v. Sutton, 230 N.C. 244, 52 S.E.2d 921 (1949).

fails to carry the burden of proof imposed upon it by law, and the accused is entitled to an acquittal.[21]

Double Jeopardy—Different Degrees of Same Offense

When a single act violates two statutes and a different element is required for proof under each statute, the offenses are exclusive, and conviction or acquittal of one does not bar prosecution for the other. *State v. Birckhead*,[22] following a prior line of North Carolina decisions,[23] held that assault with intent to commit rape is a lesser degree of the crime of rape.[24] The state contended that the two are mutually exclusive because they arise out of different statutes[25] and because proof of rape requires an additional element not required in the proof of assault with intent to commit rape. It cited three cases as authority for this contention.[26] However, each of these three dealt with statutes requiring different elements for conviction under *each* statute. This was distinguished by the Court from the present situation where a single element, penetration, is sufficient to satisfy the requirements of the rape statute once the elements of the assault statute are present. Showing that all elements of assault with intent to commit rape are included in the elements of rape, the Court said "when all pertinent tests are applied . . . the offense of assault with intent to commit rape is a lesser degree of the offense of rape, when based on the same occurrence, and the two offenses are the same in fact and in law."[27]

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[21] 256 N.C. at 489, 124 S.E.2d at 177.

[22] 256 N.C. 494, 124 S.E.2d 838 (1962). See *Effect of Mistrial, infra.*

[23] State v. Green, 246 N.C. 717, 100 S.E.2d 52 (1957); State v. Roy, 233 N.C. 558, 64 S.E.2d 840 (1951); State v. Williams, 185 N.C. 685, 116 S.E. 736 (1923).

[24] As is shown in the remarks on this case under *Effect of Mistrial, infra.*, the holding here came up in an unusual context. Instead of a conviction of the lesser crime on an indictment for rape, the reverse was attempted after mistrial was granted on the indictment for assault with intent to commit rape. The adherence to the lesser included offense interpretation in this context led to a reversal of a conviction for rape.

[25] N.C. GEN. STAT. §§ 14-21 (rape) and 14-22 (assault with intent to commit rape) (1953).

[26] State v. Barefoot, 241 N.C. 650, 86 S.E.2d 424 (1955); State v. Midgett, 214 N.C. 107, 198 S.E. 613 (1938); State v. Malpass, 189 N.C. 349, 127 S.E. 248 (1925).

[27] 256 N.C. at 504, 124 S.E.2d at 846. This definitive holding should put to rest any further attempts to urge separateness of the offenses of rape and assault with intent to commit rape, whether the context be one of conviction of the lesser degree on an indictment of rape or an attempt to secure convic-

Double Jeopardy—Effect of Mistrial

In a prosecution for assault with intent to commit rape, evidence developed at the trial that penetration had occurred.[28] The solicitor then requested that the Court order a mistrial in order that he might submit an indictment for rape. The Court acquiesed "to the end that Justice might be served and that a correct charge may be presented to the Grand Jury." Upon appeal of the subsequent conviction of rape the Supreme Court reversed, holding that jeopardy attached at the original trial.[29]

The question presented for the first time in North Carolina was whether jeopardy attaches when the trial court, without consent of the defendant, discharges the jury because it is of the opinion that the evidence shows him guilty of a higher crime. Answering in the affirmative, the Court reiterated North Carolina's stand against double jeopardy, although no constitutional provision expressly prohibits it,[30] and set forth precisely when jeopardy attaches.[31] However, even with these conditions met North Carolina has held that the judge may discharge the jury and hold the prisoner for another trial without his consent when "necessity" makes the mistrial mandatory.[32] Although this has been interpreted only to mean either "physical necessity"[33] such as illness of a juror or the defendant, or the "necessity of doing justice"[34] when some fraudulent practice has made a fair trial impossible, these standards have been loosely applied in non-capital cases.[35]

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tion of rape, once the state has proceeded on the assault theory to the point where jeopardy attaches.

[28] State v. Birckhead, 256 N.C. 494, 124 S.E.2d 838 (1962).

[29] See generally *Different degrees of same offense, supra.*

[30] "It is a fundamental and sacred principle of the common law, deeply imbedded in our criminal jurisprudence, that no person can be twice put in jeopardy of life or limb for the same offense . . . . While the principle is not stated in express terms in the North Carolina Constitution, it has been regarded as an integral part of the law of the land within the meaning of Art. 1 Sec. 17." State v. Crocker, 239 N.C. 446, 449, 80 S.E. 243, 245 (1954).

[31] Jeopardy attaches when a defendant in a criminal prosecution is placed on trial: (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn to make true deliverance in the case. 256 N.C. at 504, 124 S.E.2d at 846.

[32] State v. Beal, 199 N.C. 278, 154 S.E. 604 (1930); State v. Cain, 175 N.C. 825, 95 S.E. 930 (1918); State v. Upton, 170 N.C. 769, 87 S.E. 328 (1915); State v. Washington, 89 N.C. 535 (1883); State v. Bell, 81 N.C. 534 (1879); State v. Wiseman, 68 N.C. 203 (1872).

[33] State v. Wiseman, *supra* note 32.

[34] State v. Cain, 175 N.C. 825, 95 S.E. 930 (1918); State v. Upton, 170

Recognizing the tendency to leave the decision of mistrial to the discretion of the trial judge, the Court nevertheless took a firm stand holding that "necessity of doing justice" does not exist where the sole purpose of the mistrial is to prosecute the defendant for a higher offense.[36]

Jurisdiction Over Federal Enclave

G.S. § 104-7[37] grants jurisdiction to the federal government of lands purchased by the United States. Jurisdiction vests when title is passed to the United States and shall continue so long as the United States owns such lands. In *State v. Burell*[38] the title to land that was the situs of a crime was in the United States. However, the federal government had not indicated acceptance of jurisdiction by the required procedure.[39] Does the unequivocal cession of jurisdiction in G.S. § 104-7 deprive the state of any jurisdiction over crimes committed on federal land over which the United States has not assumed jurisdiction? Faced with this problem for the first time, the Court refused to interpret the state statute literally. Applying the principle that a literal interpretation will not be given a statute if it leads to absurd results,[40] the Court refused to create a no man's land by the relinquishment of sovereignty as the statute literally directs.

Post-Trial Investigation

In two companion cases[41] the defendants contested their imprisonment on the grounds that they were not present at the conference when the judge determined applicable sentences to be imposed after pleas of guilty. The Court refused to overturn the convictions.[42]

N.C. 769, 87 S.E. 328 (1915); State v. Washington, 89 N.C. 535 (1883); State v. Bell, 81 N.C. 535 (1879).

[36] State v. Humbles, 241 N.C. 47, 84 S.E.2d 264 (1954); State v. Guice, 201 N.C. 761, 161 S.E. 533 (1931).

[36] This is the rule of the majority with similar procedure that have been faced with the problem. See, *e.g.*, Application of Williams, 85 Ariz. 109, 333 P.2d 280 (1959); People v. Ny Sam Chung, 94 Cal. 304, 29 Pac. 642 (1892); Griffin v. State, 28 Ga. App. 767, 113 S.E. 66 (1922); State v. Noel, 66 N.D. 676, 268 N.W. 654 (1936).

[37] N.C. GEN. STAT. § 104-7 (1953). For comment on the problems envisioned at the time see Note, 23 N.C.L. REV. 258 (1945).

[38] 256 N.C. 288, 123 S.E.2d 795 (1962).

[39] 40 U.S.C. § 255 (1952). See Adams v. United States, 319 U.S. 312 (1943).

[40] State v. Barksdale, 181 N.C. 621, 107 S.E. 505 (1921).

[41] State v. Anderson, 257 N.C. 336, 126 S.E.2d 134 (1962); State v. Pope, 257 N.C. 326, 126 S.E.2d 126 (1962).

[42] Noted in 41 N.C.L. REV. 260 (1963).

DAMAGES

BREACH OF WARRANTY

In *Seymour v. W. S. Boyd Sales Co.*[1] plaintiff, operator of a trucking company, purchased a tractor from the defendant, making a down payment of fifty dollars and receiving one thousand dollars on a trade-in for a used truck. The balance was financed through a credit company. A substantial portion of plaintiff's business was carried on in the State of New York, but he was refused a license to operate the truck in that state because of an unsatisfied fuel lien against the truck. When plaintiff notified defendant of the outstanding lien, defendant promised to discharge it, but failed to do so. The defendant subsequently repossessed the truck from a garage where plaintiff had left it for repairs. Defendant then offered to sell it at auction to satisfy the lien. Plaintiff sued for breach of warranty of good title and against encumbrances, and for conversion. He contended that he was unable to make the payments on the conditional sales contract or to repurchase the truck at the auction because he could not operate the truck in New York. As to the cause of action for breach of warranty, it was held that the plaintiff could recover no more than nominal damages until he paid the amount of the outstanding lien or had been deprived of possession because of the lien. The Court pointed out, however, that plaintiff would prevail if he could show special damages within the contemplation of the parties at the time the contract of sale was made.[2]

It was further held that plaintiff could not recover the loss of anticipated profits without allegation and proof that they were within the contemplation of the parties at the time the contract was made.[3]

[1] 257 N.C. 603, 127 S.E.2d 265 (1962). Also discussed under SALES, *Express Warranty—Failure to List Existing Liens on Motor Vehicle Title Certificate, infra.*

[2] The case is apparently one of first impression on this point in North Carolina. The Court relied on Close v. Crossland, 47 Minn. 500, 50 N.W. 694 (1891), and Paul Hellman, Inc. v. Reed, 366 P.2d 391 (Okla. 1961). The Court has applied the same measure of damages for breach of covenant in cases involving real estate transactions. See Fishel v. Browning, 145 N.C. 71, 58 S.E. 759 (1907); Lane v. Richardson, 104 N.C. 642, 10 S.E. 189 (1889).

[3] This is in accord with the great weight of authority. See, *e.g.*, Wentworth & Irwin, Inc. v. Sears, 153 Ore. 201, 56 P.2d 324 (1936). See generally MCCORMICK, DAMAGES § 8 (1935). North Carolina had previously held in Price v. Goodman, 226 N.C. 223, 37 S.E.2d 592 (1946), that a defendant could not recover loss of profits by way of counterclaim without allegation and proof that the plaintiff had knowledge that the defendant intended to resell the goods. There the action was to recover the unpaid balance on a contract for the sale of goods.

COLLATERAL RECOVERY

In *Tart v. Register*[4] the plaintiffs were passengers in an automobile operated by defendant *X*, which collided with an automobile operated by defendant *Y*. One of the plaintiffs received payment for his medical and hospital expenses under the medical payments provision of defendant *X's* comprehensive automobile liability insurance policy.[5] The trial judge permitted the plaintiff to testify that she incurred these expenses, and the jury was allowed to consider them in awarding damages. On appeal, the judgment was reversed. According to the majority view, a person injured by the operation of an automobile insured under a comprehensive policy is entitled to recover under both the liability clause and the medical payments provision, even though this amounts to a double recovery.[6] The North Carolina Supreme Court viewed the trend of decisions in this jurisdiction as away from the majority position, however, and held that defendant *X* was entitled to a credit against the judgment in the amount paid by his insurance carrier.

There was an indication that the Court would so hold in the earlier case of *Jordan v. Blackwelder*.[7] There the parties stipulated that a joint tortfeasor, joined for contribution by the original defendant, would be entitled to a credit against his pro rata share of the judgment since his insurance carrier had already paid a portion of the plaintiff's medical and hospital expenses. The *Jordan* case is, of course, distinguishable because of the stipulation by the parties. Nevertheless, it foretold our Court's aversion to a double recovery in this situation.

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[4] 257 N.C. 161, 125 S.E.2d 754 (1962). Also discussed under EVIDENCE, *Spontaneous Statements and Res Gestae, infra.*

[5] A comprehensive automobile liability policy is one which "in addition to the liability clause for payment on behalf of insured [of] any tort liability within policy limits, contains a medical payment clause obligating insurer to pay directly to persons injured, irrespective of negligence, medical expenses incurred by reason of the operation of the described automobile." 257 N.C. at 172, 125 S.E.2d at 763.

[6] Dumas v. United States Fid. & Guar. Co., 125 So. 2d 12 (La. App. 1960); Long v. Landy, 35 N.J. 44, 171 A.2d 1 (1961); Southwestern Fire & Cas. Co. v. Atkins, 346 S.W.2d 892 (Tex. Civ. App. 1961); Severson v. Milwaukee Auto. Ins. Co., 265 Wis. 488, 61 N.W.2d 872 (1953). See generally 8 APPLEMAN, INSURANCE LAW & PRACTICE § 4896 (1962). Louisiana had previously held that one could not recover under both the medical payments provision and the liabiilty provision. Hawayek v. Simmons, 91 So. 2d 49 (La. App. 1956). This, of course, is the view taken by the North Carolina Court in *Tart*. Appleman, in discussing the *Hawayek* case, called the decision "clearly erroneous."

[7] 250 N.C. 189, 108 S.E.2d 529 (1959).

GENERAL OVERHEAD EXPENSES

In *Harris & Harris Constr. Co. v. Crain & Denbo, Inc.*[8] the defendant submitted the winning bid to construct improvements for a municipality. The defendant had an agreement with plaintiff (which did not have a state contractor's license and was therefore ineligible to submit its own bid) whereby the latter was to secure a performance bond, deposit a sum of money in a designated bank subject to the joint control of the parties, and perform the contract. When defendant discovered that the bank deposit had not been made, it ordered plaintiff to leave the job site, and undertook to complete the work itself. Plaintiff brought this action for breach of the subcontract agreement, and defendant counterclaimed. Among the items of expense claimed in defendant's counterclaim, and allowed by the lower court, was one for "overhead." On appeal the Court, in a case of first impression in North Carolina, held that general overhead expenses are not allowable items of damage for breach of contract.[9]

PUNITIVE DAMAGES—LOSS OF PROFITS

The Labor Management Relations Act[10] permits only the awarding of actual damages.[11] Where the defendant's conduct involves a tort in violation of state law, however, punitive damages may also be awarded. Such damages, however, are properly assessed only where there is allegation and proof of violence, threats of violence, and intimidation.[12] Thus, in *Overnight Transp. Co. v. International Bhd. of Teamsters*[13] where plaintiff sought to recover for injuries

[8] 256 N.C. 110, 123 S.E.2d 590 (1962). Also discussed under CREDIT TRANSACTIONS, *Mortgages and Deeds of Trust—Independent Trustee,* and CONTRACTS, *Construction Contracts, supra.*

[9] The Court in reaching its decision considered the following cases: Lytle, Campbell & Co. v. Somers, Fitler & Todd Co., 276 Pa. 409, 120 Atl. 409 (1923), where general overhead expenses were not allowed; Grand Trunk Western R. R. v. H. W. Nelson Co., 116 F.2d 823 (6th Cir. 1941), where overhead expenses were allowed, but limited to on-the-job expenses; Snyder v. Reading School Dist., 311 Pa. 326, 166 Atl. 875 (1933), where overhead expenses were allowed, but it does not appear whether or not they were limited to on-the-job expenses; Elias v. Wright, 276 F. 908 (2d Cir. 1921), and Sofarelli Bros. v. Elgin, 129 F.2d 785 (4th Cir. 1942), where general overhead expenses were allowed. The *Lytle* case is the subject of a note in 40 N.C.L. REV. 799 (1962).

[10] See 61 Stat. 159 (1947), 29 U.S.C. § 187(b) (1958).

[11] UMW v. Patton, 211 F.2d 742 (4th Cir. 1954).

[12] UMW v. Osborne Mining Co., 279 F.2d 716 (6th cir.), *cert. denied,* 364 U.S. 881 (1960); Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957); UAW v. Wisconsin Employment Relations Bd., 351 U.S. 266 (1956).

[13] 257 N.C. 18, 125 S.E.2d 277 (1962). Also discussed in AGENCY AND WORKMEN'S COMPENSATION, *Servants and Non-servant Agents, supra,* and in LABOR LAW, *Secondary Boycott—Suit for Damages Under* 303(b), *infra.*

caused by defendant-union's unfair labor practices,[14] it was held that the plaintiff was not entitled to recover punitive damages upon an allegation merely of willful, wanton, and malicious conduct.

Since the plaintiff accurately established a loss of profits resulting from the wrongful interruption of his business, and such loss was not merely conjectural, it was properly included as an item of actual damages.

TEMPORARY DAMAGES

In *Owens v. Elliott*[15] plaintiff was the owner of a house and lot which adjoined a subdivision, but which was not a part thereof. A street graded and gravelled by the owner of the subdivision was plaintiff's only means of access to his home. The street was closed by the defendant, and plaintiff instituted this action to recover damages and for injunctive relief. The trial court found as a matter of law that the street had been dedicated to public use and instructed the jury that the plaintiff was entitled to recover the reasonable market value of his house and lot immediately prior to the closing, less the reasonable market value immediately afterwards. Reversing for error in the trial court's holding that the street had been dedicated as a matter of law, the Supreme Court stated that the permanent damages rule was not applicable here. Thus, if the plaintiff was entitled to recover at all, his remedy was by way of injunction plus temporary damages. In so holding, the Court adopted the rationale of an earlier case,[16] easily distinguishable from *Owens* on its facts, to the effect that where the injury is impermanent or temporary in the sense that it could be removed voluntarily or abated by equitable proceedings, the permanent damages rule is not applied.

WAIVER

In a suit by a mother, as next friend, for personal injuries sustained by her infant child in an automobile accident, an award of damages including medical and hospital expenses was affirmed.[17]

[14] It was alleged that defendant-union called a strike of plaintiff's employees without being certified as bargaining agent for them, and instituted a secondary boycott.

[15] 257 N.C. 250, 125 S.E.2d 589 (1962).

[16] Phillips v. Chesson, 231 N.C. 566, 58 S.E.2d 343 (1950), which involved the construction of a wall and extensive excavation by the defendant which resulted in a diversion of the natural watercourses and a consequent overflow onto the plaintiff's land.

[17] Doss v. Sewell, 257 N.C. 404, 125 S.E.2d 899 (1962).

Both parents had filed express waivers of their rights to sue for such expenses.

The necessary medical expenses of an unemancipated minor are the responsibility of the father if living, or the mother if he is not, and a separate cause of action for these items exists in favor of the appropriate parent.[18] It had previously been held that where the parent having the cause of action participated in the litigation as next friend, and no limitation on the minor's right to recover was pleaded and the charge of the court was sufficient to include the medical expenses of the minor, the parent's right to bring a subsequent action was waived.[19] In the instant case, the parent participating in the trial was not the one having the cause of action.[20] Nevertheless, both parents having made express waivers, it was permissible for the trial court to include medical and hospital expenses in the judgment recovered by the child's mother as next friend. The Court pointed out that it is "immaterial to the defendants whether the infant or the parent asserts the claim,"[21] assuming, of course, that having once suffered damages, the defendant would be protected from a subsequent suit by the other party.

DOMESTIC RELATIONS

Absolute Divorce

Prior Criminal Conviction

In *Taylor v. Taylor*[1] the husband filed for absolute divorce on grounds of two years separation. The wife admitted the allegation of two years separation but alleged that the separation was brought about and continued due to the willful abandonment of her by the plaintiff. The wife in further answer and defense, and as a cross action for alimony without divorce under G.S. § 50-16, alleged abandonment without just cause. She also alleged that the plaintiff had been convicted in a municipal court of abandonment and non-support from which conviction the plaintiff admitted he had not

[18] Thompson v. Lassiter, 246 N.C. 34, 97 S.E.2d 492 (1957); Ellington v. Bradford, 242 N.C. 159, 86 S.E.2d 925 (1955); Williams v. Charles Stores Co., 209 N.C. 591, 184 S.E. 496 (1936).

[19] Pascal v. Burke Transit Co., 229 N.C. 435, 50 S.E.2d 534 (1948).

[20] Ellington v. Bradford, 242 N.C. 159, 86 S.E.2d 925 (1955).

[21] 257 N.C. at 410, 125 S.E.2d at 903.

[1] 257 N.C. 130, 125 S.E.2d 373 (1962).

appealed. She attached a copy of the criminal proceedings to her answer and asked for judgment on the pleadings dismissing the plaintiff's action. The plaintiff in reply denied the further defense and alleged that he had denied his guilt in the criminal proceeding and continued to deny it. The lower court, however, concluded as a *matter of law,* that the plaintiff, having admitted the prior criminal conviction for abandonment and nonsupport, could not maintain an action for absolute divorce based upon the facts which constituted the defendant's plea in bar. The wife's motion to dismiss was, therefore, granted.

This decision was affirmed on appeal. After citing *Pruett v. Pruett,*[2] to the effect that a wife may defeat a husband's action for absolute divorce on grounds of two years separation by alleging and establishing as an affirmative defense that the separation was caused by the husband's willful abandonment, the Court stated:

> The issue raised by plaintiff's plea of not guilty in said criminal prosecution is the identical issue raised by the plaintiff's denial of defendant's alleged affirmative defense or plea in bar. The only difference is that in the criminal prosecution the State had the burden of proving defendant's guilt beyond a reasonable doubt.[3]

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[2] 247 N.C. 13, 100 S.E.2d 296 (1957).

[3] Taylor v. Taylor, 257 N.C. 130, 132-33, 125 S.E.2d 373, 374 (1962).

According to the dissenting opinion in this case the majority holding is to the effect that the judgment of the municipal court is res judicata as to the question of abandonment and nonsupport. This was the appellant's argument. Brief for Plaintiff, pp. 3-4, Taylor v. Taylor, *supra.*

If this were so, the conclusion reached by the Court here would appear to be in conflict with the decision in Durham Nat'l Bank & Trust Co. v. Pollard, 256 N.C. 77, 123 S.E.2d 104 (1961), in which the Court held that evidence of a conviction and judgment therein or acquital rendered in a criminal prosecution was not admissible in evidence in a purely civil action to establish the truth of facts on which the verdict of guilty or acquital was rendered. There the Court made it clear that while the same facts may be involved in two cases, one civil and the other criminal, the parties are necessarily different because the one action is maintained by the state while the other is prosecuted by an individual. The *Pollard* case is also discussed under EVIDENCE, *Evidence of Prior Criminal Convictions, infra. Accord,* Wicker v. Wicker, 255 N.C. 723, 122 S.E.2d 703 (1961). There it was held that an order entered in a habeas corpus proceeding based on facts found by the trial judge was not res judicata to an action for divorce on grounds of adultery.

North Carolina in Warren v. Pilot Life Ins. Co., 215 N.C. 402, 2 S.E.2d 17 (1939), placed itself with the numerical majority in concluding that the introduction of criminal records and judgments thereon in a civil proceeding was not permissible. *E.g., State v. Fitsgearld,* 140 Me. 314, 37 A.2d 799 (1944); Girard v. Vermont Mut. Fire Ins. Co., 103 Vt. 330, 154 Atl. 666 (1931). See generally Annot., 130 A.L.R. 690 (1941). The principal case,

In further support of its decision the Court concluded that if the plaintiff were allowed the absolute divorce, the defendant's right to support, which arose out of judgment in the criminal action imposing sentence on the plaintiff being suspended on condition that he make specified payments for support of his wife, would be terminated in violation of the provisions of G.S. § 50-11.[4]

ADOPTION

In *Hicks v. Russell*[5] the grandparents instituted proceedings for the adoption of the four children of their deceased daughter. The

however, seems to place a new twist on North Carolina's position in this respect. Although the Court adhered to this approach in Durham Nat'l Bank & Trust Co. v. Pollard, *supra,* the distinction between that case and the principal one appears to be the fact that in the principal case the party at fault sought to sustain a civil action the basis of which was grounded in his own criminal conduct; whereas in the *Pollard* case the party on whose behalf the action was being brought was the wronged party. Accepting this as the basic distinction between these two cases, North Carolina puts itself in stride with the modern trend of decisions which allow admission of criminal records and verdicts in purely civil actions especially where the plaintiff seeks to reap the fruits of his own criminal acts. *E.g.,* Osborne v. People's Benevolent Industrial Ins. Co., 19 La. App. 667, 139 So. 733 (1932); Minasian v. Aetna Life Ins. Co., 295 Mass. 1, 2 N.E.2d 17 (1936). See generally Annot., 18 A.L.R.2d 1287 (1951). When such evidence is admitted it is considered only evidence of guilt and at most prima facie evidence thereof. *E.g.,* Sovereign Camp. W. O. W. v. Gunn, 227 Ala. 400, 150 So. 491 (1933); Schindler v. Royal Ins. Co., 258 N.Y. 310, 179 N.E. 711 (1932).

On this latter point of the conclusiveness of the evidence, the principal case would appear to be in the minority. In view of the fact that the lower court was sustained in giving judgment on the pleadings and holding that the plaintiff was as a matter of law estopped to bring the action it appears that evidence of the prior conviction was conclusive as to the plaintiff's guilt and not merely prima facie evidence thereof. Only one other jurisdiction has adopted this approach. See Eagle, Star & British Dominions Ins. Co. v. Heller, 149 Va. 82, 140 S.E. 314 (1917), discussed in Note, 6 N.C.L. REV. 333 (1928).

It should be noted the appellee in its brief made it clear that no reliance had been placed on the proposition that the prior criminal conviction was res judicata in the divorce action, and it was also pointed out there that the court below had not ruled that as a matter of law the conviction was such. Brief for Defendant, p. 6, Taylor v. Taylor, *supra.* On the contrary, the argument of the appellee was to the effect that an action never lies when a plaintiff must base his claim, in whole or in part, on his own violation of the criminal laws. Lloyd v. R. R., 151 N.C. 536, 66 S.E. 604 (1909). Brief for Defendant, pp. 4-5, Taylor v. Taylor, *supra.* The majority seems to have accepted this approach to the husband's action.

[4] This statute provides that a decree of absolute divorce shall not impair the right of the wife to receive alimony and any "other rights" provided for her under any judgment of a court rendered before the rendition of the judgment for absolute divorce.

[5] 256 N.C. 34, 123 S.E.2d 214 (1961).

petition alleged abandonment by the father and failure to provide support for the children. The father was served by publication and through his attorneys appeared and obtained a consent order granting additional time for filing of an answer. No answer or other pleading was ever filed. The petitioners moved for judgment by default final against the father and such was granted. Thereupon the final decrees of adoption were entered.

The father made a motion in the cause for vacation of the orders and decrees claiming that the court did not find that he had willfully abandoned his children for a period of at least six months immediately preceding the action, and therefore the court did not have jurisdiction over him or the children. His motion was denied on grounds that having become a party to the proceedings, and not having filed an answer or other pleading, or made further appearance, and not having appealed from the orders of adoption, he was irrevocably bound by the proceedings and could not question their validity.

This decision was affirmed on appeal. In what appears to be the first interpretation of G.S. § 48-28[6] from the standpoint of a direct or collateral attack by a natural parent the Court said:

> We further hold that the provision of G.S. § 48-28, which permits a direct or collateral attack on an adoption proceeding by a natural parent or guardian of the person of the child, is limited to such natural parent or guardian of the person of the child, *who was not a party to the adoption proceeding.*[7]

Thus, this decision now makes it clear that even a natural parent who is a party to the adoption proceeding will not be allowed to attack its validity.

Alimony Without Divorce

Abandonment

In *Thurston v. Thurston*[8] the wife instituted an action for alimony without divorce, alleging that defendant abandoned her without cause in that he removed his personal belongings from the home

[6] This statute prohibits questioning the validity of an adoption proceeding after the final order of adoption is signed, by anyone who was a party to the proceeding or anyone claiming under such party by reason of any defect, jurisdictional or otherwise. Any ambiguity with respect to whether this statute prohibits a parent who was a party to the proceeding from attacking its validity was settled by the principal case.

[7] 256 N.C. 34, 41, 123 S.E.2d 214, 219 (1961). (Emphasis added.)

[8] 256 N.C. 663, 124 S.E.2d 852 (1962).

and announced he was leaving with intent to go to Florida where he might get a "quickie" divorce. It was further alleged that the defendant had periodically deposited sums of money to the plaintiff's credit in a local bank.

The plaintiff asked as relief an award of reasonable subsistence fees, including a pendente lite allowance, and that the defendant be enjoined from instituting and prosecuting an action for divorce in any state other than North Carolina during the determination of the alimony without divorce action. Both of these requests were granted.[9]

On appeal the defendant assigned as error, among other things, the court's failure to sustain his demurrer to the complaint on the grounds that it failed to state a cause of action in that it did not allege failure to provide adequate support. Affirming the lower court decision on this point, the Supreme Court ruled that *Pruett v. Pruett*[10] controlled. In that case the Court stated that although a permanent denial of the husband's society might be mitigated by a provision for the wife's support, the offense of abandonment is complete if the cohabitation is brought to an end without just cause, without intention of renewing it, and without consent of the spouse. Thus, the Court in the principal case makes it clear that abandonment as used in G.S. § 50-7(1) does not require failure to support.[11]

[9] The injunction aspect of the *Thurston* case is discussed in EQUITABLE REMEDIES, *Injunction Against Foreign Divorce, infra.*

[10] 247 N.C. 13, 100 S.E.2d 296 (1957).

[11] This statute sets out the grounds for divorce from bed and board. It is tied in with G.S. § 50-16 through the fact that the latter statute provides that any ground on which an action for a divorce from bed and board, as well as absolute divorce, can be predicated also provides a ground for an action for alimony without divorce.

The Court in Pruett v. Pruett, *supra* note 10, at 23, 100 S.E.2d at 303, stated that the mere fact that the husband provides adequate support for the wife does not in itself negative abandonment as used in G.S. § 50-7(1). The principal case clarifies this point which had not previously been decided in the context of a separate action by the wife for alimony without divorce on grounds of abandonment in contrast to the *Pruett* case type situation where the wife used such abandonment as a means of defeating the husband's action for absolute divorce on grounds of two years separation.

To conclude that abandonment under G.S. § 50-7(1) does not require a failure to support, in a suit for alimony without divorce, seems clearly correct since G.S. § 50-7(1) refers to abandonment of "his or her spouse" and there is no support obligation on the part of the wife. But, to take the additional step taken in *Pruett* and hold that abandonment being used as a defense to two years separation also does not require nonsupport seems questionable. For a discussion of this latter point see Note, 36 N.C.L. REV. 495 (1958).

Amount of Award

In *Harris v. Harris*[12] the wife instituted an action for alimony without divorce under G.S. § 50-16 alleging abandonment and failure to provide support for her and the children. On plaintiff's motion for alimony pendente lite the defendant was ordered to pay a specified sum of money per month. At a subsequent hearing on the merits the order was continued undiminished.

The defendant on appeal contended that the court below committed error in not ascertaining his net income and limiting the award to one-third thereof. He relied on G.S. § 50-14 which, by its terms, limits an award in actions of divorce from bed and board to such one-third, but which makes no reference to actions for alimony without divorce. Answering this contention, the Court ruled that except when the allowance is made following a decree of divorce from bed and board the court making the award is not confined to an allowance of no more than one-third of the defendant's net income. Thus, the Court makes a complete repudiation of the one-third rule with regard to actions brought under G.S. § 50-16.[13] Previous cases had indicated that although the one-third rule did not apply to actions under G.S. § 50-16, it did have the effect of a guide showing legislative intent.[14]

Effect of Appeal from Pendente Lite Award

In *Joyner v. Joyner*[15] the wife filed suit for alimony without divorce, counsel fees, and custody of the child. By motion in the cause she applied for alimony pendente lite for the support of herself and her child, and for custody of the child. The motion was granted and the husband filed an appeal.

The wife filed an affidavit one month later alleging the defendant

[12] 258 N.C. 121, 128 S.E.2d 123 (1962).

[13] The principal case is not the first to state that the trial court had in its discretion power to award such alimony as it deemed proper, which award was not limited to the one-third rule and would not be disturbed except where such discretion had been grossly abused. See, *e.g.*, Wright v. Wright, 216 N.C. 693. 6 S.E.2d 555 (1940); Anderson v. Anderson, 183 N.C. 139, 110 S.E. 863 (1922). However, the apparent conclusiveness of the Court's ruling in the *Harris* case expresses more definiteness than any case heretofore.

[14] Kiser v. Kiser, 203 N.C. 428, 166 S.E. 304 (1932). There the Court said "while perhaps the limitation in C. S. § 1665 would not apply to C. S. Supp. 1924, § 1667, nevertheless the two are cognate statutes, dealing with similar questions, and may be considered as the composite will of the Legislature." *Id.* at 431, 166 S.E. at 305.

[15] 256 N.C. 588, 124 S.E.2d 724 (1962).

had violated the court's custody order. A show cause order was issued and at the hearing it was found that the defendant was in contempt of court. However, the trial court concluded that since the defendant had appealed from the order, it was without power to issue any further orders in the action. Both parties appealed.

The North Carolina Supreme Court held that the appeal stayed the contempt proceedings until the validity of the judgment was determined.[16] With respect to the support order for the child, the Court concluded that the appeal from the order allowing support pendente lite took the case out of the jurisdiction of the superior court and during that time the judge was *functus officio*.[17] On this latter point, however, it was held that notwithstanding the fact that no contempt proceedings could be started during the appeal, just as in the case of a wife's alimony pendente lite,[18] the allowance for the child could be enforced by execution against defendant's property pending appeal unless stay or *supersedeas* was ordered. The Court intimates, however, that it does not consider execution an adequate remedy for the child.[19]

Pleading

In *Creech v. Creech*[20] the wife brought an action for alimony without divorce alleging abandonment without just cause and refusal to provide support for her and the four children. The defendant's answer denied all allegations except marriage and paternity of the children and set up adultery as a defense. The wife did not deny the allegation of adultery and the court made no finding on that issue.

On appeal the lower court decision awarding alimony pendente

[16] Lawson v. Lawson, 244 N.C. 689, 94 S.E.2d 826 (1956).

[17] Lawrence v. Lawrence. 226 N.C. 221, 37 S.E.2d 496 (1946). See 4 AM. JUR. 2d *Appeal and Error* § 352 (1962).

Functus officio is defined as "having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority." BLACK, LAW DICTIONARY 802 (4th ed. 1951).

[18] Vaughan v. Vaughan, 211 N.C. 354, 190 S.E. 492 (1937). There the Court stated that "by this judgment plaintiff became indebted to defendant, and she could issue the ordinary execution against the property of plaintiff to collect the judgment, as no stay bond was given . . . ." *Id.* at 361, 190 S.E. at 496.

[19] "Surely, however, some more adequate provision should be made for the child during the legal battle of its parents. Frequently it is months after an appeal is taken until the record is seen here." Joyner v. Joyner, 256 N.C. 588, 592, 124 S.E.2d 724, 727 (1962).

[20] 256 N.C. 356, 123 S.E.2d 793 (1962).

lite was reversed for failure to make findings with respect to the alleged adultery as is required by G.S. § 50-16.[21] The Court concluded that although the wife did not expressly deny the defendant's allegations of adultery, they did not relate to a counterclaim and therefore came within G.S. § 1-159 which provides that all allegations in an answer are deemed controverted without the necessity of reply if they do not relate to a counterclaim.[22]

Residence

In *Harris v. Harris*[23] the wife instituted an action for alimony without divorce on the grounds that the defendant abandoned her while they were temporarily residing on a farm owned by the defendant in North Carolina. On application of the plaintiff an order was made for alimony pendente lite and counsel fees. From this the defendant appealed. Among numerous exceptions taken by the defendant on appeal one in particular presented a proposition of first impression in North Carolina.

The defendant contended that the lower court committed error in making the pendente lite award in that it did not have jurisdiction to hear the plaintiff's claim since neither the plaintiff nor the defendant was domiciled in North Carolina, nor did the marriage occur in this state. To this the Court replied that although neither party was domiciled in North Carolina they made frequent visits to this state and it was on one of these visits that the cause of action for abandonment arose. In commenting further on this exception the Court, apparently for the first time, concluded that residency in North Carolina was not a prerequisite to the right to institute an action for alimony without divorce under G.S. § 50-16. On this particular point there is a conflict of authority.[24]

[21] N.C. GEN. STAT. § 50-16 provides in part: "[I]n all applications for alimony under this section it shall be competent for the husband to plead the adultery of the wife in bar of her right to such alimony, if the wife *deny* such plea, and the issue be found against her by the judge . . . ." N.C. GEN. STAT. § 50-16 (1950). (Emphasis added.)

[22] *E.g.*, Nebel v. Nebel, 241 N.C. 491, 85 S.E.2d 876 (1955); Wells v. Clayton, 236 N.C. 102, 72 S.E.2d 16 (1952).

[23] 257 N.C. 416, 126 S.E.2d 83 (1962).

[24] On the point of whether an action for alimony without divorce can be brought in a jurisdiction where neither party is a resident there are basically two schools of thought.

On one side the view is that the court has no jurisdiction over such suit where neither party thereto is a resident of the state, although the husband has property in the state. *E.g.*, Miller v. Miller, 33 Fla. 453, 15 So. 222 (1894); Anderson v. Anderson, 140 Okla. 168, 282 Pac. 335 (1929); Curtis

CUSTODY OF CHILDREN

In *Blankenship v. Blankenship*[25] the husband instituted an action for absolute divorce on grounds of two years separation. Two years prior to the husband's action the wife had instituted an action for alimony without divorce in another county and a temporary order was entered awarding her subsistence and custody of the children.

The wife entered a general appearance in the husband's action and alleged as a plea in bar to his prayer for custody that the alimony without divorce action was a prior action pending which involved the question of custody and that the order of subsistence and custody pendente lite entered in the earlier action was res judicata as to the custody of the children.

Subsequently, judgment in the absolute divorce action was entered in the trial court granting the divorce. In the judgment the court recited that it did not have jurisdiction over the custody question. On motion of the husband, in which he asked the trial court to take jurisdiction over the matter of custody, the court concluded that the judgment for absolute divorce abated the action for alimony without divorce under the provisions of G.S. § 50-11, and since no permanent judgment had been entered in that action prior to the granting of the absolute divorce it was vested with sole and exclusive jurisdiction in the matter of custody. Thereupon the trial court granted the husband's motion and entered judgment under which the cause was retained for further proceedings and orders with respect to custody of the children.

On appeal by the defendant the North Carolina Supreme Court

v. Curtis, 200 Pa. 255, 49 Atl. 769 (1901). See generally Annot., 74 A.L.R. 1242 (1931). The theory behind these cases is that the wife has no right to alimony in a state of which neither she nor her husband is a resident because of the possibility that if she were allowed to do this she might institute a proceeding in every state where her husband had property and have it decreed to her in each state; while, the court in the jurisdiction where the parties are domiciled might have decreed restitution of conjugal rights.

The protagonists for the other side take the view that the court has jurisdiction on the basis that the action for maintenance is independent of divorce statutes and is transitory, and may be maintained without reference to the residence of the parties, or either of them, except for statutory provisions which impose a residence requirement on one of the parties as a prerequisite to jurisdiction of such suit. *E.g.*, Artman v. Artman, 11 Conn. 124, 149 Atl. 246 (1930); Zouck v. Zouck, 204 Md. 285, 104 A.2d 573 (1954); Wells v. Wells, 27 S.D. 257, 130 N.W. 780 (1911); Kelley v. Bausam, 98 Wash. 686, 168 Pac. 181 (1917); See generally Annot., 74 A.L.R. 1242 (1931).

[25] Note, 41 N.C.L. REV. 274 (1962).

held that the decree of absolute divorce did not oust the jurisdiction of the court in which the wife's action for alimony without divorce was pending over the question of custody.

Previously, it was thought that the provision of G.S. § 50-16 in regard to custody determination in actions for alimony without divorce was merely intended as a substitute for the habeas corpus proceeding provided for under G.S. § 17-39.[26] The Court in a number of cases had held that the filing of a complaint in a divorce action immediately ousted the jurisdiction of a habeas corpus proceeding to determine custody.[27] Thus, the Court could have reached an opposite result here.

This decision, however, clearly indicates that the result reached under G.S. § 17-39 does not control the question of jurisdiction for determining custody when an action for absolute divorce is instituted subsequent to a pendente lite award of custody in a prior action under G.S. § 50-16.

DIVORCE

In *Donnell v. Howell*[28] the wife brought partition proceeding concerning certain property allegedly held with the defendant as tenants in common as a result of an Alabama divorce. The defendant answered that plaintiff was domiciled in North Carolina at the time of the divorce, that the decree was void, and that they still held as tenants by entirety, and that therefore no partition could be had. The plaintiff replied that the defendant could not attack the validity of the Alabama decree for two reasons: (1) defendant was estopped in that he had participated in the divorce proceeding by signing a written answer in which he waived service of process, jurisdiction, and admitted that the plaintiff was a bona fide resident of Alabama; (2) the decree was not subject to attack by virtue of full faith and credit clause of the United States Constitution.

It was held that the defendant was not estopped to attack the decree and the decree was not entitled to full faith and credit. This case is discussed more fully in a note in this *Review*.[29]

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[26] This statute sets out the procedure for a determination of custody between parents who are living in a state of separation but not divorced.

[27] *E.g.*, Weddington v. Weddington, 243 N.C. 702, 92 S.E.2d 71 (1956); Phipps v. Vannoy, 229 N.C. 629, 50 S.E.2d 906 (1948); Robbins v. Robbins, 229 N.C. 430, 50 S.E.2d 183 (1948).

[28] 257 N.C. 175, 125 S.E.2d 448 (1962).

[29] Note, 41 N.C.L. REV. 274 (1962).

GUARDIAN AND WARD

In *In re Simmons*[30] the movant-ward was insane and had been such since his birth. Subsequent to the time the ward reached majority, the guardian, appointed for the ward's minority, made application to an appropriate court and was duly authorized to sell certain land of the ward. In negotiating the sale the guardian placed the matter in the hands of an attorney, now deceased, with the result that a sale was made of these lands for less than ten cents per acre. The ward, now represented by a newly appointed guardian, sought to have the order authorizing the sale declared void.

In affirming the lower court decision vacating the order of sale, the North Carolina Supreme Court concluded that when one is appointed as a guardian for a minor, his right to act terminates when the ward reaches majority.[31] Thus, notwithstanding the fact that the ward was insane when he reached majority, the guardian appointed for his minority had no authority to act in his behalf.[32]

As a second reason for vacating the order of sale the Court emphasized that the guardian must act in the best interest of his ward.[33] The Court was unable to conclude that the guardian had fulfilled his fiduciary obligation to his ward in view of the fact that the land had been sold for less than a dime an acre, and the entire sale had been placed in the hands of an attorney who appeared not to be working solely for the ward's best interest.

MARRIAGE

In *Harris v. Harris*[34] a novel question was presented. Would North Carolina recognize a valid foreign common-law marriage?

The Court held that while North Carolina does not recognize common-law marriage,[35] such marriage being valid in South Caro-

[30] 256 N.C. 184, 123 S.E.2d 614 (1962).

[31] *E.g.*, Adams v. Adams, 212 N.C. 337, 193 S.E. 661 (1937); Melton v. McKesson, 35 N.C. 475 (1852).

For an excellent discussion by the Court of the power of a court to act on an unauthorized appearance see Howard v. Boyce, 254 N.C. 255, 118 S.E.2d 897 (1961).

[32] For a case which very closely resembles the principal case see Cook v. Cook, 6 Ind. 268 (1839). There it was held that the power of the guardian to act terminated upon the ward reaching majority, and the fact that the ward was insane could not prevent her arrival at full age.

[33] *E.g.*, Owen v. Hines, 227 N.C. 236, 41 S.E.2d 739 (1947); Adams v. Adams, 212 N.C. 337, 193 S.E. 661 (1937).

[34] 257 N.C. 416, 126 S.E.2d 83 (1962).

[35] State v. Wilson, 121 N.C. 650, 28 S.E. 416 (1897). See generally Annot., 39 A.L.R. 538 (1925).

lina[36] would be given recognition in this state. This appears to be the first case on the precise point of recognition in North Carolina of a common-law marriage consumated in a jurisdiction where such marriages are valid.[37] This decision, however, comes as no great surprise in view of the fact that North Carolina had in an early case given recognition to an interracial marriage which was validly entered into in another jurisdiction.[38]

PATERNITY

In *State v. Knight*[39] the defendant was indicted and convicted of willful failure to provide support for his alleged illegitimate child. On appeal the defendant contended that his constitutional rights had been violated in that he was not tried on the issue of paternity first, and then if found guilty, tried in a separate proceeding on the general issue of failure to support the child.

In holding his contention to be untenable the Court stated that it has been common practice in this state to submit separate issues[40] rather than have separate proceedings. This procedure is permissbile since paternity need be established only once, whereas the willful failure to support after notice and demand constitutes a continuing

[36] Frayer v. Frayer, 9 S.C.Eq. (Rich Cas.) 85 (1831).

[37] The general rule in regard to recognition of common-law marriages in jurisdictions where such are not permitted is that such marriages will be recognized if valid under the laws where entered or celebrated. *E.g.*, Tryling v. Tryling, 245 Ky. 399, 53 S.W.2d 725 (1932); Willey v. Willey, 22 Wash. 115, 60 Pac. 145 (1900); Jackson v. State Compensation Comm'r., 106 W.Va. 374, 145 S.E. 753 (1928). See generally Annot., 94 A.L.R. 1000 (1935).

[38] State v. Ross, 76 N.C. 242 (1877).

[39] 256 N.C. 687, 124 S.E.2d 855 (1962).

[40] It appears to be well settled law in North Carolina that there is no need for a separate and distinct trial on the issue of paternity. The Court in the case of State v. Love, 238 N.C. 283, 77 S.E.2d 501 (1953), stated in this connection "that three issues are required to be submitted in a single case, and that the trial court should instruct the jury to consider them in the order in which they appear, that is: That the issue of paternity should be considered first. That if it be answered in the negative, the other issues would not be considered. But if answered in the affirmative, the jury would proceed to consider the second issue, as to wilful nonsupport; that if it be answered in the negative, the answer to the third issue would be 'not guilty.' But if the first and second issues be answered in the affirmative, the jury would answer the third issue 'guilty'; that is, the answer to the third issue would follow as a matter of law." *Id.* at 286, 77 S.E.2d at 503. *Accord,* State v. Robinson, 236 N.C. 408, 72 S.E.2d 857 (1952). There, only the first and second issues were submitted to the jury and on appeal the verdict as to the first issue was upheld but a new trial was granted because there was no verdict as to the guilt of the defendant on the fact found as the offense charged; so new trial was ordered on the second issue.

offense,[41] and a trial on that issue involves failure to support up to the date of the indictment or warrant.

Separation Agreement

Fiduciary Relationship Between Recipient and Beneficiary of Support Payments

In *Goodyear v. Goodyear*[42] the Court spelled out the relationship between a child and a parent who is receiving payments under a separation agreement which are designated to be for the child's support. A number of courts adopt this same view which is to the effect that the parent is a mere trustee of these payments, and is accountable to the child for that part of the payments not reasonably necessary for the child's support and maintenance.[43]

Pre-separation Conduct

In *Richardson v. Richardson*[44] the husband started an action for absolute divorce on grounds of two years separation. The wife alleged in bar of the husband's action that he was at fault and caused the separation, and that he had failed to comply with the terms of the agreement. The action for divorce was denied and plaintiff-husband appealed.

On appeal the lower court decision was reversed for error in certain instructions, and the Court concluded that since the plaintiff and defendant had separated and executed the agreement by mutual consent the defendant could not attack the legality of their separation from and after the date of separation because of alleged misconduct of the plaintiff while they were living together. Thus, the Court ruled that the defendant was estopped to assert as an affirmative defense to the action, under G.S. § 50-6, the pre-separation conduct of the party seeking the absolute divorce.

In reaching its decision the Court analogized the situation of the parties in the principal case to that where the husband abandons the wife and she obtains a divorce from bed and board. There, the decree in her action has the effect of legalizing their separation from the date of such judgment, and the husband can bring an action for absolute

[41] State v. Coppedge, 244 N.C. 590, 94 S.E.2d 569 (1956).
[42] 257 N.C. 374, 126 S.E.2d 113 (1962).
[43] *E.g.*, Thomas v. Holt, 209 Ga. 133, 70 S.E.2d 595 (1952); Corbridge v. Corbridge. 230 Ind. 201, 102 N.E.2d 764 (1952); Watts v. Watts, 240 Iowa 384, 36 N.W.2d 374 (1949).
[44] 257 N.C. 705, 127 S.E.2d 525 (1962).

divorce on grounds of two years separation at any time after two years from the date of the decree.[45]

In part the Court seems to base its decision on the case of *Pearce v. Pearce*[46] which intimates that as long as the agreement is voluntarily entered into it will be a bar to the assertion of an affirmative defense relating to pre-separation conduct of a spouse unless the agreement was procured by fraud or deceit.

The lower court had instructed the jury that if it found that the plaintiff had failed to comply with the agreement simply because he did not want to, not because he was unable to, this would have the effect of placing the parties back in the same position, insofar as the separation was concerned, as they were prior to the time the agreement was entered. These instructions were held erroneous and the Court concluded that since there had been a valid separation within the meaning of G.S. § 50-6, this fact could not be removed nor its legal significance impaired by the plaintiff's failure to comply with its terms.[47]

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[45] *E.g.*, Sears v. Sears, 253 N.C. 415, 117 S.E.2d 7 (1960); Pruett v. Pruett, 247 N.C. 13, 100 S.E.2d 296 (1957); Lockhart v. Lockhart, 223 N.C. 559, 27 S.E.2d 444 (1943).

The basis of the appellant's argument centered around the analysis adopted by the court. Brief for Plaintiff, p. 4, Richardson v. Richardson, 257 N.C. 705, 127 S.E.2d 525 (1962).

[46] 225 N.C. 571, 35 S.E.2d 636 (1945).

[47] The appellee argued in her brief that under the normal rules of contract a party will not be allowed to repudiate part of his entire contract and retain the benefits of another part. Brief for Defendant, p. 6, Richardson v. Richardson, 257 N.C. 705, 127 S.E.2d 525 (1962). LaSalle Extension Univ. v. Osborne, 174 N.C. 427, 93 S.E. 986 (1917). Her argument contended that in allowing the plaintiff to fail to meet the terms of the separation agreement and to sustain his contention that the agreement was a bar to the assertion of the affirmative defense was allowing him to do just what the *LaSalle* case had concluded should not be allowed. Perhaps there is some merit in this contention.

Although the case of Cram v. Cram, 116 N.C. 288, 21 S.E. 197 (1895), was not cited by the appellee in her brief, it would appear appropriate for consideration on the matter of repudiation by the husband. There, the husband and wife entered a separation agreement whereby he was to pay her a stated sum of money per month. The husband made these payments up until such time as the wife made demands on him for an increase in the amount to be paid per month, at which time he ceased to pay. The wife brought an action under an appropriate statute to secure reasonable subsistence for herself and the children. The Court held that the husband could not after repudiating the agreement set it up as a bar to the wife's recovery in the action.

Although in Cram v. Cram, *supra*, the wife was the party seeking affirmative relief, whereas in the *Richardson* case the party at fault sought the affirmative relief, it would appear that the former case clearly enunciates the principle that the party at fault will not be allowed to set up such an agreement as a defense to relief, either negative or affirmative.

Validity of Provisions of the Agreement

In *Kiger v. Kiger*[48] the wife instituted an action under G.S. § 50-16 in which she asked for alimony pendente lite, permanent alimony, custody of the children, and counsel fees. She alleged adultery as a ground for the action. The defendant in his answer pleaded a deed of separation as bar to the lower court's power to award alimony pendente lite and counsel fees. The deed of separation was duly executed as required by G.S. § 50-12 and contained a provision whereby the wife agreed that in the event that a suit for divorce should be instituted by either husband or wife, the wife would not pray the court, or otherwise ask for counsel fees, alimony pendente lite, or subsistence of any character for herself. It was this portion of the agreement that the defendant pleaded in bar to the lower court order awarding the wife alimony pendente lite and counsel fees.

On appeal the Court concluded that in view of the fact that the agreement had not been attacked by plaintiff on the grounds of fraud or coercion in its procurement, or execution, it stood unimpeached and the parties were bound by its terms.[49] Thus, the Court held that the lower court was prohibited from making an allowance of alimony pendente lite and counsel fees for the wife.[50]

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[48] 258 N.C. 126, 128 S.E.2d 235 (1962).

[49] It was the plaintiff's contention that the case of Butler v. Butler, 226 N.C. 594, 39 S.E.2d 745 (1946), supported the ruling of the lower court in making the awards notwithstanding the separation agreement provisions. The Court, however, disagreed with this interpretation and distinguished that case, in which the agreement provided that the terms thereof represented the extent of the rights of the parties, on the ground that the agreement there also reserved the right of appeal by either party to a named judge for a revision of the amount to be paid the wife. In that case it was held that the agreement did not prevent an award of alimony pendente lite.

North Carolina has with consistency held that as to the husband and wife who have entered a valid separation agreement they are remitted to the rights and liabilities under the agreement or the terms of a consent judgment entered thereon. *E.g.*, Turner v. Turner, 205 N.C. 198, 170 S.E. 646 (1933); Brown v. Brown, 205 N.C. 64, 169 S.E. 818 (1933); Lentz v. Lentz, 193 N.C. 742, 138 S.E. 12 (1927). These agreements, however, are subject to modification in behalf of children of the marriage. Holden v. Holden, 245 N.C. 1, 95 S.E.2d 118 (1956). Therefore, it seems logical that if the agreement provided for no alimony pendente lite and counsel fees the parties should be bound by this.

There is authority from other jurisdictions for the position taken by the Court to the effect that where the parties have entered a valid separation agreement whereby adequate provision for the maintenance for the wife has been made, courts should not in a subsequent divorce action allow alimony pendente lite if prohibited by the agreement. *E.g.*, McLaren v. McLaren, 33 Ga. (Supp.) 99 (1864); Romaine v. Chauncey, 129 N.Y. 566, 29 N.E. 826 (Ct. App. 1892). See generally Annot., 60 Am. Dec. 678 (1884).

[50] This particular point has never been decided before in North Carolina.

EMINENT DOMAIN

Access Points

It has long been the rule in North Carolina that where only a part of a tract of land is condemned by the Highway Commission for highway purposes, the measure of damages is the difference between the fair market value of the entire tract immediately before the taking and the fair market value of what is left immediately after the taking, less any general and special benefits resulting to the landowner from the taking.[1] This rule has been applied in numerous cases where the condemnation was for the purpose of *constructing* a highway across the owner's property.[2] In *Kirkman v. State Highway Comm'n*,[3] however, an access point to a *previously existing highway* was taken. The defendant argued that the trial judge erred in failing to instruct the jury that it was entitled to have general and special benefits to the plaintiff set-off against plaintiff's recovery. The Court, however, affirmed the trial court because the defendant failed to introduce any evidence as to general and special benefits. It also pointed out that the question of benefits to the landowner was taken into consideration when the land was originally condemned for construction of the highway, and "a benefit once allowed cannot be reasserted in a further proceeding to condemn."[4]

If an act is a proper exercise of the police power, as distinguished from the power of eminent domain, the constitutional provision[5] that

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There appear to be two schools of thought on whether such provisions in separation agreements can be held to estop the wife from claiming and being awarded counsel fees in a subsequent action. Such provisions have been held valid and enforceable where the agreement makes an allowance for support of the wife, or an adequate award in lieu thereof. *E.g.*, Worman v. Worman, 118 Fla. 471, 159 So. 677 (1935); Greenfield v. Greenfield, 161 App. Div. 573, 146 N.Y. Supp. 865 (Sup. Ct. 1914).

On the other hand, some courts have held that terms of separation agreements to this effect are void as against public policy. *E.g.*, Edleson v. Edleson, 179 Ky. 300, 200 S.W. 625 (1918); Banner v. Banner, 184 Mo. App. 396, 171 S.W. 2 (1914). See generally Annot., 116 A.L.R. 947 (1939) and 164 A.L.R. 1236 (1946).

[1] See N.C. Gen. Stat. § 136-19 (Supp. 1961).

[2] Templeton v. State Highway Comm'n, 254 N.C. 337, 118 S.E.2d 918 (1961); Williams v. State Highway Comm'n, 252 N.C. 514, 114 S.E.2d 340 (1960); Robinson v. State Highway Comm'n, 249 N.C. 120, 105 S.E.2d 287 (1958); North Carolina State Highway & Pub. Works Comm'n v. Black, 239 N.C. 198, 79 S.E.2d 778 (1954); Proctor v. State Highway & Pub. Works Comm'n, 230 N.C. 687, 691, 55 S.E.2d 479, 482 (1949).

[3] 257 N.C. 428, 126 S.E.2d 107 (1962).

[4] *Id.* at 433, 126 S.E.2d at 111.

[5] U.S. Const. amend. XIV, § 1.

private property shall not be taken for public use unless compensation is paid is not applicable.[6] The establishment of dual lane highways with median strips has been recognized as a proper exercise of the police power.[7] It is generally held that an individual proprietor has no right to insist that the entire volume of traffic that would naturally flow over a highway pass undiverted and unobstructed. In fact, he has no right to have anyone pass by his premises at all.[8] The latter rule was applied in *Barnes v. North Carolina State Highway Comm'n*[9] where part of a tract of land owned by plaintiff was condemned for the purpose of converting a single lane highway into a dual lane highway with a median. The Court held that plaintiff was not entitled to compensation for the diminution in value of the remaining land, which was used for commercial purposes, caused by the fact that there was direct access only to one lane of the new highway.

As to the elevated concrete traffic islands or curbing placed on plaintiff's property by the defendant, the Court stated that while entire access may not be cut off, an owner is not entitled to access to his land at all points along a highway. If he has free and convenient access, and ingress and egress are not substantially impaired, there is no cause for complaint.[10]

EQUITABLE REMEDIES

Injunction Against Foreign Divorce

In *Thurston v. Thurston*[1] the North Carolina Supreme Court affirmed a temporary restraining order enjoining a husband from instituting or prosecuting a suit for divorce in another state pending the final determination of his wife's action in North Carolina for

[6] State v. Fox, 53 Wash. 2d 216, 332 P.2d 943 (1958); Walker v. State, 48 Wash. 2d 587, 295 P.2d 328 (1956).

[7] Muse v. Mississippi State Highway Comm'n, 233 Miss. 694, 103 So. 2d 839 (1958).

[8] Board of County Comm'rs v. Slaughter, 49 N.M. 141, 158 P.2d 859 (1945); City of Memphis v. Hood, 208 Tenn. 319, 345 S.W.2d 887 (1961). See generally 2 Nichols, Eminent Domain § 6.445 (3d ed. 1950).

[9] 257 N.C. 507, 126 S.E.2d 732 (1962).

[10] State v. Ensley, 240 Ind. 472, 164 N.E.2d 342 (1960); Iowa State Highway Comm'n v. Smith, 248 Iowa 869, 82 N.W.2d 755 (1957); Annot., 100 A.L.R. 491 (1936). Plaintiff in the principal case is, however, entitled to recover for the injury to his remaining property caused by the traffic islands to the extent that they impair free movement across his property.

[1] 256 N.C. 663, 124 S.E.2d 852 (1962). Also discussed under Domestic Relations, *Abandonment, supra.*

alimony without divorce. The plaintiff asserted that although the defendant was presently providing her with an adequate means of support she was vulnerable to instantaneous impoverishment at the will of the defendant in view of his announced intention to go to Florida and procure a "quickie" divorce. The issuance of the temporary restraining order had been based upon findings in the lower court that if the plaintiff were forced to defend an action for divorce in a foreign state, and if such a decree were rendered prior to her present action for alimony without divorce, she would suffer irreparable harm for which there is no adequate remedy at law.[2]

This was the first such case to arise in North Carolina, and the decision in the instant case is in accord with the generally recognized principle that a court of equity has the power to enjoin, in an appropriate case, the commencement or prosecution of an action by one spouse for divorce in another state.[3] Such equitable relief has been considered appropriate where the foreign divorce action is in evasion of the laws of the parties' matrimonial domicile;[4] where the establishment of the divorcing spouse's residence is fraudulent upon the jurisdiction of the foreign court;[5] where the foreign proceeding is vexatious in nature and would cause the wife unnecessary expense and inconvenience,[6] or, as in the present case, where a decree pending in the injunction forum would be rendered ineffectual by the foreign divorce.[7]

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[2] N.C. GEN. STAT. § 50-11 (Supp. 1961) provides: "After a judgment of divorce . . . all rights arising out of the marriage shall cease and determine . . . provided . . . a decree of absolute divorce shall not impair or destroy the right of the wife to receive alimony . . . under any judgment or decree rendered before the rendering of the judgment for absolute divorce." Under this section if the foreign decree of divorce were obtained prior to the final judgment in the plaintiff's action for alimony without divorce and such decree were not set aside in North Carolina, the defendant could plead it in bar of the enforcement of any decree entered in favor of the plaintiff. Feldman v. Feldman, 236 N.C. 731, 73 S.E.2d 865 (1953).

[3] See generally Annot., 54 A.L.R.2d 1240 (1957).

[4] Ashkenaz v. Ashkenaz, 180 Misc. 580, 41 N.Y.S.2d 388 (Sup. Ct. 1943).

[5] *E.g.*, Usen v. Usen, 136 Me. 480, 13 A.2d 738 (1940).

[6] Aghnides v. Aghnides, 150 N.Y.S.2d 371 (Sup. Ct. 1956), *aff'd*, 159 N.Y.S.2d 343 (Sup. Ct.) (permanent injunction), *aff'd*, 4 App. Div. 2d 498, 167 N.Y.S.2d 201 (1957), *motion for leave to amend denied*, 4 N.Y.2d 676, 149 N.E.2d 538 (1958).

[7] Palmer v. Palmer, 268 App. Div. 1010, 52 N.Y.S.2d 383, *affirming*, 50 N.Y.S.2d 329 (Sup. Ct. 1944), *motion for leave to appeal denied*, 268 App. Div. 1076, 53 N.Y.S.2d 309, *motion for leave to serve supplemental answer denied*, 184 Misc. 291, 53 N.Y.S.2d 784 (Sup. Ct. 1945) (after divorce obtained).

Injunctions against foreign divorce had once been denied on grounds that the foreign state was without jurisdiction since it was not the matrimonial domicile. Thus, any decree rendered by the foreign state would be a nullity.[8] This protection to the non-migratory spouse, however, was removed in *Williams v. North Carolina*[9] which established that if the domicile of the migratory spouse was sufficient to confer jurisdiction under the laws of the foreign state, any decree of divorce rendered therein was prima facie entitled to extraterritorial recognition and favored by a presumption of validity.[10] It has since been held that to cast such a burden of proof upon the non-migratory spouse is a sufficient hardship to warrant the interposition of equitable relief.[11]

Mistake of Law and Fact

In *United States Fid. & Guar. Co. v. Reagan*[12] the plaintiff sought rescission and restitution of payments made on a policy of insurance issued to the defendant. Plaintiff alleged that the issuance of the policy had been induced by the false representation of the defendant that he was the owner of the insured automobile. The defendant made a motion for judgment of involuntary nonsuit which was allowed by the lower court. The Supreme Court, reversing, held that the policy was void because the defendant had no insurable interest. In so holding, the Court applied the general rule that a payment made under an erroneous belief induced by a mistake of fact caused by the false representations of the defendant entitles the payor to restitution provided the payment has not caused such a change in the position of the payee that it would be unjust to require a refund.[13]

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[8] Goldstein v. Goldstein, 283 N.Y. 146, 27 N.E.2d 969 (1940) (5 to 2 decision), *reversing* 258 App. Div. 211, 15 N.Y.S.2d 782 (1939).

[9] 317 U.S. 287 (1942).

[10] Williams v. North Carolina, 325 U.S. 226 (1945). In this, the second *Williams* case, it was held that the finding of bona fide domicile by the divorcing state is not conclusive and may be relitigated in a sister state. For an excellent review of matrimonial litigation both prior and subsequent to the *Williams* cases see Baer, *The Law of Divorce Fifteen Years After Williams v. North Carolina,* 36 N.C.L. Rev. 265 (1958).

[11] Garvin v. Garvin, 302 N.Y. 96, 96 N.E.2d 721 (1951), *affirming,* 277 App. Div. 858, 98 N.Y.S.2d 211 (1950); Pereira v. Pereira, 272 App. Div. 281, 70 N.Y.S.2d 763 (1947).

[12] 256 N.C. 1, 122 S.E.2d 774 (1961).

[13] See, *e.g.,* Sparrow v. John Morrell & Co., 215 N.C. 452, 2 S.E.2d 365 (1939); Simms v. Vick, 151 N.C. 78, 65 S.E. 621 (1909); Adams v. Reeves, 68 N.C. 134 (1873). *Cf.* Tarlton v. Keith, 250 N.C. 298, 108 S.E.2d 621 (1959).

The Court regarded the mistake as to the defendant's title to, or insurable interest in, the property as a mixed question of law and fact which has generally been treated as a mistake of fact.[14] Thus the Court avoided the harshness of the doctrine of *Bilbie v. Lumley*[15] that there can be no relief for a mistake of law. This doctrine is founded on the supposition that all persons are presumed to know the law.[16] Because of the obvious injustice inherent in the universal application of so broad a rule, there has been a gradual process of attrition whereby the general rule has nearly been engulfed by its exceptions. Repeatedly courts have, as here, applied to a mistake of law the same criteria and principles that they would apply to a mistake of fact in a situation otherwise the same.[17]

The doctrine of the *Bilbie* case is adhered to in North Carolina, but its application is confined to similar fact situations, that is, to cases where a payment has been voluntarily made with full knowledge of the facts in response to an honest demand but under a mistaken belief as to the law.[18] In almost all other instances North Carolina will grant relief where a benefit has been conferred upon another under a mistake of law.[19] The most extreme case in this process of delimitation of the general rule in North Carolina is that

[14] See Baltimore & A.R.R. v. Carolina Coach Co., 206 Md. 237, 111 A.2d 464 (1955); Roney v. Commercial Union Fire Ins. Co., 225 Ala. 367, 143 So. 571 (1932).

[15] 2 East 469, 102 Eng. Rep. 448 (K.B. 1802). This was an action by an underwriter on a policy of insurance to recover payments made to the defendant under a mistake relating to the time of the sailing of the insured ship. The defense was that the plaintiff had the means of such knowledge in his hands, the defendants having placed papers before him containing such information, and that a payment made with full knowledge of the circumstances cannot be recovered back. The Court, ruling in favor of the defendant's contention, said: "Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried." *Id.* at 449-50.

[16] The rule as announced by Lord Ellenborough has itself been referred to as a "monstrous mistake of law." Patterson, *Improvements in the Law of Restitution*, 40 CORNELL L.Q. 667, 676 (1955).

[17] See generally RESTATEMENT, RESTITUTION, *Topic 3, Mistake of Law, Introductory Note* at 179-80 (1937). Several states have now abolished the doctrine by statute. *E.g.*, N.Y. CIV. PRAC. ACT. § 112-f (revised in N.Y. CPLR § 3005, effective Sept. 1, 1963).

[18] See Collins v. Covert, 246 N.C. 303, 98 S.E.2d 26 (1957); Guerry v. American Trust Co., 234 N.C. 644, 68 S.E.2d 272 (1951); First Nat'l Bank v. Taylor, 122 N.C. 569, 29 S.E. 831 (1898).

[19] See, *e.g.*, State Trust Co. v. Braznell, 227 N.C. 211, 41 S.E.2d 744 (1947) (reformation allowed where a mistake of law induced a mistake of fact); M.P. Hubbard & Co. v. Horne, 203 N.C. 205, 165 S.E. 347 (1932) (reformation allowed where unilateral mistake of law induced by fraud).

of *Kornegay v. Everett*.[20] There, by mutual mistake of both the parties, a deed executed by a trustee was not effective to convey an unencumbered title in fee to the plaintiff. The Court allowed the instrument to be corrected to conform with the intention of the parties even though the error was purely a mistake of law.

The present case is another example of the narrowing of the old rule that a mistake of law cannot be corrected in equity and seems to indicate an extension of this trend into the area of insurable interest.[21]

EVIDENCE

Burden of Proof

When a plaintiff makes out a prima facie case there is no shifting of the burden of proof to the defendant.[1] The establishment of a prima facie case merely assures the plaintiff that he will not be nonsuited, but it in no way keeps the jury from finding for the defendant.[2] The jury may return a verdict for the defendant even though he offers no evidence to rebut the prima facie case made out against him; however, as a practical matter the defendant usually finds it necessary to go forward with evidence in his favor.[3]

In *Knight v. Associated Transp., Inc.*[4] evidence that the defendant's insignia was painted on the side of a truck involved in a wreck was held to establish a prima facie case under *respondeat superior*. The trial court charged the jury to the effect that the establishment of a prima facie case necessitated a verdict against the defendant if he offered no evidence in rebuttal. The Supreme Court, in reversing the lower court, held that the plaintiff must prove his case by the greater weight of the evidence in order to make out a prima facie case, but the jury may nevertheless find for the defendant even though he offers no evidence. This case and the question of the burden of proof is the subject of a note in this volume of the *Law Review*.[5]

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[20] 99 N.C. 30, 5 S.E. 418 (1887).

[21] This case is also discussed under Insurance, *Automobile Casualty Insurance, infra.*

[1] The making of a prima facie case merely takes the case to the jury who in turn may decide for either party, and whether the defendant goes forward with the evidence is for him to determine.

[2] See Stansbury, North Carolina Evidence § 203 (1946).

[3] Vance v. Guy, 224 N.C. 607, 31 S.E.2d 766 (1944); Star Mfg. Co. v. Atlantic Coast Line R.R., 222 N.C. 330, 23 S.E.2d 32 (1942).

[4] 257 N.C. 758, 127 S.E.2d 536 (1962).

[5] Note, 41 N.C.L. Rev. 124 (1962).

CONDUCT AS AN IMPLIED ADMISSION

The conduct of a party opponent which indicates he is conscious of the fact that his case is weak or unfounded may amount to an implied admission that he ought to lose.[6] The attempt to bribe jurors,[7] the attempt to commit suicide,[8] and the failure to testify[9] have all been held to be admissible as implied admissions. Conduct, when treated as an implied admission, raises no presumption of guilt but is merely competent evidence which may be considered by the jury.[10]

In *Pratt v. Bishop*[11] the petitioner instituted proceedings to adopt her grand-daughter alleging that the father had abandoned the child to her care. As evidence of abandonment the petitioner introduced certain depositions which tended to show that the respondent, in violation of a restraining order, had obtained possession of the child and had taken her out of the state where he negotiated for her return to the petitioner only upon the payment of 150,000 dollars. The Court held that the evidence contained in the depositions relating to the respondent's conduct was receivable against him as an indication that he had no faith in the merits of his case and therefore amounted to an implied admission that he ought to lose. The Court felt that one could certainly infer from the respondent's conduct in ransoming his child that he had no confidence in his ability to pursue the case on its merits.

DEAD MAN'S STATUTE (G.S. § 8-51)

In *Tharpe v. Newman*[12] the plaintiff alleged that he was injured in an automobile accident while the defendant's husband was driving the vehicle as her agent. The defendant's husband was killed in the accident and there was no other evidence as to who was driving at the time of the wreck.

The plaintiff's proffered testimony to the effect that the decedent was driving at the time of the accident was excluded under G.S. § 8-51[13] (North Carolina's Dead Man's Statute). The Court said

[6] State v. Kincaid, 142 N.C. 657, 55 S.E. 647 (1906); see STANSBURY, *op. cit. supra* note 2, § 178.
[7] State v. Case, 93 N.C. 545 (1885).
[8] State v. Lawrence, 196 N.C. 562, 146 S.E. 395 (1929), noted in 7 N.C.L. REV. 290 (1929).
[9] York v. York, 212 N.C. 695, 194 S.E. 486 (1938).
[10] State v. Dickerson, 189 N.C. 327, 127 S.E. 256 (1925).
[11] 257 N.C. 486, 126 S.E.2d 597 (1962).
[12] 257 N.C. 71, 125 S.E.2d 315 (1962).
[13] N.C. GEN. STAT. § 8-51 provides that in an action against the admin-

that when two persons are involved in an automobile accident, the survivor's testimony as to the identity of the driver at the time of the accident concerns a personal transaction between the parties within the meaning of G.S. § 8-51 and is incompetent when offered in evidence against a decedent's estate.[14]

While in *Tharpe* the action was not against the decedent's estate but against his principal under the doctrine of *respondeat superior,* the Court nevertheless pointed out that under *respondeat superior* the principal has an implied right of indemnity against the decedent's estate,[15] and therefore, any testimony allowed against the principal is also allowed indirectly against a decedent's estate.[16]

The Court's reasoning is in accord with a line of cases which have held that testimony offered against a decedent's surety, which may be adverse to the decedent's estate, is within the purview of G.S. § 8-51 since the surety, after paying the liability, may then go against the decedent's estate for reimbursement.[17]

Evidence of Prior Criminal Conviction

The proper method for excluding irrelevant matter from a pleading is by a motion to strike.[18] Whether such matter is relevant or not depends upon whether the evidence which would support the allegation would be admissible at the trial.[19] Accordingly, if certain evidence would be incompetent upon the trial of the facts then the allegations relative to such evidence should be struck from the pleadings.[20] However, regardless of the relevancy of the matter in the pleadings, a lower court's decision not to exclude the matter will be

istrator of a deceased person an interested party shall not be examined as a witness "concerning a personal transaction or communication between the witness and the deceased."

[14] *Accord,* Davis v. Pearson, 220 N.C. 163, 16 S.E.2d 655 (1941); Boyd v. Williams, 207 N.C. 30, 175 S.E. 832 (1934), noted in 13 N.C.L. Rev. 230 (1935).

[15] Hayes v. City of Wilmington, 243 N.C. 525, 91 S.E.2d 673 (1956); Newsome v. Surratt, 237 N.C. 297, 74 S.E.2d 732 (1953).

[16] Compare Bailey v. Westmoreland, 251 N.C. 843, 112 S.E.2d 517 (1960), where the interested witness was allowed to testify as to a transaction with the defendant's agent due to the fact that the agent would not have been personally liable and therefore the testimony would have no effect on his estate.

[17] *E.g.,* McGowan v. Davenport, 134 N.C. 526, 47 S.E. 27 (1904).

[18] N.C. Gen. Stat. § 1-153 (1953).

[19] Penn Dixie Lines, Inc. v. Grannick, 238 N.C. 552, 78 S.E.2d 410 (1953); Penny v. Stone, 228 N.C. 295, 45 S.E.2d 362 (1947).

[20] Daniel v. Gardner, 240 N.C. 249, 81 S.E.2d 660 (1954).

upheld on appeal unless its retention in the pleadings would be prejudicial to the moving party.[21]

In *Durham Bank & Trust Co. v. Pollard*[22] the defendant moved to strike from the pleadings the plaintiff's allegations that the defendant had been convicted in a prior criminal action of killing the plaintiff's intestate. The North Carolina Supreme Court held, in accord with the great weight of authority, that evidence of a prior criminal conviction or acquittal is inadmissible in a subsequent civil action in an attempt to prove the truth of the facts upon which the prior verdict was rendered.[23] Although the facts are the same in both the civil and criminal action, the parties are different—one being an action by the state and the other by an individual. The Court held that the motion to strike should have been allowed, since the allegations of the prior criminal conviction were irrelevant and their retention in the complaint would be prejudicial to the defendant.

Evidence of a Prior Contract

As a general rule, evidence that a defendant made a contract with one person is not competent for the purpose of showing a similar contract existed with another.[24] However, in the recent case of *Doub v. Hauser*,[25] where the plaintiff sought to prove an implied contract, the Court upheld the admission of evidence that the defendant had proposed a similar agreement with another party. The plaintiffs had alleged that the defendant, who was in poor health and had been living alone, had promised to devise them his farm if they would come live with him and take care of him. The Court held that although the evidence of a similar agreement with another person was incompetent to prove the existence of a contract between the parties, it was admissible for the purpose of corroborating the plaintiffs' evidence that the defendant was sick, lonely, and wanted someone to live with him.[26] Although the trial court failed to restrict the evidence for purposes of corroboration only, its admission was held

[21] Call v. Stroud, 232 N.C. 478, 61 S.E.2d 342 (1950); Hinson v. Britt, 232 N.C. 379, 61 S.E.2d 185 (1950).

[22] 256 N.C. 77, 123 S.E.2d 104 (1961).

[23] *Id.* at 79, 123 S.E.2d at 106. *Accord,* Warren v. Pilot Life Ins. Co., 215 N.C. 402, 2 S.E.2d 17 (1939); Annot., 18 A.L.R.2d 1290 (1951).

[24] Winborne Guano Co. v. Plymouth Mercantile Co., 168 N.C. 223, 84 S.E. 272 (1915).

[25] 256 N.C. 331, 123 S.E.2d 821 (1962).

[26] *Accord,* Koonce v. Atlantic States Motor Lines, 249 N.C. 390, 106 S.E.2d 576 (1959).

not to be in error due to the failure of defendant to request such a restriction.

Evidence of Racing Prior to Collision

In *Corum v. Comer*[27] the plaintiff's intestate was killed as a result of an automobile collision between the two co-defendants. The trial court admitted, over objection, evidence tending to show that the defendants had been racing about twenty minutes before the collision.

On appeal it was held that evidence of a prior course of action must be relevant to the issues before the court, and must have a tendency to prove or disprove, whether directly or indirectly, a question in issue; otherwise, it is incompetent.[28] Evidence which is too remote or which is merely intended to provoke prejudice is inadmissible because it would merely confuse the jury and prolong the trial.[29] The Court held that evidence to the effect that the defendants had been racing about twenty minutes prior to the accident was too remote to have any bearing upon the defendants' negligence at the time of the wreck. In order for evidence of racing at a prior time to be admissible, it must be shown that the race continued to the scene of the accident.[30]

Opinion Evidence—Invading the Province of the Jury

It is generally held that a lay witness cannot give his opinion on questions which are to be decided by the jury if he can relate the facts to the jury so that it will be in as good a position as the witness to draw its own inferences and conclusions.[31] It is only when the facts are incapable of being adequately expressed by the witness so as to enable the jury to draw a reasonable inference therefrom that the witness may give his opinion.[32]

In the recent case of *Ponder v. Cobb*,[33] it was alleged that the defendant had caused to be published certain libelous statements charging the plaintiffs, as the election officials, with ballot-stuffing

[27] 256 N.C. 252, 123 S.E.2d 473 (1962).

[28] *Accord,* Pettiford v. Mayo, 117 N.C. 27, 23 S.E. 252 (1895).

[29] Wilson v. Ervin, 227 N.C. 396, 42 S.E.2d 468 (1947); Godfrey v. Western Carolina Power Co., 190 N.C. 24, 128 S.E. 485 (1925).

[30] 256 N.C. at 254, 123 S.E.2d at 475. *Accord,* Barnes v. Nello Teer Constr. Co., 218 N.C. 122, 10 S.E.2d 614 (1940).

[31] *E.g.,* Jones v. Bailey, 246 N.C. 599, 99 S.E.2d 768 (1957).

[32] State v. Peterson, 225 N.C. 540, 35 S.E.2d 645 (1945); see generally Stansbury, *op. cit. supra* note 2, § 124.

[33] 257 N.C. 281, 126 S.E.2d 67 (1962). This case is the subject of a note in 41 N.C.L. Rev. 153 (1962).

and otherwise conducting a fraudulent election. The plaintiffs had held the election, counted and recorded the ballots, and certified the results. The original return of the election results was put in evidence.

The plaintiffs, in an attempt to prove the falsity of the defendant's statements, were allowed to testify, over objection, that the election returns in question correctly stated the vote cast in the election. On appeal, the Supreme Court held that whether the election returns correctly reflected the votes cast was the very issue to be decided by the jury and not a proper conclusion for the witness to draw. The Court was of the opinion that the plaintiffs had ample opportunity to place facts before the jury tending to show the election was conducted in the prescribed manner without resorting to their opinion.

The concurring justice in *Ponder* felt that the plaintiffs should have been allowed to testify that the election returns were in fact correct, for after all, the original return certified by the plaintiffs was admitted in evidence. The concurring opinion drew a distinction between cases where a witness attempts to draw deductions and inferences from the actions of others and where testimony is given from first-hand knowledge. The opinion stated that the plaintiffs should have been allowed to testify from their own first-hand knowledge in reply to the charge against them, and that such testimony does not usurp the function of the jury.

In *Carter v. Bradford*[34] the defendant negligently closed a car door on the plaintiff's hand, and at the trial the plaintiff was allowed to testify that by the time of the trial, she had lost ninety per cent of the use of her right hand. The Court upheld the admissibility of the plaintiff's testimony on the grounds that a lay witness may give his opinion as to his present state of health and ability to work.[35] The Court stated that the ability to perform physical acts is not necessarily a question for expert opinion,[36] for the plaintiff having suffered the injury was more qualified than anyone else to testify about her disability.[37]

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[34] 257 N.C. 481, 126 S.E.2d 158 (1962).

[35] *Accord,* Lee v. New York Life Ins. Co., 188 N.C. 538, 125 S.E. 186 (1924); see STANSBURY, *op. cit. supra* note 2, § 129.

[36] See Bulluck v. Mutual Life Ins. Co., 200 N.C. 642, 158 S.E. 185 (1931); Note, 16 N.C.L. REV. 180 (1938).

[37] *Accord,* Gossett v. Metropolitan Life Ins. Co., 208 N.C. 152, 179 S.E. 438 (1935), where a lay witness was allowed to testify as to the plaintiff's permanent disability. Norris v. Elmdale Elevator Co., 216 Mich. 546, 185 N.W. 696 (1921), where the plaintiff was allowed to testify that due to his injury his ability to do carpenter work was decreased by one-half.

Prior Accidents as Evidence of Negligence

As a general rule, when one is charged with a negligent act, evidence as to his negligence on prior unrelated occasions is inadmissible.[38] The lack of relevancy between two independent though similar acts would allow the evidence of the prior act, if admitted, to be used to demonstrate the character of a defendant or that his disposition is such that he would be likely to commit certain acts of a like nature.[39] This in turn would clearly violate the rule that character cannot be proved by specific acts when character is a collateral issue.[40]

In *Mason v. Gillikin,*[41] where the defendant was being sued for negligently causing an automobile collision, the Court held that evidence of defendant's previous accidents was immaterial in determining his negligence in a completely unrelated instance. The evidence of the prior accidents was found to be so unrelated to the cause of action being tried that it could only be accepted by the jury as evidence that the defendant had a reputation for negligence.

Spontaneous Statements and Res Gestae

Spontaneous statements made contemporaneous to the witnessing of an incident, or shortly thereafter and without time for reflection, may be admissible in evidence as a part of the *res gestae.*[42] In order for such statements to be competent as a part of the *res gestae,* they must be voluntary and instinctive rather than in the form of a narrative. The spontaneity of a declaration is said to be the assurance of its trustworthiness.[43]

In *Hargett v. Jefferson Standard Life Ins. Co.*[44] the plaintiff's intestate died from a wasp sting and the plaintiff sought to collect on a double indemnity life insurance policy. Witnesses testifying for the plaintiff said that the decedent, who had been walking along the

[38] Heath v. Kirkman, 240 N.C. 303, 82 S.E.2d 104 (1954); Robbins v. Alexander, 219 N.C. 475, 14 S.E.2d 425 (1941); Annot., 20 A.L.R.2d 1210 (1951).

[39] See Stansbury, *op. cit. supra* note 2, § 91.

[40] State v. McClain, 240 N.C. 171, 81 S.E.2d 364 (1954).

[41] 256 N.C. 527, 124 S.E.2d 537 (1962).

[42] Little v. Power Brake Co., 255 N.C. 451, 121 S.E.2d 889 (1961); see Powers, *The North Carolina Hearsay Rule and the Uniform Rules of Evidence,* 34 N.C.L. Rev. 171, 188 (1956); Annot., 163 A.L.R. 92 (1946).

[43] Coley v. Phillips, 224 N.C. 618, 31 S.E.2d 757 (1944); Queen City Coach Co. v. Lee, 218 N.C. 320, 11 S.E.2d 341 (1940) (Court excluded statement made fifteen minutes after the accident); Batchelor v. Atlantic Coast Line R.R., 196 N.C. 84, 144 S.E. 542 (1928); see Stansbury, *op. cit. supra* note 2, § 164.

[44] 258 N.C. 10, 128 S.E.2d 26 (1962).

highway, suddenly crossed the road and stated to them that a wasp had stung him and that the pain was unbearable. This testimony and other evidence showed the decedent had walked about one hundred yards and that nearly two minutes had elapsed from the time of the incident to the making of the statement.

Previous North Carolina cases have been inconsistent as to the interval of time which may elapse between an occurrence and the making of a declaration in order to have the declaration deemed a part of the *res gestae.* In a number of cases the Court has insisted upon strict contemporaneousness,[45] while in other cases statements have been held admissible when made after the incident, but before there had been time for fabrication.[46]

The Court in *Hargett* held that the fact that the decedent's statement was made voluntarily, shortly after the incident, and in explanation of his pain, took it out of the hearsay rule and rendered it competent as a part of the *res gestae.* The Court indicated that whether a statement is a part of the *res gestae* depends upon the particular circumstances involved, and that the contemporaneousness of the statement, although important, is only one factor to be considered.[47]

In *Tart v. Register*[48] the defendant made a left turn as another car was passing her automobile, and in the resulting collision a number of her passengers were injured. There was testimony to the effect that the passengers had seen a car approaching from the rear and that they warned the defendant that if she turned they would be hit. These statements were held to be competent as spontaneous statements and admissible as a part of the *res gestae.* The Court found that the declarations were made as a part of the transaction and without time for reflection.[49]

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[45] *E.g.,* Holmes v. Wharton, 194 N.C. 470, 140 S.E. 93 (1927); State v. Butler, 185 N.C. 625, 115 S.E. 889 (1923); Hill v. Aetna Life Ins. Co., 150 N.C. 1, 63 S.E. 124 (1908).

[46] *E.g.,* State v. Smith, 225 N.C. 78, 33 S.E.2d 472 (1945); Young v. Stewart, 191 N.C. 297, 131 S.E. 735 (1926), where the Court held that the declaration need not be made immediately upon the happening of the incident, but any remoteness of time may be considered in determining whether the declaration was narrative.

[47] "[T]he court should consider the time, place and content of the utterance, whether it was voluntarily made, motive for fabrication, condition of the declarant, and corroborating circumstances." 258 N.C. at 14, 128 S.E.2d at 30 (1962).

[48] 257 N.C. 161, 125 S.E.2d 754 (1962). This case is also discussed in DAMAGES, *Collateral Recovery, supra* and TORTS, *Joint Tortfeasors, infra.*

[49] *Accord,* Woods v. Roadway Express, Inc., 223 N.C. 269, 25 S.E.2d 856 (1943).

INSURANCE

AUTOMOBILE CASUALTY INSURANCE

In *United States Fid. & Guar. Co. v. Reagan*[1] the plaintiff-insurer sought to recover payments made on an automobile casualty insurance policy issued to defendant. Plaintiff alleged that the policy was issued under the mistaken belief that defendant was the owner of the insured automobile.[2] Upon the close of plaintiff's evidence, the trial court allowed defendant's motion of involuntary nonsuit. On appeal the Supreme Court, reversing, found defendant to be without an insurable interest and held the policy void. The Court, upon sound equitable principles,[3] held that the insurer would be entitled to restitution for money paid under a mistake of fact, even though defendant had expended the sums in payment for repairs to the automobile.

AUTOMOBILE LIABILITY INSURANCE

In *State Farm Mut. Auto. Ins. Co. v. Employers' Fire Ins. Co*,[4] an employee of an automobile dealer was a passenger in a car owned by the dealer for demonstration purposes. The driver lost control of the car and the employee was injured as a result. The employee, after recovering workmen's compensation, brought suit against the driver for the injuries suffered. The driver called upon his insurer, plaintiff in this action, to defend and discharge his liability. Plaintiff brought this suit for declaratory judgment, joining its insured, the dealer, and the dealer's insurer. Plaintiff admitted that its policy covered the driver, but contended that it was only responsible for excess coverage[5] and that the dealer's insurance provided the primary coverage which should be exhausted before a claim is brought against it. The dealer's insurance, on the other hand, expressly excluded recovery by an "employee of the insured" for bodily injury or medical coverage for injuries sustained in the course of employ-

[1] 256 N.C. 1, 122 S.E.2d 774 (1961).

[2] In a prior action against the tortfeasor, plaintiff was allowed a voluntary nonsuit when defendant here testified, as plaintiff's witness, that he did not at any time own the automobile.

[3] See EQUITABLE REMEDIES, *Mistake of Law and Fact, supra.*

[4] 256 N.C. 91, 123 S.E.2d 108 (1961).

[5] "[T]he excess insurer is liable only for the amount of the loss in excess of the limits of other valid and collectible insurance covering the same loss." Consolidated Shippers, Inc. v. Pacific Employers Ins. Co., 45 Cal. App. 2d 288, —, 114 P.2d 34, 36 (1941); Cooper v. Commercial Ins. Co., 26 Misc. 2d 179, 206 N.Y.S.2d 25 (Sup. Ct. 1960).

ment and for "any obligation for which the insured or any company as his insurer may be held liable under a workmen's compensation law."[6] Plaintiff, however, contended that the driver was an additional insurer under the dealer's policy and the exclusion clauses in that policy remove from coverage only the employees of the driver and those to whom the driver pays workmen's compensation.

The trial court held that plaintiff was obligated under its policy with the driver and that the dealer's insurer incurred no liability. The Supreme Court affirmed on appeal, finding that the use of the term "employees" in the exclusions of the dealer's policy meant the dealer's employees and not those of the driver.

There are two views[7] on this matter: (1) the term "insured" includes the named insured and any additional insured under the policy,[8] and (2) the only employees excluded are those of the named insured.[9] However, the appellant contends for a slightly different approach in that it alleges that the term "employees of the insured" should be limited to the employees of the insured invoking coverage under the policy. Our Court in adopting the view that the excluded employees are those of the named insured, stated: "to arrive at the conclusion [the driver's] . . . employees and not [the dealer's] . . . are excluded requires complicated, circuitous and involved reasoning."[10]

In *Roomy v. Allstate Ins. Co.*[11] husband and wife, residents of New York, were passing through North Carolina and were involved in an accident in which the wife sustained personal injuries. A suit was brought by the wife wherein she was awarded a substantial recovery against her husband. An execution was issued against the husband, but was returned unsatisfied. The wife then brought this action against the husband's insurer after having made demand for payment to the limits of the policy. Insurer denies liability for the injuries, contending that they were not covered under the provisions of the policy, pleading the applicable New York statute.[12]

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[6] 256 N.C. at 92, 123 S.E.2d at 109.

[7] For a discussion of the "employee exclusion" clause controversy, see Kelly v. State Auto. Ins. Ass'n, 288 F.2d 734 (6th Cir. 1961); Annot., 50 A.L.R.2d 78 (1956).

[8] See, *e.g.*, Motor Vehicles Cas. Co. v. Smith, 247 Minn. 151, 76 N.W.2d 486 (1956).

[9] See, *e.g.*, Lumberman's Mut. Cas. Ins. Co. v. Stukes, 164 F.2d 571 (4th Cir. 1947).

[10] 256 N.C. at 95, 123 S.E.2d at 111.

[11] 256 N.C. 318, 123 S.E.2d 817 (1962).

[12] N.Y. INSURANCE LAW § 167(3) provides "No policy or contract shall

The trial court held that "as a matter of law" there was no coverage under the policy. The Supreme Court affirmed and stated: "Under the general doctrine, the interpretation of an insurance contract depends on the law of the place where the policy is delivered . . . . We see no reason . . . to depart from this well established principle."[13]

In *Crisp v. State Farm. Mut. Auto. Ins. Co.*[14] the insurer issued a policy on the car of the insured, and the FS-1 form[15] had been delivered to the North Carolina Department of Motor Vehicles. The insurer attempted to cancel the policy for nonpayment of premiums in November. In December the insured was involved in an accident and the insurer refused to pay for the damages, claiming that the policy was not in force.

The policy in this case was subject to the provisions of the Vehicle Financial Responsibility Act of 1957.[16] The applicable statute[17] for cancellation and termination of automobile liability insurance is held to be mandatory in its provisions and a failure to comply substantially with the provisions fails to effectively cancel the policy. Here the insurer in its notice to the insured, failed to show on the face of the notice of cancellation "that proof of financial responsibility is required to be maintained . . . and that operation of a motor vehicle without

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be deemed to insure against any liability of an insured because of death of or injuries to his or her spouse . . . unless express provision relating specifically thereto is included in the policy."

[13] 256 N.C. at 322, 123 S.E.2d at 820. *Accord,* Myers v. Ocean Acc. & Guarantee Corp., 99 F.2d 485 (4th Cir. 1938). In Connecticut Gen. Life Ins. Co. v. Skurkay, 204 N.C. 227, 167 S.E. 802 (1933), the policy was executed in Pennsylvania and the Court held that insurer's right to cancel would be determined by Pennsylvania law.

[14] 256 N.C. 408, 124 S.E.2d 149 (1962); also discussed in CIVIL PROCEDURE (PLEADING AND PARTIES), *Insurance—Nonpayment of Premiums, supra.*

[15] Issuance of the FS-1 form or certificate represents that the insurer has issued and that there is in effect an owner's motor vehicle liability policy which complies with G.S. § 20-279.21. Swain v. Nationwide Mut. Ins. Co., 253 N.C. 120, 126, 116 S.E.2d 482, 487 (1960); see N.C. GEN. STAT. § 20-279.19 (Supp. 1961).

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

[17] N.C. GEN. STAT. § 20-310 (Supp. 1961), provides that "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 . . . . Every such notice of termination for any cause whatsoever sent to the insured shall include on the face of the notice a statement that proof of financial responsibility is required to be maintained continuously throughout the registration period and that operation of a motor vehicle without maintaining such proof of financial responsibility is a misdemeanor . . . ."

maintaining such proof of financial responsibility is a misdemeanor."[18]

The Court determined that in the absence of circumstances indicating a waiver or estoppel such a statement "is essential to a valid concellation or termination, especially when the suit is by a member of the class the Act is designed to protect."[19]

The Court in *Hawley v. Indemnity Ins. Co. of North America*,[20] held that coverage under an "omnibus clause" in an automobile liability insurance policy is confined "to situations where the use made of the vehicle at the time of the accident is within the scope of the permission granted."[21]

Burglary Insurance

In *Tayloe v. Hartford Acc. & Indem. Co.*[22] plaintiff as lessee was obligated, under the terms of the lease, to keep the premises in good repair, "reasonable wear and tear and unavoidable accidents excepted."[23] The lessee carried insurance which was to pay for damages to the premises resulting from robbery or burglary provided that lessee is liable to the landlord for such damage. Burglars entered the premises by "smashing the glass, locks and frame of the two front doors, and by springing the hinges on which the doors swung."[24] The trial judge allowed the plaintiff to recover for the damage to the doors. Defendant appealed contending that the damage resulted from an "unavoidable accident"; that the lease excepted plaintiffs from such liability; and, therefore that, defendant was not liable on its policy. The Supreme Court affirmed the trial judge, finding that intentional damage to the premises is not an unavoidable

[18] *Ibid.*

[19] 256 N.C. at 414, 124 S.E.2d at 154. In Nixon v. Liberty Mut. Ins. Co., 258 N.C. 41, 43, 127 S.E.2d 892, 894 (1962), the Court held that "neither defective notice, nor failure to give notice, *to the Commissioner* affects the validity or binding effect of the cancellation; the notice to the Commissioner serves an entirely different purpose." (Emphasis by the Court.) Here binding notice to the insured had been made, but the insurer had not given the statutory notice to the Commissioner within the required fifteen days. "Cancellation of a policy is not conditioned upon the statutory notice to Commissioner." *Id.* at 44, 127 S.E.2d at 894.

[20] 257 N.C. 381, 126 S.E.2d 161 (1962). See Note, 41 N.C.L. Rev. 232 (1963).

[21] *Id.* at 387, 126 S.E.2d at 167.

[22] 257 N.C. 626, 127 S.E.2d 238 (1962).

[23] *Id.* at 626, 127 S.E.2d at 239.

[24] *Id.* at 627, 127 S.E.2d at 239.

accident within the terms of the lease, so as to except plaintiff from liability to the lessor for the damages.[25]

There is a split of authority as to whether or not intentional damage or damage resulting from the negligence of a third person is an unavoidable accident. This decision adopts what appears to be the preferable position.[26]

Fire Insurance

In *Rouse v. Albany Ins. Co.*[27] plaintiff sought to recover for the contents of its building which was destroyed by fire. Included among the contents were articles of clothing which were in plaintiff's possession, as bailee, for the purpose of dry cleaning. Defendants had each issued to plaintiff a standard North Carolina fire insurance policy containing stock coverage provisions.[28] Defendant demurred on the ground that the policies "were intended to insure the plaintiff against liability to the owner and not to insure the property."[29] The lower court overruled the demurrer and was affirmed on appeal. The Court noted that it was alleged that the policies insured the contents of a building "used as a dry cleaning plant."[30] It found that this language put the defendants on notice as to the type of articles which would be stored in the building and held that the policies insured the clothing held by plaintiff as bailee. The Court pointed out, however, that the recovery will be held by plaintiff as trustee for the benefit of the owners of the clothing.[31]

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[25] The rationale of this decision is related to that of North Carolina decisions holding that the intentional killing of the deceased party does not come within the scope of the term "death by accidental means" as that term is used in the standard life insurance policy. Slaughter v. State Capital Life Ins. Co., 250 N.C. 265, 108 S.E.2d 438 (1959); Goldberg v. United Life & Acc. Ins. Co., 248 N.C. 86, 102 S.E.2d 521 (1958).

[26] In Kirby v. Davis, 210 Ala. 192, 97 So. 655 (1923), the court held that unavoidable accidents include the acts of strangers. The opposite view was taken in Leominster Fuel Co. v. Scanlon, 243 Mass. 126, 137 N.E. 271 (1922), where it was held that the breaking of a plate glass window through the negligence of a stranger, under the control of neither the landlord nor the tenant, was not an unavoidable accident. See generally Annot., 20 A.L.R. 1101 (1922), supplemented in Annot., 24 A.L.R. 1461 (1923).

[27] 257 N.C. 267, 125 S.E.2d 424 (1962).

[28] "[W]hen this policy covers STOCK or merchandise it shall include all stock items usual or incidental to the business of the occupancy described . . . the property of the insured or for which the insured is liable while contained in the described building . . . ." 257 N.C. at 268, 125 S.E.2d at 424.

[29] *Id.* at 269, 125 S.E.2d at 425.

[30] *Ibid.*

[31] *Id.* at 270, 125 S.E.2d at 426.

There is a split of authority on the question whether the stock coverage provision provides for indemnity insurance against the insured's legal liability for loss or whether it insures the property which the insured possesses as bailee. This decision adopts what would appear to be the majority view.[32]

General Liability Insurance

In *Iowa Mut. Ins. Co. v. Fred M. Simmons, Inc.*[33] an insurance policy covering property damage provided that the insurer would pay all damage for which the insured shall become liable because of injury to property "caused by accident." Insured, a roofing contractor, removed the roof on a building in the process of replacing it. To protect the interior of the building from rain damage, insured placed a waterproof covering, secured by heavy blocks, over the opening. During an ordinary shower of rain there was seepage resulting in damage. On these facts the Court found that whether or not there was an accident within the meaning of the policy was an issue of fact to be determined by the jury, and that the existence of negligence did not justify the trial court in ruling that there was no accident as a matter of law.[34]

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[32] See, *e.g.*, American Eagle Fire Ins. Co., v. Gayle, 108 F.2d 116, 119 (6th Cir. 1939), *cert. denied*, 309 U.S. 686 (1940). See generally 29 Am. Jur. *Insurance* §§ 295-96 (1960); Patterson, Insurance Law § 28 (1957); 4 Appleman, Insurance Law & Practice §§ 2345-46 (1941); Annot., 67 A.L.R.2d 1241, 1245 (1959).

In Smith v. Rochester Am. Ins. Co., 248 N.C. 718, 104 S.E.2d 822 (1958), an action was brought to recover on a policy covering loss of tobacco by fire, the property of others, in the custody of a warehouseman for auction. Plaintiff, a "pin hooker," bought tobacco at a regular sale and left it on the warehouseman's floor until he could re-work it for resale at the next auction. Between the purchase date and the next auction the warehouse burned. Defendant-insurer asked for a nonsuit on the basis that the policy covered only tobacco held for sale and not for resale. Affirming the trial court on appeal the Supreme Court found that the language of the policy did not require such a technical construction, and that "the purpose of insurance is to insure."

[33] 258 N.C. 69, 128 S.E.2d 19 (1962).

[34] See Standard Oil Co. v. United States, 264 Fed. 66, 69 (4th Cir. 1920). See generally Annot., 12 A.L.R. 1409, 1411 (1921). Recent cases have indicated an acceptance of this point of view, *i.e.*, that negligence being present as a causative element does not preclude an occurrence from being an accident. Employers Ins. Co. v. Alabama Roofing & Siding Co., 271 Ala. 394, 124 So. 2d 261 (1960); Bennett v. Fidelity & Cas. Co., 132 So. 2d 788 (Fla. Dist. Ct. App. 1961); Wolk v. Royal Indem. Co., 27 Misc. 2d 478, 210 N.Y.S.2d 677 (Sup. Ct. 1961).

LIFE INSURANCE

In *Blackman v. Liberty Life Ins. Co.*[35] the deceased and his wife applied to a savings and loan association for a loan. The loan association prepared a note and a deed of trust conveying certain lands to their trustee as security. As further security the loan association required a life insurance policy on deceased, to be issued by defendant-insurer, for the purpose of mortgage redemption. The secretary-treasurer and general manager of the loan association, who was also local agent for defendant-insurer, prepared the application for insurance and forwarded it to the insurer.[36] The application was approved and the policy sent to the local agent. The loan association set up a credit for deceased and his wife designated as "loan in process" and deducted items amounting to fifty-five dollars for expenses in connection with the loan. Several days after receipt of the policy by the loan association insured was killed in an automobile accident. The policy had not been delivered to him. The insurer would not honor the policy and the loan association refused to allow any credit on the loan.

The administrator of deceased's estate brought this action alleging a cause of action in tort for negligent failure to deliver the policy. The trial court sustained a demurrer by the insurer, and this was affirmed on appeal. The Supreme Court, however, indicated that there may be a cause of action in contract if plaintiff alleges and can prove the policy was duly issued and delivered to the loan association. It is not clear that delivery to the *cestui que vie* is essential; and the Court intimated doubt as to whether delivery to the loan association could be denied, since the policy was held by its general manager, even though the same person was local agent for the insurer.[37]

[35] 256 N.C. 261, 123 S.E.2d 467 (1961).

[36] In Bank of French Broad, Inc. v. Bryan, 240 N.C. 610, 83 S.E.2d 485 (1954), where there was a similar relationship, the Court held that where such agent had said that he would cause the insurance to issue, he may be held liable for the amount of loss attributable to him.

[37] The Court recognized that there may be a problem of proof as to the contract cause of action: "The savings association had charge of the . . . account . . . from which it had already deducted certain expenses incident to the loan. The policy provided for payment of the insurance premium along with the interest to the Savings Association. There may or may not be reason why it could not and should not deduct the premium due on the insurance policy in the same manner it had deducted other expenses." 256 N.C. at 262, 123 S.E.2d at 469. Since the insurance premiums are included in the loan repayments to the loan association and it appears that the insurer is insuring the association's customers, as such, without any other incidents that normally go along with the issuance of a life policy it would appear

LABOR LAW

SECONDARY BOYCOTT—SUIT FOR DAMAGES UNDER 303 (b)

A secondary boycott involves a combination to exert coercive pressure on the customers of a primary employer to induce them to withhold or withdraw their patronage under fear of similar activity directed against themselves. The Taft-Hartley Act in sections 8(b)(4)(A) and (B)[1] designates such conduct on the part of the union an unfair labor practice. It further authorizes a suit for damages by the offended employer under section 303[2] in any court having jurisdiction of the parties.

In *Overnite Transp. Co. v. International Bhd. of Teamsters*[3] plaintiff, a non-unionized trucking company, was engaged in the interstate handling and transportation of direct freight within its territory and exchange freight requiring the cooperation of carriers outside its territory. The defendant, by establishing picket lines at the plaintiff's terminals, unsuccessfully attempted to force its recognition as the bargaining agent for the company employees even though it had not been certified as such. Thereafter the defendant, through its members who were employees of neutral carriers doing exchange freight business with the plaintiff, organized a boycott against the movement of such freight. The plaintiff brought an action

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not unreasonable to find the insurance in effect. The provision for repayment of the premium is incorporated in the policy and would seem to dispense with any necessity for prepayment of premium before the insurance goes into effect. An insurance contract is to be construed liberally for the insured. Roberts v. American Alliance Ins. Co., 212 N.C. 1, 4, 192 S.E. 873, 876 (1937); see generally 29 AM. JUR. *Insurance* §§ 214-16, 221-22, 560 (1960).

For a discussion of the conflict as to whether or not there is a cause of action for negligent failure to deliver the policy, see TORTS, *Liability of Insurer for Agent's Failure to Deliver Policy, infra.*

[1] Labor Management Relations Act, 1947, 61 Stat. 141, 29 U.S.C. § 158(b)(4)(A), (B), amending National Labor Relations Act, 49 Stat. 449 (1935) (Wagner Act).

[2] Labor Management Relations Act, 1947 (Taft-Hartley Act) § 303, 61 Stat. 158 (1947), 29 U.S.C. § 187 (1958), as amended, 73 Stat. 545 (1959), 29 U.S.C. § 187 (Supp. I, 1962). Section 303(b) is the pertinent provision therein. It provides: "Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States . . . or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

[3] 257 N.C. 18, 125 S.E.2d 277 (1962); also discussed in DAMAGES, *Punitive Damages—Loss of Profits, supra.*

to recover for damages sustained in its efforts to continue its business and for punitive damages.[4]

The trial court awarded 363,000 dollars actual and 500,000 dollars punitive damages to the plaintiff. The North Carolina Supreme Court, reversing as to the punitive damages, held that in a cause of action arising under section 303(b), actual damages only, together with the costs of the action, are recoverable.[5] Undoubtedly this is in accord with the literal wording and accepted interpretation of that section.[6]

In the instant case the plaintiff alleged only one cause of action based on section 303(b), and the Court had no jurisdiction to apply any remedy apart from the prescribed measure of damages therein. However, the Court pointed out that had the complaint, in a separate cause of action, alleged conduct marked by violence and imminent threats to the public order, they would have had jurisdiction to determine both causes and award punitive damages to enforce a state remedy.[7] This necessarily follows because of the compelling state interest to maintain the peace and prevent and punish violent torts. Yet the recognized rule is that absent such violence there is no jurisdiction in the state courts.[8]

Union Expenditure of Dues for Purposes Other Than Collective Bargaining—Injunction

In an action to enjoin the enforcement of a union-shop agreement it was alleged by the non-union employees of the defendant rail-

[4] The plaintiff alleged that as a result of the concerted refusal of its customers and other trucking companies doing interchange freight business with the plaintiff to handle any goods going to or coming from the plaintiff, it has been deprived of otherwise profitable freight business and has been required to expend extraordinary sums of money in its efforts to operate its business despite the wrongful acts of the defendant.

[5] The Court considered the breadth of control conferred by the defendant's constitution and the financial assistance contributed for the maintenance of the boycott and concluded that a principal-agency relationship existed between the defendant and its local unions.

[6] See UMW v. Patton, 211 F.2d 742 (4th Cir.), *cert. denied,* 348 U.S. 824 (1954).

[7] International Union, UAW v. Russell, 356 U.S. 634, *rehearing denied,* 357 U.S. 944 (1958); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954); UMW v. Osborne Mining Co., 279 F.2d 716 (6th Cir.), *cert. denied,* 364 U.S. 881 (1960); UMW v. Meadow Creek Coal Co., 263 F.2d 52 (6th Cir.), *cert. denied,* 359 U.S. 1013 (1959) (Douglas, J., dissenting).

[8] See San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959); North Dade Plumbing, Inc. v. Bowen, 116 So. 2d 790 (Fla. Dis. Ct. App. 1960).

way company that the periodic dues, fees, and assessments which they would be required to pay in order to retain their jobs would be regularly and continuously used by the defendant unions for political compaign contributions. The trial court enjoined the defendants from placing any compulsion on the employees either to join or pay any money to the unions except upon a further showing as to what portion of the collections were reasonably related to bargainable subjects. In *Allen v. Southern Ry.*[9] the North Carolina Supreme Court, by a six to one majority, reversed the trial court principally on the authority of *Railway Employees' Dep't v. Hanson.*[10] On petition to rehear[11] the Court divided evenly[12] thereby affirming the judgment of the trial court.

The unions have never offered to prove what portion of the collections were reasonably necessary and related to collective bargaining, and thus the injunction stands. The result is that North Carolina has successfully enjoined the union-shop agreement in spite of the provision of the Railway Labor Act authorizing this form of union security notwithstanding any statute or law of the state to the contrary.[13]

The *Allen* cases are the subject of a note appearing elsewhere in this *Law Review.*[14] Subsequent thereto certiorari has been granted in the United States Supreme Court.[15]

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[9] 249 N.C. 491, 107 S.E.2d 125 (1959).

[10] 351 U.S. 225 (1956). In this case the United States Supreme Court held that a union-shop agreement may constitutionally require financial support to a bargaining representative from all who benefit from its agency. *Compare Hanson, with* International Ass'n of Machinists v. Street, 367 U.S. 740 (1961).

[11] Allen v. Southern Ry., 256 N.C. 700, 124 S.E.2d 871 (1962).

[12] Justice Sharp presided at a hearing and entered an interlocutory decree at the trial court level and took no part in the consideration of the case on rehearing.

[13] Railway Labor Act, 64 Stat. 1238 (1951), 45 U.S.C. § 152, Eleventh (1958).

[14] 41 N.C.L. REV. 285 (1963).

[15] Brotherhood of Ry. Clerks v. Allen, 371 U.S. 875 (No. 316, 1962 Term). The questions presented are: (1) Whether enforcement of a union-shop agreement complying with the provisions of the Railway Labor Act may be enjoined because the union uses a portion of its dues and fees for political activity; (2) whether the enforcement of such agreement may be enjoined with respect to employees who had no knowledge of the political contributions and who did not inform the union of their opposition to such activity and expenditures; (3) whether the enforcement of such agreement may be enjoined with respect to employees who, since the date of the agreement, have not joined the union and have paid no dues, fees or assessments. 31 U.S.L. WEEK 3081 (U.S. Sept. 11, 1962).

MUNICIPAL CORPORATIONS

Conflicts Between Local and State Law

In *Tastee Freeze, Inc. v. Raleigh*[1] the plaintiff instituted action under the Declaratory Judgment Act[2] challenging the validity of a Raleigh city ordinance[3] prohibiting the peddling of ice cream along the city streets. Plaintiff's business included selling ice cream products to the public from mobile freezer units and it had secured a state license to carry on such business. Plaintiff was refused a city license on the basis of the local ordinance.

The Supreme Court, basing its decision on G.S. § 105-53[4] imposing a state license tax on peddlers, held the ordinance invalid in that it prohibited the exercise of a privilege sanctioned by the General Assembly. The Court, following the traditional pattern of refusing to rule on constitutional issues unless squarely presented, left open the question of whether a city has authority to enact such an ordinance based on considerations of public safety.[5]

Housing Authorities

Housing Authority v. Wooten[6] involved a proceeding by the Housing Authority of the City of Wilson to condemn respondent's

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[1] 256 N.C. 208, 123 S.E.2d 632 (1962).

[2] N.C. Gen. Stat. §§ 1-253 to -67 (1953). Although the defendant did not question whether an action under the Declaratory Judgment Act was proper in this instance, the Court expressly refused to decide whether a municipal ordinance could be tested by this procedure, deferring consideration until the question was directly presented.

[3] The ordinance, contained in section 105 of chapter 14 of the City Code of Raleigh, reads: "No ice cream shall be peddled along the streets and/or sidewalks of the city from push carts or other vehicles or in any other manner." This provision was adopted at some undisclosed date prior to 1950 and the Court pointed out that the reference to "push carts" suggested it dated back to the "horse and buggy era." Neither is there any evidence to indicate the reason for the provision. The Court suggested that it might have been adopted as a health measure at a time when present methods of refrigeration were unknown. This suggestion seems well taken in that the provision is not included in chapter 21 of the city code which provides for regulation of traffic on the city streets.

[4] N.C. Gen. Stat. § 105-53 (1958).

[5] Defendant's evidence in the lower court consisted of testimony to the effect that the approach of similar mobile units, announced by the ringing of bells or other signals, caused young children to become excited and to hurry across the street and congregate about the mobile units, creating a hazard to them and to other persons and traffic using the street. Based on this evidence the lower court held that the operation of such units constituted a menace to the public safety and that the ordinance was a valid exercise of the police power. *But cf.* State v. Byrd, 259 N.C. 141, 130 S.E.2d 55 (1963).

[6] 257 N.C. 358, 126 S.E.2d 101 (1962).

land for a low-rent housing project.[7] Respondents contended that in selecting their land the Housing Authority acted arbitrarily and capriciously in that the land selected was not a slum area but consisted of ninety per cent cleared land, and that the few houses therein were not slum houses. They further contended that the erection of dwelling units on cleared land was not a public use and that their land was selected merely to save the expense of removing the dilapidated slum buildings from the tract of land immediately adjoining.[8]

The Supreme Court upheld the action of the trial court in allowing petitioner's motion to strike[9] the above allegations from respondent's answer. The Court said that housing authorities are vested with a broad discretion in exercising the power of eminent domain and that the selection of respondent's land was not an abuse of discretion.[10] The Court, in accord with its previous holdings,[11] said that there is nothing in the law which requires housing projects to be located only where slum areas exist.[12]

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[7] Article 1 of chapter 157 of the General Statutes provides for the creation of housing authorities. G.S. § 157-2 declares slum clearance to be a public purpose. N.C. GEN. STAT. § 157-2 (1952).

A petition to the city clerk signed by twenty-five or more residents of a city is sufficient to require a public hearing at which the legislative body of the city is empowered to determine the existence of facts necessary to create an authority. The statute sets out guiding standards, and a finding that: (1) unsanitary or unsafe dwellings exist in the city and/or that (2) there is a lack of suitable accommodations is sufficient to establish an authority. The existence of *either* of the above conditions is sufficient. N.C. GEN. STAT. § 156-4 (1961).

[8] Respondents also alleged that the entire plan perpetrated a fraud upon the residents of the city of Wilson and that the Housing Authority was not eliminating slum dwellings but was engaged in the private enterprise of rental units.

[9] The basis of the Housing Authority's motion to strike portions of respondent's answer was that the facts therein alleged constituted no legal defense. The Supreme Court said that the motion was, in effect, a demurrer to what was in substance a plea in bar and thus the respondents could appeal from an order allowing the motion.

[10] See, e.g., *In re* Housing Authority of the City of Salisbury, 235 N.C. 463, 70 S.E.2d 500 (1952); *In re* Housing Authority of the City of Charlotte, 233 N.C. 649, 65 S.E.2d 761 (1951).

[11] *In re* Housing Authority of Charlotte, *supra* note 10. The fact that a few desirable homes will be taken does not affect the public character of the condemnation proceeding. See, *e.g., In re* Edward J. Jeffries Home Housing Project of Detroit, 306 Mich. 638, 11 N.W.2d 272 (1943); Blakemore v. Cincinnati Metropolitan Housing Authority, 74 Ohio App. 5, 57 N.E.2d 397 (1943).

[12] The practicality of such a rule is readily apparent. The purposes of the act would be defeated in many instances if the new project had to be built in the slum area where topography, drainage, sewage, and space might be undesirable or insufficient. This rule is in accord with the decisions in

Thus our Court has defined "slum clearance" to include the erection of low-rental housing into which residents of undesirable and congested areas may move, even though the project is built on vacant land and the dilapidated buildings in the slum area are not removed.

NEGOTIABLE INSTRUMENTS

Acceleration Clause—Co-makers' Liability

In *Shoenterprise Corp. v. Willingham*[1] the defendant and two others signed a promissory note as co-makers. The note called for installment payments of $2002.90 each year for four years with a final installment of $2002.98 in the fifth year until the total amount of $10,014.58 was paid. There was an acceleration clause in the note which provided that a default in the payment of principal or interest would, at the option of the holder, cause all sums then remaining unpaid to become immediately due and payable without notice. In 1957,[2] two years after the execution of the note, the plaintiff elected to accelerate the debt. It sued the other two co-makers in Tennessee, but failed to notify the defendant of its election or of the action. The two co-makers were bankrupt and the judgment in plaintiff's favor proved to be worthless. In 1960 plaintiff brought this action for the amount of the note which remained unpaid. The trial court held that the statute of limitations barred recovery for the first two installments in 1956 and 1957, but that the installments for 1958, 1959 and 1960 were still recoverable. On appeal, the North Carolina Supreme Court reversed this latter portion of the trial court's decision and held that the statute of limitations barred recovery for any amount.

This case presented for the first time,[3] the question of whether an acceleration clause affects the debt as a single obligation or

other jurisdictions. See, *e.g.*, Riggin v. Dockweiler, 15 Cal. 2d 651, 104 P.2d 367 (1940); Stockus v. Boston Housing Authority, 304 Mass. 507, 24 N.E.2d 333 (1939); Housing Authority v. Higginbotham, 135 Texas 158, 143 S.W.2d 79 (1940); Chapman v. Huntington Housing Authority, 121 W. Va. 319, 3 S.E.2d 502 (1939).

[1] 258 N.C. 36, 127 S.E.2d 767 (1962).

[2] The only payment ever made on the note was a payment of interest in 1955 and 1956. Thus, without payment of any principal, there was a default.

[3] The Court said: "The question presented appears to be one of first impression in this jurisdiction and elsewhere. No case involving an analogous factual situation has been discovered by our research or by that of counsel." 258 N.C. at 40, 127 S.E.2d at 770.

whether it affects the separate liabilities of the several parties on the note. The Court said that while these co-makers were jointly and severally liable,[4] the acceleration acted on the debt itself. On election, the debt matured and the statute of limitations started running on that date irrespective of a party's particular liability. This result seems the most desirable here because it conforms to the express language of the parties in this note and in most notes with acceleration clauses. That is, it appears from the language that the intention of the parties is that on default the debt matures, and not their liability as a separate matter, since the latter cannot support a judgment in the absence of the former.

Collecting Agent's Failure to Give Prompt Notice of Dishonor—Damages—Past Acquiescence as Estoppel

In *Benthall v. Washington Hog Market, Inc.*[5] the plaintiff-seller drew a sight draft on the buyer and made it payable to the Bank of Rich Square. The bank took the draft for collection only and credited the plaintiff's account. The bank then sent the draft to the defendant bank for collection from the drawee-buyer, who had a deposit with the defendant. The defendant requested authority from its depositor to honor the draft,[6] but the latter declined to give it. The defendant delayed in returning the check for six days. When the Bank of Rich Square received back the draft, it charged it to the plaintiff's account. The plaintiff instituted this action against the buyer and the defendant bank to recover the amount of the draft. He obtained judgment by default against the insolvent buyer and now seeks to obtain judgment against the defendant on the ground that it was negligent in its failure to return the dishonored draft within a reasonable time.[7] The Court denied recovery on the grounds that the plaintiff failed to show either that the bank's delay

[4] In the absence of a contrary intent on the face of the instrument, the words, "I promise to pay" are held to indicate joint and several liability. Granger v. Harper, 217 Cal. 16, 17 P.2d 135 (1932); Bullard v. Holman, 184 Ga. 788, 193 S.E. 586 (1937).

[5] 257 N.C. 748, 127 S.E.2d 507 (1962).

[6] It was conceded that the defendant bank could not honor the draft without specific authority from the buyer.

[7] The plaintiff could not rely on G.S. § 25-144, which provides that the drawee's failure to give notice of nonacceptance of a draft within twenty-four hours after it is presented, constitutes an acceptance, because the Court has held that where the draft is drawn on the buyer, he is the drawee and not his bank of deposit. Branch Banking & Trust Co. v. Bank of Washington, 255 N.C. 205, 120 S.E.2d 830 (1961).

was negligent, or that he suffered any damages. The evidence showed that the plaintiffs chances for collection from the buyer were not jeopardized during the six business days the bank held the draft.[8] There also were findings by the trial court to support non-recovery on the ground that the plaintiff was estopped to assert negligence because on fifteen prior occasions he had acquiesced in, and actually benefited from the defendant's method of collection without complaint or objection.[9]

PUBLIC UTILITIES

Utility Rate Bases

In *State ex rel. Utilities Comm'n v. Public Service Co. of North Carolina*[1] the defendant Public Service Co. applied to the Utilities Commission for approval of a rate increase designed to absorb an increase in the price of gas by its supplier. In addition to the increase in costs due to the higher price paid for gas, Public Service introduced evidence to show additional new expenses by way of increased taxes resulting from changes in the depreciation rate of its properties, large contributions to its employee's pension fund, and requirement of a minimum balance by creditor-banks as working capital.

The Utilities Commission refused to allow the increase and reinstated the old rates.[2] The majority found the fair value of defendant's property for rate purposes to be 16,125,000 dollars, which would allow net income to reflect a six per cent profit at the old rate. The minority took the view that this was an arbitrary figure and

[8] 257 N.C. at 750, 127 S.E.2d at 509.

[9] The defendant had found that chances of collecting from a drawee-buyer were better if they did not press for collection too hard, but rather allowed the buyer a short period of time with occasional reminders.

[1] 257 N.C. 233, 125 S.E.2d 457 (1962).

[2] The Commission had allowed Public Service to collect the new rates under bond given to make refund if the increased rates were found to be excessive.

The rules fixing rates are set forth in G.S. §§ 62-122-34; see especially G.S. § 62-124. N.C. Gen. Stat. §§ 62-122-34 (1960). They are discussed in Utilities Comm'n v. Piedmont Natural Gas Co., 254 N.C. 536, 119 S.E.2d 469 (1961); State v. Carolina Power & Light Co., 250 N.C. 421, 109 S.E.2d 253 (1959); State *ex rel.* Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954). See *Public Utilities, Ninth Annual Survey of North Carolina Case Law,* 40 N.C.L. Rev. 562 (1962). See also Hanft, *Control of Electric Rates in North Carolina,* 12 N.C.L. Rev. 289 (1934).

was selected only to produce such net revenue by the use of a six per cent rate of return as the rates in effect prior to the proposed increase. Public Service made objections to these findings and conclusions of law. On appeal to the superior court the objections were overruled and an order entered affirming the Commission. Public Service appealed.

The Supreme Court held that juggling of figures as charged in the dissent was confirmed by an examination of the record and that the statutory right to consider "all other facts"[3] does not give the Commission the right to "roam at large in an unfenced field."[4] The Court noted that both the rate base and the allowable deductions were arbitrarily reduced so that net income would reflect a six per cent profit at the old rate. For example, despite an increase in plant investment, the new rate base was less by 325,000 dollars than the Commission had found it in a general rate hearing conducted shortly before defendant's supplier increased its price.

The Court held that the evidence failed to support the rate base fixed by the Commission and that the additional expenses introduced by Public Service were proper items to be considered in fixing rates.[5]

MUNICIPAL FRANCHISES

Pee Dee Elec. Membership Corp. v. Carolina Power & Light Co.[6] and *Duke Power Co. v. Blue Ridge Elec. Membership Corp.*[7] involved similar facts and questions of law which were decided by the Court on a former appeal.[8] These cases, both decided by a unanimous Court, stand for the proposition that electric membership corporations can continue to serve their members who were changed from citizens of a rural area to citizens of an urban area due to annexation. The membership corporations may not, however, *expand* their services into the urban area.[9]

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[3] N.C. GEN. STAT. § 62-124 (1962).

[4] 257 N.C. at 237, 125 S.E.2d at 460.

[5] The Court also said that original cost was an item to be considered and that the weight it should be given was a matter of judgment, but that it should not be ignored.

[6] 256 N.C. 56, 122 S.E.2d 761 (1961).

[7] 256 N.C. 62, 122 S.E.2d 782 (1961).

[8] See Pee Dee Elec. Membership Corp. v. Carolina Power & Light Co., 253 N.C. 610, 117 S.E.2d 764 (1961); Duke Power Co. v. Blue Ridge Elec. Membership Corp., 253 N.C. 596, 117 S.E.2d 812 (1961). For a treatment of the issues involved in the first appeal see *Public Utilities, Ninth Annual Survey of North Carolina Case Law*, 40 N.C.L. REV. 559 (1962).

[9] Pee Dee Elec. Membership Corp. v. Carolina Power & Light Co., *supra* note 8. In Duke Power Co. v. Blue Ridge Elec. Membership Corp., *supra*

In the *Pee Dee* case the superior court, on remand from the former appeal, granted sweeping injunctive provisions which were unnecessary to protect either plaintiff or defendant from irreparable injury. The North Carolina Supreme Court, in the present appeal, held that the judgment should be limited to an adjudication of the respective basic legal rights of the parties as found in the earlier decision and that injunctive relief was not required.[10]

In the *Duke Power Co.* case the superior court couched its judgment on remand in terms indicating that residency in the town of Hudson was an essential element to the right of the membership corporation to continue service to members. The Supreme Court said that a member who was receiving current in Hudson prior to the extension of the town's boundaries may continue to receive current even though he was not then and is not now a resident of Hudson. The Court held the test to be: "Where is the service rendered?, not the residence of the member."[11] The judgment was reformed to permit continued service to members at premises owned or occupied by them prior to annexation.

REAL PROPERTY

Adverse Possession

In *Bowers v. Mitchell*,[1] an action to recover damages for timber cut by the defendant, the plaintiff sought to prove title in himself by adverse possession of the land under color of title for the statutory period, or by deeds vesting him with his father's title allegedly acquired by adverse possession. But he was able to show color of title merely to separate lots and not to the entire tract.[2] Furthermore, although he showed a record chain of title for a period in excess of thirty years, the plaintiff failed to present evidence of actual possession in his predecessors in title. Consequently, nonsuit was entirely

note 8, it was not necessary to put this limitation on the right of the membership corporation to continue existing service.

[10] There was no threat by either party to interfere with the rights of the other as adjudicated by the Court and the injunctive provisions to protect rights which were not threatened were unnecessary.

[11] 256 N.C. at 65, 122 S.E.2d at 784.

[1] 258 N.C. 80, 128 S.E.2d 6 (1962).

[2] Possession of a single tract is not constructively extended to a separate and distinct tract even though both tracts are described in the same conveyance. *Id.* at 82, 128 S.E.2d at 8, and cases cited therein.

proper if the plaintiff sought to prove title by adverse possession under color.

The case is primarily significant, however, for its abrogation, in effect, of the proviso added in 1959 to G.S. § 1-42. That proviso reads: "Provided that a record chain of title to the premises for a period of thirty years next preceding the commencement of the action shall be prima facie evidence of possession thereof within the time required by law." The possible applicability of this proviso was involved here because the plaintiff in the course of a completely inadequate attempt to show title by adverse possession *had* shown a record chain of title for a period of more than thirty years. While the plaintiff on appeal did not suggest that he had shown prima facie title under the proviso, the defendant alluded to the statute in his brief, submitting that it was not applicable to the facts of the case. The Court agreed with the defendant and set out this dictum: "Suffice it to say, the statute does not declare that one who claims title, relying merely on a paper writing more than thirty years old, thereby acquires title to the land . . . nor does it establish title *prima facie*."[3] By injecting these words the Court took the opportunity to construe a statute which could be misleading if not carefully analyzed.

It must be kept in mind that in actions where title is in issue the plaintiff has the dual burden of showing (1) legal title, relying on the judicial rules set forth in the leading case of *Mobley v. Griffin*,[4] and (2) possession within the requisite statutory period, as a condition precedent to maintaining the action.[5] The latter requirement arises out of the anomalous historical development of our statutes of limitation relating to possessory actions and has never had direct bearing on the traditional methods of showing title.[6] In the event that neither plaintiff nor defendant can show the necessary possession, G.S. § 1-42

[3] Bowers v. Mitchell, 258 N.C. 80, 84, 128 S.E.2d 6, 10 (1962).

[4] 104 N.C. 112, 10 S.E. 142 (1889). This opinion lists these methods of showing prima facie title: showing chain of title from the state; showing adverse possession for the statutory periods; title by estoppel; and connecting the defendant with a common source of title and showing a better title in the plaintiff. The *Mobley* rules are still valid, except that it is no longer necessary to prove that the sovereign has parted with its title when it is not a party to the action. Cothran v. Akers Motor Lines, Inc., 257 N.C. 782, 127 S.E.2d 578 (1962). See N.C. GEN. STAT. § 1-36 (1953).

[5] N.C. GEN. STAT. § 1-39 (1953). The plaintiff need not allege that he was seized or possessed of the premises within twenty years preceding the action. Failure so to allege is not ground for demurrer. Elliott v. Goss, 250 N.C. 185, 108 S.E.2d 475 (1959).

[6] See generally 3 AMERICAN LAW OF PROPERTY § 15.1 (Casner ed. 1952).

merely allows one party to prevail over the other by virtue of the presumption of possession which the statute raises from a showing of title.[7] Since this is the only effect of that statute, it in no way aids a party to show the critical element of title. This must be done by one of the judicially approved methods. The proviso is quite properly construed as not providing a new method of showing title prima facie.[8]

FUTURE INTERESTS—G.S. § 41-6

In *Scott v. Jackson*[9] the testator devised his real and personal property to his wife "for and during the term of her natural life," with a remainder over in fee to Ethel Mae, the wife's niece; but "in the event that the said Ethel Mae Stafford should die without leaving any issue or the issue of such then I devise such of my real estate to go to my heirs." The plaintiffs, who were the heirs-at-law of Ethel Mae (who died intestate and without issue), contended that G.S. § 41-6 converted the word "heirs" in the defeasance clause to "children." If the will so read, the condition over would fail because, the testator never having had children, there was never anyone who could qualify as the ultimate devisee. Consequently, the plaintiffs would be the owners. The Court held, however, that G.S. § 41-6 was inapplicable for two reasons: (1) the statute applies only when the conveyance is to the heirs of a living person, and (2) the testator had no children when the will was executed. Under the provisions of G.S. § 31-5.5, the devise to Ethel Mae would have been defeated by a subsequent birth of issue to the devisor. Substituting the word "children" would do violence to the obvious intent of the testator, in the opinion of the Court. Ethel Mae was

[7] Bland v. Beasley, 145 N.C. 168, 58 S.E. 993 (1907).

[8] The 1959 proviso to G.S. § 1-42 was probably intended to effect a simplified procedure for showing title prima facie, but it seems misplaced appended to G.S. § 1-42. The Georgia statute directly achieves this result: "A prima facie case shall be made out in actions respecting title to land upon showing good record title for a period of 40 years, and it shall not be necessary under such circumstances to prove title to the original grant from the State." GA. CODE ANN. § 38-637 (1954). Proceeding even farther than the Georgia statute, which merely permits a prima facie case to be made out, the various "merchantability acts" seek absolutely to cut off old claims solely on the basis of showing a chain of title for a statutory period, unless there is a legitimate reason for preserving the claim. The purpose of these statutes, of course, is to facilitate conveyancing. See ILL. ANN. STAT. ch. 83, §§ 12.1-.4 (Supp. 1962), a forty-year merchantability statute. For a current discussion of merchantability acts see CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 255-58 (1962).

[9] 257 N.C. 658, 127 S.E.2d 234 (1962).

given a defeasible fee, and when she died without issue her estate terminated. Title vested in the heirs-at-law of the devisor. This case is the subject of a note at page 317 of this volume of the *Review.*

LEASES AND OPTIONS—ASSIGNABILITY

In *Smithfield Oil Co. v. Furlonge*[10] the plaintiff, an assignee of a lease containing an option to purchase, brought an action against the original lessor for specific performance of the option agreement. Although not contesting the assignment of the lease, the defendant argued, in part, that the option was personal between the original parties and was therefore non-assignable. The Court held that the lease and option were assignable, and that the provision in the option clause that "lessors agree not to sell . . . to any person other than the lessees" was merely an affirmation of the option.

Generally, in the absence of a statutory or contractual restriction on assignment, a lease, including an option to purchase, is assignable, irrespective of the presence or absence of the word "assigns" in the instrument.[11] An option involving personal services or personal confidence is usually not assignable.[12]

Inasmuch as the lease-and-option agreement is a common transaction, the drafting attorney should not lose sight of the well-settled principles of law stated in this case. If the intent of the parties is that the option is extended to the optionor exclusively, a clause making the option non-assignable is necessary.

PERCOLATING WATERS

Bayer v. Nello L. Teer Co.[13] was an action for damages resulting from alleged wrongful acts by the defendant in interfering with the plaintiff's water supply. The defendant, who operated a rock quarry on land adjacent to the plaintiff's lot, pumped percolating waters[14] from the quarry in order to reach the rock. Since the

[10] 257 N.C. 388, 126 S.E.2d 167 (1962).

[11] Pearson v. Millard, 150 N.C. 303, 63 S.E. 1053 (1909); Annot., 45 A.L.R.2d 1034 (1956); 32 AM. JUR. *Landlord & Tenant* § 319 (1941).

[12] 55 AM. JUR. *Vendor & Purchaser* § 42 (1946). *But see* Harry's Cadillac-Pontiac Co. v. Norburn, 230 N.C. 23, 51 S.E.2d 916 (1949). A contract of sale executed in reliance upon the personal credit of the potential vendee is assignable in the absence of some provision in the instrument against assignment or some circumstance judicially recognizable dehors the agreement.

[13] 256 N.C. 509, 124 S.E.2d 552 (1962).

[14] "Subterranean waters are generally classified as (1) streams or bodies

locale was a coastal area, the diminution of the fresh water supply caused salt water to seep into the plaintiff's well, rendering it unfit for use. Defendant conducted its operation according to the best practices of open pit mining. Holding that the defendant's motion for judgment of involuntary nonsuit was improperly overruled, the Court found that the defendant was using its land in a legitimate and natural manner, and that in this factual situation the defendant was not chargeable with waste for not using the water it removed.

The decision applies the settled North Carolina "reasonable use" rule[15] to a mining or quarrying situation for the first time. Briefly stated, the rule, as accepted by an increasing number of states,[16] is that "the landowner is said to have the right only to a reasonable and beneficial use of the waters upon the land or its percolations or to some useful purpose connected with his occupation and enjoyment . . . . He may consume it, but he must not waste it to the injury of others."[17] This rule is a departure from the common-law doctrine[18] which holds that in the absence of malice, negligence, or any contractual or statutory restrictions, the owner of the surface has the absolute right to make whatever use of percolating waters he pleases.

Restrictive Covenants

Logan v. Sprinkle[19] was an action to have restrictive covenants in a deed declared void. The defendant divided a tract of land into eight lots. He sold one lot to the plaintiff and six lots to another party, retaining one lot himself. The plaintiff's deed contained a covenant restricting the use of his lot to residential purposes. However, the deed conveying the six lots contained a covenant restrict-

of water flowing in fixed or definite channels, the existence and location of which are known or ascertainable from surface indications or other means without excavations for that purpose, and (2) percolating waters, which ooze, seep or filter through the soil beneath the surface, or which flow in a course that is unknown or undefined, and not discoverable from surface indications without excavations for that purpose." Jones v. Home Bldg. & Loan Ass'n, 252 N.C. 626, 634, 114 S.E.2d 638, 644 (1960).

[15] See Jones v. Home Bldg. & Loan Ass'n, *supra* note 14; Rouse v. City of Kinston, 188 N.C. 1, 123 S.E. 482 (1924). See also *Real Property, Eighth Annual Survey of North Carolina Case Law,* 39 N.C.L. Rev. 389 (1961).

[16] See Annots., 29 A.L.R.2d 1354, 1361 (1953); 109 A.L.R. 395, 399 (1937).

[17] Sloss-Sheffield Steel & Iron Co. v. Wilkes, 231 Ala. 511, 517, 165 So. 764, 769 (1936), quoted with approval in the principal case.

[18] See generally 56 Am. Jur. *Waters* § 113 (1947).

[19] 256 N.C. 41, 123 S.E.2d 209 (1961).

ing their use to residential and motel purposes. When the buyer of the six lots subsequently built a motel, other businesses had begun to move into the previously vacant surrounding area, so that at the time of suit the plaintiff's lot was in a predominantly business locale. Declaring the plaintiff's covenant void, the Court held that by expressly permitting the motel to be built, the defendant had abandoned any intention to restrict the subdivision to residences. The defendant thereby failed to develop the subdivision according to a uniform scheme or plan,[20] which was a requisite to continued validity of the covenants.[21]

An element of uncertainty rather frequently arises in North Carolina in cases of this kind. Is it permissible to grant release of restrictive covenants for reason of change of condition *outside* the subdivision as well as *inside?* The Court in the instant case stated that the trial court "had the right to consider the changed conditions in the immediate area, without as well as within the development."[22] But the recent case of *Tull v. Doctors Bldg., Inc.*[23] held flatly that evidence of change without, even when there is also evidence of change within, is not admissible.[24] The distinction lies in whether or not there is proof of a uniform plan of development.[25] The defendant's failure to effectuate a uniform residential scheme[26] is, in *Logan,* the Court's basis for decision. The *Tull* rule is thus still controlling where a uniform plan affecting the covenanted tract is shown.

[20] Consequently, the grantees of property in the subdivision have no right to enforce restrictions *inter se.* Maples v. Horton, 239 N.C. 394, 80 S.E.2d 38 (1954); Phillips v. Wearn, 226 N.C. 290, 37 S.E.2d 895 (1946); Humphrey v. Beall, 215 N.C. 15, 200 S.E. 918 (1939).

[21] See East Side Builders, Inc. v. Brown, 234 N.C. 517, 67 S.E.2d 489 (1951); Vernon v. R. J. Reynolds Realty Co., 226 N.C. 58, 36 S.E.2d 710 (1946); Starkey v. Gardner, 194 N.C. 74, 138 S.E. 408 (1927).

[22] Logan v. Sprinkle, 256 N.C. 41, 48, 123 S.E.2d 209, 214 (1961). *Accord,* Muilenburg v. Blevins, 242 N.C. 271, 87 S.E.2d 493 (1955); Elrod v. Phillips, 214 N.C. 472, 199 S.E. 722 (1938). See also Shuford v. Asheville Oil Co., 243 N.C. 636, 91 S.E.2d 903 (1956); Snyder v. Caldwell, 207 N.C. 626, 178 S.E. 83 (1935); Oldham v. McPheeters, 203 N.C. 141, 164 S.E. 731 (1932); Higgins v. Hough, 195 N.C. 652, 143 S.E. 212 (1928); Starkey v. Gardner, *supra* note 21.

[23] 255 N.C. 23, 120 S.E.2d 817 (1961), noted in 41 N.C.L. REV. 147 (1962).

[24] *Accord,* Higdon v. Jaffa, 231 N.C. 242, 56 S.E.2d 661 (1949); Vernon v. R. J. Reynolds Realty Co., 226 N.C. 58, 36 S.E.2d 710 (1946); Brenizer v. Stephens, 220 N.C. 395, 17 S.E.2d 471 (1941).

[25] See cases cited note 22 *supra.*

[26] The Court distinguished Tull v. Doctors Bldg., Inc., 255 N.C. 23, 120 S.E.2d 817 (1961) and Vernon v. R. J. Reynolds Realty Co., 226 N.C. 58, 36 S.E.2d 710 (1946) on this point.

SALES

EXPRESS WARRANTY

Failure to List Existing Liens on Motor Vehicle Title Certificate

In *Seymour v. W. S. Boyd Sales Co.*[1] the defendant sold a used tractor truck to the plaintiff under a conditional sales agreement. In the contract of sale the defendant represented that there were no liens or encumbrances on the tractor, when in fact there was a New York fuel tax lien existing at the time of the sale. After he was denied an operating license in New York because of the lien, the plaintiff requested the defendant to have the lien removed, which the latter promptly agreed to do. After some delay, and without discharging the lien, the defendant informed the plaintiff that no further payments on the truck would be necessary until the lien was removed. Several weeks later the defendant repossessed the truck without the consent or knowledge of the plaintiff. Held, plaintiff has alleged facts sufficient to support a cause of action for breach of warranty of title.

It is firmly established that in the sale of personal property there is an implied warranty that the seller has good title, which includes a warranty against liens, charges, and encumbrances.[2] Moreover, in North Carolina every seller of a motor vehicle, when he endorses and assigns the title, warrants that the title is good. He must also list all liens and encumbrances. Failure to list an existing lien is a warranty that it does not exist. Thus, the defendant's failure to list the New York fuel tax lien was an express warranty against such lien.

Reliance

Another problem of warranty arose in the case of *Garner v. Kearns.*[3] The plaintiff sold to the defendant his automobile dealership and franchise, including all stock and equipment. This suit was for the balance of the purchase price. The defendant counterclaimed in breach of express warranty[4] that the parts and equip-

[1] 257 N.C. 603, 127 S.E.2d 265 (1962). Also discussed under DAMAGES, *Breach of Warranty, supra.*

[2] J.I. Case Co. v. Cox, 207 N.C. 759, 178 S.E. 585 (1935); Martin v. McDonald, 168 N.C. 232, 84 S.E. 258 (1915).

[3] 257 N.C. 149, 125 S.E.2d 390 (1962).

[4] Defendant's original theory was partial failure of consideration. On trial he shifted to an express warranty theory. The Court held neither theory tenable.

ment were not worth what the plaintiff had represented. The evidence showed that the defendant had conducted the business for about a year before he took his first inventory. At that time he found a shortage in the amount of parts, but made no complaints to the plaintiff. There was additional evidence that the defendant had checked the parts and equipment at the time of the sale.

In affirming a nonsuit of the counterclaim the Court held, in a per curiam opinion, that the defendant's own evidence showed he had not relied on the alleged representations of the defendant. Therefore, no cause of action for breach of express warranty lay.[5] Mere representation of fact is not an express warranty, giving rise to a claim for damages when the fact proves false, unless there has been reliance on its verity.[6]

Implied Warranty

Seller's Knowledge of Buyer's Use

In *Boy v. Riddle Airlines, Inc.*[7] the plaintiffs bought from the defendant the fuselage and center section of a wrecked plane which defendant had purchased from the United States Air Force. The plaintiffs intended to rebuild it and sell it in South America. When they applied for a license from the Federal Aviation Agency, they found that the defendant had agreed with the Air Force at the time of the original sale that the parts would not be used in a rebuilt aircraft. Because of this agreement the FAA refused to grant a license for any plane built with the parts. The plaintiffs, contending the parts had no value except as scrap, sued on implied and express warranty.

The Supreme Court, reversing a judgment of involuntary nonsuit, held that the evidence, considered in a light most favorable to the plaintiffs, established knowledge in the defendant of the special purpose for which plaintiffs were purchasing the parts. This knowledge would render the defendant liable on implied warranty.

In the usual case, where the seller knows of the buyer's special purpose in making the purchase, there is an implied warranty that the goods are reasonably fit for such purpose.[8] Here, while the

[5] Smith v. Alphin, 150 N.C. 425, 64 S.E. 210 (1909).
[6] Smith v. Reed, 141 Wis. 483, 124 N.W. 489 (1910).
[7] 256 N.C. 392, 124 S.E.2d 118 (1962).
[8] Jones v. Siler City Mills, Inc., 250 N.C. 527, 108 S.E.2d 917 (1959); Southern Box & Lumber Co. v. Home Chair Co., 250 N.C. 71, 108 S.E.2d 70 (1959).

fuselage and center section was reasonably fit for the purpose of constructing a rebuilt plane, it was worthless for that purpose[9] since no license could be obtained for the finished product due to the seller's own agreement with the Air Force—a fact peculiarly within his knowledge. The Court was of the opinion that the doctrine of implied warranty should be extended rather than restricted. To strictly apply the rule of *caveat emptor* is inconsistent with the principles underlying modern trade and commerce.[10]

TAXATION

SALES TAX

In *Piedmont Canteen Serv., Inc. v. Johnson*[1] the taxpayer operated vending machines which dispensed items costing less than ten cents each to the purchaser. The Commissioner of Revenue contended that the taxpayer was liable for the three per cent North Carolina retail sales tax on these sales. The taxpayer argued that the sales tax is a consumer's tax, and since the "retail bracket system" specifically states that no tax is to be collected from the consumer on sales of less than ten cents,[2] it is not liable for the tax. The Court held for the Commissioner, affirming the result reached by the lower court.

In support of its contention that the sales tax is a tax on the consumer, the taxpayer cited certain language in a report filed in 1956 by the Tax Study Commission. In this report the Commission recommended, as one of the fundamental policies of the retail sales tax law, that it be "a tax levied against the consumer . . . to be collected from him by the retailer and paid to the State."[3] The

[9] The seller is still liable for implied warranty even though the goods can be reasonably used for another purpose. The S.S. Angelo Toso, 271 Fed. 245 (3d Cir. 1921). There, coal was bought for steam ships. While the coal was merchantable for some purposes, it was unsuitable for steam ships and the seller was held liable.

[10] UNIFORM SALES ACT, § 15(1) provides that "where a buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose." The principal case thus appears to be in accord with the Uniform Sales Act, even though it has not yet been adopted in North Carolina.

[1] 256 N.C. 155, 123 S.E.2d 582 (1962).

[2] N.C. GEN. STAT. § 105-164.10 (1958).

[3] [1956] REPORT OF THE TAX STUDY COMMISSION OF THE STATE OF NORTH CAROLINA 43.

Court, however, felt that the legislature did not follow the recommendation of the Commission when it revised the statute in 1957.[4]

The legislature provided, as the Court pointed out, that this tax shall be a privilege or license tax upon the retailer;[5] that it shall be imposed in addition to all other license or privilege taxes;[6] and that it shall be collected from the retailer and paid by him.[7] From these provisions, the Court concluded that the legislative intent had been expressed in clear and unambiguous terms.[8]

However, there is other language set forth in the retail sales tax provisions which indicate a contrary legislative intent. G.S. § 105-164.7 provides in part as follows:

> Said tax shall be stated and charged separately from the sales price and shown separately on the retailer's sales records and *shall be paid by the purchaser to the retailer as trustee for and on account of the state and the retailer shall be liable for the collection thereof and for its payment to the Commissioner* and the retailer's failure to charge to or collect said tax from the purchaser shall not affect such liability. *It is the purpose and intent of this article that the tax herein levied and imposed shall . . . be borne and passed on to the customer, instead of being borne by the retailer.*[9]

The legislature further provided that it was a misdemeanor for a retailer to offer to absorb the tax.[10] After setting forth the retail bracket system containing language which makes its use by the retailer mandatory, the same statutory section goes on to provide that the "use of the above bracket does not relieve the retailer from the duty and liability to remit to the Commissioner an amount equal to three per cent (3%) of the gross receipts derived from *all taxable* retail sales during the taxable period."[11] Thus, it seems that the legislature has indicated an intent that the retailer act merely as a collection agent of the tax for the state and as such agent, the

[4] N.C. Sess. Laws 1957, ch. 1340, § 5.
[5] N.C. GEN. STAT. § 105-164.4 (1958).
[6] N.C. GEN. STAT. § 105-164.2 (1958); N.C. GEN. STAT. § 105-164.4(5) (1958).
[7] N.C. GEN. STAT. § 105-164.4(4) (1958).
[8] Hedrick v. Graham, 245 N.C. 249, 96 S.E.2d 129 (1957); City of Raleigh v. Mechanics & Farmers Bank, 223 N.C. 286, 26 S.E.2d 573 (1943).
[9] Emphasis added.
[10] N.C. GEN. STAT. § 105-164.9 (1958). *Quaere* why such a provision would be enacted if the tax was actually one upon the retailer.
[11] N.C. GEN. STAT. § 105-164.10 (1958). (Emphasis added.)

retailer is faced with the duty and liability of remission of the tax to the Commissioner.

The taxpayer also contended that the statute as applied discriminates against retailers who sell merchandise through vending machines and, therefore, violates the due process clause of the North Carolina Constitution and the due process and equal protection clauses of the federal constitution. The Court in rejecting this contention relied on a case in which the Supreme Court of Washington held that a similar statute was reasonable and was "designed to accomplish the purposes of the tax law as effectively as possible . . . ."[12] The Washington court pointed out that the use of the bracket system may sometimes result in inequities, but the statute makes no attempt to discriminate among sellers nor to provide an arbitrary or unreasonable classification.

The Court seems to have correctly decided the constitutional question raised since inequities are sometimes to be expected in our tax laws.[13] In regard to its construction of the retail sales tax provisions, it may be conceded that there is internal contradiction to some extent in the statute. However, the overall language of the statute together with its practical operation support the conclusion that the retail sales tax is a tax on the consumer. Such a conclusion would eliminate the harsh, although constitutional, inequity which the result of the principal case incorporates into the sales tax law.

Gift and Income Tax

In *Boylan-Pearce, Inc. v. Johnson*[14] an action was brought by a family corporation to recover gift and income taxes assessed as a result of payments made to the widow of the corporation's former president and director. The decedent had served as president of the corporation from 1940 until his death in May of 1958. In June of 1959 the board of directors of the corporation adopted a resolution to pay the widow of the decedent 36,000 dollars over a two year

[12] White v. State, 49 Wash. 2d 716, 727, 306 P.2d 230, 236 (1957).

[13] The United States Supreme Court has said that it is not necessary "that government in levying a graduated tax upon all the members of a class must satisfy itself by inquiry that every group within the class will be able to pay the tax without the sacrifice of profits. The operation of a general rule will seldom be the same for every one. If the accidents of trade lead to inequality or hardship, the consequences must be accepted as inherent in government by law instead of government by edict." Fox v. Standard Oil of New Jersey, 294 U.S. 87, 102 (1934).

[14] 257 N.C. 582, 126 S.E.2d 492 (1962).

period. The corporation deducted these payments as business expenses on its North Carolina income tax returns in the years of payment (1959 and 1960). The Commissioner disallowed the deduction and contended that the payments were taxable gifts by the corporation to the widow.[15] The Court in affirming the lower court's decision in favor of the corporate taxpayer stated:

> We attach no legal significance to the fact there was no pre-existing plan or policy, or to the fact the resolution authorizing the payments was not adopted until June 26, 1959, or to the fact plaintiff is a so-called 'family corporation.' At most, these facts are of evidentiary significance in determining the nature of the employer's payments.[16]

In reaching this result the Court relied upon G.S. § 105-147(23) which provides that in computing net income there shall be allowed as a deduction

> the amount of the salary or other compensation of an employee which is paid for a period of not more than twenty-four months after the employee's death to his estate, widow or heirs provided such payment is made in recognition of services rendered by the employee prior to his death and is reasonable in amount.[17]

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[15] The widow on her North Carolina tax returns claimed that the payments were a gift to her from the corporation and not taxable compensation. The Court would not directly say that the widow had to bear the tax burden on the amount of the payments exceeding $5000, but there is dictum indicating this as the result.

[16] 257 N.C. 582, 592, 126 S.E.2d 492, 499-500 (1962). The Commissioner contended that payments by an employer are deductible only when there is a legal obligation to make such payments. The Court refuted this by pointing out that the 1957 amendment would be meaningless if the Commissioner was correct since prior to 1957 the discharge of legal obligations to compensate employees was clearly deductible under G.S. § 105-147.

[17] This provision was recommended by the 1956 Tax Study Commission and was enacted by the 1957 legislature. [1956] REPORT OF THE TAX STUDY COMMISSION OF THE STATE OF NORTH CAROLINA 23; N.C. Sess. Laws 1957, ch. 1340, § 4(au). In conjunction with this new provision the 1957 legislature made an addition to G.S. § 105-141(a) to provide that these payments shall be income to the payee subject to a $5000 exclusion. N.C. Sess. Laws 1957, ch. 1340, § 4(q). In making this recommendation, the Tax Study Commission considered it "to be desirable to encourage such payments. Such encouragement is best accomplished by a tax deduction to the employer. It is not believed desirable, however, to allow unlimited deductions of this type." [1956] REPORT OF THE TAX STUDY COMMISSION OF THE STATE OF NORTH CAROLINA 23. For a comparable federal income tax provision dealing with an exclusion to the payee see INT. REV. CODE of 1954, § 101(b).

This decision should make the statute one of popular use. It should be pointed out, however, that the taxpayer has the burden of proving both the purpose of these payments and that they were "reasonable in amount." The assumption should not be made that because the Commissioner did not contest the reasonableness of the payments in the instant case, he will not do so in future cases involving this statutory provision.

TORTS

NEGLIGENCE

Contributory Negligence as a Matter of Law

When the plaintiff's own evidence shows that his negligence was a proximate cause of the injury of which he complains, he will be deemed contributorily negligent as a matter of law. In *Jenkins v. Atlantic Coast Line R.R.*,[1] where the plaintiff did not heed a stop sign at a crossing, but relied solely on the fact that he had heard no train whistle, and in *Carter v. Atlantic Coast Line R.R.*,[2] where the momentum of the plaintiff's car carried him into the path of a train even though he had begun applying his brakes when thirty feet from the track, the Court so held.

On the other hand, the Court will not find contributory negligence as a matter of law when reasonable minds might differ as to the effect of the plaintiff's conduct. In *Johnson v. Southern Ry.*[3] the trial court granted a nonsuit when the plaintiff's evidence showed that even though he had stopped thirty feet before reaching the track at a point where his view was unobstructed and the automatic signaling device at the crossing was not working, it would have been possible for him to have gotten a later view of the track. The Court reversed because "the failure of automatic signal lights at a railroad crossing to work has the tendency to abate the ordinary caution of a traveler on the highway, and . . . he has a right to place some reliance on such failure."[4]

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[1] 258 N.C. 58, 127 S.E.2d 778 (1962).

[2] 256 N.C. 545, 124 S.E.2d 561 (1962).

[3] 257 N.C. 712, 127 S.E.2d 521 (1962), *affirming* 255 N.C. 386, 121 S.E.2d 580 (1961). The trial judge granted a second nonsuit because he thought the earlier decision had been based on the Court's belief that plaintiff had stopped his vehicle and looked and listened at the best vantage point available to him. *Id.* at 715-16, 127 S.E.2d at 524.

[4] 257 N.C. at 716, 127 S.E.2d at 524.

If a train and a car reach a crossing at the same time, the train has the right-of-way.[5] For this reason the motorist has a duty to look and listen before attempting to cross. When, however, the circumstances are such that looking and listening make difficult the discovery of the train's presence, the motorist is under no duty to turn around and go the other way or to go upon the track and look before crossing.[6] Rather, he may rely on a warning from the train of its approach, and if no warning is forthcoming, his presence on the track when the train approaches is not necessarily negligence. An automatic signal light is a method adopted by the railroad to give this warning, and the Court was correct in holding that the question of the plaintiff's prudence was for the jury.

Effect of Misplaced Stop Signs

Kelly v. Ashburn[7] clarifies the Court's holding in *Tucker v. Moorfield*[8] concerning the rights and duties of motorists entering an intersection at the same time. Ordinarily when two vehicles reach an intersection at approximately the same time the driver of the vehicle on the left must yield to the vehicle on the right.[9] However, when either the State Highway Commission or local authorities have designated a street under their jurisdiction a through highway by erecting stop signs regulating secondary streets, the driver of a vehicle approaching an intersection on the secondary street must stop and yield the right-of-way.[10] In other jurisdictions with similar rules, once a street has been designated a main thoroughfare such status is not lost merely because the sign on an intersecting street has become illegible, destroyed or otherwise removed.[11]

In *Tucker,* however, the Court said that if a stop sign had been erected pursuant to authority other than that designated in G.S. § 20-158(a),[12] motorists would have no right to rely on the fact that they believed a sign to belong there, but could only rely on the actual

[5] "From the character and momentum of a railroad train, and the requirement of public travel by means thereof, it cannot be expected that it will stop and give precedence . . . ." Continental Improvement Co. v. Stead, 95 U.S. 161, 164 (1877).

[6] *E.g.,* Norton v. North Carolina R.R., 122 N.C. 910, 29 S.E. 886 (1898).

[7] 256 N.C. 338, 123 S.E.2d 775 (1962).

[8] 250 N.C. 340, 108 S.E.2d 637 (1959).

[9] N.C. GEN. STAT. § 20-155(a) (Supp. 1961).

[10] N.C. GEN. STAT. § 20-158(a) (Supp. 1961).

[11] *E.g.,* Jones v. McCullough, 148 Kan. 561, 83 P.2d 669 (1938); Schmit v. Jansen, 247 Wis. 648, 20 N.W.2d 542 (1946).

[12] See note 9 *supra.*

physical presence of the sign.[13] Since the stop sign was not in place at the time of the collision, the driver of the vehicle on the left was negligent in failing to yield the right-of-way and would be liable if the jury found this to be a proximate cause of the collision.[14]

In *Kelly* a stop sign had been originally erected by proper authority but was not in place at the time of the collision. The defendant had known that the stop sign was normally there, but the trial judge gave preemptory instructions to the effect that the driver of the vehicle approaching from the left was negligent unless there had actually been a stop sign in place at the time of the collision giving notice to the driver approaching from the right. The Supreme Court reversed because a motorist traveling on a favored highway does not lose his right to assume that he has the right-of-way if the stop sign governing the secondary highway has been removed unless he has actual or constructive notice of the removal.[15] He may be found to be negligent, however, if other circumstances indicate that a reasonable man would have yielded.

Joint Tortfeasors

Technically, either concert of action or breach of a joint duty is essential to the commission of a joint tort;[16] however, the term has been extended to include situations where a single indivisible injury is sustained as a result of the independent, concurring, tortious acts of two or more persons.[17] If the act of either person alone would

[13] 250 N.C. at 343, 108 S.E.2d at 639.

[14] Since this same motorist crossed the intersection at least once a week in the course of his employment and since the sign had been down for approximately two months before the collision, he would probably have been liable absent this holding. However, the Court makes clear the fact that the decision will be considered to have turned on the failure of lawful authority for the original placing of the stop sign in *Kelly* where it said that "decision was based on the premise the evidence affirmatively showed the sign to have been erected by the city engineer on account of a special hazard and not by either the State Highway Commission or the local authorities (the governing body of the city) as specified in G.S. § 20-158(a), leaving G.S. § 20-155(a) applicable." 256 N.C. at 343, 123 S.E.2d at 778.

[15] Bobbitt, J., dissented because he thought the motorist should have had to sustain the burden of bringing himself within the exception by showing that he had reasonable grounds to believe that there was a stop sign giving him the right-of-way at the time of the collision.

[16] Bost v. Metcalfe, 219 N.C. 607, 14 S.E.2d 648 (1941). "Strictly speaking, the words 'joint tort' should be used only where the behavior of two or more tort-feasors is such as to make it proper to treat the conduct of each as the conduct of the others as well." 1 HARPER & JAMES, TORTS § 10.1, at 692 (1956).

[17] Tart v. Register, 257 N.C. 161, 125 S.E.2d 754 (1962); Rouse v.

have caused the indivisible injury, joint and several liability for the entire damage is almost uniformly imposed.[18] The same is true when no damage would have been caused except for the concurring negligent acts.[19] Such is the situation when the independent negligence of two drivers causes their vehicles to collide injuring the plaintiff, and North Carolina holds the drivers jointly and severally liable.[20] However, in the event of a chain collision where the negligence of several drivers causes more than one collision, it may be said that some damage would have been done even if one or more of the drivers had not been negligent. In this situation, the problem is different in nature from that presented in the two-car collision because the harm is, at least theoretically, divisible.

The recent case of *Fox v. Hollar*[21] illustrates the difficulty that is presented when two collisions occur in close proximity. Plaintiff was riding in the car of *A* when it slid into the center of the highway and collided with a truck being driven by *B*. The impact of this collision knocked the car of *A* into the car of *C* which had been following it before the first collision. Plaintiff suffered severe personal injuries and sued *A*, *B* and *C* as joint tortfeasors. The trial judge granted *C's* motion for nonsuit despite evidence that he had been following too closely, and the jury found for *A* and *B* on the issues of their negligence. On appeal the Court affirmed the verdict but reversed the nonsuit making this statement:

> [P]laintiff can no longer proceed upon the theory that his injuries were the cumulative effect of successive, joint and concurring torts, but he is entitled to show, if he can, that

Jones, 254 N.C. 575, 119 S.E.2d 628 (1961); Evans v. Johnson, 225 N.C. 238, 34 S.E.2d 73 (1945); Cunningham v. Haynes, 214 N.C. 456, 199 S.E. 627 (1938).

[18] *E.g.*, Corey v. Havener, 182 Mass. 250, 65 N.E. 69 (1902) (horses frightened when two motorcycles passed plaintiff on different sides at the same time); Anderson v. Minneapolis, St. P. & S.S.M.R.R., 146 Minn. 430, 179 N.W. 45 (1920) (defendant's fire combined with fire of unknown origin). Analogous, but distinguishable because only a single bullet strikes the victim, are cases where joint and several liability has been imposed when several hunters fire at a single object or movement and discover a dead body in the spot at which they aimed. *E.g.*, Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948).

[19] *E.g.*, Town of Sharon v. Anahma Realty Corp., 97 Vt. 336, 126 Atl. 192 (1924) (pier of one defendant and dam of another together caused an ice jam).

[20] *E.g.*, Tart v. Register, 257 N.C. 161, 125 S.E.2d 754 (1962). Also discussed in DAMAGES, *Collateral Recovery,* and EVIDENCE, *Spontaneous Statements and Res Gestae, supra.*

[21] 257 N.C. 65, 125 S.E.2d 334 (1962).

> negligence on the part of the defendant . . . [*C*] proximately caused him injury. He can recover from . . . [*C*] for only those injuries he may have suffered in the collision between . . . [*A's*] car and . . . [*C's*] car.[22]

If taken literally, the statement indicates that the plaintiff may only recover if he shows exactly what injury he suffered in each collision; however, when considered in context the statement may be the first step toward the recognition of an important distinction applicable to joint and several liability. But before this distinction may be discussed, three aspects of the Court's statement must be clarified: (1) *C's* liability for the consequences of his negligent act is in no way affected by the culpability of *A* and *B* for their acts;[23] (2) the acts of the defendants need not be simultaneous to be "concurrent";[24] and (3) the problem should be considered as one of actual cause.[25] Accordingly it may be said that the liability of *C* turns on the Court's attitude toward joint tortfeasors in a situation where the acts of each is responsible for part, but not all, of the total injury.

The general rule applicable in situations where the acts of independent parties combine to produce an injury, but where neither causes the entire injury, is that each is responsible only for that portion of the injuries attributable to his own negligence.[26] One

[22] *Id.* at 71, 125 S.E.2d at 338.

[23] Arnst v. Estes, 136 Me. 272, 276, 8 A.2d 201, 204 (1939); 4 RESTATEMENT, TORTS § 879, comment (1939). If only one of the drivers is negligent, he is responsible for all damage, but if both are negligent, either is responsible for all damage, irrespective of the comparative degree of fault between them. Cunningham v. Haynes, 214 N.C. 456, 199 S.E. 627 (1938).

[24] Hill v. Perex, 76 Cal. App. 74, 28 P.2d 946 (1934); McHorney v. Wooten, 234 N.C. 110, 66 S.E.2d 692 (1951); Barber v. Wooten, 234 N.C. 107, 66 S.E.2d 690 (1951); Micelli v. Hirsh, 52 Ohio L. Abs. 426, 83 N.E.2d 240 (1948); Roush v. Johnson, 139 W. Va. 607, 80 S.E.2d 857 (1954). *Contra,* Frye v. City of Detroit, 256 Mich. 466, 239 N.W. 886 (1932).

[25] North Carolina regards proximate cause as that cause which produces the resulting injury through a continuous sequence, without which the injury would not have occurred, and from which any man of ordinary prudence could have foreseen that such a result was probable under the existing facts. *E.g.,* Mattingly v. North Carolina R.R., 253 N.C. 746, 117 S.E.2d 844 (1961); Boone v. North Carolina R.R., 240 N.C. 152, 81 S.E.2d 380 (1954). Consequently it is correct to use "proximate" in this situation; however, there is no question but that such a result was foreseeable. The problem is whether the negligence was in fact a cause. See Micelli v. Hirsh, *supra* note 24.

[26] Glen v. Chenowth, 71 Ariz. 271, 226 P.2d 165 (1952); Garret v. Garret, 228 N.C. 530, 46 S.E.2d 302 (1948); Rice v. McAdams, 149 N.C. 29, 62 S.E. 774 (1908); Swain v. Tennessee Copper Co., 111 Tenn. 430, 78 S.W. 93 (1905).

result of this rule has been that the plaintiff is sometimes denied any recovery at all because he cannot show the amount caused by each, even though he can show that each did cause some damage.[27] Probably because of this harsh consequence, many jurisdictions, including North Carolina, have recognized exceptions in certain fact situations. One of these exceptions is that drivers whose negligence combines to cause a collision are held jointly and severally liable[28] even though the conduct of one driver was seriously wrongful and that of the other "mere" negligence.[29]

In other jurisdictions, the problem has turned on whether the damages are apportionable. Where they usually are not as a practical matter, as in automobile collisions,[30] the plaintiff must only show that each of the defendants contributed to the harm in order to be allowed a joint and several recovery. However, either of the defendants may reduce his liability by proving to the jury's satisfaction that his negligence definitely was not the cause of a specific part of the injury. If this reasoning is applied to the facts of the *Fox* case, the Court's statement becomes understandable in another light. The plaintiff's evidence tended to show that *B's* truck was being driven at a considerable rate of speed just before the first collision occurred, whereas all the evidence indicated that *C's* car was moving slowly at the time it collided with *A's* car. Moreover, the evidence showed that *A's* car had not been extensively damaged in the collision with *C's* car. Under these circumstances, it may well be that the jury would find that *C* had shown he was not responsible for much of the injury sustained by the plaintiff.

Due to the circumstances of this case it is difficult to predict what the Court will do in the future. Perhaps it will consider negligent drivers causing successive collisions jointly and severally liable without allowing them to attempt to prove to the jury that they were not responsible for all the damage, as it has done in the past;[31] however, this does not seem to be the most desirable state

[27] *E.g.*, Swain v. Tennessee Copper Co., *supra* note 26.

[28] Bechtler v. Bracken, 218 N.C. 515, 11 S.E.2d 721 (1940); Myers v. Southern Public Util. Co., 208 N.C. 293, 180 S.E. 694 (1935); West v. Collins Baking Co., 208 N.C. 526, 181 S.E. 551 (1935).

[29] Cunningham v. Haynes, 214 N.C. 456, 199 S.E. 627 (1938).

[30] Maddux v. Donaldson, 362 Mich. 425, 108 N.W.2d 33 (1961) (facts strikingly similar to those in *Fox*). See also Landers v. East Texas Salt Water Disposal Co., 151 Tex. 251, 248 S.W.2d 731 (1952), discussed in 34 N.C.L. REV. 137 (1957).

[31] Barber v. Wooten, 234 N.C. 107, 66 S.E.2d 690 (1951); Lewis v. Hunter, 212 N.C. 504, 193 S.E. 814 (1937); West v. Collins Baking Co.,

of affairs even if it is the simplest. Certainly, it would not be desirable for the Court to interpret such language literally. The right of an injured person to full compensation must be balanced against the right of the other party to pay only that which he should justly be compelled to pay. As long as the burden is on the defendant to show that he should not be held responsible for the entire damage, the rights of the plaintiff are protected. Moreover, such a rule would be analogous to that applied when the negligent act of the defendant aggravates and adds to an already existing injury and, therefore, should not be contrary to public policy.[32]

Liability of Insurer for Agent's Failure to Deliver Policy

There is a sharp split of authority on whether or not an insurance company is under a legal duty to act upon an application for insurance with reasonable diligence. Some courts have said that the insurer is a mere offeree and under no duty to act on the application at all;[33] others have held that the insurer does have such a duty though they support this conclusion with different theories.[34] In *Fox v. Volunteer State Life Ins. Co.*[35] North Carolina apparently adopted the latter view by holding the defendant liable for its agent's negligence in failing to deliver the policy to the insured. The rationale was that "the liability of the agent for negligently failing to perform his duties is clear, and the defendant is also liable for the acts and omissions of its agent within the scope of his employ-

208 N.C. 526, 181 S.E. 551 (1935); Hodgin v. North Carolina Public Serv. Corp., 179 N.C. 449, 102 S.E. 748 (1920).

[32] Wise v. Carter, 119 So. 2d 40 (Fla. App. 1960). See Cauble v. Hill, 257 N.C. 120, 125 S.E.2d 322 (1962); Dempster v. Fite, 203 N.C. 697, 167 S.E. 33 (1932).

[33] National Union Fire Ins. Co. v. School Dist., 122 Ark. 179, 182 S.W. 547 (1916); Swentusky v. Prudential Ins. Co., 116 Conn. 526, 165 Atl. 686 (1933); Savage v. Prudential Life Ins. Co., 154 Miss. 89, 121 So. 487 (1929); Thornton v. National Council Jr. O.U.O.M., 110 W. Va. 412, 158 S.E. 507 (1931).

[34] DeFord v. New York Life Ins. Co., 75 Colo. 146, 224 Pac. 1049 (1924), *later appeal* 81 Colo. 518, 256 Pac. 317 (1927) (duty arises upon payment of premium); Duffie v. Bankers' Life Ass'n, 160 Ia. 19, 139 N.W. 1087 (1913) (duty arises because business of insurance is affected with a public interest); Boyer v. State Farmers' Mut. Hail Ins. Co., 86 Kan. 442, 121 Pac. 329 (1912) (implied contract); Berkin v. Equitable Life Assur. Soc'y, 70 N.D. 122, 293 N.W. 200 (1940) (duty imposed because of insurer's superior bargaining position); Columbian Nat. Life Ins. Co. v. Lemmons, 96 Okla. 228, 222 Pac. 255 (1923) (implied contract).

[35] 185 N.C. 121, 116 S.E. 266, *later appeal,* 186 N.C. 763, 119 S.E. 172 (1923).

ment."[36] Consequently if the jury found unreasonable delay in delivery, the defendant would be liable. However, a strong dissent[37] pointed out that the application had specifically stated that the policy was to take effect only upon the payment of the premium and that by imposing this duty the Court had obligated the defendant to a contract when the plaintiff's intestate was at liberty to reject the policy. Moreover, a concurring opinion[38] pointed out that the agent was guilty of a breach of duty only because he had promised prompt delivery when the plaintiff's intestate told him that he was ready to pay the premium. It was this split that caused the Court to later express doubt as to the authority of the decision.[39]

In 1962 the Court decided *Blackman v. Liberty Life Ins. Co.*[40] in a most unusual manner in light of the questionable status of *Fox*. Plaintiff's intestate was required to purchase life insurance in order to obtain a loan. An officer of the bank was also an agent of the defendant insurance company, and he filled out the application and submitted it to the defendant. The application was approved and a standard policy was returned to the agent. Several days later the plaintiff's intestate was killed in an automobile accident. No action had been taken to complete negotiations on either the loan or the insurance, and defendant denied liability on the policy. The litigation in question ensued and the trial judge sustained a demurrer. On appeal the plaintiff's brief relied on *Fox* exclusively, and much of defendant's brief was directed at distinguishing *Fox* and arguing that it should be overruled. The Court made no mention of *Fox* and only said that "the court properly sustained the demurrers for failure of the complaint to state a cause of action in tort based on the negligent failure to deliver the insurance policy."[41] The rest of the opinion discussed a possible action on a contract theory.[42]

[36] *Id.* at 125, 116 S.E. at 268.
[37] 185 N.C. at 130, 116 S.E. at 271 (Stacy, J.).
[38] *Id.* at 127, 116 S.E. at 269 (Adams, J.).
[39] "The *Fox case* was the subject of sharp debate . . . . But it is unnecessary for us to determine whether the *Fox case* was correctly decided or not . . . ." Sturgill v. New York Life Ins. Co., 195 N.C. 34, 36-37, 141 S.E. 280, 282 (1928).
[40] 256 N.C. 261, 123 S.E.2d 467 (1962).
[41] *Id.* at 262, 123 S.E.2d at 469.
[42] The Court's reasoning here was that the lender may have been obligated under the loan contract to pay the premium out of the money to be loaned as it had other expenses, but the Court says: "There may or may not be reason why it could not and should not deduct the premium due on the insurance policy in the same manner it had deducted other expenses." 256 N.C. at 263, 123 S.E.2d at 469. This case is discussed in INSURANCE,

Obviously, the problem needs to be re-examined. Insurance companies must calculate premiums on ascertainable contingencies, and both they and future applicants for insurance would be benefited by a definite answer. It may be that the *Blackman* case overrules the position taken in *Fox* but who can tell? Moreover, even if it does not, the question needs to be discussed in light of the public policy considerations involved.[43]

Liability of Parent for Tort of Child

In *Langford v. Shu*[44] the Court held a parent liable for injuries resulting from a practical joke played by her son. The plaintiff suffered injuries while fleeing from a furry object which she had been induced to believe was a mongoose. Actually the furry object was a foxtail which the son had sprung from a box labeled "Danger, African Mongoose, Live Snake Eater." The mother had known that plaintiff was afraid of such animals and that her son was talking to the plaintiff about the contents of the box.

With one exception,[45] North Carolina is in accord with the common-law rule that the mere relation of parent and child does not impose liability on the parent for the torts of the child.[46] However, liability has been imposed on parents where they failed to exercise their power of control over the child under circumstances which indicated, or reasonably should have indicated, that the child

Life Insurance, supra. Assuming that the lender had reason not to deduct the premium, why would the plaintiff not have a cause of action in tort? Is this decision not res judicata as to the defendant's tort liability?

[43] Of these the theory that the insurer has a duty to act upon an application with reasonable care if the premium was paid when the application was made seems the best solution. See, *e.g.,* Swentusky v. Prudential Ins. Co., 116 Conn. 526, 165 Atl. 686 (1933). After all, in most cases where the first premium is not submitted with the application, no sale has been made, and it does not seem that public policy demands that insurance companies be subjected to this type of litigation without something more to base the insured's reliance on than an application. On the other hand, however, very few persons will pay a premium when the application is being submitted unless they have already definitely decided to buy the insurance. To these the insurance company owes more than the legal duty generally owed by an offeree. There can be no question that there is an unequal bargaining position, and there is none of the pressure on the insurance company that the normal offeree has on him to act with diligence.

[44] 258 N.C. 135, 128 S.E.2d 210 (1962).

[45] N.C. GEN. STAT. § 1-538.1 (Supp. 1961) specifies a liability of parents to a maximum of $500 for malicious or wilful destruction of property by any minor under eighteen living with his parents. The statute is commented on in 40 N.C.L. REV. 619 (1962).

[46] *E.g.,* Hawes v. Haynes, 219 N.C. 535, 14 S.E.2d 503 (1941).

was likely to commit a negligent act.[47] In such a case the basis of liability is the negligence of the parent.

The negligence in *Langford* was the mother's breach of her duty not to subject the plaintiff "to a fright which, in the exercise of due care or reasonable foresight, she should have known was likely to result in some injury to her,"[48] and the Court said that she should have foreseen that her son would play the joke because "to reach any other conclusion would be to ignore the propensities of little boys, who, since the memory of man runneth not to the contrary, have delighted to stampede timorous ladies with snakes . . . and other rewarding creatures which hold no terror for youngsters."[49]

Spreading Fires—Proving Their Origin

If the negligence of a person causes a fire to originate on his property, North Carolina holds him liable for the damage done by the spread of the fire to the property of another.[50] On the other hand, the owner is ordinarily not liable for the spread of such a fire to the property of another if it is accidentally started by the act of a stranger or by some other cause with which he has no connection.[51] However, the owner may be liable even though he is not responsible for the starting of the fire if he has left his property in an unsafe condition so that a fire may easily become ignited thereon.[52] Courts usually consider the distinguishing factor here to be that the condition of the premises is one of the actual causes of the fire.[53]

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[47] Lane v. Chatam, 251 N.C. 400, 111 S.E.2d 598 (1959).

[48] 258 N.C. at 139, 128 S.E.2d at 212.

[49] *Id.* at 140, 128 S.E.2d at 213.

[50] Royal v. Dodd, 177 N.C. 206, 98 S.E. 599 (1919); Brady v. Waccamaw Lumber Co., 175 N.C. 704, 95 S.E. 483 (1918). Negligence is inferred if the cause of the fire is an instrumentality under the control of the defendant at the time the fire originates. Harris v. Mangum, 183 N.C. 235, 111 S.E. 177 (1922) (boiler); Simmons v. John L. Roper Co., 174 N.C. 220, 93 S.E. 736 (1917) (locomotive).

[51] McBee v. Seaboard Air Line R.R., 171 N.C. 111, 87 S.E. 985 (1916); Kemp v. Norfolk S.R.R., 169 N.C. 731, 86 S.E. 621 (1915); Hamburg-Bremem Fire Ins. Co., 132 N.C. 75, 43 S.E. 548 (1903).

[52] Lawrence v. Yadkin River Power Co., 190 N.C. 664, 130 S.E. 735 (1925) (lightning caused a molten insulator to fall among drying grass and decaying vegetation). *Accord, e.g.,* Phillips Petroleum Co. v. Berry, 188 Ark. 431, 65 S.W.2d 533 (1933); Menth v. Breez Corp., 4 N.J. 428, 73 A.2d 183 (1950).

[53] "If the right of way beneath the tower had been free of inflammable matter, the moulten mass and fragments of the shattered insulator would have quickly cooled, and no harm would have resulted to the plaintiff." *Id.* at 672, 130 S.E. at 739.

In *Maharias v. Weathers Bros. Moving & Storage*[54] a fire started in the northwestern part of the defendant's warehouse and spread to the plaintiff's restaurant which was located approximately four feet to the North. The only evidence tending to establish the cause of the fire was the opinion of an assistant fire chief who had examined the premises of the defendant after the fire. He had found an overturned metal cabinet, evidence of burned rags, and about a half-bushel of charred rags piled in the northwest corner on which there was some type of furniture polish. He stated that the cause of the fire could have been the spontaneous combustion of these rags, but on cross-examination admitted that he did not know where the rags had been before the fire and that the fire could have been started in other ways. The Court affirmed a nonsuit because "the evidence raised a mere conjecture, surmise and speculation as to the cause of the fire."[55]

In situations such as *Maharias* it is often difficult, if not impossible, to prove the cause of the fire. For this reason it seems worthwhile to point out that there may be another approach to establishing liability. If the plaintiff produces evidence that the defendant maintained his premises in such a manner that a fire hazard existed thereon to his knowledge, should not the actual cause of the fire—whether an act of God or a deliberate or accidental act—be immaterial? The defendant's negligence is in allowing such a condition to exist. It would certainly be foreseeable that the existence of a fire hazard might be the cause of the fire, and if a fire did break out it would be foreseeable that it would result in injury to the property four feet from his premises because the fire hazard would cause the fire to spread faster. To maintain an action for negligence the plaintiff must show that the negligence was a substantial factor in the circumstances that caused the injury. In this type of situation the cause of the injury is the fire's spreading as well as the fire itself, and the existence of the fire hazard is a substantial factor in the spread of the fire. There is authority supporting this reasoning.[56]

DEFAMATION

In North Carolina the consequence of participation in the publication of a libel is joint liability for damages,[57] whereas, slander is

[54] 257 N.C. 767, 127 S.E.2d 548 (1962) (per curiam).
[55] *Id.* at 768, 127 S.E.2d at 549.
[56] Chicago, M. St. P. & P.R.R. v. Poarch, 292 F.2d 449 (1961); Prince v. Chahalis Sav. & Loan Ass'n, 186 Wash. 372, 58 P.2d 290 (1936).
[57] Taylor v. Kinston Free Press Co., 237 N.C. 551, 75 S.E.2d 528 (1953).

considered an individual tort incapable of joint commission unless the perpetrators were acting as conspirators.[58] Consequently allegations of conspiracy are only necessary if joining defendants for slander.

In *Greer v. Skyway Broadcasting Co.*[59] the Court held that the complaint did not fail for a misjoinder of causes and parties since the allegations showed "a common agreement or conspiracy existing between them to injure plaintiff."[60] The acts complained of were the publication both of false statements concerning the plaintiff in television broadcasts and of films showing him in the custody of police officers.

In view of the fact that the complaint alleges publication on television, it is difficult to see why an allegation of conspiracy would be necessary,[61] unless North Carolina adopts a novel approach to such publication and considers it slander. If this is in fact what the Court is doing, it seems worthwhile to point out that such a position would be unique among American jurisdictions.[62] Moreover, the distinctions between libel and slander are primarily historical,[63] and many cases have held that such distinctions provide no assistance when dealing with defamation over radio and television.[64] The Court notes this in its opinion[65] but makes no evaluation of its feeling on the

[58] Manley v. Greensboro News Co., 241 N.C. 455, 85 S.E.2d 672 (1955).
[59] 256 N.C. 382, 124 S.E.2d 98 (1962).
[60] *Id.* at 391, 124 S.E.2d at 104.
[61] North Carolina requires proof of malice when a misstatement of fact, as contrasted with opinion, is made to the general public under a qualified privilege; however that requirement would be satisfied here by the allegation that employees of the broadcasting company accepted the sheriff's statement that the victim of the alleged rape had identified the plaintiff when she was in the building and it could easily have been verified by these employees. Lewis v. Carr, 178 N.C. 578, 101 S.E. 97 (1919). Furthermore, such a requirement places North Carolina in the minority when a misstatement of fact is involved. See Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875, 896-900 (1949); 41 N.C.L. REV. 153, 157-58 (1962).
[62] Australia considers defamation by radio to be slander. Meldrum v. Australian Broadcasting Co., [1932] Vict. L. Rep. 425, [1932] Aust. L. Rep. —. In New York, the question has apparently turned on whether or not there was a script. Hartmann v. Winchell, 296 N.Y. 296, 73 N.E.2d 30 (1947).
[63] See PROSSER, TORTS 585-86 (2d ed. 1955); 33 N.C.L. REV. 674 (1955).
[64] Niehoff v. Congress Square Hotel Co., 149 Me. 412, 103 A.2d 219 (1954); Kelly v. Hoffman, 137 N.J.L. 695, 61 A.2d 143 (1948); Irwin v. Ashurst, 158 Or. 61, 74 P.2d 1127 (1938); Summit Hotel Co. v. National Broadcasting Co., 336 Pa. 182, 8 A.2d 320 (1939). A recent case suggests that the tort should be labeled "defamacast," American Broadcasting-Paramount Theatres, Inc. v. Simpson, 106 Ga. App. 230, 126 S.E.2d 873 (1962).
[65] 256 N.C. at 390-91, 124 S.E.2d at 104.

matter; therefore *Greer* should not be considered to stand for rejection of such a rule. The fact remains that, while it would be desirable for the Court to talk in terms of substantive issues when they are present, the very same result was reached by finding a conspiracy when very few allegations supporting such a finding were present in the complaint.[66]

TRIAL PRACTICE

PROCESS

In *Byrd v. Piedmont Aviation, Inc.*[1] plaintiff instituted suit to recover for the death of his intestate who was killed while traveling as a passenger in an airplane owned and operated by a Michigan partnership of which the defendant, Bergsma, a resident of Michigan, was a general partner. Summons was sought to be served on the defendant Bergsma by serving the Commissioner of Motor Vehicles of North Carolina who in turn forwarded the summons and complaint with appropriate notice by registered mail to the defendant in Michigan.

Defendant Bergsma entered a special appearance and moved to quash the purported service of the summons on the ground that the Commissioner of Motor Vehicles is not a proper person on whom service can be made for the defendant. The trial court denied defendant's motion.

The Supreme Court reversed and held that G.S. § 1-105 which provides for the service of process upon nonresident drivers of motor vehicles does not apply in this case since an airplane is not such a motor vehicle as is contemplated by the statute. The motor vehicle contemplated by the statute, said the Court, is one which travels on land and not one which uses the airlanes.

PROCESS—WAIVER OF INVALIDITY

In *Harris v. Harris*[2] the defendant entered a special appearance and challenged the validity of process by warrant of attachment and publication before the clerk of the court. Defendant's motion was denied. Plaintiff then served notice on the defendant that she would

[66] This case is discussed in CIVIL PROCEDURE, *Joinder of Causes and Parties, supra.*

[1] 256 N.C. 684, 124 S.E.2d 880 (1962).
[2] 257 N.C. 416, 126 S.E.2d 83 (1962).

apply to the superior court judge for alimony pendente lite. Defendant, although he had appealed from the clerk's refusal to dismiss the suit, did not request a ruling on the motion to dismiss but participated in the hearing of plaintiff's motion for alimony. The Supreme Court held that by taking part in the motion for alimony the defendant had waived his right to object to the invalidity of the process. Defendant should have asked for a ruling by the judge on his appeal from the action of the clerk before taking part in the alimony motion. If the judge had sustained the clerk, defendant should have taken an exception and proceeded to oppose the allowance of alimony. This he could have done without waiving his objection to the validity of the process by reason of G.S. § 1-134.1.

VENUE

In *Lowther v. Wilson*[3] defendant, before otherwise pleading, moved for a change of venue for the convenience of witnesses and assigned various grounds supporting his request. The trial court granted defendant's motion and ordered the cause removed to another county because of the convenience of witnesses.

In reversing this action, the Supreme Court held that a motion to change the venue on the ground of the convenience of witnesses is premature if made before answer is filed. While there is no such provision in the applicable statute, G.S. § 1-83, the ruling of the Supreme Court is sound because, until the answer is filed, one cannot know just what witnesses will be required.

PLEA IN ABATEMENT

In *Perry v. Owens*[4] *A* had instituted suit in the Durham County Civil Court, a court with a jurisdictional limit of 1,500 dollars. The action arose out of a motor car collision. *B,* the defendant in the action, then instituted suit for more than 1,500 dollars in the Superior Court of Wake County, in which county he was a resident, and sought to recover damages he had suffered as a result of the collision aforesaid. *A* filed a plea of abatement in his answer to *B's* suit alleging the pendency of his action in the Durham County Civil Court. *B* demurred to this plea in writing and at a hearing on *B's* demurrer the trial judge sustained the plea in abatement and ordered *B's* action dismissed. On appeal, the Supreme Court held that since *B* could

[3] 257 N.C. 484, 126 S.E.2d 50 (1962).

[4] 257 N.C. 98, 125 S.E.2d 287 (1962), also discussed in CIVIL PROCEDURE, *Plea of Abatement, supra.*

not have counterclaimed in *A's* action for the amount he claimed in his own superior court suit, the plea in abatement setting up *A's* prior action was ineffective.

Whether a judgment in either action would be res judicata as to the other, the Court said, was unnecessary to determine at this time.

The case points up the deficiency in North Carolina procedure and the desirability of legislation which would, on the filing of a counterclaim in a court of limited jurisdiction, result in a transfer of the entire case to the superior court where both the original claim and counterclaim could be disposed of in one action. It is significant that the Court suggests the General Assembly give attention to the desirability of such a statute and refers to a *North Carolina Law Review* note in which such statute is recommended.[5]

Plea of Release—Premature Appeal

In *Cowart v. Honeycutt*[6] plaintiff sued to recover for injuries she had sustained in a car collision. Defendant pleaded, among other defenses, release. Plaintiff alleged fraud in obtaining the release. The trial court ordered the fraud issue to be tried first and the jury found there was fraud. The defense of release was accordingly held invalid. Defendant appealed on the ground there was inadequate evidence from which the jury could find fraud and that the trial court should have granted a nonsuit since the plaintiff admitted the execution of the release.

The Supreme Court held that the appeal from the trial court's judgment declaring the release invalid was premature since that judgment does not prevent the defendant from prevailing at the trial on the merits of the case. Had the release been sustained, then the plaintiff could have immediately appealed for such reason as she deemed valid. But when the release is not sustained the case is not over, the defendant's appeal is fragmentary and premature. If defendant loses on the merits, he then may appeal on the release issue as well as on such other grounds that may be available.

Voluntary Nonsuit—Time for Taking

It is well recognized that in this state a plaintiff may, when no counterclaim has been filed, take a voluntary nonsuit *before verdict.* The question of whether plaintiff's motion was made "before verdict"

[5] 32 N.C.L. Rev. 231 (1954).
[6] 257 N.C. 136, 125 S.E.2d 382 (1962).

has been before the Court on various occasions. In *Southeastern Fire Ins. Co. v. Walton*[7] the Court has reviewed earlier cases and has laid down certain guide rules which counsel will find helpful.

In the specific case a jury returned with the issues answered. The clerk was absent at the time and the judge instructed the deputy sheriff to take the paper containing the issues and jury's answers from the jury and bring it to him. While the deputy sheriff was walking with the issue paper to the judge the plaintiff's attorney asked that he be permitted to take a voluntary nonsuit. The trial judge did not grant the plaintiff's motion but took the issue paper, read the answers to the jury, asked them if that was their verdict and upon an affirmative answer entered judgment on the verdict for the defendant. Later, at the same term of court, the judge on his own motion set aside the verdict, vacated the judgment for the defendant and entered judgment of voluntary nonsuit for the plaintiff stating he did so because the plaintiff had moved for such nonsuit before the verdict was rendered by the jury.

On appeal by defendant, the Supreme Court affirmed the trial judge. In so doing the Court referred to the old case of *Graham v. Tate*[8] in which it stated that the plaintiff could take a voluntary nonsuit even though the jury had made up their verdict provided the verdict had not been known. It also referred to G.S. § 1-224 which provides that, "In actions where a verdict passes against the plaintiff, judgment shall be entered against him."

When is a verdict "made known" and when does a verdict "pass"? The Court in *Southeastern* declared that a verdict is made known "when its contents have been seen or heard by any person or persons other than the jury serving on the case, the trial judge, and a court official or court officials acting in the presence of the judge under his direction with respect to the verdict."[9] On the basis of that test, the verdict had not been "made known" when the plaintiff's counsel moved for a voluntary nonsuit.

When does a verdict "pass"? As to that question the Court said a verdict passes "when it has been accepted by the trial judge for record."[10] On that test, it is also clear the plaintiff's motion for voluntary nonsuit had been made in ample time. Acceptance of the

[7] 256 N.C. 345, 123 S.E.2d 780 (1962).
[8] 77 N.C. 120 (1877).
[9] 256 N.C. at 349-50, 123 S.E.2d at 784.
[10] *Id.* at 349, 123 S.E.2d at 784.

verdict by the judge is a "prerequisite for a complete, valid and binding verdict"[11] but the trial judge must accept a proper verdict which determines the issues submitted to the jury in accordance with the law applicable.

JUDGMENTS—RES JUDICATA EFFECT

In *Masters v. Dunstan*[12] plaintiffs sought damages against defendant alleging that defendant had been their attorney in a prior action in which plaintiffs were defendants and that as a result of the negligence of the defendant-attorney in not filing a pleading in said prior action a judgment by default had been entered against the plaintiffs. Defendant herein, by way of answer, alleged that after the default judgment had been entered in the prior action he engaged counsel to represent the defendants (the present plaintiffs) in said action in moving to set aside the default judgment under the provisions of G.S. § 1-220. Defendant further alleged that on the hearing of that motion the court found that the defendants in said action (plaintiffs herein) did not have a meritorious defense and accordingly denied the motion to vacate.

Defendant-attorney in this action claims that the decision of the court in the previous proceeding, namely, that defendants therein did not have a meritorious defense, is res judicata as to the plaintiff's claim in this case. In short, defendant-attorney says that, since it has been determined that the plaintiffs in this action had no meritorious defense in the prior action, they were in no way prejudiced by the failure of the defendant-attorney to file an answering pleading.

Plaintiffs moved to strike out the said res judicata defense of the defendant-attorney and their motion was granted by the trial court. On appeal, the Supreme Court affirmed declaring that the principle of res judicata did not apply because the parties were neither the same in both suits nor was defendant in privity with the plaintiffs herein.

In *Taylor v. Taylor*[13] plaintiff-husband sought a divorce on the ground of two years separation. Defendant-wife pleaded the separation was due to the husband's abandonment and pleaded a conviction of the husband for the abandonment alleged. The husband had not appealed said conviction but in the present action he con-

[11] *Id.* at 348, 123 S.E.2d at 783.
[12] 256 N.C. 520, 124 S.E.2d 574 (1962).
[13] 257 N.C. 130, 125 S.E.2d 373 (1962).

tended he was not guilty then, nor now, of abandonment. The trial judge ordered the husband's action dismissed because of the admitted conviction.

The Supreme Court affirmed the lower court's dismissal declaring that although in the criminal action the parties were the husband and the state, and here they are husband and wife, the husband had had his day in court on the abandonment issue and hence the said conviction bars the husband from obtaining a divorce on the facts alleged in his complaint.

In the course of its opinion the Court considers the general question of the effect to be given judgments of acquittal and of conviction in a criminal case in which the same fact issue is involved in the pending civil action. The Court points out that a conviction is the result of evidence beyond a reasonable doubt and that an acquittal judgment merely establishes that the state has not proved its case beyond a reasonable doubt. The Court refers to the decision of the Virginia court in the oft cited *Heller*[14] case wherein it was held that a judgment of conviction for wilfully burning insured goods barred the insured from recovering in a civil action on the policy.

In its opinion in *Taylor* the Court stresses the fact that in *Heller* the plaintiff was seeking a civil recovery for a loss occasioned by his own criminal action for which he was convicted, and in *Taylor* the plaintiff is seeking a divorce based on a separation which was the result of the criminal act of the plaintiff in abandoning his wife for which he had been convicted. The Court was careful to limit the scope of its decision saying, "As in *Heller,* our decision is limited to a factual situation where the plaintiff is seeking to profit from the criminal conduct for which he has been prosecuted and convicted."

It is clear, therefore, that the *Taylor* decision is no authority for permitting a plaintiff, who is seeking a civil recovery, to claim that his recovery follows as a matter of law because the defendant was convicted in the criminal court for the very act which caused the civil loss. Nor is it authority for the admission of evidence of the conviction in the civil case.[15]

[14] Eagle, Star & British Dominions Ins. Co. v. Heller, 149 Va. 82, 140 S.E. 314 (1927), noted in 6 N.C.L. REV. 334 (1928).

[15] In this connection see Swinson v. Nance, 219 N.C. 772, 15 S.E.2d 284 (1941) where in an auto accident case evidence offered by the plaintiff that the defendant had been convicted of reckless driving by reason of the acci-

EFFECT OF EQUAL DIVISION OF THE COURT ON REHEARING

In *Allen v. Southern Ry.*[16] plaintiffs had sought an injunction against certain labor unions. The unions moved for an involuntary nonsuit which motion was denied by the trial judge. On appeal the Supreme Court reversed the trial court and held that it had erred in overruling the nonsuit motion.[17] A rehearing before the Supreme Court was had and this time the Court divided three to three, the seventh Justice not sitting.[18] In this situation, what is the effect of the equal division on rehearing? Does the Supreme Court's first opinion stand or does the trial court's opinion stand?

The Court held that the result of the equal division on the rehearing in the Supreme Court is that the trial court's decision stands without becoming a precedent. In short the rehearing in the Supreme Court operates to eliminate the decisional force of the Supreme Court's first holding.

WILLS AND ADMINISTRATION

ACCELERATION—PARTIAL RENUNCIATION

In *Keesler v. North Carolina Nat'l Bank*[1] the testator was survived by his wife, a son, and a daughter. The residuary clause of the will declared a trust in favor of the widow. The testator's son and daughter were named as remaindermen in the trust, with a further provision that accumulated surplus should be added to the corpus. A substantial portion of the *res* consisted of corporate stock. The widow subsequently by written instrument released and quitclaimed all right, title, and interest in the stock, but expressly reserved all other rights under the will. Testator's son and daughter joined as parties plaintiff in this action, alleging that the renunciation accelerated their remainder interests, and asked that the stock be divided equally between them and administered as if their mother

dent in question was held inadmissible. See also Durham Nat'l Bank & Trust Co. v. Pollard, 256 N.C. 77, 123 S.E.2d 104 (1961) where in an action for wrongful death the Court held it was error for the trial court not to strike from the plaintiff's complaint allegations that the defendant had been convicted of manslaughter for the very death in question. The *Pollard* case is discussed under EVIDENCE, *Evidence of Prior Criminal Convictions, supra.*

[16] 256 N.C. 700, 124 S.E.2d 871 (1962).

[17] 249 N.C. 491, 107 S.E.2d 125 (1961) (one justice dissenting).

[18] See note 16 *supra.*

[1] 256 N.C. 12, 122 S.E.2d 807 (1961).

had died. The Court held the stock to be accumulated surplus, and ordered it to be added to the corpus.

North Carolina has recognized the doctrine of acceleration[2] of estates in remainder where a widow, given a life estate by the will of her husband, dissents and elects to take her dower or statutory share.[3] There was a dictum in an earlier case,[4] however, that a partial renunciation would not be recognized in this jurisdiction. The Court in the principal case casts doubt upon the validity of the prior dictum by observing that "this rule probably would not be applicable in all situations."[5] It was suggested that a beneficiary under a will would be entitled to accept one gift and disclaim others where there are two or more "separate and independent" gifts.

In *Keesler,* however, since the widow had accepted and enjoyed the benefits of the will, she had not affected even a partial renunciation.[6]

Acts Barring Property Rights

In *In re Estate of Perry*[7] a husband and wife held property as tenants by the entireties and the wife murdered her husband. The wife filed a petition asserting her rights to her intestate share in the undistributed rents and profits of the land. An answer was filed on behalf of the only child born of the marriage. The clerk of superior court awarded the rents to the wife. The superior court reversed and awarded them to the child. On appeal, both parties cited the earlier case of *Bryant v. Bryant,*[8] where a husband and wife held property as tenants by the entireties and the husband murdered the wife. One of the incidents of a tenancy by the entirety in North Carolina is that the husband is entitled during coverture to the full possession, use and control of the property, and to the rents and

[2] The Court stated that "under the doctrine of acceleration the general rule is that vested remainders take effect immediately upon the death of the testator where the life estate has failed prior to testator's death, or immediately after the determination of the life estate subsequent to the death of the testator, whether the failure or determination of the life estate is due to death, revocation, incapacity of the devisee to take, or any other circumstance." 256 N.C. at 17, 122 S.E.2d at 811.

[3] Wachovia Bank & Trust Co. v. McEwen, 241 N.C. 166, 84 S.E.2d 642 (1954).

[4] Bailey v. McLain, 215 N.C. 150, 155, 1 S.E.2d 372, 375 (1939).

[5] 256 N.C. at 19, 122 S.E.2d at 813.

[6] See Perkins v. Isley, 224 N.C. 793, 32 S.E.2d 588 (1945).

[7] 256 N.C. 65, 123 S.E.2d 99 (1961).

[8] 193 N.C. 372, 137 S.E. 188 (1927).

profits.[9] Since only the husband has this vested right, and the wife has only a contingent right of survivorship in the real property,[10] the Court had, in the earlier *Bryant* decision, declared the husband a constructive trustee of the interest of the deceased wife for the benefit of the children. In the principal case, the Court concluded that petitioner had forfeited her contingent right of survivorship, and, applying the equitable principle that no one will be allowed to profit from his own wrong,[11] awarded the rents to the minor child born of the marriage.

It should be noted that had the murder occurred after October 1, 1961, the case would have been controlled by G.S. § 31A-5(1).[12]

CONTRACTS TO DEVISE—SUFFICIENCY OF MEMORANDUM

In *McCraw v. Llewellyn*[13] testatrix devised and bequeathed her real and personal property to plaintiff in consideration of services which he had rendered to her. The will was revoked by her subsequent marriage.[14] Upon the testatrix's death plaintiff sued her estate on the theory of an express contract to devise. The issue raised was whether a revoked will constitutes a sufficient memorandum of a contract to devise so as to take the contract out of the Statute of Frauds. Answering the question negatively, the Court quoted the following language: " 'A potential factor in furtherance of fraud would be engendered were a will containing a simple bequest permitted to operate as evidence of a binding contract to make such a bequest.' "[15]

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[9] Nesbitt v. Fairview Farms, Inc., 239 N.C. 481, 80 S.E.2d 472 (1954). See generally Lee, *Tenancy by the Entirety in North Carolina,* 41 N.C.L. REV. 65 (1962).

[10] Davis v. Bass, 188 N.C. 200, 124 S.E. 566 (1924).

[11] See Garner v. Phillips, 229 N.C. 160, 47 S.E.2d 845 (1948).

[12] N.C. GEN. STAT. § 31A-5(1) (Supp. 1961) provides that "where the slayer and the decedent hold property as tenants by the entirety if the wife is the slayer, one-half of the property shall pass upon the death of the husband to his estate, and the other one-half shall be held by the wife during her life, subject to pass upon her death to the estate of the husband." For an extended discussion of this statute, see Bolich, *Acts Barring Property Rights,* 40 N.C.L. REV. 175 (1962).

[13] 256 N.C. 213, 123 S.E.2d 575 (1962). Also discussed under CIVIL PROCEDURE, *Express and Implied Contracts,* and CONTRACTS, *Contracts to Devise, supra.*

[14] N.C. GEN. STAT. § 31-5.3 (Supp. 1961) provides that, with two exceptions not material here, "a will is revoked by the subsequent marriage of the maker."

[15] The Court quoted this language from Luders v. Security Trust & Sav. Bank, 121 Cal. App. 408, 9 P.2d 271 (1932).

DISSENT—TIME ALLOWED

In *First Citizens Bank & Trust Co. v. Willis*[16] testator's will specifically excluded his wife, a mental incompetent, because he had been advised by her physicians that she would have to be confined to a mental institution for the balance of her life, which confinement would be provided without charge by the government. The will was probated on December 1, 1953, and a guardian for the widow, defendant here, was appointed eight days later. In 1961 plaintiff, executor of the will, instituted this action for a declaratory judgment to guide it in making a distribution of the estate. It alleged that no dissent had been filed by the widow and that her right to dissent was now barred. Defendant's answer admitted that no dissent had been filed, but alleged that the defendant had no knowledge of the will until 1961. It was held that having failed to exercise the right to dissent[17] within six months,[18] the right was now barred.

In an earlier case[19] where an insane widow had been without a guardian for over four years after probate of her deceased husband's will, the guardian was allowed six months from the date of appointment in which to dissent. But in the instant case, the guardian had failed to assert the widow's rights for approximately eight years *after his appointment.* The further contention of the defendant that since a will which gives the widow nothing provides nothing from which she can dissent was termed "specious" by the Court.

FAMILY SETTLEMENTS

In *First Union Nat'l Bank v. Bryant*[20] testatrix was survived by her daughter and two grandsons (the children of her daughter). The will bequeathed one-half of the testatrix's personal property to her daughter for life, with no disposition as to the remainder. The remaining one-half was bequeathed to the children of the daughter when they attained specified ages. The income from the property left to the grandchildren was to be reinvested unless the daughter needed it "very badly." Plaintiff was named executor and guardians were appointed for the grandchildren as well as children not

[16] 257 N.C. 59, 125 S.E.2d 359 (1962).
[17] N.C. GEN. STAT. § 30-1 (Supp. 1961).
[18] N.C. GEN. STAT. § 30-2 (Supp. 1961).
[19] Whitted v. Wade, 247 N.C. 81, 100 S.E.2d 263 (1957). For a brief discussion of this case, see *Wills, Fifth Annual North Carolina Case Law Survey,* 36 N.C.L. REV. 470 (1958).
[20] 257 N.C. 42, 125 S.E.2d 291 (1962).

in esse. Subsequently, a family settlement was made providing that the property should be held in two separate trusts. The daughter was to receive the income from one for life with the remainder going to her children. The children were named beneficiaries of the second trust. Applying the Court's traditional test of the validity of a family settlement—the trusts must be fairly made, carry out the intent of the testatrix as found in the will, and not have an adverse effect on the rights of infants—the settlement was upheld.[21]

The Court was again called upon to rule on the validity of a family settlement in *Stellings v. Autry*.[22] Litigation had been threatened to have certain testamentary trust provisions construed and to have determined the validity of provisions relating to the duration of the trust. The settlement was entered into to obviate the necessity of such litigation. Family settlements entered into to avoid caveat,[23] or dissent,[24] or threatened litigation involving "numerous and complicated questions of law and fact, and of such nature as to dissipate the trust estate and adversely affect the interests of minors"[25] have been upheld in numerous cases. These cases were distinguished in the instant case, however, because the threatened suit only involved construction of, and a ruling on, the validity of duration provisions. The Court quoted the limitations on the power to alter a testamentary trust by family settlement set out in *Carter v. Kempton*[26] and found that there was no emergency growing out of the trust itself or directly affecting its corpus suffi-

[21] This test was approved in Redwine v. Clodfelter, 226 N.C. 366, 38 S.E.2d 203 (1946). Mr. Justice Moore dissented in the principal case because, as he viewed the facts, the trust did not adequately protect the rights of infants.

[22] 257 N.C. 303, 126 S.E.2d 140 (1962).

[23] Wagner v. Honbaier, 248 N.C. 363, 103 S.E.2d 474 (1958).

[24] Commercial Nat'l Bank v. Alexander, 188 N.C. 667, 125 S.E. 385 (1924).

[25] Reynolds v. Reynolds, 208 N.C. 578, 182 S.E. 341 (1935).

[26] 233 N.C. 1, 62 S.E.2d 713 (1950). Those limitations are: (1) The will creating the trust is not to be treated as an instrument to be revoked at the will of the devisees or to be sustained *sub modo* only after something has been sweated out of it by the heirs. (2) The rule that the law favors family settlements does not apply when an infant's rights are involved. (3) Equity will not permit the modification of a trust on technical objections merely because its terms are objectionable to the interested parties. Rather, some exigency, contingency or emergency must have arisen rendering modification necessary to preserve the trust and to protect infants. (4) The emergency must be one not contemplated by the testator and which, had it been anticipated, would undoubtedly have been provided for. (5) The exigency must relate to and grow out of the trust itself or directly affect the corpus or the income from the trust.

cient to justify alteration. In addition, it was found that the proposed settlement might adversely affect the rights of minors or persons as yet unborn.

HOLOGRAPHIC WILLS

In *In re Will of Gilkey*[27] the testatrix's son was given a power of attorney to transact her affairs. While the testatrix was still living, the son found a metal box containing life insurance policies and a handwritten will, all of which he placed in his own safe deposit box. On the death of testatrix the son presented the will for probate and his sister filed a caveat. The caveator argued that the statute[28] required an *original* discovery *subsequent* to death, and *a fortiori,* a paper could not be found after death within the meaning of the statute by a person who had knowledge of the will and had seen it prior to the author's death. The Court answered this contention by observing that such a construction of the statute would defeat the legislative intent. The requirement that the will be found after death among the valuable papers was to show the author's evaluation of the document and thereby establish the necessary *animus testandi.*

RELEASE OF AN EXPECTANCY BY A NON-HEIR

In *Stewart v. McDade*[29] testator conveyed all his real property to defendant by warranty deed and, on the same date, executed a purported will devising all his property to defendant and naming her executrix. Seven months later he executed another purported will to the same effect. A few days later, testator was declared incompetent. His guardian commenced an action to have the deed set aside on the ground that he lacked sufficient mental capacity to execute it. Defendant, to terminate the litigation, reconveyed the land to the testator and executed a release for valuable consideration of all her rights under the will. Plaintiff brought this action for a declaratory judgment to determine what interest, if any, defendant had in the

[27] 256 N.C. 415, 124 S.E.2d 155 (1962).

[28] N.C. GEN. STAT. § 31-3.4(a)(3) (Supp. 1961) provides that "a holographic will is a will found after the testator's death among his valuable papers or effects, or in a safe deposit box or other safe place where it was deposited by him or under his authority, or in the possession or custody of some person with whom, or some firm with which, it was deposited by him or under his authority for safekeeping."

[29] 256 N.C. 630, 124 S.E.2d 822 (1962).

estate. The Court held that the release executed by the defendant was valid and, consequently, that she was barred from claiming any interest in the estate. The public policy which militates against the release of an expectancy is for the protection of heirs, and is designed to protect children from spending their inheritance before it comes to them.[30] But it has no application, where, as here, the person with the expectant interest is a stranger to the blood of the testator.

[30] Price v. Davis, 244 N.C. 229, 93 S.E.2d 93 (1956); See Note, 35 N.C.L. REV. 127 (1956).